THE *Sultan Azlan Shah*
Law Lectures

Officially launched
by
The Right Honourable Lord Woolf,
Lord Chief Justice of England and Wales,
in the presence of
His Royal Highness Sultan Azlan Shah,
Her Royal Highness Tuanku Bainun
and
His Highness Raja Nazrin Shah
on 13 April 2004, Kuala Lumpur.

THE *SultanAzlanShah* Law Lectures

Judges on the Common Law

Visu Sinnadurai
Editor

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To

His Royal Highness Sultan Azlan Shah

Sultan of Perak

This publication is dedicated

by

Raja Nazrin Shah

Introduction

Established to honour His Royal Highness Sultan Azlan Shah's contribution to the Faculty of Law, University of Malaya specifically, and to the development of Malaysian law generally, especially so since Merdeka, the Sultan Azlan Shah Law Lecture Series was conceived and initiated by Professor Dato' Seri Dr Visu Sinnadurai during his tenure as Dean of the Faculty of Law, University of Malaya (1983-1986).

On the 75th year of His Royal Highness' birth it is a fitting tribute to the man who proclaimed that "the common law and its development should be homogenous in the various sections of the Commonwealth",[1] to compile this series of lectures given by a spectrum of esteemed and astute legal minds from across the Commonwealth who intimate a common concern for the state of this shared heritage: "that body of law which has been judicially evolved from the general custom of the realm".[2]

1
Per Raja Azlan Shah J (as he then was) in *Raja Mokhtar bin Yacoob v Public Trustee, Malaysia* [1970] MLJ 151 at 152; referred to by Lord Nolan in chapter 13, *Certainty and Justice: The Demands on the Law in a Changing Environment* (see page 302, below).

2
Termes de la Ley, 1641; referred to by Lord Nolan, *Certainty and Justice* (see page 302, below).

Since 1986, when the First Sultan Azlan Shah Law Lecture was delivered in Kuala Lumpur, distinguished Lord Chancellors,[3] Masters of the Rolls,[4] Lords of Appeal in Ordinary,[5] a President of the New Zealand Court of Appeal,[6] a Justice of the Supreme Court of The United States of America[7] and academics from the Commonwealth[8] have been invited to partake in the premier law lecture series of Malaysia. The speakers who graced our shores, each conferring on the series the measure of prestige befitting its Patron, have delivered authoritative, stimulating and thought-provoking lectures on a range of topics now compiled in this volume. Whilst the subject matter contained in this volume is multifarious, exploring such seemingly disparate topics from the *Spycatcher* case[9] to commercial fraud cases,[10] there is a common thread that runs through the corpus. This is the development of that ancient and unique institution of the common law. Hence the subtitle of this book: *Judges on the Common Law.*

With the modern world developing at such an exponential rate, it is a pertinent and wholly contemporary question to ask whether the common law still fulfils rapidly changing social and commercial needs, whether it still retains the same efficacy it once enjoyed in the face of an overwhelming proliferation of legislation in recent times, whether the tensions created by a dichotomy of common law and statute law have become a hindrance and, moreover, whether the common law permits judges to "make the law" despite the sovereignty of the legislature.

The flexibility of the common law to adapt to a changing environment emerges as one of the key concerns throughout the book, whether overtly stated or implied in the content of

3
Lord Mackay who delivered the eighth lecture in 1993; and Lord Irvine, invited to deliver the seventeenth in 2003. Unforeseeably, Lord Irvine resigned from his post and was forced to re-prioritize his schedule.

4
Lord Donaldson delivered the seventh lecture in 1992; Lord Woolf, the twelfth in 1997; and Lord Phillips, the seventeenth in 2003.

5
Lord Oliver, 1988; Lord Ackner, 1989; Lord Mustill, 1991; Lord Keith, 1994; Lord Browne-Wilkinson, 1995; Lord Steyn, 1996; Lord Nolan, 1998; Lord Slynn, 1999; Lord Clyde, 2000; Lord Bingham, 2001.

6
Sir Robin Cooke, now Lord Cooke, in 1990.

7
Justice Anthony Kennedy in 2002.

8
Professor WR Cornish in 1986, and Professor AG Guest in 1987; Professor JAG Griffith delivered the pre-inaugural lecture, *Judicial Decision Making in Public Law,* in 1985.

9
Fourth lecture, *The Spycatcher: Why Was He Not Caught?* by Lord Ackner. See chapter 4.

10
Eighth lecture, *Commercial Fraud Trials: Some Recent Developments* by Lord Mackay. See chapter 8.

each chapter. If, to take an example, we look at certain themes that have been deemed trends by the speakers we may see that flexibility in action. Key overarching developments of recent times in the common law have been first, the recognition of the need for certainty and thus predictability; second, the gradual abandonment of the strict "black-letter" approach to interpreting statutes in favour of a more purposive, relative one, of the Continental kind; and third, the balancing act that has to be performed by the courts to meet fairly the demands of these developments.

These trends are most demonstrable in relation to commerce since it is in this field that much weight and complexity have been added in our modern era and it is on this area of the law that a sizeable proportion of the lectures focus. Lord Steyn in his lecture, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*,[11] Lord Clyde, in *Construction of Commercial Contracts: Strict Law and Common Sense*,[12] and most recently Lord Bingham, in *The Law as the Handmaid of Commerce*,[13] all explore the problems of achieving a balance between certainty and common sense or, in other words, between a strict approach and that of the purposive kind.

The common law has played the key role in meeting the requirements of modern commerce by adapting itself to these needs rather than by attempting to bend commercial interests to its will. This is demonstrated in landmark cases such as *Mannai*[14] and *West Bromwich*,[15] in which the guidelines for interpretation have changed from the rigidity of *Hankey v Clavering*[16] to the use of such principles as reasonableness, and reference to the "factual matrix", as well as the ordinary meaning of words in contracts.

11
Chapter 11.

12
Chapter 15.

13
Chapter 16.

14
Mannai Investment Company Limited v Eagle Star Life Assurance Company Limited [1997] AC 749; [1997] 3 All ER 352, HL; referred to by Lord Clyde in chapter 15, *Construction of Commercial Contracts: Strict Law and Common Sense.*

15
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98; referred to by Lord Clyde, *Construction of Commercial Contracts.*

16
[1942] 2 KB 326; referred to by Lord Clyde, *Construction of Commercial Contracts.*

Whilst, in commerce, the overriding requirement is a need for certainty and thus predictability, in some cases this has proved to be unfair. Therefore, though the common law retains its tenet of objectivity, it has increasingly been more willing to soften that approach when injustice arises or public interest may be harmed. Moreover, it can safely be said that this approach has been adopted to meet commercial reality. In other words, because errors in the drafting of contracts are an inevitable consequence of the modern commercial world's methods of transaction and deal-making, it is necessary for the courts to find the purpose of the contract rather than apply blanket strict rules to every case with no room for discretion. The emphasis in the above lectures is squarely focused on the fact that the common law has retained its sound and commercially inclined framework of certainty whilst at the same time has come to require that parties involved in a contract must act in accordance with good faith and fair dealing. All three of the Law Lords address this development as something necessary to keep pace with the world of commerce, each elaborates the trend in his own way and not all would agree with each other's opinions but it is significant that they feel a desire to deliberate this crucial evolution of the common law in the first place.

Indeed, a further manifestation of the ways in which the common law, and thus the courts, has tailored itself to ever-growing commercial needs is given in the history of the birth of the English Commercial Court in *Commercial Disputes Resolution in the 90's*[17] by Lord Donaldson.

Following on from this area it would be unwise to leave out Lord Browne-Wilkinson's lecture, *Equity and Commercial*

17 Chapter 7.

Law: Do They Mix?[18] For, whilst the common law and equity are distinct entities, the principles behind the common law's shift of approach to commerce echoes those equitable principles of justice and fairness. They employ separate remedies—equity provides for injunctions and specific performance where common law does not—but given the proliferation in commerce of trusts such as pension funds and investment trusts, and the deepening issue of fiduciary duties, it is of contemporary importance and commercial expediency to elaborate on the courts' same general power to review disputes from a purposive approach, as is the case with the new common law approach. This Lord Browne-Wilkinson did, with the added caveat, of course, reminiscent of the speakers above, that the judges' discretion ought to be exercised with "extreme caution".[19]

Again, this thread is also picked up by Lord Nolan in his address, *Certainty and Justice: The Demands on the Law in a Changing Environment*,[20] but with a much wider scope. Like the other speakers, he also condones that development of a purposive approach in common law in the most general sense. Here he applies that same principle to interpretation of statutes and to judicial review. He addresses that burning question of whether there is much room left for the common law in the light of the proliferation of statute law, the desire of the legislature to restrict law-making by the courts and, significantly, in the light of the UK's loss of sovereignty to (what is now called) the European Union. He concludes that the role of judges and the common law have not been diminished drastically, that there is scope for them still, despite a narrowing of jurisdictional freedom.

18
Chapter 10.

19
Chapter 10, at pages 252-253, 260, below.

20
Chapter 13.

This line of argument is continued the following year in *The Impact of Regionalism: The End of the Common Law?*[21] by Lord Slynn. He concurs with his colleague that the common law continues to thrive despite the impact of supra-national bodies' sovereignty. Although Lord Slynn acknowledges that European legislation takes precedence over national statute law when they contradict one another, he argues that this makes little difference to the domestic courts: they still retain their vital role as interpreters and implementers of legislation, wherever this legislation may be derived from. Indeed, the influx of European methods seen in the Continental shift from "black-letter" law to purposive interpretation has had a positive impact on the courts and, in turn, has been absorbed through osmosis into the common law. Even taking into account this impact, the common law reigns over many areas in which Europe plays no part. This is especially the case in commercial contracts drafting and judicial review, amongst many others. Lord Slynn's learned opinion can be summed up very simply: the common law is far from being abandoned whatever the external influence is.[22] Lord Chancellor Irvine[23] would probably have gone on a similar vein had he had the opportunity to deliver his lecture on *Commerce, Common Law and the Commonwealth: New Dimensions in Malaysia and UK Law.*

One of the areas which speakers have used to exemplify the common law's continuing efficacy is the law of negligence. This is a topic upon which two other distinguished speakers have seized: Lord Oliver in *Judicial Legislation: Retreat from Anns*,[24] and Lord Mustill in *Negligence in the World of Finance*.[25] Here, they expound on the fact that the courts have independently created certain principles or tests in which a duty of care can be said to have arisen, starting from *Donoghue v Stevenson,*[26] and running through to *Anns v Merton*

21
Chapter 14.

22
See page 334, below.

23
See note 3, above; and see pages 429-430 for a short biographical note.

24
Chapter 3.

25
Chapter 6.

26
[1932] AC 562.

Borough Council[27] and *Caparo plc v Dickman*,[28] and ending up with the principles of foreseeability of damage, proximity or neighbourhood, and whether it is "fair, just and reasonable" to impose such a duty. The two speakers, and also Lord Nolan in the thirteenth lecture, have hit upon an area in which the common law still thrives, inevitably debating that controversial matter of whether judges find law or create it. The very fact that the *Anns* question produced such heated opinions, even in the lectures compiled in this book, shows the mechanisms of the common law in operation. And the fact that, subsequent to these particular two lectures which focus on *Anns*, the decision was departed from by the House of Lords in *Murphy v Brentwood District Council,*[29] demonstrates the adaptability of the common law and the role judges play. This in turn shows why it has survived and flourished for so long.

In a similar vein, the debate explored by Professor Cornish about restitutionary redress against a public authority[30] has also been absorbed by the common law. Perceptively, he was prompted to ask, "Why should there not always be a right to demand what [public bodies] had no right to demand?",[31] although at the time of his lecture being delivered the position that had been held for over 200 years was that money paid to a public authority under mistake of law is not recoverable. Since then, the traditional doctrine has been overruled by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council*,[32] showing once again that the common law's adaptability is the key to its success.

Apart from this theme of the flexibility of the common law to adapt to a changing environment, the other interesting theme in the series relates to the issue arising from a common

27
[1978] AC 728.

28
[1990] 2 AC 605.

29
[1991] AC 398; [1990] 2 All ER 908, HL.

30
First lecture, *"Colour of Office": Restitutionary Redress Against a Public Authority.* See chapter 1.

31
See page 17, below.

32
[1999] 2 AC 349; [1998] 3 WLR 1095; [1998] 4 All ER 513, HL.

law that places the judiciary in the role of constitutional guardian.

This is an issue quite explicitly addressed by Sir Robin Cooke (now Lord Cooke of Thorndon) in his lecture *Administrative Law Trends in the Commonwealth*[33] in which he explores the tensions arising from judicial review. In the lecture, he confronts head-on the conflict between the rights of government and ministers to make discretionary decisions and the inalienable rights of subjects to have recourse to justice. Despite the landmark ruling of *Anisminic*[34] which proclaimed that the courts cannot be excluded from intervening to prevent even a statutory body exceeding the jurisdiction granted by Parliament and stated the need for an administrator to act fairly, reasonably and in accordance with the law, tensions still persist in the field of judicial review and, therefore, in the issue of the courts' jurisdiction. Fortunately, in Malaysia, it is accepted that "[t]he writ of certiorari clearly survives because it is fundamental to the courts' constitutional and common law role as guarantors of due process and fair administration of law".[35] Sir Cooke concludes, along similar lines, that judicial review is a component of the Rule of Law and thus a necessary safeguard of democracy despite the tension inherent in it.

This train of thought is echoed by Lord Woolf in his lecture *Judicial Review of Financial Institutions*,[36] but in relation to review of institutions in the United Kingdom such as the Stock Exchange and the Take-overs and Mergers Panel. He argues that whether the powers of regulators be of a private, contractual nature or derived from statute, they should not be beyond the jurisdiction of the courts if they endanger public interests. In both Sir Cooke's and Lord Woolf's lectures we

33
Chapter 5.

34
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147.

35
Per Abdul Hamid LP in *Sabah Banking Employees' Union v Sabah Commercial Banks' Association* [1989] 2 MLJ 284 at 286. See page 124, below.

36
Chapter 12.

can perceive that the principles laid down in *Ridge v Baldwin* are to be praised, ie a public body has a "duty to act judicially in the administration of that power and it is therefore subject to judicial review by way of certiorari and prohibition".[37] Sir Cooke and Lord Woolf would both agree that the courts' jurisdiction should not be limited to such an extent that they are unable to uphold the Rule of Law, a principle, and now a well-established maxim, that was asserted by His Royal Highness in the landmark case of *Sri Lempah*: "Every legal power must have legal limits, otherwise there is dictatorship."[38]

Whilst the topics of the first sixteen lectures related mainly to commercial law or public law, there was a thematic shift in 2002. Justice Kennedy's proposed lecture on *Human and Economic Rights: Their Evolution Under the American Constitution* was to be the first lecture in the series to focus on human rights. This was soon followed by the most recent lecture delivered by Lord Phillips in 2003 on *Right to Privacy: The Impact of the Human Rights Act 1998*.[39]

What the Sultan Azlan Shah Law Lecture Series has successfully aimed to communicate over its illustrious eighteen years are the expert and contemporaneously salient opinions of legal luminaries from around the Commonwealth. The benefit derived from the fact that these prominent and sagacious speakers are given free reign to elaborate on whatever topic that concerns them has been the production of a collection that yields brilliant insights into an extensive range of legal issues.

Moreover, because of the nature of the tie that binds the Commonwealth, the series has perhaps inadvertently become a testament to that tie: the common law itself. As long

37
[1964] AC 40 at 186.

38
Per Raja Azlan Shah Ag CJ (Malaya) (as he then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise* [1979] 1 MLJ 135 at 148; referred to by Professor Cornish in chapter 1, *"Colour of Office": Restitutionary Redress against Public Authority* (see page 9, below), Sir Robin Cooke in chapter 5, *Administrative Law Trends in the Commonwealth* (see page 107, below), and Lord Woolf in chapter 12, *Judicial Review of Financial Institutions* (see page 286, below).

39
Chapter 17.

as that continues to evolve and its progress is felt throughout the Commonwealth, the Sultan Azlan Shah Law Lectures will not only endure but will remain a reference point for those interested in the vitality and development of the common law.

The Sultan Azlan Shah Law Lectures

The Series 1986–2003

1986

First Lecture

"Colour of Office": Restitutionary Redress against Public Authority

Professor WR Cornish

1987

Second Lecture

Money in the Law

Professor AG Guest

1988

Third Lecture

Judicial Legislation: Retreat from Anns

Lord Oliver of Aylmerton

Fourth Lecture

The Spycatcher: Why Was He Not Caught?

Lord Ackner

1989

1990

Fifth Lecture

Administrative Law Trends in the Commonwealth

Sir Robin Cooke

1991

Sixth Lecture

Negligence in the World of Finance

Lord Mustill

1992

Seventh Lecture

Commercial Disputes Resolution in the 90's

Lord Donaldson of Lymington

Eighth Lecture

Commercial Fraud Trials: Some Recent Developments

1993

Lord Mackay of Clashfern

Ninth Lecture

The Modern Approach to Tax Avoidance

Lord Keith of Kinkel

1994

Tenth Lecture

Equity and Commercial Law: Do They Mix?

Lord Browne-Wilkinson

1995

Eleventh Lecture

Contract Law: Fulfilling the Reasonable Expectations of Honest Men

Lord Steyn

1996

Twelfth Lecture

1997

Judicial Review of Financial Institutions

Lord Woolf

Thirteenth Lecture

Certainty and Justice: The Demands on the Law in a Changing Environment

Lord Nolan

1998

Fourteenth Lecture

The Impact of Regionalism: The End of the Common Law?

Lord Slynn of Hadley

1999

Fifteenth Lecture

Construction of Commercial Contracts: Strict Law and Common Sense

2000

Lord Clyde

Sixteenth Lecture 2001

The Law as the Handmaid of Commerce

Lord Bingham of Cornhill

2002 Lecture

Human and Economic Rights: Their Evolution Under the American Constitution

Justice Kennedy

Seventeenth Lecture

Right to Privacy: The Impact of the Human Rights Act 1998

Lord Phillips of Worth Matravers 2003

The Sultan Azlan Shah Law Lectures

The Speakers 1986–2003

Lord Ackner

Fourth Lecture (1989)

The Spycatcher: Why Was He Not Caught?

Lord Bingham of Cornhill

Sixteenth Lecture (2001)

The Law as the Handmaid of Commerce

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Equity and Commercial Law: Do They Mix?

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O

Lord Oliver of Aylmerton

Third Lecture (1988)

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P

Lord Phillips of Worth Matravers

Seventeenth Lecture (2003)

Right to Privacy: The Impact of the Human Rights Act 1998

S

Lord Slynn of Hadley

Fourteenth Lecture (1999)

The Impact of Regionalism: The End of the Common Law?

S

Lord Steyn

Eleventh Lecture (1996)

Contract Law: Fulfilling the Reasonable Expectations of Honest Men

W

Lord Woolf

Twelfth Lecture (1997)

Judicial Review of Financial Institutions

Editor's Note

This volume contains the full text of the speeches of the Sultan Azlan Shah Law Lectures as delivered by the speakers. However, for consistency, minor editorial changes have been made. Headings, additional footnotes, citations and other references have been incorporated where necessary. In certain instances, editorial notes have been added.

The idea for a series of annual public lectures on law was conceived in 1985. In the same year, in the presence of His Royal Highness Sultan Azlan Shah, Professor JAG Griffith (see page 427, below, for a short biographical note) delivered a public lecture entitled *Judicial Decision Making in Public Law*. At this lecture it was announced that this series would henceforth be known as the Sultan Azlan Shah Law Lectures (see [1985] 1 MLJ *clxv*). In 1986, Professor WR Cornish delivered the First Sultan Azlan Shah Law Lecture entitled *"Colour of Office": Restitutionary Redress against Public Authority*, and in 2003 the Seventeenth Sultan Azlan Shah Law Lecture entitled *Right to Privacy: The Impact of the Human Rights Act 1998* was delivered by Lord Phillips of Worth Matravers.

Whilst the best endeavours have been made to faithfully reproduce the lecture series in its entirety, it is with regret that two of these have been irretrievably lost. However, in order to preserve the chronological integrity of the series, these have been replaced with two other lectures delivered in Malaysia, compatible with the overall theme of this volume: the Second Sultan Azlan Shah Law Lecture, *Money in the Law*, by Professor AG Guest has been aptly replaced with *Recent Developments in English Commercial Law*, another lecture delivered by him at the Faculty of Law, University of Malaya in 1980; whilst Lord Hailsham of St Marylebone's *Policy Considerations in Judicial Decision Making*, a lecture delivered in Kuala Lumpur in 1987, takes the place of the Ninth Sultan Azlan Shah Law Lecture, *The Modern Approach to Tax Avoidance*, by Lord Keith of Kinkel.

Apart from these, one other lecture, *The Office of Lord Chancellor* by Lord Elwyn-Jones, a lecture delivered in 1975 at the Faculty of Law, University of Malaya, has been selected to take the place of what would have been the 2002 lecture. Although the Sultan Azlan Shah Law Lecture Series has entered its eighteenth year, due to insurmountable difficulties the speaker for the 2002 Sultan Azlan Shah Law Lecture, the Honourable Associate Justice Anthony Kennedy of the Supreme Court of the United States of America, was unable to deliver his speech, *Human and Economic Rights: Their Evolution Under the American Constitution*. Therefore, the 2003 Sultan Azlan Shah Law Lecture delivered by the Master of the Rolls, Lord Phillips of Worth Matravers, is considered the seventeenth of the series.

The Eighteenth Sultan Azlan Shah Law Lecture is scheduled to be delivered in 2004 by Lord Saville of Newdigate, Lord of Appeal in Ordinary.

Professor Dato' Seri Visu Sinnadurai

Kuala Lumpur
26 January 2004

Acknowledgements

The compilation and publication of the lectures in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law* would not have been possible without the unstinting support and encouragement of HRH Raja Nazrin Shah, Raja Muda of Perak. He believed strongly in the value that the publication of this volume brings and, to that end, steadfastly urged it through each step of the journey.

I must express my heartfelt gratitude to Joel Ng (of Genesis Publishing Services), who acted as my co-editor and who kept an overall picture of the book in mind at all times, managing the entire project with utmost skill and professionalism.

My special thanks goes to Kyle Sanderson and Faisal Ariff Rozali-Wathooth, both undergraduates, from University of London and Cambridge University, respectively, and who both sacrificed part of their summer vacation to be in Kuala Lumpur to work on the project. Kyle and Faisal helped in the

editing and reading of the manuscripts, the proofs of the text of the lectures, and provided invaluable comments in the layout and design of the book. Kyle, with great skill, also prepared the draft of the Introduction to this book. I am also most grateful to Professor Anthony Guest for his constructive observations on the Introduction; my sister, Umaya Aafjes-Sinnadurai (British Council, London) for proofreading the text; and Mercy Selvaratnam for editorial assistance.

I must also thank Andrew Wong of Compass Creative for designing the book and doing the artwork; Chris Lin, who did the pencil and charcoal sketches of the speakers; Alexandra Corrin, who, from England, prepared the Index; and Sally Kee for preparing the Table of Cases and Table of Legislation.

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Professor Dato' Seri Visu Sinnadurai
Editor

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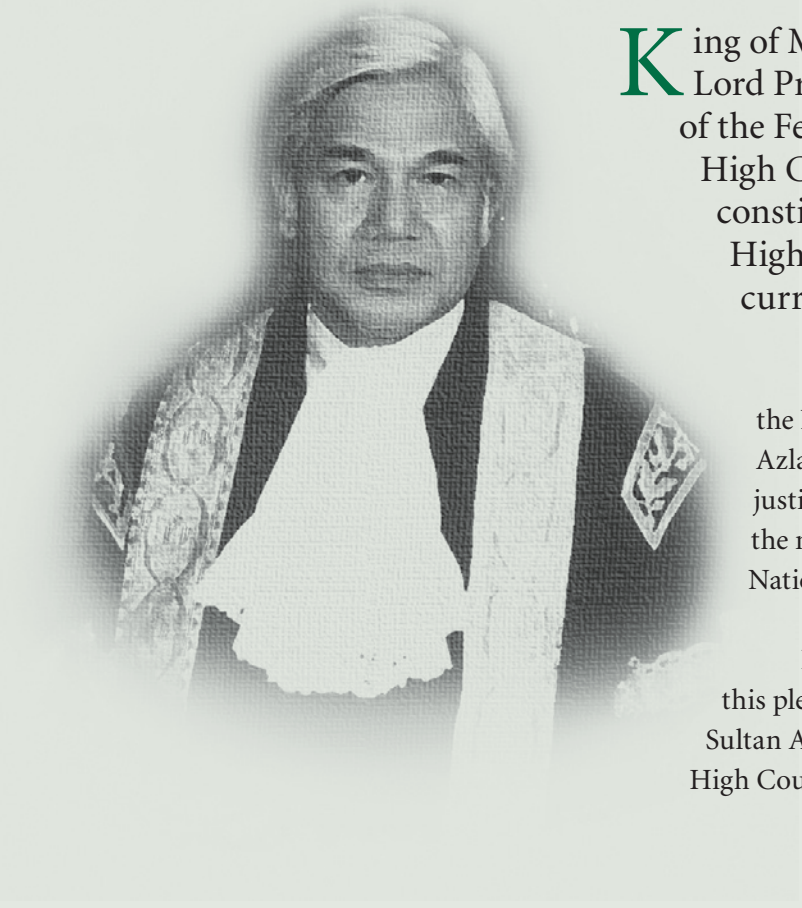
His Royal Highness Sultan Azlan Shah



King of Malaysia, Sultan of the State of Perak, Lord President (now renamed Chief Justice) of the Federal Court, Chief Justice of the High Court of Malaya: These are the high constitutional positions which His Royal Highness Sultan Azlan Shah held, or currently holds.

On 18 September 1989, on being installed as the Ninth King of Malaysia, His Majesty Sultan Azlan Shah pledged "to rule Malaysia with utmost justice based on the Laws and the Constitution of the nation … to stand for justice and peace of the Nation".

In accordance with the principles enshrined in this pledge, and similar pledges His Royal Highness Sultan Azlan Shah took, first on His elevation as a High Court Judge in 1965, and subsequently in 1984, on

His ascension to the throne as the Sultan of Perak, His Royal Highness discharged his constitutional duties. Upholding Justice, and adherence to the Rule of Law were two pillars which He fervently believed were of utmost importance for the proper administration of justice and good government. These were the guiding principles that His Royal Highness always subscribed to in the performance of His onerous duties.

His Royal Highness received His early education at the Government English School in Batu Gajah and at the Malay College in Kuala Kangsar. Thereafter, His Royal Highness read law at the University of Nottingham and was conferred a Bachelor of Laws in 1953. In the following year, His Royal Highness was admitted to the English Bar by the Honourable Society of Lincoln's Inn. He was made a Bencher of Lincoln's Inn in 1988.

His Royal Highness ascended the throne of the State of Perak on 3 February 1984 as the 34th Sultan of Perak and was officially installed as the Ruler on 9 December 1985.

In 1984, His Royal Highness was elected as the Timbalan Yang di-Pertuan Agong of Malaysia. In 1989, He was elected as the Ninth Yang di-Pertuan Agong of Malaysia, a position He held until 25 April 1994.

His Royal Highness's career in the Judiciary was both outstanding and exemplary. In 1965, at the age of only 37, His Royal Highness was elevated to the Bench of the High Court of Malaya, being the youngest judge to be appointed in the Commonwealth. His subsequent rise in the Judiciary was meteoric. In 1973, His Royal Highness was made a Federal Court Judge and six years later in 1979, His Royal Highness was appointed the Chief Justice of the High Court of Malaya, an office which He held until His appointment as the Lord President (now Chief Justice) of the Federal Court of Malaysia on 12 November 1982. He relinquished His position as the Lord President of the Federal Court when on 1 July 1983, His Royal Highness was appointed as the Raja Muda of Perak (Crown Prince of the State of Perak).

On the Bench, His Royal Highness delivered several important judgments which are still followed by the Malaysian courts. He dealt with the questions of law involved in each case succinctly and was most forthcoming in His application of legal principles to the facts of the case. Where local provisions existed, He applied them. Where there was none, His Royal Highness modified the application of the relevant common law to suit local conditions. Where there was no corresponding Malaysian law, He was not constrained to apply the common law or practice. In applying the common law, He not only took into consideration relevant English cases, but also cases from other Commonwealth jurisdictions. In one case, Raja Azlan Shah J (as He then was) said:

> Although decisions of the Commonwealth Courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in [the Australian and English cases] so that the common law and its development should be homogeneous in the various sections of the Commonwealth.[1]

In another case dealing with banking law where the "appeal raise[d] points of intricacy and commercial importance", Raja Azlan Shah FJ (as He then was) said:

> In arriving at this view I have been greatly assisted by two Commonwealth cases which seem actually to cover the point. I realise that both these cases do not bind this court, but I know of no reason why I should not welcome a breath of fresh air from the Commonwealth.[2]

In all cases before Him, His paramount concern was to dispense justice, and to uphold the Rule of Law. In one case He said:

> … every citizen, irrespective of his official or social status is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimises tyranny.[3]

1 *Raja Mokhtar bin Raja Yaakob v Public Trustee, Malaysia* [1970] 2 MLJ 151 at 152, HC.

2 *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 at 160, FC.

3 *Public Prosecutor v Tengku Mahmood Iskandar & Anor* [1973] 1 MLJ 128 at 129, HC.

And in the often quoted decision in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Entreprises Sdn Bhd*,[4] He said:

> Unfettered discretion is a contradiction in terms … Every legal power must have legal limits, otherwise there is dictatorship …

Further, as one commentator had pointed out:

> In many pronouncements of His Majesty, in the area of administrative law, one can find streaks of creativity and judicial activism … His Majesty exhibited a positivistic judicial attitude towards the Constitution … Raja Azlan Shah FJ did recognise that "the Constitution is not a mere collection of pious platitudes. It is the supreme law of the land …"[5]

It has been said that these judgments delivered by His Royal Highness on the Bench constitute a great contribution to the development of law in Malaysia at a crucial time in the country's history.[6]

On several occasions, His Royal Highness was Himself invited to deliver public lectures on certain important areas of Malaysian law. His lectures on *The Supremacy of Law in Malaysia* delivered in 1984 at the *Tunku Abdul Rahman Lecture XI*, organised by the Malaysian Institute of Management; *The Right to Know* delivered in 1986 at the Universiti Sains Malaysia Public Lecture; and *Checks and Balances in a Constitutional Democracy* delivered in 1987 to the Harvard Club of Malaysia, continue to be the classical expositions on these areas of the law. His Royal Highness's views expressed in *The Role of Constitutional Rulers: A Malaysian Perspective for the Laity* provide a clear insight on the role and the workings of the Sultans in the country.[7]

His Royal Highness Sultan Azlan Shah has contributed much to higher education in the country. He was appointed as the Pro-Chancellor of Universiti Sains Malaysia in 1971 and the Chairman of the Higher Education Advisory Council in 1974. Since 1986, His Royal Highness Sultan Azlan Shah has been the Chancellor of the University

4
[1979] 1 MLJ 135 at 148.

5
Professor MP Jain, *Judgments of Sultan Azlan Shah,* page 365, quoting Raja Azlan Shah FJ (as he then was) in the Federal Court decision in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at 189, FC.

6
See *Judgments of His Royal Highness Sultan Azlan Shah with Commentary,* 1986, edited by Professor Dato' Visu Sinnadurai, Professional Law Books Publishers, Kuala Lumpur.

7
For the text of these lectures, see *Constitutional Democracy, Rule of Law & Good Governance*, Professional Law Books Publishers and Sweet & Maxwell, 2004.

of Malaya, the oldest university in the country. His Royal Highness has been an external examiner to the Faculty of Law, University of Malaya, since the establishment of the Faculty in 1972. His Royal Highness, among others, is also the Royal Patron of the Malaysian Law Society in Great Britain and Eire, the British Graduates Association of Malaysia, and the Academy of Medicine of Malaysia.

In recognition of His enormous contribution to the country's judicial system and higher education, He was awarded honorary degrees from several universities within the country and abroad: His Royal Highness was awarded an Honorary Doctorate in Literature by University of Malaya (1979); an Honorary Doctorate of Law by Universiti Sains Malaysia (1980); His alma mater, the University of Nottingham conferred on His Royal Highness an Honorary Doctorate of Law (1986). His Royal Highness was also awarded Honorary Doctorates of Law by the University Gadja Mada, Jogjakarta, Indonesia (1990), University of Brunei Darussalam (1990), and University Chulalongkorn, Bangkok, Thailand (1990). In 1999 His Royal Highness was conferred the Honorary Doctor of Laws by the University of London.

His Royal Highness has gained recognition not only amongst the legal fraternity but also by other professionals. In 1991, His Royal Highness was awarded an Honorary Fellowship of the Royal College of Physicians of Ireland, the Fellowship of the Royal College of Surgeons of Ireland, the Honorary Fellowship of the Royal College of Surgeons of Edinburgh and also the Honorary Fellowship of the Royal College of Surgeons of England in 1999.

His Royal Highness Sultan Azlan Shah continues to take a keen interest in the development of the law in the country.

Professor WR Cornish

QC, LLB, BCL, LLD, FBA

"Colour of Office": Restitutionary Redress against Public Authority

William Randolph Cornish
(*b.* 11 September 1945)

Professor WR Cornish is currently the Herchel Smith Professor of Intellectual Property Law and President of Magdalene College. A graduate of Adelaide and Oxford Universities, with an LLD from Cambridge, he is a Barrister and Bencher of Gray's Inn. He became a Fellow of the British Academy in 1984.

As Professor of English Law at the London School of Economics, University of London from 1970-1990, he was the first to develop the teaching of intellectual property law in a British law school. He has continued this work since his appointment to the Chair of Law at Cambridge University in 1990.

Professor Cornish is also an External Academic Member of the Max-Planck-Institut für Patent-, Urheber- und Wettbewerbsrecht, Munich, Germany, and an Editor of the Institute's journal, *International Review for Industrial Property and Copyright.*

He has been Chairman of the British Literary and Artistic Copyright Association; President of the International Association for Teaching and Research in Intellectual Property; founding member of the Council of the Intellectual Property Institute, London; Specialist Adviser to the House of Lords Committee on EC Legislation on Trade Marks and Patents; and founding director of the Centre for European Legal Studies in the Cambridge Law Faculty.

He is an active panelist for domain name issues at the WIPO Arbitration and Mediation Centre, and is currently director of the Intellectual Property Unit, University of Cambridge.

Among his major publications are: *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (1981, 1989, US edition; 1991, 1996, 1999, now in its 5th edition, 2003); (with Fiona Clark, Sir Robin Jacob and others) *Encyclopedia of United Kingdom and European Patent Law* (1978-); *Cases and Materials on Intellectual Property* (now in its 4th edition, 2003).

His other publications are: *The Jury* (1968, 1970); (with AL Diamond and others) *Sutton and Shannon on Contracts* (7th edition, 1970); (with G de N Clark) *Law and Society in England, 1750-1950* (1989).

At the time when Professor Cornish delivered the First Sultan Azlan Shah Law Lecture in 1986, he was Professor of English Law at the London School of Economics, University of London, and acted as an external examiner to the Faculty of Law, University of Malaya.

1 "Colour of Office": Restitutionary Redress against Public Authority

Professor WR Cornish
London School of Economics

An amended version of the First Sultan Azlan Shah Law Lecture delivered on 23 April 1986, in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highnesses, Lord President, distinguished members of the judiciary, Deputy Vice-Chancellor, ladies and gentlemen, it is the greatest honour to be invited by the Faculty of Law of the University of Malaya to deliver the First Sultan Azlan Shah Lecture.

Before so impressive an audience it is also a daunting prospect. It is both fitting, and for me sustaining, therefore, to begin with an extract from one of your Highness' own judgments.

In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* you had occasion to remark:

> Every legal power must have legal limits, otherwise there is dictatorship … In other words, every discretion cannot be free of legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression.[1]

This uncompromising expression of a fundamental aspect of the Rule of Law has many ramifications. As we all must recognise, it poses difficult questions in trying to set bounds for the legitimate exercise of power by governments at every level and by other agencies with quasi-governmental power. I want in the hour ahead not to conduct any kind of survey of that whole range, but rather to concentrate sights on a single hillock in the terrain. It is one that has to do with the question of

1 [1979] 1 MLJ 135 at 148.

remedies, those hard measures of what we are really prepared to do in insisting that governments adhere to the authority that is given to them and act properly upon it.

Recovery against public authorities

The particular question I want to address may seem a narrow one, so narrow indeed that it ought to have been settled long ago: If a government department, local authority or any other organ purporting to exercise public authority, demands a payment or other benefit without having the power under which it purports to act, should it be obliged in law to repay or reimburse? The demand is made under colour of the office but without entitlement to make it—*colore officii,* as the older cases have it. Hence my title.

I take the question as a starting point to do a number of things that I can hope to achieve in a small compass. As I say, my first object is to consider pecuniary redress for exceeding public authority. Secondly, the question will allow me to say something about that new disposition within the common law, the law of restitution—to some still a mystery, to some an antipathetic or an inappropriate generalisation, but to others again a classification worthy of rank beside tort, contract and property in the hierarchy of civil rights. As one aspect of this, I want to show how competing values may be differently balanced in parts of the British Commonwealth, thanks to the destabilising effect of codification. Thirdly, I want to illustrate how the mother source of the common law, the English courts, are, in their middle age, coming under a strange and occult influence—from that newly acquired god-parent, the European Economic Community; it seems to me a relationship which may have repercussions for common law offsprings throughout the Commonwealth.

Dicey's classic account of the Rule of Law claimed innate superiorities for the structure given to that formative ideal by its particular expression in the British Constitution.[2] For the British

2
AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edition, 1965, Part 11, pages 195–202.

version, he proclaimed two special virtues. First, the detailed rules of property, contract, tort and criminal law were, by their careful working out over time, inherently worth more than grand declarations of fundamental rights. However, he had little to say, in relation to this, of the legislature's power to alter legal expectations in a system where no written constitution erected against Parliamentary sovereignty any entrenched guarantees of individual rights. Secondly, Dicey disparaged the French dichotomy of private and public law which left the citizen able to pursue bureaucracy only through special administrative courts; for these were by definition within the administration rather than without, and so open to manipulation, suggestion, tacit understanding.[3]

But it was at this point that his argument became thin. For there stood, in his day, the uncomfortable fact that, as against the Crown, there was no right to proceed in tort. There was only the possibility of suing the individual civil servant responsible and the willingness of the Crown to meet all reasonable claims as a matter of grace. But was this not, in his beloved common law, a blemish of exactly the character which he so willingly found across the Channel? No modern, democratic government, after all, is likely to reject out of hand all claims against it. It could not be high-handed on such a scale. What it wants is the power to deal at discretion: to be supplicated; to keep the issue private; to weigh all the circumstances as a jury unto itself; to cover up the blameworthy where exposure might bring political hurt; to allow the diffident and impecunious to exhaust themselves against a wall of inaction; and to do all or any of these things with a determination proportionate to the size of the error or the injury. So for a long period even in modern times the Crown resisted the imposition of liability in tort. And, to turn to restitution, there are occasions when it still preserves its discretion. Under the British Taxes Management Act 1970, for instance, the Board of Inland Revenue is to give such relief against overpaid tax

No modern, democratic government is likely to reject out of hand all claims against it. What it wants is the power to deal at discretion.

3 Ibid, pages 193–95, 328–405.

"as is reasonable and just" having regard to all the circumstances of the case. While repayment has been permitted where the overcharge results from a mistake of law, as well as from some factual error, it does not extend to cases where the charge follows the Revenue's "prevailing practice", even if this is later held to be wrong in law.[4] So if A establishes that he is not liable to a tax, B, C and D, who have already paid the tax in exactly similar circumstances, will not be granted it back.

One must understand the starting point from which such a discretion operates. The old discretion maintained by the Crown in relation to tort claims (ie, until the enactment of the Crown Proceedings Act 1947 and its co-ordinates around the Commonwealth) was a power to dispense relief where no legal claim lay against the Crown, even though there would be an equivalent claim against a subject. But in the case of recovering payments not due to the Crown, the discretion of the type in the Taxes Management Act 1970 is not a consequence of rules about liability which distinguish Crown and subject. As we shall see, in places where the common law applies, neither category of payee is liable to repay unless some exception can be found to the basic rule that payments under a mistake of law are irrecoverable. In those jurisdictions where legislation has reversed this rule, the change touches both categories. Accordingly, our exploration of the rules affecting public recipients must take us first into the more general area of entitlement to recover.

Entitlement to recover—generally no right to recover

The common law rule still predominates in the majority of Commonwealth jurisdictions. A person (Crown or subject) to whom money is paid under a mistake of law, if that mistake is "without more", cannot be required to repay it. In the classic formulation of the principle, Lord Ellenborough explained it as turning upon the maxim, *ignorantia juris haud excusat.*[5] While that proposition may be a highly desirable foundation of criminal responsibility, it is not self-evident that it must apply equally to civil obligation in respect of

4
Taxes Management Act 1970, section 33; see Goff and Jones, *The Law of Restitution*, 3rd edition, 1986, pages 134-35.

5
Bilbie v Lumley (1802) 2 East 469.

money paid. But as Goff and Jones point out in their formative book on the *Law of Restitution,* there is one justification for the rule which must account for its long survival and repeated utterance.[6] Only if a decision to settle a claim by paying it is treated as final can the recipient conduct his affairs with reasonable certainty. In such cases, the question of repayment only arises once there has been a demand on the one side and a decision to give in to it on the other. The person paying might have stood firm and faced the consequences. If those consequences could at most be involvement in civil litigation, then a decision to submit rather than to fight ought to be treated as binding. There should be no re-opening of the issue by an action to recover what was paid in submission, just as there can be no re-opening of an issue settled by a judgment other than through recognised channels of appeal.

Only if a decision to settle a claim by paying it is treated as final can the recipient conduct his affairs with reasonable certainty.

What then of the exceptions to this basic position at common law? If the mistake is one that can be classified as being of fact rather than law, the payer may normally recover, just as he may if he can show fraud, oppression or some form of compulsion which is more than threatened litigation.[7] The person who demands money may, for instance, have a self-help remedy: as a pledgee he may refuse to return a security, or may take steps to realise its value; as a carrier or repairer he may refuse to give back the property; as a lessor he may be able to levy distress; as a chattel owner he may engage in reception. Where these remedies are threatened or used by a person not entitled to them, the "duress of goods" is taken to justify recovery of the amount paid.

Equally, there are cases where the demander—typically a public officeholder of some kind—keeps or threatens to keep a person from what he is entitled to unless he pays. A classic instance in England was *Morgan v Palmer,*[8] where a mayor had without authority demanded a fee for a public house licence; he was required to repay it as money had and received to the plaintiff's use.

6
3rd edition, 1986, Chapter 4, especially pages 17–20. As the authors agree, it is only a partial justification. There may be payments made under mistake of law which are not a response to any demand and the recipient's claim to treat the payment as final is not so compelling.

The obvious case is a mistaken gift.

But it seems that this equally is irrecoverable; a well-known illustration was *Re Diplock* [1947] Ch 716 at 725–26; [1948] Ch 465 at 479–80—payments under a will to 139 charities in the belief that the legacy was valid, though in that case special actions, proprietary and personal, were found; see also [1951] AC 251.

7
For these standard cases of restitutionary liability, see eg, Goff and Jones (above, note 4) Chapters 3, 9; PBH Birks, *An Introduction to the Law of Restitution*, 1985, Chapter 6.

8
(1824) 2 B & C 729; similarly, *Dew v Parsons* (1819) 2 B & Ald 562.

While the case law which develops these distinctions is not entirely harmonious, the strategic line lies between payments which involve "mere" mistakes of law and those which involve some additional element of pressure. "Mistake of law" is here a broad front, stretching to cover not only the case where the payer pays without any appreciation that his liability to do so may be open to question, but also the case where he is aware of the legal doubt but chooses—even protesting—to capitulate.

As part of this approach, common law judges have shown little readiness to distinguish between public and private recipients of money paid by such "mistakes". In *William Whitely v R*[9] a London department store paid the British Inland Revenue a tax upon "servants" in respect of certain of their employees; they claimed that the tax did not apply to these individuals, but they paid "under protest" rather than litigate. When eventually the point was settled in their favour they claimed back what they had paid. Walton J refused their claim, finding the money to have been paid "voluntarily".

"Voluntariness" is a notion that is often used to preclude claims in restitution and its meaning varies a good deal. Here it was said to mean: without duress, compulsion or demand *colore officii.* But I am not sure that this takes the argument any further. Clearly the judge was influenced to find the payment voluntary because it was not really a case of mistake of law at all. The department store had faced the legal issue and even had counsel's opinion that it was not liable to pay; yet it chose to do so.[10] The case has been accepted as good law in England, by a substantial majority of the Supreme Court in Canada in the recent decision, *Nepean Hydro v Ontario Hydro*[11] and (with a certain hesitation on the part of Sir Owen Dixon CJ) in Australia, in, eg, *Mason v New South Wales.*[12] Likewise in *Twyford v Manchester Corporation,*[13] a monumental mason paid an English local authority a licence fee for permission to cut a gravestone in one of its cemeteries. He too paid under protest, and as it turned out the licence could not properly be charged for, but he could not recover. In so deciding,

9
(1909) 101 LT 741; and see *National Pati-Mutuel v R* (1930) 47 TLR 110.

10
If the payment is made by the payer on condition that it is to be returned if the amount proved not to be due, then the payee will be obliged to do so: *Sebel v Commissioners of Customs and Excise* [1949] Ch 409.

11
(1982) 132 DLR (3d) 193.

12
(1959) 102 CLR 108.

13
[1946] Ch 236; [1946] 1 All ER 621, Ch.

Romer J remarked on the absence of any evidence that the mason believed that he would be kept out of the cemetery for not paying. Had he found otherwise, the case would have resembled (though counsel did not raise them) earlier decisions such as *Steele v Williams,*[14] where a parish clerk had to pay back a charge for taking extracts from parish registers which he had no power to levy.

This was a case where a person was told that there was a charge for something to which in fact they were entitled free; accordingly it is to be distinguished from cases where there is a demand for a general rate or tax, for which there is no direct *quid pro quo.* Nonetheless, *Steele v Williams* goes a long way in favour of allowing recovery against a charging authority, for there the payment was made only after the parish records had been consulted. So the payer actually got what he wanted before he paid; yet he recovered his payment.

Reversals by statute

There are jurisdictions where the basic common law position—no recovery of money paid under mistake of law—has been reversed by statute. Among them are the territories—including Malaysia—where the Indian Contract Act 1872 is in force.[15] That Act, by section 72,[16] provides:

> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Initially this was read, in deference to common law principle, as excluding cases where the mistake was one of law.[17] But in 1948, the Privy Council, speaking through Lord Reid, disapproved of this approach and overruled the earlier case law.[18] The statute itself did not expressly contain such a limitation and the Judicial Committee seemed not to feel the strength of argument which had for so long led to maintenance of the common law position.[19] Two features may help to explain this: the case was concerned with a mistake arising over the

14
(1853) 8 Exch 625; 22 LJ Ex 225.

15
For the position in New Zealand, Western Australia, New York and other United States jurisdictions, see Goff and Jones (above, note 4) 118.

16
Editor's note: Similar to section 73 of the Malaysian Contracts Act 1950.

17
Wolf v Dadiba Khimji AIR 1920 Bom 192; *Appavoo Chettiar v SIR* AIR 1929 Mad 177; *Municipal Council, Tuticorin v Balli* AIR 1934 Mad 420; *Municipal Council, Rajahmundry v Subba Rao* AIR 1937 Mad 559; following the view of Pollock and Mulla, *Indian Contract & Specific Relief Acts,* 6th edition, 402; contra, *Jagdish Prosad v Produce Exchange Corp* AIR 1946 Cal 245.

18
Shiba Prasad Singh v Srish Chandra Nandi AIR 1948 PC 297.

19
Pollock and Mulla (above, note 17) founded their argument in part on the need for parity with section 21 which provides that a contract formed under mistake of law is not to be rescinded. The Judicial Committee, however, refused to treat the formation of contract and mere payments upon supposed liability as being on the same footing.

interpretation of a contract between private parties; and the payments had been made without any appreciation that the contract was open to a different interpretation.[20]

However, the cases in which Indian courts have subsequently considered its applicability have concerned the legality of a tax. In *Sales Tax Officer, Banaras v Kanhaiya Lal Makund Lal Sarat*[21] where a sales tax on forward transactions had been paid without appreciating that it was *ultra vires,* the Indian Supreme Court duly held the amount recoverable. It rejected an argument that taxing authorities should be exempted from the operation of section 72, as interpreted by the Privy Council, since there is nothing in the section to justify such a distinction.[22]

The first real test of the scope of the changed rule has come in *Tikochand Motichand v HB Munshi.*[23] The taxpayers had objected to imposition of a Bombay sales tax on a number of grounds and had fought and lost a case in the High Court. They did not appeal, but paid after issue of an attachment order. In these earlier proceedings, the judgment did not turn on any breach of constitutional right, but later another litigant succeeded in having the tax declared unconstitutional. The taxpayers sought to recover the tax paid but their proceedings were begun outside the period allowed by the Limitation Act 1963 for a recovery by writ, unless the exception delaying the commencement of the limitation period on the ground of mistake was applicable.[24] Accordingly they moved the Supreme Court, under Article 32 of the Indian Constitution, for relief against the infraction of their fundamental rights.[25] A majority of the Indian Supreme Court refused the relief sought, and in reaching this view, reliance was placed on the fact that the payment was not made under any mistake such as would have extended the limitation period under the Limitation Act itself. Referring specifically to section 72 of the Indian Contract Act 1872, Bachawat and Mitter JJ each characterised the payment as having been made with a clear appreciation that a constitutional challenge to the tax might have been pursued.[26] Accordingly it could not be said that there was any mistake of law. Because the first stage of the dispute was taken as far as a judgment

20
For an English decision equally treating mistake of law in the formation of contract as not justifying the return of money paid under it, see *Orphanos v Queen Mary College* [1985] 2 All ER 233.

21
AIR 1959 SC 135. NH Bhagwati J gave an interesting comparative treatment of the preceding law.

See also *Caltex (India) v Asst Commissioner of Sales Tax* AIR 1971 MP 162.

22
Nor did any estoppel arise.

23
AIR 1970 SC 898.

24
Limitation Act 1963, section 24.

25
The fundamental right found to have been offended was the right to acquire, hold and dispose of property (later removed from the Constitution by the 1979 amendments). The prohibition on levying or collecting taxes without the authority of law (Article 265) is not in the Part concerning fundamental rights.

26
Above note 23 at 907, 914; Hidayatullah CJ agreed and gave among other reasons for refusing relief "that law will presume that he knew the exact ground of unconstitutionality" (at 903).

against the taxpayer, the circumstances were special. But the decision may well herald a new, and not unreasonable, interpretation of section 72, drawing the strategic line between payments made with and without appreciation of the lack of legal basis for the demand.

If this approach is to become established, the gap between the Indian Contract Act 1872 and the prevailing view of the common law would be by no means as wide as it appeared to be after the Privy Council's judgment in 1948: payments under protest would, in both regimes, be treated as irrecoverable in the absence of any additional element of pressure amounting to coercion. The difference would remain over payments in real ignorance of the legal position. Indeed there is one common law judgment at least which would reconcile the case law along the same axis, so far as it concerns payments to public authorities and officers. Windeyer J in *Mason v New South Wales*[27] analysed the cases of recoverable payments for a public service, such as *Morgan v Palmer*[28] and *Steele v Williams*,[29] as turning upon ignorance at the time of payment that the demand was without legal authority. Whereas, if the payer was not ignorant of the position, yet paid to put an end to the matter, he should not recover unless there was an added element of duress or compulsion.

Challenging the rule

But if public authorities are to be treated as distinct in this measure, why should one not go further? Why should there not always be a right to recover what they had no power to demand? The question poses itself equally for both our sets of jurisdictions, common law and the Indian Contract Act 1872. In India itself, as we have seen, the issue has been posed by reference to fundamental constitutional rights. In *Tikochand Motichand v HB Munshi*,[30] the two members of the Supreme Court who dissented, took the view that the money must be returned in the absence of an earlier judgment against the payer of the money on the very ground which was later held to be in his favour.[31]

Why should there not always be a right to recover what public bodies had no power to demand?

27
(1959) 102 CLR 108 at 140–145.

28
(1824) 2 B & C 729.

29
(1853) 8 Exch 625; 22 LJ Ex 225.

30
AIR 1970 898.

31
They do not however adopt a common front: Sikri J treated the particular circumstances as showing a lack of understanding that the particular ground of challenge existed—there was thus a mistake of law in the narrow sense that is also the point of distinction in the majority judgments (ibid at 905–906);

Hegde J, however, would treat as a mistake of law any uncertainty about the legal position which has not been resolved by litigation (ibid at 919).

Written constitutions elsewhere may contain statements of the basic requirement of legal authority for the exaction of taxes and other public dues from which a similar result may be derived.[32] In the United Kingdom, Professor Birks has suggested that the principle can be found sufficiently stated in that strictly limited document, the Bill of Rights of 1689.[33] Even so, a rule requiring the return of moneys paid is likely to be a matter of inference from the fundamental proposition and it requires its own justification.

It is possible to rest the case mainly upon an element of duress: governmental bodies which demand charges and payments exert a pressure inherently more threatening than a private individual or enterprise.[34] This has of course a comforting sound, but it must surely be too wide a generalisation. Among those who may make such demands there are central and local governments, special government agencies, authorities acting as contracting parties, authorities fulfilling public obligations; while in the private sector there are institutions of enormously varied size and ability to sustain litigation against those who refuse their demands. Can it realistically be maintained that demands from public bodies in all shapes and forms amount inherently to "practical compulsion" or "economic duress", while those from private bodies may or may not have this character, depending on whether more than just litigation that is at stake? So long as attention is concentrated on the state of mind of the person who pays, on the degree of pressure exerted over his will-power, it seems to me that there may be no sufficient case for treating public and private demanders differently.

If they are to be distinguished, it must be on grounds which touch the very purpose for which we conceive government to be conducted. Once we start to ask about that, we may suspect that the need to stand by compromises of claims, which we have identified as having an important economic and legal value in the private sphere, may not have the same importance in the public. The innermost struggle for the soul of democratic government lies in the conflict between sectional interest and the general good; in the tension

32
The Federal Constitution of Malaysia requires the authority of federal law for the levying of a tax or rate: Article 96.

In Canada, the position has been strengthened by a decision that legislation to prevent the recovery of a tax extracted without authority is itself ultra vires: *Amax Potash v Saskatchewan* (1976) 71 DLR (3d) 1; see also JR McCamus, "Restitution of Monies Paid to Government under Mistake" (1982) 17 UBCLR 233 at 248–49.

33
Birks, *An Introduction to the Law of Restitution*, above, note 7 at 297. 1 W&M Sess 2, C.2, s. I Decl. 4 provides that "levying money for the use of the Crown, by pretence of prerogative, without grant of Parliament for longer time or in other manner than the same is or shall be granted, is illegal".

34
For a strong expression of this view, see RD Collins, "Restitution from Government Officials" (1984) 29 McGill LJ 407, esp. 429 ff.

between the pursuit of party objectives and the maintenance of government for the benefit of the whole society. In order to ensure that the victory does not go as of course to the first, there are only two real checks: the ballot box and the requirement of legality. The power of the electorate, for all that it remains weighty, is a blunt and an occasional instrument. The requirement that governmental action remains within the scope of legal authority is also only an occasional weapon, but it is by nature precise. The more the political condition of a country becomes polarised, the greater undoubtedly is the need to keep the weapon of legality well-sharpened. Among its various cutting edges, the one concerned to require that taxes, rates and charges be extracted only under legal authority remains as important as it has been since the English struggles of the 17th century. For Professor Birks, it is a necessary corollary of that principle that improper extractions should be repaid by governmental bodies. To his aid he can call the counter-proposition. Lord Haldane once informed New Zealanders, in *Auckland Harbour Board v R*,[35] that it was a fundamental constitutional principle of Britain and therefore their own country that moneys paid without authority from the general exchequer were refundable as of course.[36]

Governmental bodies do not deserve the protection that is currently given to the private demander, because they do not regularly face encounters with insolvency, the stalking horse of the marketplace.

I do not myself see that the requirement to repay should be axiomatic in either direction, in favour of government, or against it. The case must be argued. Once moneys have been paid on demand to a governmental body, that body certainly has some interest in treating the question of legality as settled. After all, the issue at stake may concern a tax of huge amount contributing a substantial proportion to an adopted budget. Nonetheless, I would submit that these bodies do not deserve the protection that is currently given to the private demander, because they do not regularly face encounters with insolvency, the stalking horse of the marketplace. Their decisions are governed not so much by commercial risk-taking as by political

35
[1924] AC 318 at 326–327.

36
See Birks, *An Introduction to the Law of Restitution*, above, note 7 at 298–299, referring to the subsequent Australian decision, *Commonwealth v Burns* [1971] VR 825 which held that not even an estoppel could affect the rule. See also the Malaysian Constitution, Article 104(3).

interest and electoral popularity. If they make unauthorised exactions and have to repay, they may suffer political embarrassment; but they enjoy, or can seek the support of others who enjoy, the power to raise revenue by other means, or even the power to make retrospective statutory exceptions (where that is constitutional). I would argue that the balance of these competing needs is indeed in favour of a rule of automatic recovery from public authority. Indeed, I would go further than Professor Birks who, influenced by a remark of that great Australian judge, Sir Isaac Isaacs,[37] considers that the courts should have an ultimate power of absolution, where to order repayment would be too evidently disruptive. I find that notion unattractive. It would confer a discretion inherently difficult to exercise; and it seems to contain the imperative that, if governments are to exceed their taxing powers, this should be done on the grandest scale. To my mind, the only warrantable exceptions would cover first, the case of *res judicata;* and secondly, the payer whose payment is "voluntary" in an evident sense: the person whose intent is to bribe; or without going as far as that, the person who pays willingly because he hopes to secure advantages ahead of competitors—the man who thinks he can get all exclusive licence or other advantage and is willing to pay for it, whether lawful or not.[38]

The refusal to place an overpaid public authority in a different position from an overpaid private individual is one instance of a wider reluctance to visit pecuniary consequences upon the misconduct of government.

The refusal to place an overpaid public authority in a different position from an overpaid private individual is one instance of a wider reluctance to visit pecuniary consequences upon the misconduct of government. There is here a point of general contrast with the conception of public law responsibility which has grown in civil law countries, and one accordingly of inherent interest. Part of the common law reluctance has its roots in the system of government (particularly local government) before democratisation, when public responsibilities lay with the landed class as part of a paternal oversight and direction of community affairs. In public matters, as in private,

37
Sargood v Commonwealth (1911) 11 CLR 258 at 303.

38
In various jurisdictions judges have shown themselves unwilling to allow recovery in cases of this type: see eg, *Gordon Foster v Langley Corp* (1980) 102 DLR (3d) 730 and under the Indian Contract Act 1872, *Dhanyalakshmi Rice Mills v Commissioner of Civil Supplies* AIR 1976 SC 2243.

their stewardships were honorific and did not readily entail financial responsibility for errors that were honest, if misguided. Looking even deeper, one may perceive the reluctance to impose pecuniary liability in the very structures of the common law system, which developed the distinct prerogative writs as directive but not compensatory tools, and allowed other courts than those of common law (notably the Court of Chancery) to grant directive orders like injunctions and specific performance but in the main kept from them the power to award damages. In the common lawyer's subconscious mind there seems to be a peculiar awfulness about the ordering of amends for what is past.

I have not, I think, asked for much in suggesting that modern government needs as one of its disciplines that unauthorised demands for money should lead to repayment. It is not of itself a large adjustment of the balance. I am nonetheless conscious that modern courts are reluctant to take precisely this step—witness, the decisions of the High Court of Australia, the Supreme Court of Canada and even the Supreme Court of India, to which I have referred. I am equally conscious that no government, left to itself, is likely to enact legislation exposing itself to greater liability to repay than the common law imposes; governments are more likely to prefer the sort of discretion that I illustrated by the British Taxes Management Act 1970.

Answers from civil law systems

However, as I have also pointed out, there is, in civil law systems of public responsibility, a greater readiness to rely upon pecuniary redress and it may be through this influence that new perceptions will come to bear in those parts of the common law world that are directly touched by their membership of the European Common Market—the United Kingdom and Ireland.

Let me illustrate the effect by reverting to the problem that I have been discussing. The European Common Market is an economic confederation in which national political interests exert immensely strong multi-polar forces and the conventional law, primarily the

Treaty of Rome 1957, as interpreted by the Community's Court of Justice in Luxembourg, is often the one means of resolving tensions. In a sphere where the scope of executive power is not well defined and often under both strain and challenge, a world where national governments find it difficult to acknowledge the extent to which their country has surrendered sovereignty to a higher alliance, the problem of taxes and charges extracted without legal authority is encountered with relative frequency.

To take a recent illustration: in the *San Giorgio* case of 1983,[39] the Italian government had levied charges for health inspection of dairy products being imported into Italy from other parts of the Common Market. The charges were later held unconstitutional as being in contravention of specific EEC regulations requiring that there should be no such charge inhibiting movement of goods between EEC countries. The Italian government then resisted repayment under an Italian Decree Law which granted the right to cover overpaid dues only upon proof that the "charge has not been passed on in any way whatsoever to other persons". This was challenged by referring the issue under the Treaty of Rome to the Community Court. This Court refused the invitation simply to say that as the Italian rule applied to all overpayments, it should cover those which arose from infractions of Community law, there being no discrimination against other Member States of the Community or their citizens. Instead, the Court established as overriding Community law that unconstitutional payments must be recoverable, except where it could be shown positively that they were passed on to someone else, so that it would be an unjust enrichment to the claimant to give the amount back to him.[40] In particular, the court displayed a lively awareness of the difficulty in most modern business systems of proving the negative that the Italian law required: that there had been no passing on "in any way" of the improper charge. From its largely civilian background, the Court found it natural to assume that there should be repayment.

I want to extract from this example only some very general points about the legal influence of the decision. So far it is only a

39
Administrazione delle Finanze dello Stato v San Giorgio [1985] 2 CMLR 658.

Cf. Blaizot v University of Liege, The Times, 4 April 1988.

40
One common law judgment to address the same issue is that of Windeyer J in *Mason v New South Wales* (1959) 102 CLR 108. It had there been argued that the transport firm wrongly charged for a road permit had passed the charge on to their customers and so had not suffered "by subtraction".

The judge's answer was that it was not necessary to show a correlative impoverishment in an action for moneys which the government "was not entitled to collect and which *ex hypothesi* it got by extortion".

decision on Community law; it in no way obliged the Italian courts to abandon their "no passing on" law for entirely domestic exactions. Secondly, nonetheless, the fact that in Community law repayment is accepted as a concommitant of the obligation to act only within the scope of legal powers may in time influence judges in Community countries in applying purely domestic law, at least when they find no mandatory statute to the contrary. A good illustration could be the current common law rule preventing recovery of payments under a "mistake of law" unless there was an additional element of duress. Thirdly, there is the question of how the rest of the common law world should react if English courts consider that consonance with Community law requires a wider imposition of liability, particularly upon governments and other public authorities.

My hope, naturally, is that on this question, as perhaps on others, Commonwealth judges would be able to see wisdom in a British bowing to external influence and would accept for themselves the same shift in direction. They are, I suspect, the more likely to do so if they also feel a fundamental alteration of course within the common law itself and that brings me back to another of my basic themes. I have intended this talk to be a demonstration of thinking in the mode of restitution. To adopt that classification, is, above all, to commit oneself to the generalisation that unjust enrichments to a defendant at the expense of a plaintiff should be capable of repayment or reimbursement by civil action. This is presented as a fundamental proposition, which is then to be given shape and definition by more precise rules, such as those that I have taken as illustration. It is a proposition at the level of high abstraction that characterises *pacta sunt servanda* or *nullum damnum absque injutia.*

A distinct law of restitution

The traditional objection to the notion of unjust enrichment, which for so long held it at bay in English judgments, was undoubtedly founded upon the severe, atomistic liberalism of so much 19th century thought: if courts were to undo unjust enrichments, the crucial necessity that each man should look after himself might be

fatally undermined. Because of this, Lord Denman CJ once insisted (in *Skeate v Beale*[41]) that a man who had entered into a revised contract, even under duress of goods, must be held to it. He soon questioned his own statement.[42] The remarkable thing was that *Skeate v Beale* remained a basic precedent in books on civil obligation until the mid-1970's.[43] There was here an inherent antagonism to readjusting bargains by means of claims in restitution which has been difficult to uproot.

A more radical criticism has been that of Professor Atiyah, who sees in the case for a distinct law of restitution, the erection of undesirable barriers to a fundamental re-orientation of the law of contract.[44] His conception of contract would displace from its central plinth that worship of promise and bargain which derives from the same liberal, non-interventionist premises as the hostility to unjust enrichment. He would place upon two higher columns the principles of unjust benefit and detrimental reliance. This he claims to be a faith better fitted to an economic and political world in which legislatures constantly set limits upon the freedom to contract on market-place terms and courts increasingly intervene to regulate and adapt civil obligation in the light both of preceding and superseding conditions surrounding a bargain.

This in turn is a challenging thesis which is already producing ripostes. Today I can only be concerned with that small part of the whole argument which seeks to define the appropriate status for a concept of unjust enrichment. I should note first of all how very different is Atiyah's approach from that conservative caution which would deny the very generalisation, unjust enrichment. Atiyah's case is that the concept must undoubtedly be accepted, but must be placed alongside others in service of a higher goal, a redefined idea of contract itself. That is of course an ambitious re-orientation of thought, and the first case for a distinct law of restitution of the kind advocated by Goff and Jones, Lord Denning, Professor Birks and other lesser mortals, is that it fits the stage that we have reached: it can be given an appropriate place within the pantheon of civil liability at

41
(1841) 11 Ad & E 983.

42
Wakefield v Newbon (1844) 6 QBD 276.

43
Real challenge began only with *The Siboen and The Sibotre* [1976] 1 Lloyd's Rep 293.

44
Atiyah, *The Rise and Fall of Freedom of Contract*, 1979, esp. Chapters 6, 15 and 22.

common law without too serious a strain upon the tendency of that law to develop only by gradual adaptation.

The second point in its favour is this: All processes of legal classification are approximate. They have penumbral shades and they serve so long as shadow does not seem to be eclipsing the light itself. As my particular subject today suggests, a separate recognition of the unjust enrichment concept as the fulcrum of a law of restitution is needed not just within that world of essentially private transactions which we label "Contract" but equally as part of the world of public responsibility and administrative law. Now, the distinction between the public and the private is a complex and sometimes awkward one and Dicey, let us recall, was vehemently opposed to one of its possible consequences, namely a splitting of jurisdictions. In the end, having belatedly discovered that, despite Dicey and Lord Hewart, the common law does indeed have an administrative law, it may be that we shall move on towards concepts of civil obligation that affect public and private institutions and individuals indifferently. It is indeed one direction in which Professor Atiyah seeks to point us.

Until preventing unjust enrichment by granting restitution can be seen as a good in itself, it is unlikely that there will be fundamental reconsideration of rules such as that allowing no recovery after submission to an honest but unjustified claim, whether by public authority or private person.

But until we feel able to take that very large step indeed, I would suggest that the unjust enrichment concept deserves a place as a fundamental value in fields of public law as well as private obligation. Until preventing unjust enrichment by granting restitution can be seen as a good in itself, it is unlikely that there will be fundamental reconsideration of rules such as that allowing no recovery after submission to an honest but unjustified claim, whether by public authority or private person. It is just this sort of work that the general principle is fitted to do. That is the case for raising rather than lowering its status in our hierarchy of values.

Your Highness, many of your judicial pronouncements show a profound appreciation of the common law as an organism in which substantive rules, procedures and professional esprit all interact constantly and intimately. Your diagnosis of the particular difficulties which I have been addressing may differ diametrically from my own. What I do feel sure of, in inaugurating the lectures that bear your name, is that it has been right to voice a few ideas about how the glandular secretions of the common law might be activated to induce change; you appreciate, I know, that healthy growth is vital to the life of the corpus. I feel sure that it will be in the same endeavour that future lecturers, more illustrious in name and powerful in thought, will approach their task.

On this biological note I should like to close: once more thanking the Faculty for the great honour of being invited to give the new series, so aptly and royally named, its birth.

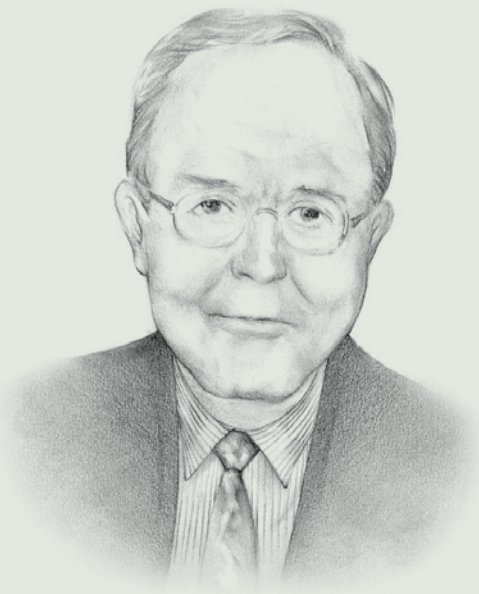
Editor's note

This lecture by Professor Cornish was described as "influential" by Lord Goff of Chieveley in the House of Lords decision in *Woolwich Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70; [1992] 3 WLR 366; [1992] 3 All ER 737, HL, at 754.

Professor AG Guest

CBE, QC, MA, FBA

Money in the Law



Anthony Gordon Guest
(*b.* 8 February 1930)

Professor AG Guest was born in 1930, and was educated at Colston's School, Bristol and St John's College, Oxford. He was called to the Bar, Gray's Inn in 1956, and was made a Bencher in 1978.

He started his academic career as a Lecturer, University College, Oxford, 1954–1955; and then became a Fellow and Praelector in Jurisprudence, 1955–1965; Dean, 1963–1964. He was subsequently a Reader in Common Law to the Council of Legal Education (Inns of Court), 1967–1980; and Professor of English Law, King's College, London, 1966–1997. From 1968–1987 he was UK delegate to the United Nations Commission on International Trade Law.

Professor Guest was appointed a Queen's Counsel in 1987 and elected a Fellow of the British Academy in 1993. He is currently a Fellow of the Chartered Institute of Arbitrators.

His area of specialisation is in contract and commercial law with special interest in sale of goods, consumer credit, banking and negotiable instruments.

He has written extensively. Some of his major publications are: edited *Anson's Principles of the Law of Contract*, 21st to 26th editions (1959–1984) (translated into Bahasa Malaysia in 2000); edited *Chitty on Contracts*, 22nd to 28th editions (1961–1999); edited *Oxford Essays in Jurisprudence* (1961); *The Law of Hire-Purchase* (1966); edited *Benjamin's Sale of Goods*, 1st to 6th editions (1974–2002); edited *Encyclopaedia of Consumer Credit* (1975); *Introduction to the Law of Credit and Security* (1978); edited *Chalmers and Guest on Bills of Exchange*, 14th and 15th editions (1991–1998); *Only Remember Me* (anthology) (1993).

At the time when Professor Guest delivered the Second Sultan Azlan Shah Lecture in 1987, he was Professor of English Law at the University of London, and also acted as an external examiner to the Faculty of Law, University of Malaya.

2 Money in the Law

Professor AG Guest
King's College, University of London

The Second Sultan Azlan Shah Law Lecture delivered by Professor AG Guest in 1987, has been irretrievably lost.

It is replaced in this volume with *Recent Developments in English Commercial Law,* a lecture delivered in 1980 at the University of Malaya, also by Professor Guest.

Recent Developments in English Commercial Law

Professor AG Guest
King's College, University of London

Text of a public lecture delivered at the University of Malaya, Kuala Lumpur on 5 September 1980.

My Lord Chief Justice, my Lords, Chairman, Ladies and Gentlemen. The academic world is full of paradoxes. There are lecturers who never lecture, tutors who never tutor and I am an external examiner, who is not here to examine. Nevertheless it is a great pleasure to have been invited by the University to visit Malaysia.

It is also a great honour to me to have been asked tonight to lecture to so distinguished an audience. I am rather daunted at the very large number who have come this evening. But I take this as a tribute, not to myself, but rather to the lasting bond of friendship which exists between Britain and Malaysia and particularly to the great bond of the common law. I only hope that the recent decision of the British Government to charge economic fees to overseas students will not break that bond irretrievably.

The subject of my lecture tonight is "Recent Developments in English Commercial Law". I wish to say from the outset that, in my opinion, the only justification for commercial law is that it serves the needs of businessmen. Businessmen require law to be certain so that they can plan ahead with respect to their rights and obligations. But they also require the law not to remain static. They wish it to develop in order to represent changes in trading and financial conditions. It is about such developments that I wish to speak tonight.

Mareva injunction

The first of these is the development of a special form of injunction, the *Mareva* injunction, which restrains a defendant from removing his assets from the jurisdiction. Those in practice will certainly know that it is one thing to obtain a judgment and another thing to enforce it and that this problem is particularly acute when a foreign defendant is involved. A foreign defendant may just sit back and allow judgment to be recovered against him. It may then prove impossible to enforce that judgment in another State because he has not submitted to the jurisdiction. So, at the first whiff of litigation, the foreign defendant will remove his assets from the jurisdiction. It is that removal of assets that the *Mareva* injunction is designed to prevent.

The procedure is very simple. An application is made ex parte to the judge in chambers and it is accompanied by an affidavit which sets out the plaintiff's cause of action and also states the grounds on which he believes that the defendant has assets within the jurisdiction and the grounds on which he believes that those assets will be removed. The injunction when granted is rendered effective, not by serving it on the defendant, but by serving it on the keeper of the funds, normally a bank. The bank is then effectively restrained from parting with those funds since to do so would assist in a breach of that injunction.

Speed and secrecy are of the essence of this procedure. The injunction can be obtained before service of the writ on the defendant and in some cases even before a writ has been issued on an undertaking that the plaintiff will subsequently issue his writ. A return date is fixed on which the application becomes inter partes and the defendant may apply to have the injunction set aside. But in surprisingly few cases does such an application succeed.

Since London is still a commercial centre of the world, the operation of this type of injunction is especially important because of the funds which may be present in London either, say, in a bank or in the hands of insurance brokers and these can be made subject

to the injunction. The *Mareva* injunction has been compared with the procedure on the Continent of Europe which is known as "*Saisie Conservatoire*". Very often, in continental legal proceedings, the first step in the proceedings is to seize the assets of the defendant and these will only be released to him if he provides security. It has been suggested that the *Mareva* injunction is, as it were, the English "*Saisie Conservatoire*". But in fact, as we shall see, the analogy is a false one. It has also been compared with the pre-trial attachment which is sometimes found in the United States under which the plaintiff attaches the defendant's assets and then that attachment founds jurisdiction of the court in the action. Again, however, as we shall see, that comparison is not an accurate one.

Where does the *Mareva* injunction spring from? And why is it called a *Mareva* injunction? It is so called because one of the first cases on the matter was entitled *Mareva Compania Naviera SA v International Bulkcarriers SA,*[1] and that has given its name to the injunction. Strictly, it ought to be called a "*Nippon* Injunction" because the very first case in which it was applied was a case[2] brought by a Japanese company, Nippon Yusen Kaisha, for hire under a charterparty. The company obtained an injunction to prevent the defendants, Greek charterers, from removing their assets from the jurisdiction. The injunction springs from section 45 of the Supreme Court of Judicature Act 1925, which provides: "A mandamus or an injunction may be granted or a receiver appointed by a interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." The English courts have deemed it just and convenient in certain circumstances to grant *Mareva* injunctions.

What are the conditions which must be satisfied before this far reaching power is exercised? One might have thought that the plaintiff would at least have to show as strong a case as he would have to show to obtain summary judgment under Order 14. After all the attachment of the defendant's assets at a very early stage in the proceedings is a most serious matter. But the Court of Appeal has

1
[1975] 2 Lloyd's Rep 509.

2
Nippon Yusen Kaisha v Ktrageorgis [1975] 1 WLR 1093.

ruled that all the plaintiff needs to show is a "good arguable case". This was established in the case of *Pertamina*[3] in 1978. The same case established that the injunction is not confined to money. It can extend to any property of the defendant which is present within the jurisdiction. As a result of this rather easy test *Mareva* injunctions have multiplied in the High Court, and particularly in the commercial court. This is not surprising because, of course, a great deal of trade is done on contracts subject to English law and the court will assume jurisdiction in such a case.

Nevertheless some qualms began to be felt about the ease with which the *Mareva* injunction was granted and as a result, in a later case, the *Third Chandris*[4] case, Lord Denning MR set out certain guidelines which have to be satisfied before the injunction will be granted. First, he laid emphasis upon a full and frank disclosure by the plaintiff of all matters within his knowledge which are material for the judge to know. Secondly, he said that the plaintiff must set out the grounds of his claim with particularity and the amount thereof, and fairly state the points made against it by the defendant—the latter requirement is perhaps, a counsel of perfection. Thirdly, the plaintiff should give some grounds for believing that the defendant has assets within the jurisdiction, and, fourthly, some grounds for believing that there is a risk of those assets being removed from the jurisdiction before the judgment or award is satisfied. These last two requirements are not too difficult: mere existence of a bank account is sufficient, and in one case[5] the fact that the defendants would not give their name and address openly to the court was held to suffice.

The injunction is not confined to money. It can extend to any property of the defendant which is present within the jurisdiction.

The *Mareva* injunction was never really a pre-trial attachment in the American sense of the word. As time went by, this has proved to be true in view of the decision of the House of Lords in *The Siskina*.[6] The facts of this case were that the plaintiffs were holders of bills of lading in respect of cargo shipped on board *The Siskina*

3
Rasu Maritima SA v Pemsabaan Pertambangan Minyak Dan Gas Bumi Negara [1978] QB 644.

4
Third Chandris Shipping Corp v Unimarine SA [1979] QB 645.

5
Bin Turki v Abu-Taba, The Times, 17 June 1980 (CA).

6
[1979] AC 210.

from Italy to South Arabia. The bills of lading were "freight pre-paid" and referred all disputes to the exclusive jurisdiction of the court of Genoa. A dispute broke out between the shipowners and the charterers of the vessel with regard to payment of freight. The shipowners unloaded the cargo at Cyprus and claimed a lien over the cargo for the freight. The plaintiffs said that the cargo had been wrongfully unloaded. They sought a *Mareva* injunction to prevent the shipowners (who were a one-ship Panamanian company managed from Greece) from removing monies from the jurisdiction. The amount was a considerable sum, for it so happened that, six weeks after the ship discharged her cargo in Cyprus, she had become a total loss. The insurance monies were payable in London to the shipowners' brokers. It was these monies that were the subject of the *Mareva* injunction.

The Court of Appeal upheld the grant of a *Mareva* injunction, but the House of Lords said that it had been wrongly granted. Their Lordships held that there was no substantive cause of action against the defendants within the jurisdiction of the English courts. You will remember that the bills of lading referred all disputes to the court in Genoa exclusively. They said an interlocutory injunction is not a cause of action in itself. It is only ancillary to and presupposes a substantive cause of action. A plaintiff could not, simply by adding a claim for a *Mareva* injunction, bring himself within the jurisdiction of the English court when there was no substantive cause of action within that jurisdiction. This case then clearly shows that a *Mareva* injunction cannot be used, as pre-trial attachment is sometimes used in the United States, to seize the assets and then say that that founds jurisdiction.

A Mareva injunction cannot be used, as pre-trial attachment is sometimes used in the United States, to seize the assets and then say that that founds jurisdiction.

A second point which has arisen is whether a *Mareva* injunction will lie against an English based defendant. Originally it was only

granted against foreign based defendants but it has been recently held in three cases[7] that the injunction will also lie against an English based defendant, and quite rightly so. Why should the foreigner be discriminated against? It is true that he may be more likely to remove his assets from the jurisdiction; but so also may an Englishman or an English company. We know that nowadays it is possible to transfer vast sums of money simply by the twinkling of a bank computer's eye, from one financial centre of the world to the other. There is no reason of principle why an English defendant should not be placed in the same position. One of the cases which decides this point was a case,[8] rather strangely in the Chancery Division before Megarry J. The learned judge, in a characteristically comprehensive judgment, pointed out that the *Mareva* injunction constitutes an exception to the previously well-settled rule that the court will not grant an injunction to restrain a defendant from disposing of his assets *pendente lite* merely because the plaintiff fears that by the time he obtains judgment the defendant will have no assets against which the claim can be enforced.

Nowadays it is possible to transfer vast sums of money simply by the twinkling of a bank computer's eye, from one financial centre of the world to the other.

One of the further problems which has arisen in this area is the question of third party claimants to the funds which are frozen. A plaintiff who obtains a *Mareva* injunction may not be the only creditor of the defendant. There may be a host of others. Does it mean that, if a plaintiff obtains a *Mareva* injunction, he "scoops the pool" (so to speak) or at least goes to the head of the queue of the other creditors? What is their position when a *Mareva* injunction has been obtained? There have been two cases in which the position of secured creditors has been assured.

The first of these is *The Cretan Harmony*[9] in 1978. The contest in this case was between judgment creditors who had obtained a *Mareva* injunction and a receiver appointed by a debenture-holder to

7
Chartered Bank v Daklouche [1980] 1 WLR 107; *Barclay-Johnson v Yuill* [1980] 1 WLR 1259; *Bin Turki v Abu-Taba, The Times,* 17 June 1980.

8
Barclay-Johnson v Yuill, ibid.

9
[1978] 1 Lloyd's Rep 425.

whom the judgment debtor (against whom the injunction had been granted) had previously charged his entire property. It was held in this case that the *Mareva* injunction should be discharged so as to allow the debenture-holder to obtain the assets. Another case, in 1980, is that of the *Iraqi Minister of Defence v Arcepey Shipping Co SA*[10] where again the contest was between, on the one hand, the plaintiff who had obtained a *Mareva* injunction to prevent the removal of assets (monies under ship's insurance policies held by brokers) and, on the other hand, interveners who claimed to be mortgagees of the ship and assignees of the policies. Goff J varied the *Mareva* injunction so as to allow the brokers to pay the amount due to the interveners.

There is, however, still little authority on the position of unsecured creditors of the defendant—how they rank once a *Mareva* injunction has been obtained. Presumably, they just have to wait until the trial of the action.

These cases show, I think, quite clearly that it is incorrect to regard a *Mareva* injunction as a "*Saisie Conservatoire*". That procedure is designed to ensure that the assets of the defendant are preserved in case the plaintiff's claim succeeds and confers a degree of priority over other creditors of the defendant. It is quite clear that, in the present context, a *Mareva* injunction does not have that effect.

In the last case that I mentioned, the *Iraqi Minister of Defence* case, a third party was allowed to intervene in the action between the plaintiff and the defendant and the question has arisen whether this right of intervention by a third party is to be generally allowed. The person in reality restrained by the *Mareva* injunction is, as I have said, usually the custodian of the defendant's funds within the jurisdiction and normally a bank. The bank is not, of course, a party to the action between the plaintiff and the defendant. May the bank, in appropriate circumstances, be allowed to intervene in the proceedings to have the *Mareva* injunction set aside? Even if the bank is not a secured creditor, it may have an interest in seeing the injunction discharged.

10 [1980] 2 WLR 488.

If the defendant-customer is a good customer, and still in need of the services of the bank, the bank may, for example, have to advance funds from its own resources to keep the customer's business going.

In a recent case with which I was concerned, a London bank applied to intervene in the proceedings and to have discharged a *Mareva* injunction granted against its customer, a foreign bank. I am glad to say that the London bank was successful in that application. The judge held there was an inherent jurisdiction in the court to allow intervention and to set the injunction aside. The plaintiff subsequently gave notice of appeal to the Court of Appeal but never pursued his appeal against the order made.

At first sight, it seems that the *Mareva* injunction is a useful weapon. Nevertheless, a certain disquiet has been felt. The consequences of, for example, the freezing of the defendant's bank account can be extremely serious. First of all, the bank will be required to dishonour all the defendant's bills and notes: it will not be able to pay. Secondly, the defendant's cash flow will be interrupted, with perhaps, very serious consequences. The money may be locked up for years while the action proceeds. Thirdly, there is the position of other creditors of the defendant who probably will not be able to obtain payment, unless they are secured. And the grant of the injunction depends merely on "a good arguable case".

British banks appear to be straining at the leash. When an appropriate moment comes, they may well challenge the validity of *Mareva* injunctions. But it is getting rather late now. *Mareva* injunctions have been going for six years, and the Master of the Rolls is a very good friend to this new remedy. Further, in *The Siskina*,[11] Lord Hailsham said that the House of Lords was "in no way casting doubt on the validity of the new practice by its decision in the instant appeal".

So, I rather think that the *Mareva* injunction is here to stay, although quite clearly there are going to be further cases, which,

11
[1979] AC 210 at 261.

perhaps, take into account some of the difficulties that I have mentioned.

Fundamental breach of contract

The second recent development with which I wish to deal is one in the field of substantive law. It is the effect on the doctrine of fundamental breach of contract of the recent decision in the House of Lords in the *Securicor* case.[12] It will be remembered, that in the 1950's, the courts in England introduced a new principle, the doctrine of "fundamental breach". This stated that if one party was guilty of a fundamental breach of contract, or a breach of a fundamental term, then no exemption clause inserted in the contract would protect him, regardless of its wording. I think it was Lord Devlin who planted the seed of this new principle, though it was nurtured, watered and tended by Lord Denning MR and eventually grew into a substantial and very sophisticated tree. Put in this form, it was a rule of law. A party could not exempt himself from liability for a fundamental breach.

It was Lord Devlin who planted the seed of this new principle, though it was nurtured, watered and tended by Lord Denning MR and eventually grew into a substantial and very sophisticated tree.

But in 1967, the House of Lords decided in the *Suisse Atlantique* case[13] that this rule of law was merely a rule of construction: if the exemption clause on its true construction applied to the breach, then effect must be given to it. Unfortunately, the speeches of their Lordships were very long and contained within them statements that were certainly ambiguous and even contradictory. Lord Denning was quick to see that all was not yet over for the doctrine of fundamental breach. Only three years later an opportunity arose in the famous *Harbutt's "Plasticine"* case.[14] The defendants had supplied to the plaintiffs certain plastic piping for the plaintiffs' factory. The piping was designed to carry hot molten wax and it was heated electrically for this purpose. The system proved to be defective. The thermostat broke down on the first day. The plastic pipes sagged and cracked. The wax escaped, caught fire and

12 *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

13 *Suisse Atlantique Societe d'Armenent Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] AC 361.

14 *Harbutt's "Plasticine" Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447.

burnt down the factory. The loss which was sustained by the plaintiffs amounted to some £150,000. The defendants relied upon a provision in the contract, an exemption clause, limiting their liability to the value of the contract, namely £2,330. Lord Denning in the Court of Appeal held that, where a fundamental breach of contract occurs and the innocent party elects to treat the contract as at an end, then the exemption clause ceases to apply. Likewise if, as in the *Harbutt's* case, the contract automatically comes to an end by reason of the breach, the clause ceases to apply. The Court of Appeal thus resurrected the doctrine as a substantive rule of law. But this has now been condemed as heresy by the House of Lords in the *Securicor* case.

The facts of this case are by now well-known. Securicor agreed with the plaintiffs to provide a mobile visiting patrol service for their factory. The charge per week was very small. It was about RM40 per week. One Sunday night the Securicor man on duty was a man named Musgrove, and he decided that he would light a fire. Whether he intended to burn down the premises is not at all clear. But the premises were burned down and damages were agreed at £615,000. Securicor, however, relied upon an exemption clause: "Under no circumstances shall Securicor be responsible for any injurious act or default by any employee of the company unless such an act or default could have been foreseen and avoided by the exercise of due diligence on part of the company as his employer." The plaintiffs were unable to prove that the fire-lighting propensity of Mr Musgrove could have been foreseen and avoided by due diligence on the part of Securicor. The Court of Appeal nevertheless held that Securicor was not protected. Their task, said Lord Denning, was to ensure the premises were not burgled or set on fire. The act was a deliberate act and not covered by the clause. The *Harbutt's "Plasticine"* case was relied upon. The House of Lords held that Securicor were protected. They stated that the *Harbutt's "Plasticine"* case was wrongly decided and reiterated the principle that the question of the applicability of exemption clauses

The question of the applicability of exemption clauses to a fundamental breach of contract was a matter of construction.

to a fundamental breach of contract was a matter of construction. In order further to justify their decision, they pointed out that the sum paid for Securicor's services was small, that the services were only visiting services and that it was more economical for the plaintiffs to insure the premises than it was for the defendants to insure against acts of arson by their employees.

So we are back to the situation of the "true construction" of the clause unless and until the Master of the Rolls thinks another way of revivifying the doctrine.

The *Securicor* case is, however, of much less importance now in England because, in 1977, that was after the facts of the case arose, a new Act was passed entitled the Unfair Contract Terms Act 1977. This prevents either absolutely or subject to qualifications the restriction or exclusion of liability by exclusion clauses in contracts. It is not for me to say whether this Act is even now in force in Penang, Melaka and East Malaysia. I would not like to venture an opinion on that rather difficult issue.

Broadly, the Act says, first, that a person can never exclude liability for death or personal injury caused by negligence. That seems to be a sensible provision. Secondly, it protects the consumer absolutely against exemption clauses in certain situations, eg the exclusion of the implied conditions as to quality or fitness in sales of goods. Much more controversial are the provisions of the Act which apply to business contracts. These say, for example, that where business is done on a standard form (written terms of business) then the businessman can only restrict or exclude his liability for breach of contract if the term is fair and reasonable. However, no one really knows how the courts are going to interpret the words "fair and reasonable". Practitioners have taken two rather different views. Some of them believe that, since the courts' approach is a matter of guesswork, it is better to advise clients to continue to use their comprehensive blanket exemption clauses. Others, particularly those acting for larger companies who have more at stake, have tended to

advise that exemption clauses in standard form documents should be redrafted so as to render them fair and reasonable, or at least to provide some argument that they are fair and reasonable.

I must say that I am of the second opinion—a "dove" rather than a "hawk". The burden of proving reasonableness is upon the person inserting the clause. It would not be an enviable task to have to justify in court an old-fashioned comprehensive exclusion clause as being fair and reasonable. If there is at least some acceptance of liability, there is some ground on which the clause can be defended. The Act has therefore brought about a really major change in English commercial practice among the larger companies in that their standard forms have been redrafted. Some of the major computer companies, for example, are obviously at enormous risk. Computer failure or an error in the software could completely disrupt a customer's business for a long period of time. Many computer manufacturers have, in fact, revised their clauses so as to accept a substantial measure of liability. The difficulty is, of course, the question of consequential loss. It is still a matter of speculation as to whether the courts will find it fair and reasonable to exclude liability for such loss if liability for (say) defects in goods is otherwise accepted.

Arbitration

The third development with which I wish to deal is statutory and it relates to arbitration. It may be that some practitioners here will have been concerned with arbitrations in London because the standard forms produced by the commodity associations frequently provide for arbitration in London and English law to be applied. One may get, for example, a contract between a Pakistan State Trading Corporation and a company in

Certain trade associations are being very short-sighted in requiring arbitrations to take place in London and only in London. It would be preferable to liberalise policy so as to enable arbitrations to take place at more convenient places, for example, in Kuala Lumpur.

Singapore which is governed by the standard provisions of a London trade association contract and provides for arbitration in London. I might just venture, as an aside, that I think that certain trade associations are being very short-sighted in requiring arbitrations to take place in London and only in London, with witnesses having to be transported to England. It would be preferable to liberalise policy so as to enable arbitrations to take place "on commission" so to speak at more convenient places, for example, in the new arbitration centre which has been set up in Kuala Lumpur.

The statute with which I wish to deal is the Arbitration Act 1979. For a long time now, businessmen have felt that something has gone wrong with arbitrations in London. The courts have previously exercised a very considerable control over arbitrations and they have done so in two ways.

Parties who go to arbitration wish to ensure privacy; they wish to have their dispute speedily resolved; they also wish to have it decided by expert arbitrators.

First of all, either party could request the arbitrator to state a point of law for the decision of the court. If he refused to do so, he could be compelled to do so by an order of the court. This procedure has unfortunately been abused. Defendants, seeing that an award would inevitably be made against them, have asked arbitrators to state a case for the decision of the court, and then taken that decision to the Court of Appeal and thence to the House of Lords. They have thereby been able to stave off the day of payment for a considerable time. This was regrettable. Parties who go to arbitration wish to ensure privacy; they wish to have their dispute speedily resolved; they also wish to have it decided by expert arbitrators. These case-stated procedures tended to negate these requirements; there was the possibility of protracted litigation in the courts, with attendant publicity, and lawyers would be making the decision instead of the expert arbitrators.

The second way in which the courts controlled arbitration was if there was an error of law on the face of the award. Since it was

open to either party to challenge an arbitration award in this way, arbitrators in London began to make awards in summary form. They would simply state, "We award $25,000 damages to the claimant. The respondent to pay to the claimant his costs and the costs of this arbitration". They then handed down their reasons in a separate document which did not form part of the award. This was to prevent challenge of the award in the courts.

The 1979 Act for the most part abolishes the case-stated procedure. It further abolishes challenge for error of law on the face of the award. It substitutes for these a simple appeal from the arbitrator on points of law to the High Court. At first sight, this might not seem to meet the objections mentioned above. A party to arbitration proceedings will simply appeal the award to the High Court. But the Act limits the opportunities to appeal to the High Court. Unless both parties consent, an appeal can only be brought with leave of the High Court judge. He will only give leave, if he considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement. Moreover, an appeal will not lie to the Court of Appeal without leave, and such leave will only be given if the decision is one of general public importance or one which for some special reason should be considered by the Court of Appeal. In a recent case, the *Pioneer Shipping Case,*[15] the Court of Appeal stated that, in a case where the question is the proper legal interpretation of a "one-off' clause in a "one-off" contract, then the judge should not give leave to appeal. Even in the case of a standard form contract, where a decision on its wording may act as a precedent, the judge should hesitate before giving leave to appeal. In many cases it is better to leave it to the arbitrators to interpret the contract in a commercial sense rather than that it should come to the courts.

The arbitrator can now be made to state the reasons for his award in sufficient detail to enable the court to consider the point of law.

15 *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1980] 3 WLR 326.

There is a further aspect to the 1979 Act. It is now possible in certain circumstances for the parties to exclude the right of appeal. A major inroad has been made into the basic principle that the parties are not entitled to exclude the jurisdiction of the courts. In non-domestic arbitration agreements the parties can, as a general rule, agree to exclude the right of appeal conferred by the Act. This can be done in the arbitration agreement itself. There are exceptions: for example, disputes arising out of insurance contracts, the admiralty jurisdiction and for the time being, commodity contracts. In these cases, the right of appeal can only be excluded after the arbitration proceedings have been commenced. But, normally, in the case of international arbitration agreements, it can in fact be excluded by the parties in the contract itself.

Romalpa clauses

A further development which is of interest is the question of retention of title clauses, sometimes called "*Romalpa*" clauses from the case[16] in which they were upheld. The minimum content of such a clause is that the seller of goods, when he sells the goods, retains title to the goods until he is paid. This is a fairly simple notion. But *Romalpa* clauses are normally more complicated, and contain these provisions:

The minimum content of such a clause is that the seller of goods, when he sells the goods, retains title to the goods until he is paid.

1. retention of title: the seller retains title to the goods until he is paid for them, or until all accounts due to him are paid, and in the meantime the buyer is to hold the goods as bailee for the seller;
2. a "product" provision: if the goods sold are mixed with, or incorporated in, other goods, for example, in the manufacturing process of the buyer, the title to the product is to vest in the seller;
3. a "proceeds of sale" provision: if the buyer sells the goods or product, he is to hold the proceeds of sale on trust for the seller.

16 *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

Romalpa clauses have become extremely common in standard form contracts. But there have been two recent decisions in England which have cast doubts upon the validity of certain aspects of these clauses.

The most important decision is that in *Re Bond Worth Ltd.*[17] In that case Slade J held that the particular *Romalpa* clause created a charge on the assets of the buyer company and was therefore void for non-registration under the Companies Acts. It may therefore be of some interest to look at the present status of these three provisions in the usual *Romalpa* clause.

First of all, the retention of title provision. In my view, such a clause will be valid if properly drawn. In *Re Bond Worth Ltd* it went wrong because the sellers reserved merely the equitable title and not legal title. The reason for this is obscure. Possibly they were afraid that if the buyer sold the goods he would be selling as their agent and they would be responsible for the condition of the goods. But if legal title is reserved against payment, the provision seems to be good.

Secondly, the "product" clause. In my view this would not be upheld. In *Borden (UK) Ltd v Scottish Timber Products Ltd,*[18] sellers sold resin to the buyers under a *Romalpa* clause which reserved property in the resin until all accounts due were paid. The resin was used for the manufacture of chipboard. The buyers went into receivership and the sellers claimed to trace into the chipboard and the proceeds of sale of the chipboard. The Court of Appeal refused to allow this claim, holding that once the resin had lost its identity in the chipboard, it could no longer be traced. But Templeman and Buckley LJJ further stated that a provision of the kind that I mentioned, which vests title in the manufactured product in the seller, would be void as an unregistered bill of sale if it was executed by an individual, and, if it was created by a company, would be void as a charge which if executed by an individual would be registrable as a bill of sale.

17
[1980] Ch 228.

18
[1979] 3 WLR 672.

The third part, the "proceeds of sale" provision, is perhaps the most contentious and most important of all. If a company goes into liquidation or receivership, it may be found that the cupboard is bare of any stock in trade. But there may be some monies available, debts due from customers and so forth. Will the provision that the buyer shall hold the proceeds of sale of the goods on trust for the seller be upheld? The provision is very unreal. When the buyer resells the goods he is not going to place the proceeds of sale in a trust account and account to the seller for the profits which he has made on the transaction. That is completely impracticable. Such a provision will only be invoked in the event that the buyer company gets into financial difficulties. It is when the vultures begin to gather around the dying corpse of the company that the seller will invoke the *Romalpa* clause and say that such proceeds of sale as he can identify are held upon trust for him. But surely the situation must be that the proceeds of sale are held on trust simply to secure the liability of the buyer to the seller. It therefore appears to me to be arguably a case of a floating charge over the assets of the buyer company which requires registration. Only if one can say that the charge is not "created" by the buyer company, but arises out of the bailor-bailee relationship between seller and buyer, could such an argument be rebutted.

It is when the vultures begin to gather around the dying corpse of the company that the seller will invoke the "Romalpa" clause and say that such proceeds of sale as he can identify are held upon trust for him.

Sale of Goods Act

One final development: we have said farewell in England to an old friend, the Sale of Goods Act 1893. It is now the Sale of Goods Act 1979. The parliamentary draftsman has decided that he could improve on the drafting of Chalmers and he has brought the language up to date, for example, for "thereof" he substitutes "of it". Whether he has succeeded by these means in making any substantive changes remains

to be seen. The Act is retrospective, so it applies to all contracts of sale of goods made after 1 January 1894. But if I may make a purely academic point—you will expect me to make one at least—the 1893 Act was also retrospective. So the 1893 Act continues to apply to all contracts of sale of goods made before 1 January 1894, although no doubt there will not be many of these still in existence. But, after all, what is the role of the parliamentary draftsman? His role is, I would suggest, to provide insoluble problems for judges and a source of perpetual revenue for lawyers.

The Right Honourable Lord Oliver of Aylmerton

Judicial Legislation: Retreat from Anns

Peter Raymond Oliver
(*b.* 7 March 1921)

Lord Oliver comes from a distinguished family of lawyers: his father was a Professor in Law in Cambridge University and his son is a very well-known Queen's Counsel in England.

Lord Oliver read law at Trinity Hall, Cambridge. He was called to the Bar at Lincoln's Inn in 1948, and was made a Queen's Counsel in 1965.

His illustrious judicial career began in 1974, when he was appointed a judge of the Chancery Division of the High Court. He was then elevated to the Court of Appeal as a Lord Justice of Appeal in 1980, and to the House of Lords as a Lord of Appeal in Ordinary in 1986. He is also a Privy Councillor.

Lord Oliver has held many other positions of prominence. He was the Chairman of the Review Body on Chancery Division of the High Court (1979-1981); a member of the Restrictive Practices Court

(1976-1980); a member of the Advisory Board of the Centre for European Studies, Cambridge University, and was Chairman of the Council of Public Concern at Work, a charity.

Lord Oliver is an Honorary Fellow of Trinity Hall, Cambridge, a Baron (Life Peer), and a Bencher of Lincoln's Inn. He was also the Treasurer of Lincoln's Inn.

Lord Oliver retired as a Law Lord on 31 December 1991 because of failing sight.

Amongst the judgments that Lord Oliver delivered in the Judicial Committee of the Privy Council on appeals from Malaysia were: *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* (1986) 4 PCC 571 (revenue law); *Syarikat Kewangan Melayu Raya Berhad v Malayan Banking Berhad* (1986) 4 PCC 595, a case dealing with charges under the National Land Code; *Singaram Thandayuthapani and Others v Lembaga Pelabuhan Kelang* (1986) 4 PCC 639, a case dealing with the transfer of employment of civil servants to a statutory body; and *Great Eastern Life Assurance Company Limited v Director General of Inland Revenue* (1986) 4 PCC 647 (revenue law).

In the leading case dealing with liquidated damages and limitation under the Housing Developers Act in Malaysia, *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* (1987) 4 PCC 699, the judgment of the Privy Council was delivered by Lord Oliver. Similarly, in the important Privy Council case dealing with creation of charges by housing developers, *Keng Soon Finance Berhad v MK Retnam Holdings Sdn Bhd and Bhagat Singh* (1987) 4 PCC 757, Lord Oliver delivered the judgment.

3 Judicial Legislation: Retreat from Anns

Lord Oliver of Aylmerton
Lord of Appeal in Ordinary, House of Lords

Text of the Third Sultan Azlan Shah Law Lecture delivered on 12 September 1988 in the presence of His Royal Highness Sultan Azlan Shah.

This is, I believe, the third of the Sultan Azlan Shah Law Lectures and I need hardly say how honoured I feel at having been invited by His Royal Highness to deliver it.

I am, at the same time, filled with apprehension that in comparison with the wisdom and erudition of my predecessors on this rostrum, what I have to say may seem so trite and elementary as to constitute an altogether unworthy return for the more than generous hospitality of my host, who has accorded to my wife and myself the rare privilege of visiting your beautiful country.

I am the more honoured and the more apprehensive, first because this lecture is given under the auspices of the University—and may therefore be expected to display a measure of academic learning—but, secondly, and perhaps even more importantly, because my host, His Royal Highness Sultan Azlan Shah is both a distinguished jurist and a former judge whose reputation for learning extends beyond the confines of this country. He is, therefore, in a better position than most to exercise those critical faculties which a lecturer would prefer to find absent in his audience and—as a fellow Bencher of Lincoln's Inn—in a better position than most to express them to me afterwards.

I should, perhaps, start with a word of warning—rather like those little notices on packets of cigarettes: "Listening to Oliver may

endanger your health". I do want to emphasise that in what follows, I am expressing my own personal and idiosyncratic views with which some or all of my colleagues may well disagree. I am, in other words, speaking as an observer, not as a Law Lord and it must not be thought that any view which I express represents the received wisdom of the House of Lords.

If I were to select a more appropriate title for this talk, I would, I think, borrow it from Jerome K Jerome: "The idle thoughts of an idle fellow".

Uncompensatable misfortune?

One of the by-products of the welfare state, with its underlying concept of corporate responsibility for every misfortune of the citizen from the cradle to the grave, has been to engender in the public mind the notion that there is no such thing as uncompensatable misfortune, even if self-induced. If you suffer loss, you look around for someone solvent to sue. If he has not actually caused the injury, you can at least get him for having failed to prevent someone else from causing it. This is a state of mind in which defendants tend to be selected—primarily for their solvency and only secondarily for their actual responsibility.

One of the by-products of the welfare state has been to engender in the public mind the notion that there is no such thing as uncompensatable misfortune, even if self-induced.

Now that is a notion which, to some extent, has communicated itself to the British judiciary, though not happily to quite the same extent as it has in the United States. I have just read in my latest copy of *The New Law Journal* that in the United States a lady has successfully sued the manufacturer of a microwave oven for having failed to warn her that if she put her poodle in it to dry after a shampoo, the animal would never be quite the same again. Again, the victim of a drunken driver has, I gather, successfully sued the

driver's hostess for allowing him to drive away from her home in an intoxicated condition.

Now we have not gone that far in the United Kingdom but, on one view, the decision of the House of Lords in *Anns v Merton Borough Council* [1] in 1978 may be said to have been at least a tentative first step along that road. To justify itself, it was necessary to invent a duty of care which the law had not contemplated before and it is that invention which—as I think at any rate—can properly be categorised as a legislative rather than a judicial exercise.

Judicial legislation

The English poet, Shelley, once observed—rather pompously, I think—that "poets are the unacknowledged legislators of the world". It was a remark the truth of which, perhaps, few would have recognised or even suspected, for the compulsive influence on conduct of, for instance, Shelley's own *Ode to a Skylark* would not, I think, have been obvious to anyone but him. If, however, in launching this aphorism upon an astonished world, he had substituted "judges" for "poets" he might have struck a more responsive cord.

In common law systems, the judiciary has traditionally tended to be remarkably shy about its legislative role in the development of the law. It operates, and has always operated, behind a comfortable theory that the law is simply "there" like an amorphous mineral deposit that has only to be mined and brought to the surface. The judges find the law. They declare it to be what it always has been, although no one knew it before. They do not make it. They are essentially explorers, not inventors. They develop the law incrementally by a process of logical deduction from established principle, building only upon the sure foundation of what has been declared already. Thus development is essentially an interpretative process and not one involving innovation. According to this theory there is a visible, although possibly flexible, demarcation of function.

1
[1978] AC 728, HL.

Interpretation, exposition and application are functions for the judge. Reform, innovation and policy are functions of the legislature.

Now this is a comfortable theory which does very little harm if it is kept within proper bounds, although it has to be confessed that it begins to look a little threadbare when one generation of judges discovers that a principle confidently expounded by the preceding generation—possibly since the time of Blackstone—is not (and therefore never was) the law and that some new principle, never previously suspected, is. Indeed, judiciously as well as judicially interpreted, the theory is positively beneficial because it enables the law to adapt sensibly to changing social and economic conditions without the delays inherent in the legislative process and without adding to the congestion and complication of a mass of statutory and regulatory material which has already become unwieldy and, frequently, so obscure as to be well-nigh undiscoverable. Where it becomes dangerous is the point at which even the pretence of incremental development is abandoned and the judge becomes, whether avowedly or by inadvertence, an instrument for expounding and applying a policy which he himself has invented. This is, in truth, judicial legislation and it is dangerous for several reasons.

Interpretation, exposition and application are functions for the judge. Reform, innovation and policy are functions of the legislature.

It is dangerous constitutionally, both because it involves the judge, who is not an elected representative, in trespassing upon those areas of policy which are properly to be decided only after full consideration and parliamentary debate and because autogenous invention is difficult, if not impossible, to combine with a non-partisan determination of the issues which are before him. It is dangerous practically, because the judge is simply a lawyer, without access to expert opinion on wider matters of policy or on the practical repercussions of his decision and without the benefits which accrue from open discussion and parliamentary debate. It is dangerous

jurisprudentially, because it introduces uncertainty into an area where certainty is of paramount importance, for it is of critical importance to the citizen that he should, so far as possible, know what the law is. It is by that knowledge alone that he can properly regulate his affairs and an unheralded shifting of the goal-posts can only create confusion and lessen his respect for the law. Finally, although it may provide a quick method of reforming the law, it is dangerous judicially, because by entangling the judge in the toils of social, economic and political considerations in which he has no necessary expertise or skill, it calls in question the validity of the method of and the qualifications for his appointment and the value of what is, or should be, an absolutely essential attribute of his function—his independence from the legislative and executive arms of government.

Even the most cursory survey of the history of the common law, however, will show that, within the limits of the incremental method, there is nothing novel or revolutionary in the notion of an inventive judge. Indeed, without him, the law would never have developed. The incremental method of legal development and the limits of judicial invention were perhaps best described by Mr Justice James Parke in 1833 in his opinion in the case of *Mirehouse v Rennell* where he said this:

> The precise facts stated by Your Lordships have never, so far as we can learn, been adjudicated upon in any court; nor is there to be found any opinion upon them of any of our judges, or of those ancient text-writers to whom we look up as authorities. The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied,

> because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.[2]

That is, I think, the only correct approach. There has, however, been a tendency in recent years, I think, for the courts—and, I have to say, I think particularly the House of Lords—to go a little further than merely applying and adapting established principle and to indulge a taste for innovation to an extent where its constitutional propriety becomes seriously open to question. It is for this reason that I have chosen what I call "judicial legislation", in particular in relation to the duty of care in tort, as the theme for this talk.

There has been a tendency in recent years for the courts to indulge a taste for innovation to an extent where its constitutional propriety becomes seriously open to question.

Now in the past decade we have seen a number of examples of what I have styled "judicial legislation" in several different spheres. We have seen it in the law of copyright and we have seen it in an acute form in the law relating to taxation. But it is, I think, in the development of the tort of negligence and its extension to embrace cases of pure economic loss unconnected with physical damage to the person or property of the plaintiff that judicial legislation has been most noticeable and its effects most direct and most widespread not only in the United Kingdom but in other countries of the Commonwealth whose legal systems derive from the common law. I refer, of course, particularly to the decision of the House of Lords in the *Anns* case which, whilst rightly considered a seminal decision, is also one of the most controversial of the past two decades.

What I would like to do, therefore, is to say a few words about the history of the development of the duty of care in tortious negligence up to the *Anns* case, to outline some of the uncertainties

2 (1883) l Cl & Fin 527 at 546; 6 ER 1015 at 1022.

and the difficulties that have been created by that decision, and finally to attempt an evaluation of the pros and cons of the process which is exemplified by *Anns,* and, so far as I can, to predict the future course to which *Anns* has pointed the way.

Before starting on that perambulation, however, we should note what was, to my mind, perhaps the most startling example of pure judicial legislation in the United Kingdom in recent years. It occurred in 1966, and it did not even pretend to be an incremental development from the existing law. In the first half of the 19th century, conflicting individual views had been expressed about whether the House of Lords was bound by its own previous decisions. The view of Lord Campbell, which conflicted with that of Lord St Leonards[3] was that it quite clearly was.

That view was adopted by the House itself in 1861 in *Beamish v Beamish,*[4] where the House held as a matter of decision that its decision bound all the subjects of the realm including the Law Lords, and could be altered only by Act of Parliament. And it was reiterated quite unequivocally by Lord Halsbury, Lord MacNaghten, Lord Morris and Lord James in *London Street Tramways Co v London County Council*[5] in 1898.

Thus, until the legislature was persuaded to intervene, English and Scottish law was saddled with the unloved and much criticised doctrine of common employment: see *Radcliffe v Ribble Motor Services.*[6] Similarly, in *Nash v Tamplin & Sons Brewety Brighton Ltd,*[7] Lord Reid lamented "the fact that this House has debarred itself from ever reconsidering any of its own decisions".

Now, that may have been illogical. It may have been—indeed it undoubtedly was—sometimes inconvenient. But it did have the advantage of certainty and it did undoubtedly represent the common law of England. On 26 July 1966, however, and without, so far as is known, any prior parliamentary or judicial consultation beyond the judicial Lords themselves, the then Lord Chancellor, Lord Gardiner,

3
(1852) 3 HL Cas 388, 391; 10 ER 152 and 153.

4
(1861) 9 HL Cas 274; 11 ER 735, 761.

5
[1898] AC 375.

6
[1939] AC 215.

7
[1952] AC 231, 250.

announced on behalf of the Law Lords that what was described as their previous *practice* was to be reversed and that the House would no longer consider itself bound by its own decisions.

The constitutional basis for this is at least open to question, but it has passed without protest beyond a few academic mutterings. It was however, undoubtedly judicial legislation which must, I think, have caused Lord Campbell and Lord Halsbury to spin in their graves like tops, and it may be taken as a fitting overture to the subject-matter of this talk.

Now the *Anns* case did not purport to be an exercise of the new found liberty with which the House had endowed itself, but it certainly involved ignoring at least one principle of law firmly enshrined in the law established by their Lordships' House. It also involved the adoption of a new and unorthodox concept of tortious liability which was reconcilable neither with accepted principle nor with previous historical development. And it involved—although it pretended not to—the imposition of a peculiar and novel form of product liability in an area in which the legislature had already intervened in the very recent past and had thus demonstrated unequivocally the limits to which, after full Parliamentary debate and consideration it considered that such liability should extend. So if ever there was a case which constituted judicial legislation in its most clearly recognisable form, *Anns* may be said to be that case.

Common law development of tort of negligence

Now just to make that good, let us just take a brief and necessarily not too detailed look at the development of the common law tort of negligence up to *Anns.* I think that we can best do this by identifying the main strands of principle that came to be united in *Anns.* I say "main" strands, because there are numerous subsidiary concepts which were, as it were, tributary streams to the main river of development; but the three principal ones may be identified as, first,

the concept of foreseeable damage, secondly, the exclusion of pure pecuniary loss as an ingredient in the tort of negligence, and finally, the parallel liability for breach of statutory duty. I have entitled this talk *The Retreat from Anns* but I suppose that this part of it could properly be called *The Advance to Anns.*

First, then, foreseeable damage. Historically and procedurally, the tort of negligence developed through the action of trespass on the case. We do not have the time nor is this the occasion for a historical discourse. It is sufficient for present purposes to note only this, that the historical and procedural origins of the action involved the consequence that actual damage had, by definition, become established as an essential ingredient of the action for negligence. One needs only a homely example to illustrate that. You can drive down a main street in Kuala Lumpur as carelessly as you like and at a reckless speed and you may be in very severe trouble with the police. But you will not be liable civilly unless and until you injure somebody, and it is only when the injury actually occurs that the cause of action arises.

At the same time, it is not all injury which makes you liable but only that which you, as a reasonable person, can foresee. That is not a result of the procedural origin of the tort but of the developed policy of the law. The important point is that by the time negligence developed as an identifiable separate tort, proof of actual foreseeable damage to the plaintiff had become an essential ingredient of the action. That sounds so elementary as to be a truism, but it assumes a major importance when we come to *Anns* so we have to keep an eye on it.

Secondly, we need to keep an eye on the further limitation which the law had come to put on liability for tortious negligence. "Damage" in the context of negligence meant originally physical damage to person or to property. Once that was established the law did not restrict the damages recoverable to compensation simply for the physical injury. In a sense, all damage is pecuniary because money

is the only medium through which the law is capable of providing compensation and it has never stopped short of making compensation for consequential loss resulting from physical injury to person or property.

What it has done is to stop short of recognising pecuniary loss not resulting from physical injury as itself constituting the essential damage necessary to ground the action. The most obvious occasion on which that is likely to arise is where a professional man makes a careless mistake which causes pecuniary loss to his client. After some initial uncertainty in the earlier part of the 19th century it came to be recognised that the appropriate form of action here was "assumpsit" and not "case" and such liability as there was became established as contractual only—a situation which endured up to the case of *Hedley Byrne v Heller* [8] in 1964 and for a few years beyond.

Thus there came to be established the principle, of which the classical exposition was in *Derry v Peek* [9] in 1889, that there was no liability in tort for a careless (as opposed to a fraudulent) statement. But that was not in fact ever universally true, because there always was liability for a careless statement causing physical damage for instance a misdiagnosis by a doctor. The so-called rule in *Derry v Peek* was in fact no more than a facet of the wider principle that pure pecuniary loss not resulting from physical damage to the plaintiff or his property did not constitute such damage as was the essential ingredient for the action for negligence. So, if you damaged A or A's property in such a way that A was unable to perform his contract with B, resulting in pecuniary loss to B, B had no remedy against you in negligence. That was firmly established in *Cattle v Stockton Waterworks* [10] and it received the blessing of the House of Lords—a position which has since been affirmed by the House in the case of *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd.*[11] Again, this is a principle upon which we have to keep an eye, both because it indicates the limits for the operation of the principle enunciated by the House of Lords in *Donoghue v Stevenson* [12] in 1932 and because it is given a new and curious dimension in *Anns.*

8
[1964] AC 465.

9
(1889) 14 App Cas 337.

10
(1875) LR 10 QBD 453.

11
[1986] AC 785.

12
[1932] AC 562.

The third factor which we have to consider is that of the parallel and alternative claim which frequently arises in actions for negligence, that of damages for breach of statutory duty. The Industrial Revolution and the consequent use of increasingly sophisticated and increasingly dangerous machinery, causing horrific injuries if it was not carefully operated, produced a spate of primary and subsidiary legislation for regulating safety at work. The action of negligence involved a breach by the defendant of a duty of care which came to depend upon the foreseeability of damage. In the case of a statutory regulation, however you did not have to look for a duty of care. The duty was there already by the statute and foreseeability of harm did not enter into the picture as an ingredient. But, inevitably, questions arose in relation to each particular statutory duty whether it was one which would entitle a person claiming to have been injured by the breach to sue the person or body on whom or on which the duty was imposed. And so there came to be evolved the test of whether, inter alia, the duty is one which is imposed not for the protection of the public generally but for the protection of the particular class of persons of whom the plaintiff is a member—a test expounded by Lord Kinnear in *Black v Fife Coal Co Ltd* [13] in 1912 and approved and applied by the House of Lords definitively in *Cutler v Wandsworth Stadium*[14] in 1949.

So much for the background. The incremental development of the law of negligence prior to *Anns* is so familiar to lawyers from their student days that it hardly calls for repetition. Originally, the courts made no attempt to expound any common principle for the establishment of a duty of care, deciding cases on a case-to-case basis and classifying the duty by reference to particular relationships or situations in which it had been held to arise or not to arise in the past. Lord Esher attempted in *Heaven v Pender* [15] to provide a wide general principle but that did not meet with universal acceptance and was, as expressed, manifestly too wide. Subject, however, to a qualification expressed in the notion of "proximity" it was adopted and reformulated in the classic "neighbour" test expounded by Lord Atkin in *Donoghue v Stevenson* in 1932. Now what has always to be remembered about Lord Atkin's classical statement is that it was made in the context of physical

13
[1912] AC 149.

14
[1949] AC 398.

15
(1883) 11 QBD 503.

injury. Read without that limitation it is manifestly so wide as to be absurd. Just consider it for a moment:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure … persons who are so closely and directly affected by your act that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the acts or omissions which are called in question.

If, for "injure", you substitute "inflict pecuniary loss upon" you necessarily arrive at a conclusion which strikes at the very root of any free economy. Business competition, if successful, necessarily involves the infliction of damage of a pecuniary nature upon other traders in the same market. When I set up a competing business, have I to take care that it does not take away custom from other existing businesses? To state the question is to answer it. So you have always to read *Donoghue v Stevenson* in the context of the state of the law in which it was decided.

The two other major developments which occurred prior to the *Anns* case are again so well-known as hardly to call for mention. First, there was the inroad upon the principle that the essential ingredient of damage in the tort of negligence was not satisfied in the absence of physical injury to or interference with person or property. That occurred in *Hedley Byrne Co Ltd v Heller & Partners Ltd* [16] in 1964 where the principle of recovery in tort for pure economic loss was recognised, but, be it noted, only in a very limited context. We have already seen that there was some early uncertainty on the question whether a professional man's liability for the negligent performance of his contractual duty lay in case (or tort) or in assumpsit (or contract). Lord Campbell, indeed, in *Brown v Boorman*[17] in 1844, had said that

Now what has always to be remembered about Lord Atkin's classical statement of the "neighbourhood" test is that it was made in the context of physical injury. Read without that limitation it is manifestly so wide as to be absurd.

16
[1964] AC 465.

17
(1844) 11 Cl & Fin 1; 8 ER 1003 HL.

the two causes of action were interchangeable. What, I think, tipped the scale in favour of the contractual basis for liability was simply ease of analysis. Once the contract was established there was, as in the case of statutory duty, no need to look for a duty of care elsewhere. The contract supplied it and the damage suffered arose from the client's reliance upon the proper performance of the duty which the defendant had assumed.

What *Hedley Byrne* did, in effect, was to put the clock back by asking the question, appropriate to the action of assumpsit, whether the defendant had assumed a duty of care to the plaintiff. It did not establish a general common law duty to make truthful or accurate statements. What it did establish was that, in circumstances where the defendant knew that the plaintiff was likely to rely upon the accuracy of his statement because of some special skill or knowledge which he, the defendant, possessed, he must be treated as if he had assumed the obligation of taking care to be accurate. If in these circumstances the plaintiff did rely upon the statement or advice and suffered pecuniary loss as a result, then he could recover that loss in an action for the tort of negligence. But it must be borne in mind that although this opened the door to a claim in negligence based upon pure economic damage with no physical injury to person or property, the opening was a very narrow one. In its inception—indeed in its conception—the action rested necessarily on, first, the knowledge of the defendant that he was being relied upon and his tacit assumption, from such knowledge, of a duty to be careful and, secondly upon the actual reliance of the plaintiff on the advice given or the statement made.

The second major step was in the area of responsibility for the acts of third parties, and I refer, of course, to the case of *Home Office v Dorset Yacht Co*[18] in 1970. In the present context, the importance of that case lies not so much in its impact upon cases where damage is inflicted by third persons but in the broad statement of Lord Reid that the general neighbourhood principle "ought to apply unless there is some justification or valid explanation for its exclusion".

18
[1970] AC 1004.

There is a third point which, I think, tends frequently to be overlooked, and it is one to which I ventured to draw attention in the Court of Appeal in *Aliakmon.* It is this: The common law has always spoken with a somewhat uncertain voice on the topic of remoteness of damage (which I think was what the concept of proximity was all about), and it became fashionable to rely upon somewhat obscure metaphysical distinctions between *causa causans* and *causa sine qua non.* In *The Wagon Mound (No 1)*[19] in 1961, however, the Judicial Committee of the Privy Council pronounced in convincing terms that there were not two tests—one for culpability (based on foreseeability) and one for damage or proximity (based on causation). There was but one test and that was the foreseeability of the damage which had occurred. Now this makes very good sense, but it does have this side effect, that if foreseeability is now to be the universal test for liability there is then no logical intermediate point at which the law can say that liability determines; no point, that is, unless the law itself intervenes to establish one—and that it can only do by reference to something called "policy" (which is another name for judicial legislation).

Now that does not matter a lot when you are talking about physical injury and its consequences, because the legal prohibition on causing physical injury is, for all practical purposes, universal. But it begins to matter a great deal when you begin to contemplate liability for pure and simple economic damage. I have already adverted to the absurdity of applying Lord Atkin's "neighbourhood" formula across the board to pure pecuniary loss. If you are going to apply that formula, then you have to keep it within bounds by laying down what sort of economic loss can be recovered, or to be more accurate, in what circumstances is the infliction of economic loss lawful and in what circumstances it is not. You cannot rest that on foreseeability alone, and that becomes of critical importance when we come to consider the implications of *Anns.*

Finally, in this run-up to *Anns* we have to mention the case which was really the curtain raiser and which, if it had gone to the

19 [1961] AC 388.

House of Lords, would certainly have preempted *Anns.* That case was, of course, *Dutton v Bognor Regis Urban District Council* [20] in 1972, of which, in a sense, *Anns* was a carbon copy. It was a case in which the plaintiff had purchased from the previous owner a house which had been built two years earlier. The Bognor Council, in exercise of its statutory powers under the Public Health Act, had, through its surveyor, passed the foundations as adequate. In fact, the house had been built on the site of an old rubbish tip. As a result of that, the foundations proved inadequate and the plaintiff had to spend a lot of money on repairs and underpinning. She successfully sued that Council for negligence, claiming that the public duty cast on the Council by statute imported also a private law duty to protect individual members of the public against loss which would not have occurred if the powers conferred by the statute had been properly performed.

There is not a great deal that one needs to say about this case that cannot equally well be said of *Anns* itself, but there are two important points by way of, as it were, clearing the ground. The first was that the Court of Appeal firmly reversed (by a bit of judicial legislation of its own) the rule, which had been established for over a century by the Court of Appeal itself, that there was no liability for letting or selling a tumble-down house. The previous rule had always been *caveat emptor,* and in the absence of a contractual warranty, the purchaser of premises which proved defective had no remedy. The second was that the case anticipated by only a few months action by the legislature based upon this perceived defect in the law which had been occupying the Law Commission for some time. In the year following that in which *Dutton*'s case was decided, there was passed the Defective Premises Act 1972 which was specifically designed to meet the sort of circumstances with which the plaintiff in that case was confronted.

It is important in the context of judicial legislation in this area, to see what limits Parliament itself, after consideration of a report specifically directed to the question and after full enquiry and debate,

20 [1972] 1 QB 373.

had thought fit to put upon the builder's liability. What that Act did, in broad terms, was to impose upon a person taking on the work of providing a dwelling (whether by original building or by conversion) a duty to every subsequent owner to take reasonable care to ensure that the work is carried out in a proper and workmanlike manner. There is thus imposed a sort of statutory warranty that enures for the benefit of every person who is, for the time being, the owner of the property. But—and this is a very big but—it is provided expressly that the cause of action for the breach of duty is deemed to arise for purposes of the Limitation Act 1963 on the date on which the building was completed. So the same Act which imposed the liability limited it to a period of six years from the date of completion.

If the Act had been in force when the plaintiff in *Dutton* had issued her writ it would have given her a clear cause of action against the builder, for the action was commenced in due time. In actual fact, she did sue the builder, but because she was advised that, as the law stood, she was unlikely to succeed, she had settled for a small sum and proceeded to try to recover the balance of her loss from the local authority whose surveyor had passed the defective work. It was held that she could recover because the Council could reasonably foresee that if it exercised its statutory power of inspection of the building without due care some subsequent owner of the property might suffer damage by having to pay to prevent the house from falling down.

The case broke entirely new ground and it did so in a number of important respects. First and foremost, it was as clear a case of judicial legislation as one could hope to see. Lord Denning was content to put it as a pure question of policy to be decided by judges from time to time whether a remedy should be accorded or not. Because the plaintiff had suffered a loss without fault on her part, someone ought to pay and as a matter of policy that someone ought to be the Council who had carelessly passed the original work as satisfactory. Secondly, the claim against the Council, although in essence a claim for breach of statutory duty, was not made to depend upon the scope of that duty as a matter of construction of the statute, but simply upon the

foreseeability of loss to someone in the future if the duty was badly performed. It was put simply on the ground of the negligent exercise of a statutory power. Indeed *Cutler v Wandsworth Stadium*[21] was not even referred to.

Thirdly, although Lord Denning put the claim on the basis of physical injury to the building—which was, of course, the very thing which was inherently defective and had therefore, in a sense, inflicted the pecuniary injury of which the plaintiff was complaining—the loss was in fact (as Lord Denning himself subsequently informally admitted) pure economic loss. The plaintiff had had the misfortune to buy an inherently defective building and she needed to spend money if she was to put it in order.

Fourthly, and importantly, the liability had nothing whatever to do with the principle of reliance established by *Hedley Byrne,* for it could not be argued that the plaintiff had relied upon the Council in buying the house.

Judicial legislation in *Anns*

And so we come to *Anns*' case. Again, the case is so familiar to lawyers working in legal systems based on the common law that the underlying facts hardly need to be stated. The plaintiffs were purchasers, some original, some derivative, of flats in a block which had been built with defective foundations and which had begun to show signs of cracking. None had suffered any physical injury nor was there any injury to anyone's property except to the block of flats itself. The defect in the foundations was one which ought to have been seen by the defendant Council's surveyor but he had either failed to inspect them before they were covered in or he had inspected them but failed to spot the defect. The case differed from *Dutton*'s case, however, to this extent, that the defect did not become apparent until some eight years after the building had been completed. Thus the plaintiffs were not helped by the Defective Premises Act 1972. Furthermore, the builder had in fact gone bankrupt. So the Council was the only defendant in the action.

21 [1949] AC 398.

Well, as you know, the House of Lords upheld the plaintiffs' claim and affirmed the correctness of *Dutton*'s case. To that extent, there was nothing new, but it was an endorsement by the final appellate court of Lord Denning's frankly legislative approach and the case has had a profounder effect than *Dutton*'s case in three important respects. First, there was the critically important statement of general principle in the speech of Lord Wilberforce to which I will revert in a moment. Secondly, there was the definition of the limits on the liability of a public authority in cases to which the general principle was applied. Thirdly, and of an importance which is seldom stressed outside the specialised field of building cases, there is the equiparation of the liability of the builder for negligence in construction with that of the local authority in failing to inspect—a liability that is additional to, independent of and much wider than any statutory liability created by the Defective Premises Act 1972. This introduced an entirely novel and unorthodox concept of the tort of negligence in building cases, and so far as builders of dwelling-houses are concerned, may be said to have rendered the Act largely otiose.

Now in describing *Anns*' case as an exercise in judicial legislation, I intend no disrespect to or criticism of the Committee of the House which decided the case, much less of Lord Wilberforce who was the author of the leading speech and in comparison with whom I, and, indeed, most of us, are intellectual pygmies. It is simply that as a matter of analysis, it can, I think, now be seen that the decision went a little over the border of deduction from or extension of established principle and may be said to have trespassed on the field of legislative inventiveness, because, however it was expressed, it opened the door to unrestricted claims in negligence for pure pecuniary loss—a door which the courts in the United Kingdom at least have recently been seeking to close or at least keep only just on the jar. It can be read and indeed should, I think, be read as a decision which was, to some extent, in advance of its time and as an attempt to find a basis for advancing beyond the illogical distinction between physical and economic damage by establishing a rational basis for drawing the line between lawful and unlawful infliction of damage. The difficulty, I

think, is that the solution to that dilemma was found—and it may be that it can only be found in this way—by investing the judge with the power to legislate (by reference to what is called "policy") where the line is to be drawn, but without at the same time establishing any criteria by reference to which that power is to be exercised. It is an interesting reflection of the controversial nature of the decision that it has been received so differently in the United Kingdom, in Australia, in Canada, and in New Zealand.

First, then, the general principle of liability emerging from *Anns* which is enshrined in the passage from Lord Wilberforce's speech which has now been quoted so frequently that I am almost ashamed to repeat it, and which established what has been referred to as "the two stage approach".

"Rather" he said:

> the question has to be approached in two stages. First one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.[22]

So on the face of it you have to ask yourself two questions only, first, was the damage which has occurred foreseeable and then if it was, you go on to ask the negative question—by some entirely unidentified criterion, is there any reason for denying liability?

There is, I think, a two-fold permissible criticism of this, if I may say so with respect to its author. First, as Lord Wilberforce himself appreciated subsequently, it is open to misinterpretation, because

22 [1978] AC 728 at 751–752.

it can be read as suggesting—and, indeed, literally read does, I think, suggest—that the first step has one ingredient only, namely foreseeability of harm which, on the face of it, appears to be treated as synonymous with something described as a relationship of proximity. In fact, as has since been stressed by the House, it involves two things: the foreseeability of damage, and in addition, a relationship of an undefined nature between the plaintiff and the defendant which is expressed in the word "proximity" or "neighbourhood" and which is not in itself comprehended simply in foreseeability. So the two-stage test is actually a three-stage test. Secondly, the dictum was I think intended only, as one writer has suggested, to be descriptive of the development which had taken place and not, as it seems if read literally, prescriptive for the future. What was in essence an historical analysis has come, because of the novelty of the context in which it appeared, and, I think, the way in which it was expressed, to be construed as an inventive formula.

Now if you treat what Lord Wilberforce said as eliding any difference between proximity and foreseeability and take this literally as a comprehensive and exhaustive test of liability for negligence, there is simply no limit to tortious liability for injury of whatsoever kind, save that it must be such as foreseeably may occur. If I set up legitimately a business competing with yours and thus cause your profits to fall, I shall be prima facie liable to you unless I can persuade the court that there is some good policy reason why I should not be. Thus what has been seen as a principle of prima facie liability has been prayed in aid in subsequent cases to justify claims for damages which have become progressively more divorced from common sense and as placing on the defendant a burden, sometimes virtually insurmountable, of showing some good reason in "policy" why he should not be held liable. It is from that principle of prima facie liability that the courts in the United Kingdom have been steadily retreating ever since.

The exposition of general principle, however, far reaching though its results have been, did not, if treated (as I believe it

was intended to be) as descriptive rather than prescriptive and as embracing an ingredient of proximity distinct from mere foreseeability, transcend the bounds of what may be described as permissible incremental law-making. The trouble is that it has been treated as if it did. But it was, in my opinion, in two other respects that *Anns* crossed the boundary into what I have styled judicial legislation.

The first was the massive extension of private law liability on public authorities for failure to perform their public statutory functions with due care. A public authority was, of course, always liable for physical injury carelessly caused by its servants and it was no defence to say that the carelessness occurred in the carrying out of a statutory duty. It would similarly be liable for breach of its statutory duty if the statute was one which, on its true construction, gave rise to a civil remedy to a member of the class of whose protection it was passed, in accordance with the principle in *Cutler v Wandsworth Stadium*.[23] It could, again, be liable under the reliance principle of *Hedley Byrne* if, in exercising its statutory powers, it carelessly made some inaccurate statement upon which the plaintiff had relied. *Ministry of Housing v Sharp* [24] in 1969 (where the authority was held liable for failing to carry out its statutory duty of registering an encumbrance on land) was, I think, on analysis such a case. What was entirely new until *Dutton*'s case (which, of course, was adopted and approved in *Anns*) was the notion that, without any element at all of reliance by the plaintiff, a public body exercising its public statutory powers (without any obligation to exercise them) would become responsible for economic loss not caused by its lack of care but which could be foreseen as capable of occurring if the power was not exercised with due care.

It is a misdescription to say that the Council's failure caused the injury to the plaintiff. Its omission to inspect properly merely failed to prevent the injury being caused by the negligent builder. One has, therefore, to look for the source of a private law duty owed to the plaintiff to prevent such injury. The novelty of the claim was that

23 [1949] AC 398.

24 [1970] 2 QB 223.

the duty was found in a common law duty of care rather than, as the existing authorities indicated, in the construction of the statute and the answer to the question whether that statute, properly construed, conferred a private right upon the person for whose protection it was passed.

It is, indeed, difficult to see from what established principles a common law duty of care in the exercise of a statutory power of this sort could be deduced. Lord Denning himself asserted that it rested simply on "policy". Lord Wilberforce expressed the view that "in principle" the local authority must be liable. And both in *Dutton* and in *Anns* an attempt was made to bring the case within *Donoghue v Stevenson* by reference to the fact that the building had suffered physical damage. The suggestion implicit in that of course was that it brought the case within the framework of the law in which Lord Atkin had pronounced his general test. But the physical damage of course was not damage caused, as in *Donoghue*'s case, by the defective product. The damage was the very defect in the product itself. So what was in contemplation here was not damage caused by defective manufacture but, in effect, a warranty of quality—the very thing which the legislature had already provided for in the Act of 1972.

The other aspect of *Anns,* which has until recently, received perhaps less attention than it merits is the liability which the decision imposed on the builder (albeit strictly by way of dictum rather than decision—but it has been treated as decision), a liability imposed in addition to and alongside his liability under the Defective Premises Act 1972 and amounting, in effect, to a non-contractual warranty of fitness to each successive owner without limit of time. And a very curious animal it is, when it is examined. It is a liability which arises without any actual damage to person or property, apart from the defective structure itself, it arises not on the delivery of the defective building or on the occurrence of the damage, but only when there is "a present or imminent risk" to health or (possibly) to property; and the damage is to be measured not by the deterioration in value of the building but by reference to the cost of putting it into a state

in which it is no longer a risk to health or safety. So that, in effect, there has been created a new and peculiar tort of negligence restricted to building cases where actual damage, which has always been the gist of the action in negligence, is no longer so but is replaced by the perception of the risk of future physical injury, as creating the cause of action. I know of no basis in the pre-existing law from which this could legitimately be deduced and it raises some fascinating jurisprudential questions which it would take far too long to pursue here. I mention it only as explaining why I have presumed to regard *Anns* as essentially an exercise in judicial legislation.

The effects of *Anns*

Now the effects of the decision have been far-reaching and this, I think, illustrates the danger of the process. Its first practical effects were to produce a significant increase in pubic authority insurance premiums but also, and more importantly, in building costs. Local authorities up and down the country became so alarmed at the prospects of incurring liability for carelessly passing building plans that they took to imposing more and more stringent, and in many cases excessive, requirements for foundations of buildings, strengthening of roof-ties and so on, the cost of which, in the end, was inevitably passed on to the consumer. The principal beneficiary has been the ready-mixed concrete industry. In this way, the case may be said to be a good illustration of the dangers which attend law reform without prior consultation and debate. *Dutton*'s case, which really arose from an unwillingness on the part of the court to accept the hardship that the plaintiff had only an inadequate remedy against the builder, may therefore be said, perhaps, to illustrate the old adage that "hard cases make bad law". And, of course, *Anns*' case involves the additional curiosity that it imposed on the building industry a liability well beyond that which the legislature itself had contemplated as being appropriate.

Anns' case involves the additional curiosity that it imposed on the building industry a liability well beyond that which the legislature itself had contemplated as being appropriate.

Its juristic effects were equally far-reaching and resulted in a spate of claims which would never previously have been considered as giving rise to any liability. There was inevitably an initial tendency, by building upon the statement of the general principle in *Anns,* to seek to extend the bounds of tortious liability even further. One notable example was the decision of the Court of Appeal in *Batty v Metropolitan Realisations* [25] in 1978 (a case of pure economic loss) where the plaintiff recovered the costs of an entire new house, although I heard recently that the defective house, which, it was said in 1978, was about to fall down, is still standing undamaged and happily occupied. Another was the House of Lords' decision in *Junior Books Ltd v Veitchi* [26] in 1983 (which has been much criticised as, in effect, abolishing the distinction between contract and tort in building cases).

In New Zealand, where *Anns* was in fact anticipated so far as the builder's liability was concerned by a decision of the Court of Appeal in *Bowen v Paramount Builders,*[27] the decision has been consistently applied in imposing more and more stringent liability on public authorities, first in *Mount Albert Borough Council v Johnson*[28] in 1979, then in 1986 in *Brown v Heathcote County Council,*[29] *Stieller v Porirua City Council* [30] and *Craig v East Coast Bays City Council* [31] and, finally, in *Rowling Ltd v Takaro Properties*[32] the decision which was reversed by the Privy Council in 1987.[33] It has been followed in Canada in *City of Kamloops v Nielsen*[34] in 1984 but was rejected by the High Court of Australia in *Sutherland Shire Council v Heyman*[35] in 1985.

The retreat from *Anns*

In the United Kingdom, the decade following *Anns* has witnessed a significant modification of the general principle expounded in the speech of Lord Wilberforce. The retreat may be said to have begun in 1983 in *McLoughlin v O'Brian*[36] and to have been led to some extent by Lord Wilberforce himself. In *Peabody Donation Fund v Sir Lindsay Parkinson*[37] in 1985, an attempt to invoke the principle at the suit of a plaintiff who had himself been responsible for the defective

25 [1978] QB 554.

26 [1983] AC 520.

27 [1977] 1 NZLR 394.

28 [1979] 2 NZLR 234.

29 [1986] 1 NZLR 76 (affirmed by the Privy Council, [1987] 1 NZLR 720).

30 [1986] 1 NZLR 84.

31 [1986] 1 NZLR 99.

32 [1986] 1 NZLR 22.

33 [1988] 1 AC 473; [1988] 2 WLR 418; [1988] 1 All ER 163, PC.

34 (1984) 10 DLR (4th) 641.

35 (1985) 60 ALR 1.

36 [1983] 1 AC 410, HL.

37 [1985] AC 210.

construction which had been passed by the council failed, Lord Keith issuing a warning that the two-stage test expounded by Lord Wilberforce must not be treated as of a definitive character and that it was essential to the existence of a duty of care that there should be "in addition to foreseeability", "a relation of proximity" between plaintiff and defendant. In seeking to find a basis for this relation, Lord Keith abandoned altogether the negative second stage question, which put the burden on the defendant of showing some reason why he should not be liable, and substituted a positive test of asking whether it is reasonable that he should be held liable. This may not be wholly satisfactory but it does at least provide some identifiable point of reference. In *McLoughlin v O'Brian*, indeed, Lord Wilberforce himself had gone out of his way to stress that the mere foreseeability of harm in itself was not a sufficient test of liability. Again in *Leigh and Sillavan Ltd v Aliakmon Shipping Co*[38] in 1986 Lord Brandon, giving the leading speech, reiterated that the *Anns* test was not intended and could not be applied to provide a universal test of the duty of care.

The result of applying the test literally and as a universal formula is apparent from three further cases in which Lord Keith's caution has been repeated. In *Curran v Northern Ireland Housing Association*[39] in 1987 an attempt was made to make a public authority liable for negligence in having lent money on mortgage for the erection by the plaintiff's predecessor in title of a defective back addition to his house. It failed and Lord Bridge warned against attempting to extend the *Anns* principle. In *Yuen Kun Yeu v AG of Hong Kong*[40] again in 1987, the Privy Council upheld the dismissal by the Hong Kong Courts of an action against the Commissioner of Deposit Taking Companies at the suit of a disappointed depositor who claimed that he would never have lent his money if the company's registration had been withdrawn, as it could have been under the Commissioner's powers. Lord Keith again repeated the warning that he had issued in *Peabody.* That was repeated yet again by the Privy Council in the *Takaro Properties* case.[41]

The Anns test was not intended and could not be applied to provide a universal test of the duty of care.

38
[1986] AC 785.

39
[1987] AC 718, HL (NI).

40
[1988] AC 175.

41
Rowling and another v Takaro Properties Ltd [1988] 1 All ER 163, PC (on appeal from New Zealand).

Perhaps the most striking examples of the literal application of Lord Wilberforce's two-stage test have been in relation to attempts to fix defendants with liability for the acts of third persons over whom they have no control whatever but where, in the circumstances, it might be said that the third person's act which has caused the damages was a foreseeable possibility. In *Lamb v Camden London Borough Council,*[42] it was unsuccessfully claimed that the defendants were liable for damage caused by squatters. In *Perl (P) (Exporters) Ltd v Camden London Borough Council,*[43] it was unsuccessfully claimed that the council was liable for the acts of burglars who had entered through their premises which had been inadequately secured. *King v Liverpool City Council*[44] was another unsuccessful claim for damage caused by vandals who had entered the defendant's premises. And in *Smith v Littlewoods Organisation Ltd* [45] in 1987, an unsuccessful claim was made against the owners of a derelict cinema which had been set on fire by vandals, the fire having spread to the pursuer's adjoining property. These claims all failed, not on the grounds of lack of foreseeability or of considerations of policy, but on the lack of the relationship which is comprised in the amorphous notion of proximity. And in the *Littlewoods* case, their Lordships kept open the possibility that there might well be circumstances imposing a positive duty to neighbours to protect one's own land from trespassers.

Probably the high water-mark for extreme claims based on *Anns* was the case of *Hill v Chief Constable of West Yorkshire*[46] earlier this year, where the mother of the victim of a mass murderer sued the police for what she alleged was their negligent failure to detect and arrest the culprit before he killed her daughter, basing herself on a combination of *Anns* and the *Dorset Yacht Company* case. That claim failed both by reason of the absence of the necessary ingredient of "proximity" and on grounds of public policy.

"Some further ingredient beyond foreseeability" said Lord Keith is "invariably needed" to establish the requisite proximity of relationship between plaintiff and defendant. The nature of the ingredient, however, still remains undefined and will be found to vary

42
[1981] QB 625.

43
[1984] QB 342.

44
[1986] 1 WLR 890.

45
[1987] AC 241.

46
[1988] 2 All ER 238.

in a number of different categories of decided cases. In the ultimate analysis, it depends simply upon what the court thinks is reasonable.

Finally, both the validity of the basis for the builder's liability in *Anns* and the recoverability of damages for pure economic loss were called in question in the recent case of *D & F Estates v Church Commissioners,*[47] again decided earlier this year. There the plaintiffs were seeking, basing themselves on *Anns,* to recover, some 21 years after the premises had been built, the cost of replacing defective plaster fixed by the defendants' sub-contractor when the premises were originally built. The claim failed and the House took the opportunity of disapproving *Batty v Metropolitan Realisations*[48] so far as it dealt with the builder's liability and of confining the much discussed case of *Junior Books* to its own peculiar facts—so that it may now, I think, be reduced to the status merely of a footnote in the textbooks.

What is clear is that foreseeability per se is not now sufficient to establish the duty. There is a further ingredient described as "proximity" or "neighbourhood", but we still lack any clear indication of what that ingredient is, or how it is to be established beyond the fact that it must be "reasonable" and that it must be positively established.

The future

The result of all this is that the law remains still in a pretty fluid state. What is clear is that foreseeability per se is not now sufficient to establish the duty. There is a further ingredient described as "proximity" or "neighbourhood", but we still lack any clear indication of what that ingredient is, or how it is to be established beyond the fact that it must be "reasonable" and that it must be positively established.

The future is obscure. We still have no clear definition of the circumstances in which pure economic loss can ground an action for negligence and there is, really, no logical reason for excluding it from the category of damage which can ground an action. If you can

47 [1988] 3 WLR 368; [1988] 2 All ER 992, HL (E).

48 [1978] QB 554.

recover on the basis of the economic loss caused by reliance on my carelessly erroneous advice, what is the logical reason for denying the recovery of the loss which you suffer from closing down your restaurant because I have carelessly severed the power cable in the road? The solution of allowing such recovery wherever the court thinks that it is policy to do so is really simply to invite further judicial legislation without any reference points by which it can be logically contained. If I may venture a prediction, I suspect that the solution may lie rather along the lines of an extension of the *Hedley Byrne* principle of an assumption of responsibility. It may be that what we ought to be looking for is some formula for determining whether in any individual case it would be reasonable to hold that the reasonable man in the position of the defendant would, if he had been asked, have assumed a responsibility for the loss which he has occasioned. I must not pretend that that represents original thought and let me acknowledge that the idea was suggested in an extremely interesting article in the Canadian Bar Review[49] by Mr Christopher Harvey, a member of the English Bar.

The line between permissible development and inventiveness beyond the judicial function is a fine one which is not always easily discernible.

Whatever the solution, the path is one which is fraught with difficulty and which ultimately may well lead back to the now abandoned philosophical discussions about when the cause of damage is an effective cause and when it is too remote. But whatever the formula it ought to be one which is firmly based upon established principle. At the same time we have to avoid the danger of being so mesmerised by the past that development is sterilised altogether. I have indicated that I think that in some ways the results of the inventive foray represented by *Anns* have been unfortunate. My criticism is not, however, that it developed the law but that the particular development was not, in all respects, if I may say so respectfully, soundly or logically based in principle. The line between permissible development and inventiveness beyond the judicial function is a fine one which is not always easily discernible. "Public

49
(1972) 50 Can BR 580–621.

policy" is a flexible concept which may well fall on either side of the line. Lord Scarman in his speech in *McLoughlin*'s case drew attention to the difficulty when he said:

> Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue as to where to draw the line is not justiciable. The problem is one of social, economic and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process.[50]

That was a view not shared by all members of the Committee—in particular by Lord Edmund Davies.

At the same time, the general principle expounded in *Anns,* as it has now been explained and restricted in *Peabody* by reference to what is reasonable, provides the judiciary, I think, with the material necessary for a further development without the necessity for what Lord Edmund Davies in *McLoughlin*'s case described as "the introduction of new legal principles so fundamental that they are best left to the legislature". That is, perhaps, the best definition of what is comprised in the concept of what I had labelled "judicial legislation". Even if, in the end, the establishment of principles of liability for pure economic loss are considered to introduce new legal principles of such a fundamental nature that it is necessary to regulate the question by legislation it is difficult to conceive of any method by which this could be done which did not in the end involve a resort to a criterion of what is reasonable. Thus, there will inevitably be left to the courts an area in which liability is made to depend upon a flexible assessment of what current policy requires. Whatever judges may say, there comes inevitably a point at which the judicial and legislative functions to some extent overlap and the judge is compelled to assume the mantle of the law-maker.

By way of conclusion, may I just say this? You in Malaysia have still a free choice of which road to follow because, as I understand

50 [1983] 1 AC 410 at 431.

it, the need to express a definitive view has not yet arisen. Perhaps some public benefactor can be stimulated into buying a tumble-down house so as to get the problem resolved. But at the moment you have a perfect freedom within the common law—you may follow the American pattern and carry *Anns* well beyond its logical conclusion. You may follow the New Zealand pattern of wide liability on public authorities. You may follow the Australian pattern and reject *Anns* altogether as an appropriate guide for the development of the common law of Malaysia. Or there may be other approaches in between these disparate lines of development.

It would be inappropriate for me to tender advice to my friends in the Malaysian judiciary and I would not presume to do so. But they might like, on a parting note, to bear in mind the wise words of the English divines who, in 1662, in compiling the *Book of Common Prayer,* observed that:

> a change in things advisedly established (no evident necessity requiring it) has resulted in inconveniences many times more and greater than the evils that were intended to be remedied by such changes.

That is an aphorism that we may all do well to bear in mind, not only in the law of tort, but in every aspect of the administration of the law.

Editor's note

The decision of the House of Lords in *Anns v Merton Borough Council* [1978] AC 728; [1977] 2 All ER 492, HL, and that of the Court of Appeal in *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373; [1972] 1 All ER 462, CA were overruled by the House of Lords in the subsequent case of *Murphy v Brentwood District Council* [1991] 1 AC 398; [1990] 2 All ER 908, HL. See also the opinion of Lord Oliver in *Murphy.* See further *Negligence in the World of Finance,* delivered by Lord Mustill, chapter 6, below.

The Right Honourable Lord Ackner

The Spycatcher: Why Was He Not Caught?

Desmond James Conrad Ackner
(*b.* 18 September 1920)

Lord Ackner read law at Clare College, Cambridge. He was called to the Bar at Middle Temple in 1945. He was in active military service during the Second World War.

Lord Ackner's career at the Bar was indeed distinguished. He was the Head of Chambers at 4 Pump Court from 1965–1971. He became a Queen's Counsel in 1961, and was appointed to the highly respected position of Chairman of the General Council of the Bar from 1968–1970.

Lord Ackner also had an illustrious judicial career. He was Recorder of Swindon (1962–1971), Judge of the Courts of Appeal of Jersey and Guernsey (1967–1971), Judge of the High Court of Justice, Queen's Bench Division (1971–1980) and of the Commercial Court (1973–1980), Lord Justice of Appeal (1980–1986), and Lord of Appeal in Ordinary (1986–1992).

Lord Ackner was a member of the Senate of the Four Inns of Court (1966–1970); and Chairman of the Law Advisory Committee, British Council (1980–1990).

He is currently a member of Lloyd's Arbitration Panel; President of the Arbitration Appeal Tribunal SFA; and Honorary Fellow of the Society of Advanced Legal Studies. He is a Bencher of Middle Temple, of which he was Treasurer in 1984.

Since his retirement from the House of Lords and Privy Council, Lord Ackner has developed a particular interest in Alternative Dispute Resolution. He was a founder member of the City Disputes Panel which was launched in 1994 to offer a speedy, adaptable and economic system of arbitration and dispute resolution. Lord Ackner now frequently sits as an Arbitrator dealing with major commercial disputes, both domestic and international.

Lord Ackner retired as a Law Lord on 30 September 1992.

4 The Spycatcher: Why Was He Not Caught?

Lord Ackner
Lord of Appeal in Ordinary, House of Lords

Text of the Fourth Sultan Azlan Shah Law Lecture delivered on 24 September 1989 in the presence of His Majesty Sultan Azlan Shah.

"Falsehood and delusion are allowed in no case whatsoever; but, as in the exercise of all virtues, there is an economy of truth. It is a sort of temperance, by which a man speaks truth with measure, if he may speak it the longer."

So spoke Edmund Burke.

This was the sense in which Lord Armstrong, the Secretary to the Cabinet used the phrase "economical with the truth" when giving evidence before Powell J in Sydney, Australia.

Three of the six years I spent in the Court of Appeal was under the "headmastership" of Lord Denning MR. It was an enormous privilege and one from which no one could avoid learning a great deal. Lord Denning's judgments had a style of their own, in which the central theme was "simplicity". "Just tell the story", he used to say. So let me come straight away to the simple but depressing facts concerning the book *Spycatcher*[1] and its author, Mr Wright. I shall try to be concise, and I "speak the truth with measure". Scott J in the substantive hearing at first instance in a most impressive judgment deals with the matter in great detail.

Facts of the case

On 1 September 1955, Mr Wright joined the British Security Service. This Service is part of the defence forces of the country. Its task is the

1 Peter Wright, *Spycatcher: The Candid Autobiography of a Senior Intelligence Officer*, 1987.

defence of the realm as a whole, from external and internal dangers, arising from attempts at espionage and sabotage, or from actions of persons and organisations whether directed from within or outside the country, which may be judged to be subversive of the State.

Mr Wright joined MI5 as a scientific adviser in its counter-espionage branch. The operations at MI5 are largely confined to operations within the United Kingdom. Mr Wright remained a member of the Service until his resignation on 31 January 1976. He was on the personal staff of the Director General as a consultant on counter-espionage. When he joined the Service in 1955, Mr Wright signed a declaration that he understood the effect of section 2 of the Official Secrets Act 1911 which was set out in the declaration. This rendered liable to prosecution any person in possession of information:

> … which he has obtained or to which he has had access owing to his position as a person who holds or has held office under Her Majesty … and communicates the information to any person, other than a person to whom he is authorised to communicate it, or a person to whom it is in the interests of the State his duty to communicate it.

When he left the Service in 1976 he signed a further declaration acknowledging, inter alia, that the provisions of the Official Secrets Acts applied to him after his appointment had ceased, that he was fully aware of the serious consequences which might follow any breach of the provisions of those Acts and that he understood:

> that I am liable to be prosecuted if either in the United Kingdom or abroad I communicate, either orally or in writing, including publication in a speech, lecture, radio or television broadcast, or in the press or in book form or otherwise, to any unauthorised person any information acquired by me as a result of my appointment (save such as has already officially been made public) unless I have previously obtained the official sanction in writing of the department by which I was appointed.

In addition to the obligation of secrecy expressly acknowledged by Mr Wright, he was also under an obligation arising out of his

employment by the Security Service and enforceable in equity not to divulge any information which he obtained in the course of his employment. The obligation arises because of:

> the broad principle of equity that he who has received information in confidence shall not take advantage of it. He must not use it to the prejudice of he who gave it.[2]

In the course of his employment Mr Wright had access to highly classified information.

After his retirement Mr Wright publicly announced that he had submitted a memorandum to the Chairman of a Select Committee of the House of Commons alleging penetrations of the Security Service by foreign agents and calling for an inquiry. Being satisfied that no inquiry was held he decided, so he alleged, to disclose the relevant material in his memoirs, together with allegations of unlawful conduct on the part of members of the Security Service over the years. Throughout the extensive litigation it has been accepted that Mr Wright committed a most serious breach of his duty of confidentiality, described in the number of judgments as *treachery*. It was accordingly at all times conceded that if, instead of emigrating to Australia, he had sought to publish his book in England, both he and his publishers would immediately have been restrained by injunctions. Mr Wright would certainly have committed serious breaches of the Official Secrets Acts and the reasonable assumption was that he would have been prosecuted.

Throughout the extensive litigation it has been accepted that Mr Wright committed a most serious breach of his duty of confidentiality, described in the number of judgments as treachery.

The British courts do not have jurisdiction beyond their shores. Every sovereign nation jealously guards its own jurisdiction. The inability of the English courts to supply a remedy by granting an injunction or other relief against Mr Wright was obviously not a weakness for which the English courts could be blamed. Accordingly,

2
Per Lord Denning MR in *Seager v Copydex* [1967] 1 WLR 923 at 931.

when Mr Wright emigrated to Australia and sought to publish his book, all that the Crown could do was to seek an injunction in the courts of Australia, in particular, in the courts of New South Wales. In 1985, the Attorney General began proceedings in New South Wales against Mr Wright and his Australian publishers, Heinemann Publishers Pty Ltd. At this stage the completed manuscript of the book was in the hands of the publishers but the book had not been published. The Attorney General sought an injunction restraining publication, or alternatively, an account of profits. Pending trial, undertakings restraining publication of the book or disclosure of information obtained by Mr Wright in his capacity as an officer of MI5 were given by Mr Wright, the publishers and the solicitors acting for them. The trial of the New South Wales action commenced on 17 November 1986.

On 22 June 1986, *The Observer,* and on 23 June 1986, *The Guardian* published articles reporting on the forthcoming hearing in Australia. The articles included an outline of some of the allegations contained in the unpublished manuscript. The articles led to two writs being issued on 30 June 1986, one against *The Observer* and the other against *The Guardian.* The actions were later consolidated.

Ex parte interlocutory injunctions against the newspapers were granted on 27 June 1986. On 11 July 1986, Millett J, inter partes granted injunctions, until trial or further order, restraining the publishing or disclosing of any information obtained by Mr Wright in his capacity as a member of MI5 or from attributing any information about MI5 to him. An appeal against this order was dismissed by the Court of Appeal on 25 July 1986.[3]

On 13 March 1987, the Attorney General's action in New South Wales was dismissed by Powell J. The Attorney General appealed to the Court of Appeal of New South Wales and the undertakings which had been given pending trial were continued pending the hearing of the appeal.[4]

3
Attorney General v Observer Ltd (1986) 136 NLJ 799.

See generally, *Attorney General v Guardian Newspapers Ltd and other related appeals (No 1)* [1987] 3 All ER 316, Ch D, CA & HL; and *Attorney General v Guardian Newspapers Ltd and other related appeals (No 2)* [1988] 3 All ER 545, Ch D, CA & HL.

4
(1987) 8 NSWLR 341; (1987) 10 NSWLR 86, CA.

On 14 May 1987, an announcement was made by Viking Penguins Inc, a United States subsidiary of an English publishing house, of its intention to publish the book in the United States. Because of the First Amendment to the United States Constitution and the guarantee of freedom of speech contained therein, it has become settled law in the United States that prior restraint against publications by newspapers cannot be obtained. Accordingly, there was no prospect of the Attorney General obtaining a court order to restrain publication there.

At this stage, *The Sunday Times* came on the scene, negotiating with the Australian publishers for the right to serialise the book. A price of $150,000 was agreed and secrecy was emphasised. The editor of *The Sunday Times* made it clear in his evidence that his intention was to publish his instalments of *Spycatcher* at least a full week before the American publication. This was in the event reduced to only two days because circumstances caused the publication to be brought forward a week. Mr Neal, the editor, knew that undertakings which had been given to the court in Australia and which continued pending the hearing of the appeal, would prevent the Australian publishers from sending him a copy of the manuscript. Mr Neal had to obtain a copy of the manuscript in order to prepare the serialisation but could not obtain one from Australia. His solution was to obtain one from the United States publishers.

The launch of the book in the United States was due to take place on Monday, 13 July. On 7 July 1987, Mr Neal flew to the United States and obtained a copy of the manuscript with the intention that the first extract would appear in *The Sunday Times,* as it did, on Sunday, 12 July 1987. Had the Crown learned of the intended publication in *The Sunday Times* they would certainly have sought and have been entitled to an injunction to restrain it. In the words of Lord Keith of Kinkel, in his judgment in the substantive hearing in the House of Lords, to which I will refer in greater detail later, this newspaper employed "peculiarly sneaky methods to avoid this".[5] The publication of 12 July was accompanied by special measure to throw

5 *Attorney General v Guardian Newspapers Ltd and Others (No 2) and related appeals* [1988] 3 All ER 545 at 644.

the Government off the scent. The first edition of the newspaper, comprising some 76,000 copies, was published without the *Spycatcher* extracts. The extracts were included in the later editions. This was to prevent the Government, on reading the first edition, from obtaining an immediate injunction to restrain the printing of the later editions. By the time the later editions came to the Government's attention, it would be too late for any action to be taken to restrain publication. The plan worked and 1.25 million copies bearing the *Spycatcher* extracts were published.

The British courts do not have jurisdiction beyond their shores. Every sovereign nation jealously guards its own jurisdiction.

On Monday, 13 July 1987, the Attorney General commenced proceedings against *The Sunday Times* for contempt of court and this had had the effect of immediately preventing any further serialisation. On the same day, *Spycatcher* went on sale in bookshops throughout the United States, and this prompted *The Guardian* and *The Observer* to apply for the discharge of the injunctions granted by Millett J. It had been contended that in view of the United States publication, the injunctions could no longer serve a legitimate or useful purpose. *The Sunday Times* joined in this application and the Vice-Chancellor, Sir Nicolas Browne-Wilkinson, acceded to the applications and discharged the injunctions. The Vice-Chancellor reached his decision with regret. He said:

> And let nobody underestimate how important these secrets are. There seems to have been a temptation to treat this case as an unreasonable pursuit by the Government of unreasonable ends. This is not a view I share. The revelation of secrets of a security agent, it seems to me, are highly important and highly undesirable. I, therefore, think it is most regrettable, if it proves to be the case, that there is no way in which the court can preserve that confidentiality.[6]

The basis of his reluctant decision was that there had been a material change in the circumstances since Millet J's order, as a result of the publication in America.

6 *Attorney General v Guardian Newspapers Ltd and Others and related appeals (No 1)* [1987] 3 All ER 316 at 330 – 331.

This decision was, however, reversed by the Court of Appeal[7] on the grounds that the Attorney General had an arguable case that further publication would in various ways damage the British Security Service and thereby national security and that although the original purpose of the Millett injunctions, that was the actual protection of national secrets, could no longer be achieved, the secondary object of the injunctions, namely the avoidance of damage to the Security Service, justified the maintenance of injunctive relief pending trial. The Court of Appeal, however, substituted for the Millett injunctions, a new injunction restraining the newspapers from publishing any extract from *Spycatcher* or any statement about MI5 purporting to emanate from Mr Wright but with the proviso that:

> this Order shall not prevent the publication of a summary in very general terms of the allegations made by Mr Wright.

This was satisfactory to neither party, so both sides appealed to the House of Lords.

This was the first occasion that the litigation had reached the House of Lords[8] and I stress that these were but interlocutory pre-trial proceedings. Following the decision of the House of Lords in *American Cyanamid v Ethicon*[9] in 1975, the essential issue was to decide whether the Attorney General had an arguable case in law. If he had, then the insufficiency of damages as a satisfactory remedy and the balance of convenience in maintaining the status quo, both pointed conclusively to the continuation of the interim injunction. The newspapers were content to accept that the Attorney General did have an arguable case.

What they contended for was that the public interest in the dissemination of the news outweighed all other considerations. Prior restraint was considered as an unacceptable fetter on the freedom of the press and on editorial discretion. By a majority of three to two, the House of Lords held that the Attorney General had an arguable case for a permanent injunction in that the newspapers had been and

7
Ibid, at 333.

8
Ibid, at 342.

9
[1975] 1 All ER 504.

would be in breach of duty in publishing extracts from or commenting on information contained in *Spycatcher,* a work published by an ex-officer of MI5 in flagrant breach of his duty of confidence owed to the Crown. As I ventured to state:

> Fortunately, the press in this country is, as yet, not above the law, although like some other powerful organisations they would like that to be so, that is, until they require the law's protection.[10]

On 24 September 1987 the New South Wales Court of Appeal[11] dismissed the Attorney General's appeal. It was a majority decision, with Street CJ dissenting. He agreed that ordinarily a foreign government would not be allowed access to the courts of Australia to enforce a public law claim, but regarded the case as justifiable in Australia because the Australian Government supported with evidence the Attorney General's case on the ground that disclosure would harm the *Australian* public interest. The Attorney General obtained leave to appeal to the High Court of Australia but the Court[12] declined to grant temporary injunctions pending the hearing of the application for leave, with the result that since 24 September 1987 there was no impediment obstructing publication of the book or disclosure of its contents in Australia. On 2 June 1988, the High Court[13] dismissed the Attorney General's appeal upon the sole ground that an Australian court should not accept jurisdiction to enforce an obligation of confidence owed to a foreign government so as to protect that government's intelligence secrets and confidential political information. A less extreme view had been taken by the Court of Appeal of New Zealand in a judgment given on 28 April 1988 in the case of *Attorney General for the United Kingdom v Wellington Newspapers Ltd (No 2).*[14] If the New Zealand court had been satisfied that the disclosure of the information would have been detrimental to the public interest in New Zealand, it would have considered granting the relief claimed.

Fortunately, the press in this country is, as yet, not above the law, although like some other powerful organisations they would like that to be so, that is, until they require the law's protection.

10 [1987] 3 All ER 316 at 363.

11 *Attorney General for the United Kingdom v Heinemann Newspapers Australia Pty Ltd and Another* (1987) 10 NSWLR 86, CA.

12 *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd (No 1)* (1987) 61 ALJR 612.

13 *Attorney General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 62 ALJR 344.

14 [1988] 1 NZLR 180.

In the meantime, publication and dissemination of *Spycatcher* and its contents had continued worldwide. Extensive publication and distribution had taken place in the United States and Canada. The total number of copies printed by Viking Penguin Inc in the United States by the end of October 1987 was 715,000. In Canada, over 100,000 copies had been printed by October 1987. A large number of copies had found their way into England, the number being estimated to run to several thousands. The Government had taken no steps to prohibit such importation into this country, taking the view that it was impractical to do so. Thus, anyone who wanted a copy was at liberty to order one from one of the United States booksellers.

On 21 December 1987, Scott J on hearing of the substantive action[15] for a permanent injunction concluded that Mr Wright had committed a breach of his duty of confidence in writing *Spycatcher* and having it published. He was thus accountable for any profit thereby made. If sued in this country, permanent injunctions would be granted against him. *The Guardian* and *The Observer* were not in breach of any duty in publishing the articles about the Australian *Spycatcher* case in their respective editions. Those newspapers had acted independently of Mr Wright and had not aided or enriched him in any way. However, *The Sunday Times* was in breach of duty in publishing the edition of 12 July 1987 and the Attorney General's claim for an account of profits thereby made succeeded. An appeal against Scott J's decision was rejected by the Court of Appeal.[16] The Attorney General's appeal to the House of Lords[17] was dismissed on 13 October 1988 and I will spend a little time dealing with the basis of that decision and in particular with that of Lord Keith, who gave the first of the five judgments.

Lord Keith's judgment

Lord Keith pointed out in his speech that the Crown's case upon all the issues which arose invoked the law about confidentiality and he therefore started by considering the nature and scope of the law. In summary, he said this:

15
[1988] 3 All ER 545.

16
[1988] 3 All ER 545 at 594.

17
[1988] 3 All ER 545 at 638.

1. The law has long recognised that an obligation of confidence can arise out of particular relationships, such as doctor and patient, priest and penitent, banker and customer. The obligation may be imposed by an express or implied term of contract but it may exist independently of any contract on the basis of an independent equitable principle of confidence.

2. Financial detriment to the confider of the confidential information is not an essential ingredient of the cause of action. Thus in the case of *Duchess of Argyll v Duke of Argyll*[18] an injunction was granted against the revelation of marital confidences, the breach of confidence involving no more than the invasion of personal privacy.

3. As a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself.

As a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even where the confider can point to no specific detriment to himself.

4. The position of the Crown, as representing the continuing government of the country may, however, be regarded as being special. The Crown, as representing the nation as a whole, has no private life or personal feelings capable of being hurt by the disclosure of confidential information. It must be in a position to show that disclosure is likely to damage or has damaged the public interest. He referred to two important cases in which the special position of a government in relation to the preservation of confidence had been considered. The first was *Attorney General v*

18 [1967] Ch 302.

Jonathan Cape Ltd.[19] That was an action for injunctions to restrain publication of the political diaries of the late Richard Crossman, which contained details of Cabinet discussions held some ten years previously and also advice given to Ministers by civil servants. Lord Widgery CJ said:

> The Attorney General must show (a) that such publication would be a breach of confidence; (b) that the public interest requires that the publication be restrained; and (c) that there are no other facts of the public interest contradictory of or more compelling than that relied upon. Moreover, the court when asked to restrain such a publication, must closely examine the extent to which relief is necessary to ensure that restrictions are not imposed beyond the strict requirement of public need … The court should intervene only in the clearest of cases where the continued confidentiality of the material can be demonstrated.[20]

5. The second case to which Lord Keith referred is *Commonwealth of Australia v John Fairfax & Sons Ltd.*[21] That was a decision of Mason J (now Mason CJ) in the High Court of Australia dealing with an application by the Commonwealth for interlocutory injunction to restrain publication of a book containing the text of Government documents concerned with its relations with other countries, in particular, the Government of Indonesia in connection with the "East Timor Crisis". The documents appear to have been leaked by a civil servant. Restraint of publication was claimed on the ground of breach of confidence and also on the ground of infringement of copyright. Mason J granted an application on the latter ground but not on the former. He then quoted from the judgment of Megarry J in *Coco v AN Clark (Engineers) Ltd* [22] that the plaintiff must show, not only that the information is confidential in quality, that it was imparted so as to import an obligation of confidence, but also that it will be "an unauthorised use of that information to the detriment of the party communicating it". He then asked himself the question—

19
[1976] QB 752.

20
Ibid, at 770 – 771.

21
(1980) 32 ALR 485.

22
[1969] RPC 41 at 47.

when the Executive Government seeks the protection given by equity what detriment does it need to show? He then said:

> The equitable principle has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the Executive Government. It acts, or is supposed to act, not according to standards of private interests, but in the public interest. That is not to say that equity will not protect information in the hands of the Government, but it is to say that when equity protects Government information it will look at the matter through different spectacles.

It may be a sufficient detriment to the citizen that disclosure of information in relation to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the Government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on publication of information relating to Government when the only vice of that information is that it enables the public to discuss, review and criticise Government action.

Accordingly, the court would determine the Government's claim of confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest it will not be protected.

The court will not prevent the publication of information which merely throws light on the past workings of Government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of Government will be prejudiced, disclosure will be restrained. There

will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality.[23]

6. Lord Keith was in broad agreement with this statement and in particular that a government is not in a position to win the assistance of a court in restraining the publication of information imparted in confidence by it which it possesses unless it can show that publication would be harmful to the public interest. He went on to say this:

> It is common ground that neither the defence of prior publication or the so-called "iniquity" defence would have availed Mr Wright had he sought to publish his book in England. The sporadic and low key prior publication of certain specific allegations of wrongdoing could not conceivably weigh in favour of allowing publication of this whole book of detailed memoirs describing the operations of the Security Service over a lengthy period and naming and describing many members of it not previously known to be such. The damage to the public interest involved in a publication of that character, in which the allegations in question occupy a fairly small space, vastly outweigh all other considerations.[24]

A government is not in a position to win the assistance of a court in restraining the publication of information imparted in confidence by it which it possesses unless it can show that publication would be harmful to the public interest.

However, the worldwide dissemination of the contents of the book which had been brought about by Mr Wright's wrongdoing was such that further publication in England would not bring about any significant detriment to the public interest beyond what had already been done. Lord Keith stressed that he did not base his decision to refuse an injunction against the newspapers upon any balancing of public interest or upon any considerations of freedom of the press, nor upon any possible defences of prior publication or just cause or excuse, but simply upon the view that

23 (1980) 32 ALR 485 at 492 – 493.

24 [1988] 3 All ER 545 at 642.

all possible damage to the interests of the Crown had already been done by the publication of *Spycatcher* abroad and the ready availability to copies in this country. *The Guardian* and *The Observer* were thus at liberty to report and comment upon the substance of the allegations made in *Spycatcher.*

7. In relation to *The Sunday Times,* Lord Keith and indeed all the members of the Committee had no hesitation in holding that this newspaper stood in the shoes of Mr Wright by virtue of the licence it had been granted by the publishers. Its own counsel accepted that neither the defence of prior publication nor the so-called "iniquity" defence would have availed Mr Wright had he sought to publish the text of *Spycatcher* in England. On the principle that no one should be permitted to gain from his own wrongdoing, the Crown was held entitled to an account of profits in respect of the publication on 12 July. *The Sunday Times* was not entitled to deduct in computing any gain, the sums paid to Mr Wright's publishers as consideration for the licence granted by the latter, since neither Mr Wright nor his publishers were or would in future be in a position to maintain an action for recovery of such payments. Nor would the courts of this country enforce a claim by them to the copyright in a work, the publication of which they had brought about contrary to the public interest. Thus Mr Wright is powerless to prevent anyone who chooses to do so from publishing *Spycatcher* in whole or in part in England or to obtain any other remedy against them. Lord Keith observed that a claim by the Crown that it was in equity the owner of the copyright in the book had not yet been advanced but it might well succeed. As regards future serialisation, since the material had now become generally available without *The Sunday Times* being responsible for this having happened, it would not therefore be committing any wrong against the Crown by continuing publication. It would not therefore be liable to account for any resultant profits. *The Sunday Times* was in no different position from anyone else who might choose to publish the book by serialisation or otherwise.

Lessons learned

What has been achieved and learned from this protracted litigation?

(a) It has been authoritatively established that members and former members of the Security Service do have a life-long obligation of confidence owed to the Crown which renders them and anyone publishing on their behalf liable to be restrained by injunction from revealing information which came into their possession in the course of the work. In the words of Lord Keith, "those who breach it, such as Mr Wright, are guilty of treachery just as heinous as that of some other spies he excoriates in his book".

In a very recent decision of the House of Lords in the case of *The Lord Advocate v Scotsman Publication Ltd* [25] which concerned a book of memoirs of a member of MI6, Lord Keith emphasised that such information is by its nature damaging to national security and there is no room for close examination of the precise manner in which its revelation of any particular information would cause damage. The public interest in requiring members of the Security Services not to breach their duty of confidence overrides the public interest in the freedom of speech.

(b) Where the Government seeks to restrain the publication of information imparted in confidence it must as a general rule establish that the publication would be harmful to the public interest.

(c) That even the most sensitive defence secrets cannot expect protection in the courts even of friendly foreign countries unless there is some specific agreement or understanding to this effect.

25 [1989] 2 All ER 852.

(d) Once the information, even if imparted in confidence, has entered the public domain and thus becomes generally accessible, it can no longer be regarded as confidential and therefore ceases to be entitled to any protection.

(e) The law of confidentiality affords no protection at all outside the confines of the domestic jurisdiction. Equally criminal sanction is useless beyond those limits.

(f) There was some doubt as to whether the relationship between Mr Wright and the Crown was contractual. Maybe the Crown would have been in a happier position to preserve its security secrets if it had imposed upon members of the Service an extremely tight contractual obligation, as I believe is the position in the United States, which can thus be enforced speedily not only against the employee but against those wrongfully procuring or abetting a breach of the contract. Contractual obligation in America obliges the agent to submit for vetting what he proposes to publish:

> If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness.[26]

(g) The Attorney General sought but failed to obtain a general injunction against all three newspapers restraining them from publishing any information concerned with the *Spycatcher* allegations obtained by any member or former members of the Security Service which they know or have reasonable grounds for believing to have come from any such member or former member. The reasons for this refusal were, in the words of Lord Keith:

26 *See Snepp v United States* (1980) 444 US 507.

> Injunctions are normally aimed at the prevention of some specific wrong, not at the prevention of wrongdoing in general. It would hardly be appropriate to subject a person to an injunction on the ground that he is the sort of person who is likely to commit some kind of wrong, or that he has an interest in so doing. Then the injunction sought would not leave room for the possibility that a defence might be available in a particular case.[27]

Before concluding my observations I should perhaps refer to two related matters.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

This Convention, to which the United Kingdom Government adheres, provides in Article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …

2. The exercise of these freedoms, since it carried with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary.

In *Sunday Times v UK,* [28] decided in 1978, the European Court of Human Rights decided by a majority of eleven to nine that there had been a violation of the Convention by reason of the judgment

27
[1988] 3 All ER 545 at 646.

28
(1979) 2 EHRR 245, European Court of Human Rights, *The Sunday Times' Case*, decision of 27 October 1978, series A30.

of the House of Lords which restrained *The Sunday Times* from publishing:

> Any article which prejudges the issues of negligence, breach of contract or breach of duty or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against Distillers … in respect of the development, distribution or use of the drug Thalidomide.

The European Court pointed out that the House of Lords applying domestic law had balanced the public interest in freedom of expression and the public interest in the due administration of justice. But the European Court:

> … is faced not with the choice between two conflicting principles but with a principle of freedom of expression which is subject to a number of exceptions which must be narrowly interpreted … It is not sufficient that the interference involved belongs to that class of exceptions listed in Article 10 which has been invoked; neither is it sufficient that the interference was imposed because its subject matter fell within a particular category or was caught by a legal rule formulated in general or absolute terms; the court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.[29]

Lord Templeman in his speech in *Spycatcher No 1 (interlocutory appeal)*[30] in commenting on the Convention said:

> My Lords, in my opinion a democracy is entitled to take the view that a public servant who is employed in the Security Service must be restrained from making any disclosures concerning the Security Service, and that similar restraints must be imposed on anybody who receives those disclosures knowing that they are confidential.
>
> There are safeguards. No member of the Secret Service is immune from criminal prosecution or civil suit in respect of his actions. Instructions from superior officers are no defence. In addition, anyone,

29
Ibid at 281, paragraph 65.

30
[1987] 3 All ER 316 at 342.

> whether public servant, newspaper editor or journalist who is aware that a crime has been committed or is dissatisfied with the activities of the Secret Service is free to report to the police in relation to crime and in other matters is free to report to the Prime Minister who is charged with the responsibility of the Security Services and to the Security Commission who advises the Prime Minister. The Security Services are not above the law. In the present case there is not the slightest evidence that these safeguards have failed. Furthermore there is nothing to prevent the press investigating all the allegations made by Mr Wright and reporting the results of their investigations to the public. It is only unlawful for the press to publish information unlawfully disclosed by Mr Wright and which may or may not be true.[31]

However, in considering whether an injunction is "necessary" within the meaning attributed to that expression by the European Court of Human Rights, one has to consider whether the restriction on freedom of expression constituted by the injunction is "proportionate to the legitimate aim pursued" as required by the European Court in the *Handyside* case.[32]

The Official Secrets Act 1989

By the date of the recent hearing of the appeal by the House of Lords in the *Scotsman Publications Ltd* case,[33] referred to above, the Official Secrets Act 1989 had been enacted[34] and will be brought into force on such date as the Secretary of State may by order appoint. This Act abolishes section 2 of the Official Secrets Act 1911 which, because it did not define the categories of official information which required the protection of the criminal law, had been the subject-matter of continual criticism. That section applied to all official information whether significant or trivial, damaging or innocent. It left it to the discretion of the prosecuting authorities and the Attorney General to decide whether to institute proceedings in any particular case. The result was that neither the public servants nor the media knew where they stood. The new Act was designed to remedy this situation.

31
Ibid, at 356.

32
Handyside v UK (1976) 1 EHRR 737.

33
The Lord Advocate v Scotsman Publication Ltd [1989] 2 All ER 852.

34
11 May 1989.

Section 1 of the Act deals specifically with security intelligence. Section 1(1), applies to members and former members of Security and Intelligence Services and notified persons whose work is connected with such Services. It prohibits them, without lawful authority, from disclosing the information, document or other article relating to security or intelligence. In section 1(5) there is a very limited defence, ie, that the security employee did not know and had no reasonable cause to believe that the information, etc, related to security or intelligence.

Sections 1(3) and 2–4, create offences which may be committed by Crown servants and Government contractors as defined in the Act if without lawful authority they make a damaging disclosure of any information, etc. relating to security or intelligence. By section 7, a disclosure by a Crown servant is made *with lawful authority* only when it is made in accordance with the official duty and a disclosure by any other person is made *with lawful authority* only if it is made in accordance with an official authorisation duly given by a Crown servant.

Section 5 deals with perhaps what might loosely be called third parties, that is to say, generally speaking, persons who are not and have not been members of the Security or Crown Services. This section makes it an offence to make an unauthorised disclosure of information protected by sections 1–4, where that information has been entrusted to the third party or comes into his possession as a result of an unlawful disclosure by a Crown servant or Government contractor. This section will thus restrict the ability of the media in future to report such revelations as in *Spycatcher.* Where an editor is charged with making an unlawful disclosure under this section, the prosecution will have the burden of proving that he knew or had reasonable cause to believe that the information in question was protected, that, where there is a test of harm,[35] the disclosure was likely to be harmful and that he knew or had reasonable cause to believe that it would be such. The Government, despite much pressure, successfully resisted the inclusion in the Act of a "public interest" defence.

35
See sections 1 to 3.

In the protection of official secrets, this Act will not only have an important part to play in the criminal but also in the civil jurisdiction. In his speech in *The Scotsman Publications* case[36] Lord Templeman had this to say:

> In my opinion the civil jurisdiction of the courts of this country to grant an injunction restraining a breach of confidence at the suit of the Crown should not, in principle, be exercised in a manner different from or more severe than any appropriate restriction which Parliament has imposed in the Act of 1989 and which, if breached, will create a criminal offence as soon as the Act is brought into force.[37]

36
Lord Advocate v Scotsman Publications Ltd [1989] 2 All ER 852, HL.

37
Ibid, at 859.

The Right Honourable Lord Cooke of Thorndon

Administrative Law Trends in the Commonwealth

Robin Brunskill Cooke
(*b.* 9 May 1926)

Lord Cooke graduated with LLM (first class honours) from Victoria University College, New Zealand. In 1950, he was awarded the prestigious University of New Zealand Travelling Scholarship in Law to study at Cambridge, where he became a Research Fellow (now Honorary Fellow) of Caius College. He subsequently obtained his Doctor of Philosophy (PhD). He was awarded an Honorary Doctorate in Law by Victoria University College and Cambridge University in 1989 and 1990 respectively.

Lord Cooke returned to New Zealand in 1955 to practice as a Barrister. He became a Queen's Counsel in 1964.

His judicial career began in New Zealand with his first judicial appointment in 1971, when he was made a Judge of the Supreme Court. He advanced to become a Judge of the Court of Appeal in 1976. In 1986, he was elevated to the highest judicial position in New Zealand: President of the Court of Appeal of New Zealand. Lord Cooke also sat as the President of the Courts of Appeal of Western Samoa and the Cook Islands.

In 1977, he was made a Privy Councillor, sitting in the Judicial Committee of the Privy Council to hear appeals from some countries of the Commonwealth.

Lord Cooke delivered a dissenting judgment in *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* (1984) 4 PCC 359 (on appeal from Singapore), one of the very few cases where a dissenting judgment was delivered in the Privy Council. Lord Cooke also delivered the judgment of the Privy Council in *Hajjah Tampoi bte Haji Matusin and Others v Haji Matussin bin Pengarah Rahman* (1984) 4 PCC 345 (on appeal from Brunei) (land law).

On Lord Cooke's retirement as a Privy Councillor in October 2001, Lord Steyn paid a tribute to Lord Cooke's "massive contribution to the coherent and rational development of the law in New Zealand, in England and throughout the common law world" (*Delaware Mansions Ltd v City of Westminster* [2001] UKHL 55).

Lord Cooke has written extensively on various legal subjects and many are published in leading law journals. Amongst his major publications are: *The Struggle for Simplicity in Administrative Law in Judicial Review in the 1980's* (1986) Oxford University Press, Auckland; *Judging the World: Law and Politics in the World's Leading Courts* (1988) Butterworths, Sydney.

Lord Cooke is presently the Government nominated Member of the International Centre for Settlement of Investment Dispute (ICSID), World Bank. He is also an Honorary Bencher of Inner Temple, London, and a life member of Lawasia.

At the time the Fifth Sultan Azlan Shah Law Lecture was delivered in 1990, Lord Cooke (then known as Sir Robin Cooke) was the President of the Court of Appeal of New Zealand.

5 Administrative Law Trends in the Commonwealth

Sir Robin Cooke
President of the Court of Appeal, New Zealand

Text of the Fifth Sultan Azlan Shah Law Lecture delivered on 4 December 1990 in the presence of His Majesty Sultan Azlan Shah.

A decade ago, Your Majesty, then Raja Azlan Shah FJ, expressed a basic premise of administrative law: "Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship." [1]

That dictum sums up this body of law. It is a body of law of which in a sense Your Majesty can be said to be the heart, for, in the words of Mohamed Noor J in 1988,

> The right of His Majesty's subjects to have recourse to the courts of law cannot altogether be excluded ...[2]

The learned judge said this when holding that a failure to apply for certiorari within the prescribed time (to quash a decision depriving the plaintiff of the privilege of using a national registration card rather than a passport) did not deprive the court of its discretionary jurisdiction to grant a declaration. His words have a wider application, however, and merit reflecting upon. I believe that they may embody a profound truth, since they may illustrate that in any democracy, whatever the detailed constitutional arrangements, some common law rights are inalienable.

Because of the symbolic central significance of the throne in administrative law, and the judicial career of the present occupant of the throne, it is particularly apt that this, the fifth of the law lectures

1 *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd* [1979] 1 MLJ 135.

2 *Sugumar Balakrishnan v Chief Minister of State of Sabah* [1989] 1 MLJ 233 at 236.

dedicated to him, should be concerned with that field. I am doubly honoured to be asked to give it, as the four previous lectures were all by English academic lawyers or Law Lords. Of each it could be said in the words of WS Gilbert:

> He is an Englishman!
> For he himself has said it,
> And it's greatly to his credit,
> That he is an Englishman!

I cannot claim that credit, but it is not my fault, and I can only hope that an offering from the South Seas may in some degree justify, in novelty at least, the hazard of this break with precedent.

This is my second visit to Kuala Lumpur. On a wall of my chambers in Wellington, just below a publication which seems rather out of date now, the *England and Empire Digest,* is a large colour photograph reminding me of my first visit, which was for the Fourth International Appellate Judges' Conference, in April 1987. That conference, organised with notable dignity and hospitality, was surely a major event in the history of the modern Malaysian legal system. Since then there have been the sad events in 1988 concerning the Lord Presidency. It would be artificial to avoid any reference to them, but gratuitously intrusive and provocative to comment. I have read some of the writings, and note that they include an article by Professor FA Trindade,[3] a book by Mr PA Williams QC,[4] with whose advocacy in criminal appeals and trials I am familiar, and a book by Raja Aziz Addruse,[5] with whose advocacy I have not had the opportunity of first-hand acquaintance—which is not the only difference between the two books. The one point that it may be relevant to make here is that, although some aspects of those events were the subject of litigation, that was evidently not so as to the core events themselves. What a challenge for an administrative law system such a case would have presented! But the Malaysian judiciary was spared the problem of constituting a bench able to try it.

3 *The Removal of the Malaysian Judges* (1990) 106 LQR 51.

4 *Judicial Misconduct,* Pelanduk Publications, Malaysia,1990.

5 *Conduct Unbecoming,* Walrus Books, Kuala Lumpur, 1990.

Reference to those writings reminds me that in the months which have culminated in today I have been sent more than one copy of the Third Sultan Azlan Shah Law Lecture, Lord Oliver of Aylmerton's *Judicial Legislation: Retreat from Anns.*[6] I am not sure why there has been this duplication, yet no copy of Lord Ackner's fourth lecture,[7] though Lord Ackner tells me that his lecture included some good jokes. I rather suspect that it was thought that I might not entirely agree with Lord Oliver. In July, at the Oxford and Cambridge Club in Pall Mall, I happened to meet a distinguished Canadian torts lawyer, who was planning to join in the Canadian Bar Association expedition to Paisley in September, in memory of the alleged snail in *Donoghue v Stevenson.*[8] Having one of the copies of Lord Oliver's lecture with me, I lent it to him overnight. Next day I received through the club porter a note returning the offprint and saying, "This piece by Oliver makes my blood boil. It is an excellent target for me to fire at." That was a tribute in a way to Lord Oliver's force of exposition. His lecture did not produce in me quite the same dramatic elevation of temperature, but in conjunction with the later House of Lords decision in *Murphy v Brentwood District Council*[9] it did stimulate me to a rather extreme reaction, videlicet the writing of an article for the *Law Quarterly Review.* But if anyone is at all interested in my views about the retreat from *Anns,* it will be necessary to be patient until January, as it is not germane to the subject today.

The subject today perhaps contrasts with the issues in *Murphy* in that the leading principles of administrative law can be quite simply stated and by-and-large probably do not admit of much controversy. It was not always so. The subject used to be vexed by such refinements as the doctrine of error of law on the face of the record, Lord Sumner's "inscrutable face of a sphinx",[10] the related concept of jurisdiction as an umbrella under the shelter of which errors of law could be committed safely, the label quasi-judicial, the elusive differences between *nullity, void* and *voidable.* If not totally dispelled, these obscurities are now seen as largely irrelevant, the case which did most to cut through them in England being *Anisminic Ltd v Foreign*

6
(1988) 1 SCJ 249.
See chapter 3, above.

7
The Spycatcher: Why Was He Not Caught? See chapter 4, above.

8
[1932] AC 562.

9
[1990] 2 All ER 908.

10
R v Nat Bell Liquors Ltd [1922] 2 AC 128, 159.

Compensation Commission.[11] For some years I have ventured to suggest that it is not a totally absurd oversimplification to say that the whole of administrative law can be summed up in the proposition that the administrator must act fairly, reasonably and in accordance with law.[12] It is encouraging that in the preface to the sixth edition of his pre-eminent English textbook on *Administrative Law,*[13] Sir William Wade is prepared to entertain this as tenable. Latterly also the House of Lords have used language emboldening one to claim that is not altogether wide of the mark. For instance Lord Diplock has spoken of the three heads of illegality, irrationality and procedural impropriety.[14] Needless to say, such general formulations are not meant to be exhaustive, but the differences between them appear to be little more than semantic.

It is not a totally absurd oversimplification to say that the whole of administrative law can be summed up in the proposition that the administrator must act fairly, reasonably and in accordance with law.

To assert that the struggle for simplicity in administrative law is gradually succeeding is certainly not to imply that cases are simple to decide. If the governing principles are relatively straightforward, their application can be excruciatingly difficult. It is a field where, perhaps more than any other except the closely neighbouring one of constitutional law, the courts are put to the test. On the one hand, there are the inalienable rights of subjects to resort to the courts for the protection of their rights. On the other, there are the rights of governments, ministers and officials to decide policy and make discretionary decisions. The balancing exercise can be fine and demanding: judgments can readily be misunderstood or even misrepresented when not read as a whole: emotive criticism, suggesting either undue subservience to the executive or frustration of the will of the elected representatives of the people, has to be recognised as inevitable. The judges are in a no-win situation but must accept this as inseparable from their role.

That is why as a short title for this lecture I would select *Administrative Law Tensions.* In what follows I will try to give you

11
[1969] 2 AC 147.

12
Third Thoughts on Administrative Law [1979] NZ Recent Law 218; *The Struggle for Simplicity in Administrative Law,* a paper published in *Judicial Review of Administrative Action in the 1980's,* Oxford University Press, Auckland, 1986, 5 et seq.

13
Clarendon Press, Oxford, 1988, viii.

14
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 408–411.

some anecdotal evidence of the results of these tensions, drawn from my own experience on the bench, and then look more widely if briefly at some other jurisdictions, ending with an outside look at Malaysian administrative law. When sitting in Western Samoa some years ago I was struck by the maps of the world on sale there, showing that country as the centre and Asia, Europe, the Americas and Africa as peripheral. I am not beginning with New Zealand cases because of any illusion that New Zealand is the centre of the administrative law world, but only because first-hand evidence can have some freshness for an audience.

New Zealand

Administrative law is much occupied with statutory interpretation. The approach that seems to me right aims at a realistic and sympathetic construction of the statute and an examination of the true grounds of the administrative decision in question, checked against the purposes of the statute and any relevant common law rules, such as natural justice. By no means does this mean that the complainant always wins. I would guess that I have participated in considerably more judgments where the administrative authority has succeeded than where decisions have been held invalid. Let me give one illustration.

Of course we have accepted that the courts must not usurp the policy-making function, which rightly belongs to Parliament, but we do hold that the courts can in a sense fill in the gaps, though only in order to make the Act work as Parliament must have intended.

Of course we have accepted that the courts must not usurp the policy-making function, which rightly belongs to Parliament, but we do hold that the courts can in a sense fill in the gaps, though only in order to make the Act work as Parliament must have intended. An example is *Northland Milk Vendors Association v Northern Milk Ltd*,[15] where a new regime for home milk supply had been enacted but could not operate until standards applying to the relevant delivery district had been fixed by the new authorities. Yet the old regime had been repealed, so

15 [1988] 1 NZLR 530.

it was argued that, pending the fixing of new standards, milk vendors had a common law right or liberty in Hohfeldian terms to trade as they saw fit—for instance, by reducing the number of household deliveries weekly. Manifestly the particular problem had not been foreseen by those responsible for the drafting. The court held that the Act envisaged *continued* home deliveries (there was a reference to that in the long title) and that to make it workable the former conditions as to frequency of deliveries must continue to apply until new standards were duly fixed. In effect, an operative licensing system was inferred. There were no particular enacting words which could be pinpointed as bearing that meaning. The intention was seen as implicit in the Act as a whole.

That tremor may have been Lord Simonds turning in his grave. It must be acknowledged that he could well have described that decision as "a naked usurpation of the legislative function under the thin disguise of interpretation".[16] One can only plead in defence that to some a constructive approach to interpretation seems as legitimate as a destructive one. So too legislation and common law need not be treated as oil and water. There can be a harmony, a reciprocal influence and interplay. It is true that the function of the legislature is to make laws, the function of the courts to interpret them; but it is also simplistic, for the boundary between legislation and interpretation is destined to remain forever undefined and in dispute.

To some a constructive approach to interpretation seems as legitimate as a destructive one.

Though the administrators win more often than not, it is cases that have gone the other way that tend to stand out more in one's memory, possibly because they sometimes require more of an effort to avoid cowardice. Let me tell you about three "crunch" cases.

In *Finnigan v New Zealand Rugby Football Union Inc* [17] the courts stopped an All Blacks tour of South Africa. I am sufficiently

16 *Magor & St Melons Rural District Council v Newport Corporation* [1951] 2 All ER 839 at 841.

17 Reported at various stages in [1985] 2 NZLR 159; 181; 190.

parochial to believe that a Malaysian audience will know who the All Blacks are. The rugby union is an incorporated society and technically a private sporting body controlling an amateur game, but its de facto standing and significance in the New Zealand community give it a national importance. The distinction created or articulated in England in recent years, chiefly by Lord Diplock, between public and private law has not been one which we have sought to apply rigorously. It can have some relevance to questions of procedure—whether, for instance, the more appropriate remedy is injunction or declaration on the one hand or judicial review on the other.

A statutory judicial review remedy and associated rules were introduced in New Zealand in 1972, making resort to the prerogative writs unnecessary. It was the forerunner of similar reforms in Australia and England, and in turn had been much influenced by the Ontario model. But it has been seen in my country as a procedural change simplifying the review of decisions taken or proposed under statutory powers, rather than as producing a confinement or freezing of the substantive grounds of challenge. The substantive grounds do not necessarily require distinctions between the public and private law. Indeed a 1977 amendment to the Act pointedly ignored the line between public and private territory by bringing within the definition of "statutory power" powers or rights conferred under the constitution or rules of any body corporate. That is healthily wide.

Such was the setting in which, in 1985, two young lawyers, who happened to be members of local rugby clubs, had the temerity to apply for an injunction against the New Zealand union, with which the clubs were ultimately affiliated through a hierarchy. In 1981, there had been a South African tour of New Zealand which had provoked unprecedented discord in the community, with protests sometimes deteriorating into violence (though no lives were lost) and normally law-abiding citizens carrying their opposition to apartheid to lengths quite foreign to their ordinary conduct. By its rules, the first object of the union was to foster the game throughout New Zealand. The

argument of the applicants was that the council of the union had lost sight of that object in their determination to send a side to South Africa in defiance of a unanimous vote in Parliament asking them not to do so and widespread public reaction against the tour.

The first question was standing. The applicants had no contract with the union, being at grassroots level. The Chief Justice of the day struck out the proceedings on that ground, presented on behalf of the union under the heading that the claim was frivolous, vexatious and an abuse of the process of the court. In the Court of Appeal, we certainly did not think that there was anything frivolous about the case and I still remember the look of delight on the face of leading counsel for the appellants when he realised from the questions of the judges that victory was not out of the question. In the event we accorded them standing. It was a unanimous judgment of a court of five. We thought that the plaintiffs could not be dismissed as mere busybodies, cranks or mischief-makers. They were specifically and legally associated with the sport and this was a moment of crucial bearing on its image, standing and future as a national sport. Indeed the New Zealand community as a whole was affected.

The next and as it turned out crucial stage occurred in the High Court, where the plaintiffs applied for an interim injunction before Casey J. The judge heard the matter for three days; some distinguished anti-apartheid witnesses were called, but for reasons which are not altogether clear the defendants did not seek to have any evidence heard at that stage from the chairman of their council. On Saturday, Casey J telephoned me to say that he was giving a decision that afternoon and to ask whether I would reserve time for the Court of Appeal to hear an urgent appeal on Monday. Arrangements were made accordingly. He did not volunteer nor did I ask what way he was going to decide. In the event, he decided that the plaintiffs had established a strong *prima facie* case that the decision would not foster rugby: it was arguable on the evidence that the council had closed their minds to any genuine consideration of the effect of a tour on the welfare of the game. He said:

> … I feel I must have regard to the unique importance of this decision in the public domain and the effect it could have on New Zealand's relationships with the outside world and on our community at large. This was noted by the Court of Appeal and is amply borne out in correspondence from the Prime Minister and the letter from his Deputy which the Union itself requested. I am satisfied that such a situation requires that body (or any other in a similar position) to exercise more than good faith in reaching its decision; it must also exercise that degree of care which it has been found appropriate to impose on statutory bodies in the exercise of their powers affecting the legal rights or legitimate expectation of the public.

Note the reference to legitimate expectation. The judge granted an interim injunction. The defendants did not take the opportunity of appealing urgently; instead they cancelled the tour, issued a press statement saying that they now had no opportunity to establish in court that the decision to tour had been right, and later applied for leave to appeal to the Privy Council. In due course that was refused, partly on the ground that the issue was academic once the parties had agreed, as they did, to bring an end to the proceedings by a consent order. Later still their Lordships of the Privy Council refused special leave. The procedural manoeuvres are not necessarily to be criticised: the rugby administrators were wrestling with a novel situation, just as the courts had been. In retrospect, I am glad that in that case the administrative law tensions were resolved as they were by the judicial decisions. Another rugby tour of South Africa is no longer out of the question. Our judgments may have played some small part in the change of approach now apparent there.

The second "crunch" case is *New Zealand Maori Council v Attorney General.*[18] Again it was concerned with race relations, so mention of it may not be out of place in the multi-racial society in which I have the honour of speaking. British colonisation of New Zealand and the establishment of a white majority was the sequel to the Treaty of Waitangi 1840, entered into between Queen Victoria, by her duly authorised representative, and Maori chiefs. The Treaty

18 [1987] 1 NZLR 641. *Editor's note:* See also the Privy Council decision in *New Zealand Maori Council and others v Attorney General of New Zealand and others* [1994] 1 All ER 623, PC (on appeal from New Zealand).

provided that in the new nation all were to be British subjects, but reserved to the chiefs and their peoples *rangatiratanga,* a term of controversial import. The status of the Treaty in law is still under debate. For the Maoris, it has always had very high significance. The community generally is increasingly conscious of its importance as a fundamental document, but its brief language—there are only three clauses, with a preamble and a testimonium—can do little to answer the specific problems of a developed nation 150 years later. There have been many allegations—some well founded, others not—that over the years land has been by various means taken away from the Maoris in breach of the Treaty. In 1975, the New Zealand Parliament established a recommendatory body, the Waitangi Tribunal, to hear claims of such breaches. In 1987, under the pressure of economic circumstances and philosophies, the Government decided to corporatise with a view to privatising (such is the shorthand) a range of state activities. That involved the likelihood of on-sale of lands once in Maori ownership and still retained by the Crown, thus much diminishing any prospect of restoration to the Maori people. Representations at an appropriately high level caused the Government to alter the Bill which became the State-Owned Enterprises Act 1986 so as to provide in section 9 that nothing in it should permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. The Act had some machinery preventing inviolable on-sale from the newly-created corporations called State Enterprises, but these were limited to cases where Maori claims had been submitted by an early deadline date.

In that matrix of facts, the Maori Council applied for judicial review of the Crown's proposal to transfer lands to State Enterprises. The issue reduced to whether the apparently resounding declaration in section 9 should be accorded practical effect or be seen as hardly more than window-dressing. The point was not at all easy, for there was a good deal to suggest that window-dressing may have been precisely what the politicians had in mind. Hansard lent some support to that verdict, and currently the New Zealand courts do not renounce all opportunity of ascertaining by reference to Hansard what the legislators actually thought they were enacting. But in the end, the

court was unwilling to adopt that uncharitable interpretation. Section 9 was held to mean what it said: it was declared that the Crown could not lawfully transfer lands to the new corporations without general safeguards for Treaty of Waitangi claims. Certain amending and safeguarding legislation was negotiated and enacted in consequence. The details do not matter here, nor the subsequent litigation building on the foundation thus laid. Perhaps what is important about the case is that it shows what impartial justice can achieve in the administrative law field in a multi-cultural society where the Rule of Law is observed, with courts that (so we claim at least) are truly unbiased. Incidentally, no member of our court is a Maori. We have found underlying the Treaty the principle of partnership between races. This may have some relevance to your society also.

My last first-hand example of administrative law tension is *Petrocorp*[19] decided as recently as August and as yet unreported. It is about, not race relations, but an equally hazardous subject, oil. Under the New Zealand legislation the Minister of Energy has a dual function. He is the licensing authority for petroleum mining. As well he can take part in the industry himself. The Minister entered into a joint venture with oil companies to prospect for oil in a certain province. The joint venture held a mining licence for a defined area within that province. They discovered a rich oil field extending, within the province, beyond the boundaries of their licence. The Act allowed the Minister in his discretion to extend the limits of a licence. The joint venture, in which the Minister himself held a 38 per cent interest on behalf of the state, applied to him for such an extension. The state would have acquired 38 per cent of the oil in the extended one. The Minister saw, however, that it would be better to have 100 per cent; so he declined the joint venture application, awarded a sole licence to himself for the extended area, and offered to sell it to his joint venture partners at a price to be bargained.

The case shows what impartial justice can achieve in the administrative law field in a multi-cultural society where the Rule of Law is observed, with courts that (so we claim at least) are truly unbiased.

19 *Petrocorp Exploration Ltd v Butcher* (CA 240/89; judgment dated 14 August 1990).

The other joint venture partners brought judicial review proceedings. A High Court judge dismissed them, holding that the Minister's perception of the national interest was paramount. The Court of Appeal, by a majority of four to one, saw the case otherwise: the Minister was acting admittedly for purely pecuniary reasons: fairness, reasonableness and the Act in its true interpretation required him to comply with his obligations to his commercial partners. Moreover the partners had a legitimate expectation of being at least heard, whereas the evidence was that the plan to grant a licence to the Minister only was deliberately withheld from them. Perhaps a billion dollars is at stake.

My country, unlike Malaysia since 1985, retains the appeal to the Privy Council. Perhaps we lag behind you in perception of what maturity requires. The decision in *Petrocorp* may ultimately be made in the fine building in Downing Street next to No 10, where I have often had the privilege of sitting. How their Lordships will respond to the tension, whether even they will see any tension, it is not for me to try to foretell. What I can say without reservation from the point of view of a judge having to decide the issue in the national community wherein it arose is that the case provides a stern test of a judicial system.

England

In a less personally involved way, let me now speak briefly of case law elsewhere in the Commonwealth. To this audience there can be little new that I can tell about English administrative law. From reading many Malaysian judgments, it is evident that English precedents are still very often the main stock on which courts and counsel here draw. The landmark English cases in the field are so well-known that it is virtually enough to recite a list of judges. When the following names are mentioned, most of them will conjure up in the minds of the *cognoscenti* one or more famous or possibly in one or two cases, infamous decisions: Sir Edward Coke, Sir John Holt, Lord Denman, Lord Esher, Lord Loreburn, Lord Sumner, Lord Atkin, Viscount Simon, Lord Thankerton, Lord Radcliffe, Lord Goddard, Lord Parker, Lord Reid, Lord Denning, Lord Wilberforce, Lord Diplock.

That list and what it evokes will serve as an outline of the history of English administrative law. At the Commonwealth Law Conference in Auckland in April 1990, one of the highlights was a polished debate between two men, both of whom I greatly admire and have the privilege of counting as friends: Sir William Wade and Sir Patrick Neill. Regretfully it has to be said that Wade looked askance at the rugby union case, and for similar reasons, voiced misgivings about the willingness of the English courts to review such non-statutory bodies as the Takeover Panel[20] and the Professional Conduct Committee of the Bar Council.[21] Neill took the view that the courts should not abdicate from the responsibility of checking that justice is done in areas of public significance (this is but a brief paraphrase), and as it seemed to me, carried with him the chairman of the session and most of those present. If so, the victory lay in the inherent strength of his argument, for there was assuredly nothing between the duellists in skill and elegance of presentation.

To the history of English administrative law just given, there can perhaps be added as a statement of its current essence a quotation from Lord Donaldson of Lymington MR in *Guinness:*[22]

> It may be that the true view is that, in the context of a body whose constitution, functions and powers are *sui generis,* the court should review the panel's acts and omissions more in the round that might otherwise be the case and, whilst basing its decision on familiar concepts, should eschew any formal categorisation. It was Lord Diplock who in *Council of Civil Service Unions v Minister for the Civil Service* [23] formulated the currently accepted categorisations in an attempt to rid the courts of shackles bred of the technicalities surrounding the old prerogative writs. But he added that further development on a case-by-case basis might add further grounds.[24] In the context of the present appeal he might have considered an innominate ground formed of an amalgam of his own grounds with perhaps added elements, reflecting the unique nature of the panel, its powers and duties and the environment in which it operates, for he would surely have joined in deploring any use of his own categorisation as a fetter on the continuous development

20
R v Panel on Take-overs and Mergers, ex parte Datafin plc [1987] 1 All ER 564; *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1989] 1 All ER 509.

21
R v General Council of the Bar, ex parte Percival [1990] 3 All ER 137.

22
[1989] 1 All ER 509 at 512–513.

23
[1985] AC 374.

24
Ibid, at 410.

> of the new "public law court". In relation to such an innominate ground the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take.

Although that passage is nominally confined to *sui generis* bodies, consider the words "as always": it is really all there.

Canada

One of the strongest courts in the English speaking world is surely the Supreme Court of Canada. How administrative law tensions may stretch a court is illustrated by their decision in 1989—after an unsurprising gestation period of ten months—in *Paccar of Canada Ltd v Canadian Association of Industrial and Mechanical and Allied Workers.*[25] The case was about industrial relations, a fertile source of fairly novel problems in administrative law, as Malaysian experience also bears out. The court was divided as to whether a decision of a Labour Relations Board should be set aside. It is instructive that even the more conservative view, which prevailed, recognised that under a collective bargaining regime quite a different approach is called for than was once customary in considering contract cases between master and servant. La Forest J said :

> … it no longer makes sense to speak of the common law. The collective bargaining relationship is governed by the provisions of the Labour Code, not the common law.

A collective agreement having expired, attempts to agree on a new one had not succeeded, and the employer gave notice discontinuing negotiations and announcing terms and conditions on which it was prepared to employ workers henceforth. They were less advantageous to the workers than the old terms, but the workers did not strike, preferring to remain in work. The Board held that the employees action was lawful. The British Columbia courts, influenced by common law contract concepts, held that terms could not be

25 [1989] 2 SCR 983.

unilaterally imposed by an employer. The majority of the Supreme Court held otherwise, saying that "curial deference" was appropriate towards a specialist tribunal: the tribunal has the right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be supported by the relevant legislation and demands intervention by the court on review. (The note struck by the Master of the Rolls seems to be echoed.) The minority judges, Wilson and L'Heureux-Dube JJ, did not differ from the majority in principle but they thought that the Board's decision failed even that liberal test. In the words of Wilson J, it was "completely inconsistent with the concept of freedom and equality of bargaining power and the paramount role of the collective bargaining process in labour dispute resolution".

Frank recognition that legislation does not always have one inevitable meaning, that it may be open to more than one reasonable construction, offers one way through the thicket of difficulties occasioned by a hard-dying idea: namely the idea that a limited tribunal must be expected to have jurisdiction to decide some questions of law conclusively. Courts have wrestled with this for years. There are many conflicting decisions. Malaysian case law has shown some movement towards another solution, as will be shown shortly.

Australia

In reply to my impossible request to name one case epitomising the approach of another distinguished Commonwealth court, the High Court of Australia, to administrative law, Chief Justice Sir Anthony Mason nominated *Kioa v West*.[26] One reason why I am glad to mention that decision of 1985 is that it largely mirrored a New Zealand decision five years earlier, *Daganayasi v Minister of Immigration*[27] in holding that in certain circumstances natural justice or procedural fairness must be observed

The content of the doctrine of fairness is flexible but "a strong manifestation of contrary statutory intention" is needed to exclude it.

26
(1985) 159 CLR 550.

27
[1980] 2 NZLR 130.

by the Minister or his delegate in considering the making of deportation orders. The content of the doctrine of fairness is flexible but, as Mason CJ put it, "a strong manifestation of contrary statutory intention" is needed to exclude it. Perhaps one can say that such an intention is required at the very least.

Probably more striking than *Kioa*, however, is a three-two decision of the High Court in June of this year, to which Sir Anthony also referred me, *Haoucher v Minister of State for Immigration and Ethnic Affairs*.[28] There the Minister had decided to proceed with a deportation notwithstanding an Administrative Appeals Tribunal recommendation that the deportation order be revoked. Earlier the Minister had announced in Parliament that such recommendations would be overturned by him in exceptional circumstances only, and only when strong evidence could be produced to justify his decision. The case was referred by the court to the Minister yet again. The majority of the High Court responded to the administrative law tension by holding that the appellant had a legitimate expectation entitling him to know what was "exceptional" about his case and what the "strong" evidence was. The expectation arose from the Minister's statement to Parliament.

Like so many common law developments in all the national jurisdictions in the second half of the 20th century, the principle that the duty to act fairly may arise from a "legitimate expectation" is an invention of Lord Denning.

Like so many common law developments in all the national jurisdictions in the second half of the 20th century, the principle that the duty to act fairly may arise from a "legitimate expectation" is an invention of Lord Denning.[29] Like many of his other ideas, it flourishes because it helps to satisfy a widely-felt human sense of what natural justice requires. Since the categories of situations in which a legitimate expectation may be recognised can hardly be closed, it may prove a most fruitful invention.

28
(1990) 93 ALR 51.

29
Schmidt v Secretary of State, Home Afairs [1969] 2 Ch 149, 170.

South Africa

Earlier I had occasion to mention South Africa in terms not particularly warm, so it is pleasing to be able to insert something now about administrative law in that non-Commonwealth country. It was also pleasing that two South African judges attended in September, the Fifth International Appellate Judges' Conference in Washington—a sign of the times.

Last year, the Appellate Division of the South African Supreme Court decided *Administrator, Transvaal v Traub.*[30] Some young qualified medical practitioners serving in a Soweto hospital had applied for certain appointments. They had favourable recommendations from the local departmental head. Nevertheless, the Transvaal director of hospital services did not approve their applications because they had signed a certain letter protesting in abrasive language at the disgusting and despicable conditions in the medical wards. In a judgment with which the other members of his court concurred, Corbett CJ held that they had not been fairly heard. A quashing of the refusal to approve was upheld. Interestingly, in the meantime the reconsideration ordered in the court below had resulted in their receiving appointments. Possibly more interesting still, the appeal judgment is based solely on legitimate expectation.

Malaysia

So finally I come to grasp the nettle of Malaysian administrative law. How are your courts responding to the tensions? It is necessary to stress the limits of my knowledge. Such as it is comes from general impressions and more particularly from reading in recent weeks some scores of reported decisions. I am in no position to be judgmental. It would be rash to do more then throw out a few prima facie thoughts. But to do less would be to fail my audience.

30
1989 (4) SA 731.

Two thoughts concern style and technique rather than substance. First, the conciseness of the Malaysian judgments is impressive. Your judges do not go in for elaborate disquisitions, loaded with case and article references, and smacking of the lamp. Their judgments are easy to read and assimilate. They avoid Scylla. As long as they can steer clear of Charybdis—the danger of too cursory a consideration of cases, especially at the highest level— this commands admiration.

Secondly, on the surface there may seem to be a dependence on English precedent more heavy than appropriate after Merdeka. But further acquaintance suggests that such a verdict would be superficial. Albion is not perfidious, but fortunately consistency is not high among the features of 20th century English case law in the administrative field. Within the rich jurisprudence high authority can be found for almost any possibly tenable proposition. The shades of difference can be subtle and multiple. If we take only three modern House of Lords cases so well known that they require no citations, *Padfield,*[31] *Bromley,*[32] *GCHQ,*[33] we may equip ourselves with a range of options for own approach to a new case. A Malaysian court may be making a truly Malaysian choice when it decides which English dictum to convert to its own use. For this reason, I may very well be doubtful whether there is substance in the criticism sometimes voiced that the Malaysian courts are still colonialist at heart.

As for substance, in *Sabah Banking Employees' Union v Sabah Commercial Banks' Association*[34] Abdul Hamid LP has said:

> The writ of certiorari clearly survives because it is fundamental to the courts' constitutional and common law role as the guarantors of due process and the fair administration of law.

The Lord President there sounds a note close to that struck by Your Majesty in the pronouncement quoted when I began this lecture. While such words represent the spirit in which Malaysian

31 *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; [1968] 1 All ER 694, HL.

32 *Bromley LBC v Greater London Council* [1983] 1 AC 768; [1982] 1 All ER 153, HL.

33 *Council for Civil Service Unions v Minister of State for the Civil Service* (*GCHQ* case) [1985] AC 374; [1984] 3 All ER 935, HL.

34 [1989] 2 MLJ 284 at 286.

administrative law is administered, there will be confidence that administrative law and the Rule of Law are safe in Malaysia.

The performance of the courts may conveniently be looked at in terms of the threefold criterion, "fairly, reasonably and in accordance with law". With regard to fairness, there have been some decisions which in my humble opinion an impartial examiner should give an alpha plus. I mention the *Berthelsen* case,[35] where cancellation of the employment pass of a press correspondent was quashed for failure to hear him. It is an application in this country of the legitimate expectation doctrine, in line with the trends elsewhere on which I have dwelt. The outsider is struck by the fact that the Malaysian Bar was represented at the Supreme Court hearing by no less than six counsel on watching brief. Param Cumaraswamy, Mooney, Sidhu, Sri Ram, Cyrus Das, Thomas. What a constellation! Further as to personalia, one of the rewards of reading for this lecture has been closer acquaintance with the judgments of Abdoolcader SCJ. This is the one describing another case as being about "a pesky and pernicious epiphenomenon of transnational beachcombing"—and hence easily distinguishable of course from a case about a representative of the Asian Wall Street Journal.

I mention, too, the judgment delivered by Salleh Abas LP in the *Keruntum* case,[36] managing to resist the blandishments of my persuasive friend Michael Beloff QC and holding that the Director of Forests, Sarawak, could not treat a licence as automatically forfeited for transfer of controlling shares: again the firm insistence on an opportunity of a hearing accords with international trends as well as Malaysia's own well-established domestic jurisprudence.

For the moment, it is better to leave out reasonableness and go straight to "in accordance with law". I have read some perceptive judgments interpreting statutes in a way giving effect not merely to their literal meaning but to their true intent and spirit. In that category is the judgment[37] of a court consisting of Abdul Hamid, then acting Lord President, Mohamed Azmi and Abdoolcader SCJJ, quashing

35
JP Berthelsen v Director General of Immigration, Malaysia [1987] 1 MLJ 134.

36
Minister of Resource Planning v Keruntum Sdn Bhd [1988] 2 MLJ 226.

37
Chai Choon Hon v Ketua Polis Daerah Kampar [1986] 2 MLJ 203.

as unreasonable a decision restricting the number of speakers at a solidarity dinner to seven:

> on the overwhelming legal ground put by Abdoolcader J that one unduly prolix and periphrastic speaker might be an even worse evil than excessive numbers. Likewise the decision[38] that a delay of seven years in holding a land acquisition inquiry, when compensation was tied to the date of the gazette notification, was outside the purview and scope of the Act.

Doctrinally two particularly valuable Malaysian cases on error of law are *Inchcape*[39] and *Enesty*,[40] both in 1985, holding that although the Industrial Court was properly seized of matters after references from the Minister, that court did not have power to determine conclusively whether a director was a "workman" or whether workmen were "on strike" if their union issued a strike notice. In a sense, both decisions were straightforward applications of *Anisminic*[41] but it is to the credit of your Supreme Court that they were not diverted from the straight path into the more tortuous windings resulting from the apparent inconsistency between Lord Diplock's expositions in *Racal*[42] and *O'Reilly v Mackman*[43] and the Privy Councils reversion in *Fire Bricks*[44] to an older approach described by Salleh Abas LP as having "jolted the Malaysian judiciary".

A fundamental error of law by a limited tribunal or administrator justifies judicial review and there is no need to add the further puzzling, perhaps spurious, question, "Does it go to jurisdiction?"

Seah and Mohamed Azmi SCJJ have left Malaysian administrative law in their debt by suggesting in those cases that the Malaysian courts might come to adopt the Denning–Diplock view that a fundamental error of law by a limited tribunal or administrator justifies judicial review and that there is no need to add the further puzzling, perhaps spurious, question, "Does it go to jurisdiction?"

38 *Pemungut Hasil Tanah v Ong Gaik Kee* [1983] 2 MLJ 35, Wan Suleiman, Salleh Abas and Abdul Hamid FJJ, the judgment being delivered by Salleh Abas then CJ (Malaya).

39 *Inchcape Malaysia Holdings Bhd v Gray* [1985] 2 MLJ 297.

40 *Enesty Sdn Bhd v Transport Workers Union* [1986] 1 MLJ 18.

41 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208, HL.

42 *In re Racal Communications Ltd* [1980] 2 All ER 634.

43 [1983] 2 AC 237.

44 *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 MLJ 165.

At least that is a paraphrase of this line of thought, a line which I have long found compelling. It cuts through the mystery of the concept of jurisdiction on which, incidentally, I wrote my PhD dissertation at Cambridge too long ago and accords with two more important concepts. One is that it is the inalienable province of the courts to determine the law, that not being the province of any other authority, high or low. The other is that for practical reasons judicial review has to be discretionary: the reviewing court should normally hold its hand if the error of law is insufficiently important, or there is adequate appeal machinery, or undue delay or other solid ground appears for refusing to intervene.

It is the inalienable province of the courts to determine the law. For practical reasons judicial review has to be discretionary.

The ultimate authority of the courts to decide the law brooks no exceptions, though on occasion the correct decision for the courts on the law is that the parties have freely and effectively contracted to submit to private arbitration or the like. A good Malaysian example of this principle of omnicompetence is the Federal Court decision in *OSK*[45] that certiorari lies to the stock exchange. An example of a different kind, however, seems to be the inconsistent Supreme Court decision in *Ganda*[46] that the writ will not go to a commodity exchange. There are echoes here of the Wade–Neill debate and the rugby tour case. Certainly legitimate arguments can be raised about whether the procedure should be by prerogative writ or its modern equivalent or by declaration and injunction, but the functioning of such powerful bodies in the community should be amenable to review some kind of procedure. I have to admit that Hashim Yeop A Sani SCJ and his colleagues were led astray by a New Zealand precedent[47]—not a New Zealand President as the excellent typist thought; for they followed a decision of the Court of Appeal of which I am a member, apparently renouncing ability to review the stock exchange. That is an excuse for Malaysia, but not for New Zealand. The New Zealand case rests, in my opinion, on misinterpretation of earlier case law in our court. You may not be surprised to learn that I did not sit in the case. Some of my judicial friends decided it while I was out of the country.

45 *OSK & Partners Sdn Bhd v Tengku Noone Aziz* [1983] 1 MLJ 179.

46 *Ganda Oil Industries Sdn Bhd v Kuala Lumpur Commodity Exchange* [1988] 1 MLJ 174.

47 *New Zealand Stock Exchange v Listed Companies Association* [1984] 1 NZLR 699.

It is to be hoped that nothing of that sort is happening this week. It would add a new terror to lecturing overseas.

Lastly I come back to reasonableness: the merits, substance, how far will the courts go? Here the Malaysian picture is mixed. Let it be clear that no one, anywhere, suggests that the courts can substitute their discretion for that of the administrative authority, or intrude into policy formation and application where the policy is consistent with statute. Even the administrator's view of the facts is at least highly likely to be accepted if reasonably open: for it is doubtful whether the concept of jurisdictional fact has validity any longer. The concern is to check that the decision of the Minister or other authority is one that could reasonably be reached on the facts and in the light of the relevant law. It is no severe test; to refrain from insisting even on compliance with this generous test would be to abandon proper judicial responsibility. Often lawyers round the world speak of *Wednesbury* unreasonableness. I venture to think that there is nothing arcane or special about the subject requiring the geographical epithet. The duty is simply to act reasonably, that is to say in accordance with reason.

The courts must be willing to get as close as they can to the real heart of the issue in order to see whether the test is satisfied. An admirable Malaysian example is the *Merdeka University*[48] case, where the rejection of a petition for the establishment of a University based on the Chinese language was held not to be an unreasonable exercise of discretion. The careful examination of the facts by Abdoolcader J at first instance and the historical and constitutional exposition of the importance of Bahasa for national unity by Suffian LP on appeal are models of their kind. Those eminent judges did not renounce jurisdiction. The Government succeeded but judicial review was seen at its best.

Unfortunately, there are cases about which one cannot be so enthusiastic. Thus a "crunch" case where the administrative law tensions may be seen in severe operation is *Government of Malaysia*

48 *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356; [1982] 2 MLJ 243.

v Lim Kit Siang[49] decided in March 1988. Surely if a member of Parliament has arguable grounds for alleging impropriety in the award of a public contract it is in the public interest that the courts should be prepared to sift the matter impartially and thoroughly. Of course the allegation may turn out to be baseless, and, if so, well and good; but, if by any chance the reverse were to prove to be the case, manifestly the proceedings will be justified. To strike out in limine must tend to undermine faith in the judicial system. Yet it must be acknowledged that both Salleh Abas LP and Abdul Hamid CJ (Malaya) as they then were, were of the majority who adopted that course. I have respectful sympathy for them and cannot be confident how I would have responded in their shoes, but the reasoning of the minority is hard to rebut.

A more recent case which also seems rather worrying is *Aliran,*[50] where the Supreme Court allowed an appeal from a High Court decision quashing the rejection of an application for a permit to publish a magazine in Bahasa Malaysia. Attentive reading of the judgment leaves one unclear as to the reason why the application was refused; and if the court cannot identify any good reason, the administrative decision should fall. Ministerial discretion is to be respected, but the corollary is that the grounds of the ministerial decision should be apparent, unless indeed some compelling reason of national security dictates otherwise—in which case the court must at least be satisfied by sufficient evidence that national security was truly the ground.

A somewhat similar approach appears in cases concerned with the Internal Security Act 1960. The Malaysian courts have been scrupulous in insisting on strict compliance with the procedure for deprivation of liberty, as well illustrated by the judgments of Mr Justice Hashim Yeop Sani, in *Public Prosecutor v Koh Yoke Koon* [51] (continued detention unlawful after unauthorised two-day period) and *Tan Hoon Seng v Minister for Home Affairs, Malaysia*[52] (future date for commencement of detention not able to be specified). But now the Singapore Court of Appeal have held[53] in effect that the Malaysian courts have unnecessarily abandoned the possibility of

49
[1988] 2 MLJ 12.

50
Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351.

51
[1988] 2 MLJ 301.

52
[1990] 1 MLJ 171.

53
Ching Suan Tze v Minister of Home Affairs [1989] 1 SCR 103.

checking whether there are substantial security reasons, by labelling the discretion as "subjective". It would be presumptuous for a New Zealand judge to intrude into the facts of the internal security cases. I know next to nothing about the security position in Malaysia and Singapore. But as a matter of legal principle, it must be permissible to suggest that the so-called objective-subjective dichotomy here is misleading. No discretion is either wholly subjective or wholly objective. With every discretion the question is always whether it has been exercised in a way reasonably open.

In sum, the Malaysian administrative law has some notable achievements, but perhaps as well the tensions have taken their toll. The tensions will not relax. As in other countries, one can predict from experience that administrative law cases will continue to get harder. A guiding thought for those charged with judicial responsibility is that in this field, judicial review is an aspect of democracy. To suggest, as some people unreflectingly tend to do, that democracy equates with majority rule is simplistic and fallacious. A dictionary definition of democracy is "a state of society characterised by equality of rights and privileges". Administrative law is a servant of such a society.

The so-called objective-subjective dichotomy is misleading. No discretion is either wholly subjective or wholly objective. With every discretion the question is always whether it has been exercised in a way reasonably open.

Just as in a sense, Your Majesty, we of the law are all your servants. My wife and I acknowledge with gratitude your bountiful and considerate hospitality.

The Right Honourable Lord Mustill

Negligence in the World of Finance

Michael John Mustill
(*b.* 10 May 1931)

Lord Mustill studied at St John's College, Cambridge. He was called to the Bar in 1955, and was made a Bencher of Gray's Inn in 1976. He became a Queen's Counsel in 1968.

From 1978–1985, Lord Mustill was a Judge of the Queen's Bench Division of the High Court. In 1985, he was appointed Lord Justice of Appeal. Lord Mustill became a Lord of Appeal in Ordinary in the House of Lords in January 1992.

However, before reaching the compulsory retirement age, Lord Mustill retired as a Lord of Appeal in Ordinary in April 1997.

Lord Mustill was the Chairman of the Judicial Studies Board (1985–1989); a Trustee of the Mental Health Foundation (1980–1990); Member of the House of Lords Select Committee on Medical Ethics (1993–1994); President, Vice-President and Member

of the International Law Association, Expert Witness Institute, Court of Arbitration of International Chamber of Commerce, Advisory Board, Centre for Medical Law and Ethics, and Institute of Criminology.

Lord Mustill is one of the most distinguished scholars on commercial law. He has written some of the more significant judgments in the area of commercial law in recent years. He is the co-author of *The Law and Practice of Commercial Arbitration* (with Stewert C Boyd, now 2nd edition, 2001); was the joint-editor of *Scrutton on Charterparties and Bills of Landing*; and joint-editor of the classical work on marine insurance, *Arnould on Marine Insurance* (now with JCB Gilman QC and in its 17th edition, 1997, published in 3 volumes). He is one of the contributors to *Modern Law of Marine Insurance Volume 2*, (edited by Professor D Rhidian Thomas, 2002).

As a Queen's Counsel, Lord Mustill, gained ad hoc admission to the Malaysian Bar in 1971 (see *Re Michael John Mustill* [1971] 1 MLJ 175, High Court, Kuala Lumpur, before Yong J). Interestingly, he appeared before His Royal Highness Sultan Azlan Shah (then Raja Azlan Shah J) in the High Court in the case of *Boon & Cheah Steel Pipes Sdn Bhd v Asia Insurance Co Ltd & Ors* [1973] 1 MLJ 101; [1975] 1 Lloyd's Rep 452, HC, the only reported case in the Commonwealth on marine insurance dealing with the total loss of the insured cargo and the application of the de minimis rule in calculating whether there is total loss of cargo (referred to in most leading textbooks on marine insurance and also referred to in *25 Halsbury's Laws of England*, 4th edition, 2003 Reissue, paragraphs 462 and 468).

6 Negligence in the World of Finance

Lord Mustill
Lord of Appeal in Ordinary, House of Lords

Your Majesty, it is a great privilege to have been chosen to deliver the Sixth Sultan Azlan Shah Law Lecture.[1]

Not only because of the honour which this accords, but also because it will enable me to claim a qualification which few Englishmen have possessed during the past 800 years: namely to have addressed the same personage successively as judge and as Monarch: as judge, during January 1972 in the case of *Boon & Cheah Steel Pipes v Asia Insurance Co;*[2] as Monarch, at this gathering here tonight, almost 20 years later.

I have mentioned the interval of 800 years, for that is the time which separates us from King Henry Plantaganet, the ruler who founded the English judicial system, the test-bed of the common law, that great engine of justice under whose authority countless millions throughout the world still live their lives.

Thus, when called upon to perform the most difficult task which faces a person invited to give a lecture—namely to select a topic—I resolved at once that it should spring from the common law; that it should raise doctrinal problems faced by every legal system; and that it should be of practical importance to my host country, poised as it is on the verge of a great expansion into the world of international commerce. These requirements combined to suggest a discussion of liability for negligence by professional men and women, leading to pure economic loss.

This paper is an expanded version of the Sixth Sultan Azlan Shah Law Lecture, delivered on 10 December 1991 in the presence of His Majesty Sultan Azlan Shah.

1
The writer is greatly indebted to Dr Lorraine Newbold, Barrister, for references to some valuable sources.

In the United Kingdom a great body of literature on the topic has accumulated and it would be pointless to list them all.

Amongst the more recent articles in English journals at the time this lecture was delivered may be mentioned — BS Markesinis, (1989) 105 LQR 104; P Cane (1989) 52 MLR 2000: IN Duncanl Wallace (1991) 107 LQR 228; J Stapleton (1991) 107 LQR 249; K Nicholson (1991) 40 ICLQ 551.

2
[1975] 1 Lloyd's Rep 452.

Categorising the cases

This catchphrase, familiar though it is, calls for explanation. Most, although not all, claims in negligence seek compensation for financial loss. This may happen in a number of ways, calling for very different legal analysis. Six of these are illustrated in Appendix I.[3] The first is the most familiar. The plaintiff is injured in an accident. Whilst recovering he is off work and loses wages. The second situation also stems from a negligent act or omission having physical consequences, but here those consequences are not suffered by the plaintiff himself. For example, the defendant's barge carelessly rams a bridge, and whilst it is shut a lorry containing goods urgently required by the plaintiff is kept waiting.

The second pair of situations is concerned with claims arising from words carelessly uttered. In one instance, perhaps rather uncommon, the words lead to an event the physical consequences of which cause the plaintiff to suffer financial loss—as where, for instance, the defendant unwisely tells the plaintiff that the road is clear for him to back his car into heavy traffic. Of greater interest to us today is the fourth situation, where carelessly uttered words lead directly to financial loss—the classical case of the auditor whose inaccurate report misleads an investor.

The third pair of situations identifies more complex types of complaint. Here there is an earlier act or omission (usually the latter) associated with a physical object, which had later adverse repercussions on the plaintiffs relationship with the object. In one, the negligent act by the defendant (typically a surveyor) causes an adverse condition to pass unnoticed, which when later revealed puts the plaintiffs to the expense of repair. (For example, the subsequent purchaser of a house finds that he has to spend money strengthening foundations the inadequacy of which ought to have been discovered by the defendant when the house was built.) The other situation differs, in that the house plans which were carelessly approved suffers cracking when the foundations subside.

3
See page 178, below.

These and similar classifications serve one useful purpose, in that they impose some semblance of order on an otherwise chaotic "wilderness of single instance".[4] Working as it does *a posteriori* the common law bogs down if the material from which general principles are to be derived is simply a blur of static. But all those working in the field do, I believe, come in the end to realise that the categories do not form a basis from which a strictly logical, as distinct from a practically serviceable, delictual law of negligence can be derived. Neither by distinguishing the consequences of words from those deeds, nor by distinguishing those adverse effects on the plaintiff's pocket which stem from damage to his person or property from those which occur without the interpolation of damage, is it possible to build up an intellectually sound defensible law of tort.

Furthermore, not only do the categories have a false air of precision, but they also tend to disguise other, equally plausible, ways of dividing up the cases. One such instance is germane. It is often convenient to speak of liability for "negligent misstatement" as if all such sources of liability were the same. But this is not so. In some instances, the defendant's carelessness takes the shape of the act of making the statement: for instance, where he intends to write one thing but writes another. A different, and much more common source of an asserted liability exists where the statement itself is accurate, in the sense of reflecting correctly the outcome of a previous process of reasoning, but where that process contains an error. Such is the case where an auditor certifies an inaccurate set of accounts. Here, it is almost always unsound to describe the act of signing as negligent, since it will be no more than a formality; the auditor has written what he meant to write. Rather, if he is held liable, it is for the lack of care of those who have at an earlier stage collected the information on which the accounts are based, and have formed and expressed in the draft accounts an opinion upon them.

This example points to another and different basis of categorising negligent conduct: namely into acts and omissions.

4
Alfred, Lord Tennyson, "Aylmer's Field".

Very often this dichotomy is of no practical importance, and may indeed seem purely linguistic. Where the friend has caused damage by carelessly telling the driver that he can safely reverse into a busy road, to draw a distinction between the wrongful act of speaking without having first looked, and the wrongful omission of having failed to look before he spoke, will serve only to make the practical man impatient. Yet for any sound analysis of the roots of delictual liability for negligence this distinction is potentially of great importance, since if the second way of putting the case is right the defendant is being held liable for failing to do something which he has never promised the defendant to do. This objection is not too hard to overcome when only two parties are involved, but it becomes much more difficult when the situation is complex, as we shall later have to observe.

I mention these distinctions, not because it is practicable to explore them here tonight, but to sound a note of warning. A single lecture could not begin to address the practical and intellectual problems arising from delictual responsibility for negligent conduct in all its multifarious shapes. The focus must be narrowed. Even liability for "economic loss" is too large a topic. A very important aspect of this, represented by situations 5 and 6 in Appendix I,[5] has very recently been the subject of published analysis, both by His Majesty [6] and by two recent Sultan Azlan Shah Lecturers;[7] I shall abstain from covering the same ground again, and will instead concentrate on liability for that form of "economic loss" which stems from "negligent misrepresentation". I feel justified in this course, because my concern tonight is principally with juristic method rather than with an exploration of what the law is, or what it should be. Nevertheless, I must repeat that to assume that these categories are exhaustive or even soundly based may soon lead to error.

Donoghue v Stevenson

Against this background I will briefly trace the history of the chosen topic by reference to a few only of the salient English cases. Whatever else the law student forgets, *Donoghue v Stevenson* [8] will remain, with *Carlill v Carbolic Smoke Ball Co,*[9] forever embedded in his recollection. He will

5
I am very grateful to Harriet Edgerly for preparing the diagrams which form the Appendices.

6
His Majesty Sultan Azlan Shah, "Engineers and the Law: Recent Developments" (1989) SCJ 89.

Now see *Constitutional Democracy, Rule of Law and Good Governance,* 2003, Professional Law Books and Sweet & Maxwell, Kuala Lumpur.

7
Sir Robin Cooke, *Administrative Law Trends in the Commonwealth*, chapter 5, above, and Lord Oliver of Aylmerton, *Judicial Legislation: Retreat from Anns*, chapter 3, above.

8
[1932] AC 562.

9
[1893] 1 QB 256.

recall that in the company of a friend Mrs Donoghue went into Mr Minchella's cafe. The friend bought, amongst other items, a drink of ginger beer and poured some of it out for Mrs Donoghue. According to the latter's pleaded case there floated out the decomposed remains of a snail, the sight of which made her ill. Her claim for damages against the manufacturers failed in the court of session, but on appeal to the House of Lords she won a memorable victory, by three votes to two.

What is odd is that although everyone remembers the victory, very few actually read the case. It is an instructive task, on which I comment in a moment, but first let me identify the crucial elements in the decision:

1 . The claim was brought against the background of a chain of two or more contracts—one by which the friend purchased the beverage from Mr Minchella, and the other by which the latter purchased it from the defendant manufacturers.

2. Mrs Donoghue did not sue upon either of these contracts, for she was not a party to them. This fact would have made it futile in 1930 even to contemplate an action in contract, and would probably be so regarded by the great majority of practitioners today. I shall return to this later.

3. Mrs Donoghue sued the manufacturers, not Mr Minchella. She could not have sued him in contract, for she did not herself buy the drink, and an action in tort would have failed, since he could not have known about the snail.

4. Mrs Donoghue did not assert that the manufacturers knew about the snail, merely that they had failed to take care in providing a system of work which would ensure that foreign bodies did not contaminate the drink and remain undetected.

Although these facts are a long distance from our topic tonight, they have two features which we must immediately notice.

The first is that the case was of a type illustrated in diagram 1 of Appendix I.[10] *Donoghue* represents the simplest and most common case of negligence, in which a careless act causes direct physical damage, which in turn leads to economic loss.

The second feature, which I have already mentioned, is that the claim arose against the background of one species of what may be called a "contractual network". These networks, and the problems which they raise, are not easy to describe in words without confusing both the listener and oneself, and I have therefore illustrated some varieties of them in Appendix II.[11] In each of them the plaintiff is at the top of the diagram. The continuous lines represent contracts, and the broken lines are the duties in tort asserted by the plaintiff.

These diagrams are mainly self-explanatory, but a few words of comment may be useful. In Group A (Appendix II), diagrams 1, 2 and 3 illustrate situations where only two parties are concerned. The first is the simplest: the traffic accident. The second exists where the physical damage is caused to one person, but the economic loss is suffered by another; for example where a workman operating a mechanical digger severs an electricity cable in the road and thereby shuts down the plaintiff's factory. In the third, the parties are already linked by a contract which imposes duties on the defendant, but for some reason it suits the plaintiff to lay his claim for breach of those duties in tort.

Diagrams 4 and 5 in Group B are I believe self-explanatory, differing only that in the latter the plaintiff is not connected to the defendant by an uninterrupted chain of contracts, albeit contracts create the framework of the relationships.

The situations depicted in Groups C, D and E are essentially triangular in nature, but differ as to the extent to which each party is linked by contract to one or more of the others.

10
See page 178, below.

11
See pages 179–181, below.

The diagrams in Group F serve to illustrate relationships very often encountered in commerce. These can take many different forms, but share the characteristic that the parties, often numerous, are linked only by their common participation in a network of relationships.

The diagrams in Group G are of a different kind, and I will discuss them at a later stage.

Let us now return to *Donoghue*.[12] When we come to read the report, the impression is surprising, for the appeal was argued quite briefly on a very narrow front, as a case on dangerous chattels. The question posed was whether the law confined, or at least whether it should any longer confine, the right of recovery to cases where either the article fell into the category of objects dangerous in themselves, or it was an article which the manufacturer knew to be dangerous. The two dissenting speeches concerned themselves exclusively with this question, and proposed a narrow answer on grounds which, regarded as an exercise in precedent, still carry much conviction. The majority by contrast were prepared to extend the responsibility as far as a duty on a manufacturer of goods intended for human consumption to use reasonable diligence to ensure freedom from possible non-apparent defects which would be likely to make the product noxious or dangerous in use.

Now it was at once realised that this was a landmark decision. To a modern lawyer that is not surprising, but what is surprising is the reason for this assessment. We can see this in a brief article by Sir Frederick Pollock, published some six months later:[13]

> As to the importance of the decision there is no doubt. The House of Lords itself has proclaimed it. A notable step has been made in enlarging and clarifying our conception of a citizen's duty before the law (to put it in the shortest and plainest words) not to turn dangerous or noxious

12
The remarkable history of this case, the outlines of which are known to so many, and the details to so few, is set out in *The Paisley Papers*, a compilation as enjoyable as it is instructive, published (IBSN 0-86504-551-8) by The Continuing Legal Education Society of British Columbia. I am indebted to the Hon Mr Justice Martin R Taylor of the Court of Appeal of British Columbia, for making available copies of this volume.

13
49 LQR 22.

> things loose on the world. We have to thank the Scots Lords of Appeal for overriding the scruples of English colleagues ...

And so on. The case was treated as lying in the field of what we would now call "product liability". As such, it is of no interest at all today (except perhaps in one respect to which I shall later return). It now seems incomprehensible that the liability of the manufacturer should ever have been in doubt. And it may be that within a few years the whole of the British law on the topic may be made obsolete by European Community directives invoking no-fault liability.

Immateriality of contractual rights

It was not however all that *Donoghue* decided. Two other matters were canvassed, both of them central to our topic. The first concerned the difficulties created by the co-existence of contractual rights and liabilities as far down the chain as the pursuer's friend. Nowadays, as we shall see, it might be suggested that this could form the basis of a cause of action. At the time, however, precisely the opposite was asserted. *Donoghue* was an instance of what I have called a "broken chain" of the type shown in Appendix II, diagram B5. The defendant manufacturers had for a stipulated price assumed towards their wholesalers (or Mr Minchella, if they sold direct to him) responsibilities which were defined by the terms of their contract of sale, read against the background of the general law of contract. How could it be fair, not only to add a further liability towards someone who had made no contract with the manufacturers or anyone else and had paid no price to them or anyone else, but also to do so in a manner which imposed on them, not the contractual duties which they had chosen to accept, but different duties, imposed by the law of tort? This was a formidable objection at the time, and remains so today, although the part which it played in *Donoghue* is now largely forgotten. Whatever one makes of the problems of "non-cumul"—ie, of the question whether in the simple bilateral situation shown in diagram B3 the plaintiff should have any right of action in tort—it is at least clearly established that the plaintiff is not allowed to assert any

more onerous duty than the defendant assumed under his contract. Why should the position be more favourable to the plaintiff in a situation such as *Donoghue,* simply because the parties are separated by a chain, and a broken chain at that?

This problem was tackled head-on by Lord Macmillan, in the following passage:

> Where, as in cases like the present, so much depends upon the avenue of approach to the question, it is very easy to take the wrong turning. If you begin with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the manufacturer and so disentitled to sue upon it. There is no contractual relation between the manufacturer and the consumer; and thus the plaintiff, if he is to succeed, is driven to try to bring himself within one or other of the exceptional cases where the strictness of the rule that none but a party to a contract can found on a breach of that contract has been mitigated in the public interest, as it has been in the case of a person who issues a chattel which is inherently dangerous or which he knows to be in a dangerous condition. If, on the other hand, you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer, and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer, and whether he owed a duty to be careful in a question with a party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to the incidental contract of sale becomes irrelevant, and his title to sue the manufacturer is unaffected by that circumstance. The appellant in the present instance asks that her case be approached as a case of delict, not as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been

To treat contractual background as immaterial to the existence of a cause of action in tort places a formidable obstacle in the way of a contractual approach to the problems of recovery for pure economic loss.

> held to be entitled to complain of some defect in the subject matter of the contract which has caused him harm.

It is not my place to consider whether this is a convincing answer. Nevertheless, it does seem to me plainly to show a resolve to treat the contractual background as immaterial to the existence of a cause of action in tort, and if it is still good law (and I know of no authority for asserting that it is not), it places a formidable obstacle in the way of a contractual approach to the problems of recovery for pure economic loss, of the kind to which I shall come in due course.

A general duty of care

The second and far more celebrated feature of *Donoghue* was the enunciation of a general duty of care, not confined to product liability. For many years, the following words from the speech of Lord Atkin echoed through every law faculty lecture hall in the common law world:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as so affected when I am directing my mind to the acts or omissions which are called in question.

This novel concept of a general duty of care, centred on the foreseeability of harm, opened up exciting new vistas. The landscape of delictual responsibility, hitherto sparsely furnished with isolated clumps of nominate causes of action, entitled trespass to goods, chattels dangerous per se, and so on, would suddenly become densely planted with fresh varieties of potential liability, multifarious in foliage yet all having the same rootstock in a general duty of care.

Events never previously imagined as a source of responsibility would suddenly become actionable; duties would be owed by categories of people and to categories of people who would never previously have been parties to an action for what could now simply be called "negligence".

Twenty years after the good neighbour principle was articulated, law students such as myself were taught to regard it as an exemplar of the common law method working at its best. Induction followed by deduction. The assembly of a set of instances; the derivation from them of a unifying principle; the application of that principle to a new set of facts. The fresh yet magisterial tone of Lord Atkin's language; the boldness of its theme in the face of timid and reactionary opposition; its success in giving Mrs McAllister a remedy where a remedy was obviously just. All these combined to make *Donoghue v Stevenson* seem a dramatic *coup de main,* inspirational and seminal in a way perhaps unequalled since the unknown medieval clerk invented the writ in *consimili casu.*

So it seemed to us. It is plain enough however, if you look at the cases, that it is not how it was viewed in the courts, then or for some time afterwards, and it is instructive to see why.

Before this, however, I must pause for a word of explanation. My object this evening is not to give a chronological epitome of the English law of negligence. Even to a legal historian in England it would be of only marginal interest, and surely none at all to those here tonight. My purpose is to use the tangle in which the English cases have entwined themselves to illustrate the serious conceptual, social and economic problems raised by claims against professionals, and to see what a more satisfactory way forward might be.

The tangle in which the English cases have entwined themselves illustrate the serious conceptual, social and economic problems raised by claims against professionals.

Low impact of *Donoghue*

Returning to *Donoghue,* there are, I believe four reasons why the statements of Lord Atkin and Lord MacMillan did not detonate an explosive increase in successful claims for negligence outside the established area of direct physical injury happening between persons in direct contact. Of these, two were broadly social in character, and two intellectual.

In the first place, there were few successful claims, simply because few people at the time would have thought of claiming, and those who did would rarely have been able to afford it. The expectation that through some outside agency all misfortunes must be remedied had not yet been born. Hardship was so prevalent, and so little mitigated by social services in the modern pattern, that it was viewed as something to be borne, no doubt resentfully, but without the assumption that a right must have been infringed. Resignation not litigation was the response.

There was another reason. Delictual rights had traditionally grown by accretion, like coral. A remedy established in one situation was the growth point for the establishment of another, in a slightly different situation, just as claimants were reticent to demand, so courts were frugal to recognise, entirely new types of recourse. The judicial approach was cautious, and the climate was not ripe for broad generalisations of delictual rights.

A serious intellectual objection to the good neighbour principle also told against it: namely that it is circular, or at least risks being so, for it proposes a dialogue on the following lines. Question: "When does the author of another's misfortune incur a liability in tort?" Answer: "When he owes him a duty of care." Question: "How do we tell whether he owes the other person a duty of care?" Answer: "When he stands in a sufficient proximity to him." Question: "When does he stand in such a proximity?" Answer: "When he owes him a duty of care." Not for the first or last time in the history of the common law a

principle is stated in terms which conceal the fact that the process of deciding on liability begins with an answer which is largely intuitive, and reasons backwards from it.

Another, kindred, reason why Lord Atkin's generalisation has been a failure, and indeed one must say, the source of decades of fruitless effort, is that in practice it tells us nothing. Of course the generalisation is consistent with cases such as liability for motor accidents, for medical negligence, and for reliance on misleading financial forecasts. But liability in these cases can be, and in fact has been, developed on a piecemeal basis without recourse to the good neighbour principle. Consistency of the generalisation with existing authorities is not enough to validate it; to be of any use it must predict the outcome of new disputes. In theory it does do this, but the use of foreseeability of loss as the only criterion would lead to so many successful claims as to become socially and economically unsupportable, and the application of the principle has had to be so heavily qualified that it is no longer an active principle at all.

Not for the first or last time in the history of the common law a principle is stated in terms which conceal the fact that the process of deciding on liability begins with an answer which is largely intuitive, and reasons backwards from it.

These were amongst the reasons why a general liability in respect of the foreseeable consequences of loss made little headway during the two decades after *Donoghue.* Rather, we can see traces in the judgments and the academic writings of the view that Lord Atkin's generalisation was untimely; that it was *obiter;* that it marked an important step forward, but only in the field of product liability; that it was valid, but only in relation to claims for physical damage resulting from physical acts of negligence; and so on. In this intellectual climate it is not surprising to find that even after *Donoghue* the rule which had been laid down years before in *Le Lievre v Gould* [14] precluding a recovery in tort for losses resulting from a negligent misstatement remained undisturbed. Thus, the

14 [1893] 1 QB 491.

negative outcome of *Candler v Crane Christmas*[15] in 1951 was entirely predictable.

There, the plaintiff was contemplating an investment in a Cornish tin mine. Prudently he wanted to see some up-to-date figures, and the chairman of the company arranged for a clerk with the company's accountants to show him the draft annual accounts, on the basis of which the plaintiff ventured and duly lost his money. It was held by a majority in the Court of Appeal that he had no cause of action against the accountants notwithstanding that the accounts had been negligently drawn, and also notwithstanding that the parties were in direct personal contact in circumstances which made it clearly foreseeable that carelessness would cause the investor to suffer loss.

I cannot stay to analyse the decision, but history demands that I mention the dictum in Lord Justice Denning's dissenting judgment that in the earlier cases, including *Donoghue,* the courts had been divided in opinion—"On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side were the bold spirits who were ready to allow it if justice so required." Nor must one overlook the riposte of Asquith LJ, who held in company with Cohen LJ that *Donoghue* did not apply outside the field of damage to person or property, and added pointedly—"If this relegates me to the company of 'timorous souls' I must face that consequence with such fortitude as I can command". This comment was the cause of much restrained mirth in 1951, but as we shall see it is not always the person who laughs loudest who laughs last.

Even if the snail of a general law of negligence had escaped from the bottle of confining doctrine, it had travelled neither fast nor far.

For the time being, therefore, it seemed that even if the snail of a general law of negligence had escaped from the bottle of confining doctrine, it had travelled neither fast nor far. Nor had it made any greater progress in the United States, where on the very high authority of Chief Justice Cardozo it had been held in a similar case[16] to *Candler,*

15
[1951] 2 KB 264.

16
Ultramares v Touche 174 NE 441 (1931).

that in the absence of fraud the unlucky investor had no cause of action.

I pause for a moment to invite attention again to Appendix I. The third situation (*viz* negligent words leading directly to physical damage) is rarely a source of claims, and tends to be overlooked. Situations 5 and 6 had not yet achieved prominence, so that in the 1950's those concerned with claims in tort tended to divide them into the orthodox claims for physical damage resulting from physical acts or omissions, and all the others. These others mainly comprised situations 2 and 4, and it was easily assumed that because they were unorthodox they were the same, the more so since most instances of pure economic loss arise from negligent misstatements, and most negligent misstatements have purely economic consequences. It now seems plain that the two categories are in reality quite different, but it was not so obvious at the time.

Thus in the 1950's the law student was taught, and the practitioner assumed, that there was no liability in tort for careless misstatement. The broader question of recovery for pure economic loss however caused was not greatly canvassed, because it arose principally in the context of negligent misstatement and was mistakenly assumed to be a reflection of the same point.

Explosion in law of negligence

This continued to be the orthodox doctrine for more than a decade. Only a brave young lawyer would have stood up to assert a claim in negligence for pure economic loss, and only one brave to the point of foolhardiness would have argued for a liability founded on a careless misstatement. And yet within less than 20 years the position was completely turned around. The law of negligence exploded and the impact penetrated into areas of commercial life which would have astonished Lord Atkin himself, let alone judges such as Scrutton and Asquith LJJ. Whereas for centuries it had seemed impossible to win a claim for negligence based on pure economic loss or careless

misstatement, it seemed for a while impossible to lose one, if the facts were right. Suddenly the snail of a general duty of care was accelerating towards the horizon.

A torrent of litigation was unleashed, on a scale without precedent in English law: and this was not just an English experience but was reproduced everywhere, to a greater or lesser extent, throughout the free-market world.

What were the reasons for this phenomenon? One would need the qualifications of a sociologist as well as a lawyer, and the space of half a dozen lectures, to attempt a full answer. But let me touch upon a few factors, legal and psychological.

The legal facts are the more obvious. In England the decisive impetus came from two decisions of high authority which gave an incalculable psychological as well as doctrinal boost to aspiring claimants in hitherto unexplored fields. These two cases were *Hedley Byrne v Heller*[17] in 1963, and *Anns v Merton London Borough Council,*[18] 14 years later, which seemed for a while to have struck off the chains of the old doctrines. Both will be familiar to the lawyers in this audience, but I must describe them briefly for the benefit of others.

Hedley Byrne v Heller

Like *Candler v Crane Christmas, Hedley Byrne* was an instance where negligent words had caused pure economic loss. On this occasion the words took the shape of a banker's reference, supplied by the defendants to a vendor who was being asked to extend credit to one of the banker's customers. The reference was favourable, but in truth the customers were not in good shape and soon went into liquidation leaving the suppliers with a large unpaid debt. The vendors sued the bankers claiming that they had been misled by the reference. Once again the claim failed, but for a new reason: namely that the reference expressly stated that it was given without responsibility. In the House of Lords, it was held that this factor was sufficient to negative any

17 [1964] AC 465.

18 [1978] AC 728.

assumption of a duty of care on the part of the bank. So far, nothing suprising, although the effectiveness of such a disclaimer, at least in a case where the service is not gratuitous, is increasingly open to question, in face of the rising tide of consumerism.

However that may be, the real importance of the case resides in the unanimous opinions of the House that the suppliers would have had a good cause of action but for the disclaimer. I well remember the astonishment which the case caused at the time.

In the first place, Lord Justice Asquith's mild joke had lost its point, and the dissenting judgment of Lord Justice Denning in *Candler v Crane Christmas* had been vindicated. How had this come about? I believe that if most lawyers had been told the conclusion and invited to speculate as to the way the House had reached it they would have expected heavy reliance on *Donoghue v Stevenson,* either by a direct application of Lord Atkin's good neighbour principle or by treating a misleading reference as analogous to a dangerous chattel: and this was indeed how the matter was argued for the plaintiffs. One might therefore have had either an elaboration of the existing general duty of care, applied in a new field; or the expansion of a "pocket" of particular law, on this occasion in the field of consumer protection. Rather surprisingly, the House adopted neither of these lines. With the exception of Lord Hodson, the Lords did not legitimise their opinions by reference to the existing authority of *Donoghue*—very possibly because they suspected, not without reason, that it would not bear the weight. Instead, the House struck out in an entirely new direction by developing the concept of a "voluntary assumption of responsibility". According to this, the bank could, if it thought fit, have declined to supply a reference, but having chosen to so do it must (in the absence of a disclaimer) be taken to have accepted some responsibility for seeing that the answer was given carefully. No longer was a duty imposed on a defendant by operation of law simply by virtue of the foreseeability that his acts would cause harm. Instead, he was understood to have brought the duty on himself by electing to establish a relationship with the plaintiff. This was a much narrower

concept, not perhaps far removed from that of a contractual promise, unsupported by consideration.

If we pause to analyse the nature of the plaintiffs' complaint, which neither judges nor lawyers have taken much time to do, we can see that these are not cases where the negligence resides in the making of the statement. Rather, the complaint has two components: first, that the defendant has done a poor job of work; and second, that he has gone on to communicate the results of his work to the plaintiff, implicitly representing that it has been well done. In a real sense, therefore, the defendant is being sued for having caused economic loss by a misperformance of a job performed under a contract made with someone other than the plaintiff.

The plaintiffs' complaint has two components: first, that the defendant has done a poor job of work; and second, that he has gone on to communicate the results of his work to the plaintiff, implicitly representing that it has been well done.

Although it has tended to pass from view in later years, the distinction between such a claim and one founded on a "pure" negligent misrepresentation was clearly recognised in *Hedley Byrne*. The discussion in the House was dominated by consideration of the actionability of negligent misstatements, and very little is said about pure economic loss. This is perfectly understandable, since the problem was how to dispose of a line of authority of which *Candler* was only the latest example which had established that negligent misstatements were not actionable. If the plaintiffs failed in this, the question of economic loss was academic. Unfortunately the endorsement by the House of a solution to this problem seems to have led to a much later assumption that the problem of economic loss had also been successfully brushed aside.

I say "much later" because I recall well that in the profession this problem was seen at the time as very much alive. For example, I was involved as counsel in a dispute where the negligent navigation

of an oil carrier had resulted in extensive pollution to holiday beaches. The physical damage, represented by the cost of cleaning up, was large enough; but far larger was the economic loss suffered by those who were not directly concerned with the physical damage. In the front line were the hoteliers, whose customers did not want to spend their holidays paddling in oily mud. At one remove were the owners of cafes and gift shops. Further away were the wholesale food merchants who supplied the hotels and cafes. Still further were the importers who brought into the country the food and the souvenirs. All those concerned with the case were aware of these receding vistas of potential liability and knew very well that the courts would have to draw a line somewhere. What nobody knew was whether the court would decide that the line was so impossible to draw on any rational basis that it would maintain a rule which entirely denied a recovery for pure economic loss except in cases of negligent misstatement (since *Hedley Byrne* had established a right of recovery which could hardly be undone so soon afterwards), or whether a way would be found to say that hoteliers could recover and wholesalers would not; an exercise which would have in some way to skirt the plain man's objection that whatever foreseeability in the abstract might involve, in reality, the last thing that the ship's master was contemplating when he set the wrong course on the chart was anything at all about the people ashore. The case was settled at quite an early stage, which was a pity because the dispute would undoubtedly have reached the House of Lords, before the freewheeling approach of later years had obscured the fact that *Hedley Byrne* was not a case about economic loss—and moreover in a context where the highest court would have been forced to recognise the fact that the formulation of duties of care involved a broad exercise in social engineering.[19]

Anns v Merton Borough Council

However none of this happened, and we must now press forward to the next decade, where we encounter the problem of *Anns v Merton Borough Council.* The plaintiffs were lessees, most of them taking by assignments from prior parties, who had purchased the leases from

19
On 30 April 1992, the Supreme Court of Canada delivered important judgments in a case where the ramming of a bridge by a tug led to delays in the use of the bridge by railway companies who had contracts with the owneres of the bridge. The Court was deeply divided but the judgments contain much valuable material. In particular the dissent of La Forest J displays a cosmopolitan and wide-ranging appreciation of the social and economic issues to where this area of the law gives rise.

Editor's note: See *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021, SC.

builders. The local authority passed plans which showed foundations of a particular design and dimensions, but the flats were actually built with foundations to a different depth. It was alleged that in consequence the flats underwent subsidence, and in proceedings against the local authority it was contended that the latter were negligent in failing through their inspectors to ensure that the building corresponded with the plans. This was on the face of it a different type of claim from those we have so far considered. It was of the type illustrated in diagram 6 of Appendix I, which is analogous to, but not always the same as the one shown in diagram 5.

Any complete discussion of the problems raised by cases of this kind will have to address the question whether situations 5 and 6 are governed by the same principles, and whether either or both of them are governed by the same principles as those which apply to situation 1, where the defective object or negligent act injures someone or something other than itself. This was a well-recognised problem in the field of commercial and maritime law, where it was not uncommon to encounter claims based on defects in machinery or structures which were discovered before they had the opportunity to cause damage, but which led to the condemnation of the article and consequent costly delay. These cases, which arose in the field of insurance as well as negligence, very rarely came to trial, and attracted little academic attention; and it was not until *Anns* and its immediate predecessors that the question became a matter of more general debate.

For the reasons already stated I shall not this evening address the very difficult question whether on the alleged facts it was rightly held in *Anns* that the plaintiffs had a good cause of action against the local authority. For the time being, at least this particular problem has been laid to rest in the United Kingdom—although by no means everywhere else—by a series of very recent decisions in the House of Lords[20] which have in effect decided that is was not rightly so held. There are however two important aspects on which I must remark.

20 Of which *Smith v Eric S Bush* [1989] 2 All ER 514 and *Caparo Industries v Dickman* [1990] 2 WLR 359 are perhaps the most conspicuous examples.

In the first place I think it clear, looking back on this line of cases, that the answer at which the court will arrive, if left free to do so, is determined by the social and economic premises from which it starts. Of course, it is constrained by prior binding decisions, which it will endeavour to synthesise and apply. But there is a very perceptible undercurrent of policy impelling the court towards deciding in a particular way; and this current may change direction with the passage of time.

The second, and more particular, aspect of *Anns* is that it laid down a principle which was new, albeit acknowledging parentage in the good neighbour principle. This involved a two-stage process. At the first, the court considered whether the relationship between the parties was such that in the reasonable contemplation of the defendant, carelessness on his part might be likely to cause damage to the plaintiff. If the answer was "Yes", then a cause of action would be held to exist unless there were any considerations which ought to negative or reduce or limit the scope of the duty or the class of persons to whom it was owed or the damages to which a breach of it might give rise.

This enquiry was plainly more favourable to plaintiffs than a formulation under which they had to persuade the court that something more than mere proximity existed, and much more favourable than a regime which required plaintiffs to fit their claims into pigeon-holes representing situations which were already recognised as generating causes of action. The decision was also much more radical than *Donoghue*. The two cases had this much in common, that neither plaintiff had any connection at all with the defendant at the time of the allegedly tortious act. But the noxious drink and the lady's injured person were different, whereas with *Anns* the subject matter of the negligence and the subject matter of the loss were the same. Whether this ought to make a difference in law is for debate on another occasion, but *Anns* plainly added a conspicuous new category of potential claims; and did so by a new route.

In the result, *Hedley Byrne* and *Anns* legitimised the assertion in principle of claims for pure economic loss—and in particular for the kind of loss which results from the combination of doing a poor job, and representing to someone who had not actually employed you to do the job, that you have done it well.

I say "legitimised" because there had developed by this time a social and economic climate ripe for an entirely new approach to negligence in the field of commerce, and was awaiting only the development of the legal tools to make its presence felt.

Coupled with this was what one may call the encouragement factor. Advisors who in the past, rightly believing a cause of action to be unarguable on the law as it stood would have refrained from wasting their clients' money in trying to argue it, were now faced with two radical and unexpected benefits. If the law could change so fast in one direction, why not try to change it in another? Timorous souls were now at a discount.

Previously, if your accountant let you down, you changed your accountant; now you sue him. Moreover you also sue somebody else's accountant, if you think he has cost you money, notwithstanding that it is not you who have paid his fee.

Other factors were in play as well. Most obviously, there was the sheer size of potential claims. Even allowing for the fall in the value of money, potential liabilities are vastly greater than they were at the time of *Candler.* The stakes are now very high, and the incentive to turn irritation into litigation is correspondingly great. It may also be said that the increased complexity of modern life gives more opportunity for mistakes although I am myself skeptical about this.

Equally if not more important however was a general shift in the relationship between the individual and society—at least in the northern world, and those parts of the globe imbued with the values

of the northern world. In particular I believe that the notions of misfortune and bad luck had come to feature much less in people's thinking than in the past. Whereas previously if someone suffered loss he would try to rise above it, to treat it as a reflection of the risks involved in being a human being, now the response was to look round for compensation—in the first place from society at large, and if not from society then from the individual conceived to be the author of the misfortune. Instead of relying on himself the individual relies on someone else, and if necessary blames someone else. Coupled with the contemporary pre-occupation with rights, this has led to an astonishing growth in litigation, very evident in our chosen field today. Previously, if your accountant let you down, you changed your accountant; now you sue him. Moreover you also sue somebody else's accountant, if you think he has cost you money, notwithstanding that it is not you who have paid his fee.

For these and no doubt other reasons there began a period during which the policy underlying the decisions of appellate courts encouraged freewheeling claims for pure economic loss arising from negligent misstatement. Bankers were much in evidence as both plaintiffs and defendants in these claims, which came in all shapes and sizes. For our purposes they may be arranged in two, and possibly three, broad categories:

1. Those where the plaintiff and the defendant are linked to one another by a contract: the bipolar situation, shown in Appendix II, Illustration 3.

2. Those where either the plaintiff, or the defendant or both are parties to a contract or contracts connected with the subject matter, but where there is no direct contract between them: the network situation, Appendix II, Illustrations 12, 13, and 14.

3. (Possibly) Those where the plaintiff's economic loss occurs without the intervention of any relevant contract.

I mention the third category only for completeness, since in practice the plaintiff's economic loss will almost always arise because the defendant's negligence induces him to make a contract, or do something under a contract, or because it in some other way affects his rights under a contract. One can imagine idiosyncratic cases—for example where a motorist stops to ask the way, and his informant sends him on a circuitous route involving a great waste of fuel. But in the world of finance these cases are so rare as not to merit discussion, and I leave them aside, theoretically interesting though they are.

I will also pass rapidly over the bipolar situation where the defendant already owes to the plaintiff a duty in contract, but the latter puts forward the same complaint as the basis for a parallel claim in tort. Such cases are usually brought because the plaintiff gains a procedural advantage by formulating his claim in negligence—because he is better off as regards jurisdiction, or measure of damage, or barring by lapse of time, or in some other way. The problems are difficult. They are solved in French law by the doctrine of *non-cumul,* which forbids the existence of a parallel duty in tort. English law seems to be moving in that direction: witness the Privy Council case of *Tai Hing Cotton Mill v Lin Chong Hing Bank*[21] in 1986, and a very recent decision of the House of Lords in *Scally v Southern Health and Social Services Board.*[22] However, the even more recent decision at first instance in *Nitrigin Eireann Teoranta v Inco Alloys Ltd*[23] shows that it has by no means arrived there as yet.

Although the bi-polar situations are interesting and difficult they are of quite limited importance in practice, and pressure of time requires me to leave them aside, pausing only to note a paradox. In *Donoghue,* one problem which faced the majority in the House of Lords in 1931 was how to find a duty of tort when there was no contract between the parties. Sixty years later the problem was seen by the House in *Scally* as finding a duty in tort where there was a contract between the parties. Can both objections be soundly based? Surely not.

21
[1986] AC 80.

22
[1991] 4 All ER 257. There are other cases, too numerous to be cited here, but a glimpse of the problem may be obtained from *Midland Bank Trust Co v Hett Stubbs & Kemp* [1979] Ch 384, [1978] 3 All ER 571, Ch D and *Youell* v *Bland Welch & Co* [1990] 2 Lloyd's Rep 431.

23
[1992] 1 All ER 854, QBD.

The retreat

The remaining cases concern what I call the network situation, where although the parties are not directly linked contractually, one or more contacts are an essential feature of the commercial context. For a time plaintiffs in network situations had a good deal of success throughout the common law world. Too much success, perhaps, and serious alarm quite soon began to develop.

In the first place, it came to be recognised that the readiness of the courts to give effect to these claims had overlooked some facts of economic life. In the carefree days of the 1960's and 1970's, it had appeared that state and corporate defendants had such ample resources that they could sustain almost indefinitely the claims of anyone who had suffered financial hardship as the result of culpable though honest mistakes. This was not so; the money had to come from somewhere. In the case of the state, the funds for satisfying claims had to be found either by reducing the provision of state services, or by increasing taxes: in either event the result was to compensate the injured plaintiff at the expense of his fellow citizens. In the case of commercial or professional defendants the ultimate liability was borne by insurers, who would raise the premiums paid by their assured, who in turn would pass them on to their clients in the shape of increased professional fees. At best, this meant that the courts were engaged in running a kind of slow, costly and erratic mutual insurance scheme, in which all the citizens and commercial bodies insured one another against the economic consequences of negligence. At worst, the cost of the claims would compel insurers to cease writing liability business, and would drive many professional people, either out of their professions altogether, or into less exposed positions within it. The serious social problems presented by the uncontrolled growth of medical malpractice suits are well known. Perhaps less well known, for the moment, is the serious disquiet now being expressed about the health of the accounting profession—a profession whose soundness is essential to the world of finance—in view of the enormous claims faced at the suit of third parties who

have relied on work done by the accountants, work for which they have not themselves paid.

The next cause for concern was the open-ended nature of the liability thrust on the professional by these third-party claims. Visiting us from the past comes the warning given by Chief Justice Cardozo[24] against the creation of liability "in an indeterminate amount for an indeterminate time to an indeterminate class". Visiting us from the past has come the oft-cited hypothetical example of the careless cartographer who omits from a chart a submerged reef, on to which many years later a ship is driven, owned by someone of whom the cartographer has never heard and who indeed may not even have existed at the time when the mistake was made. For two decades and more warnings of this kind were brushed aside as reactionary. Now they have the ring of truth.

The need to remedy the loss suffered by the plaintiff has so filled the screen that the defendant's interests have been almost completely hidden.

Again, the need to remedy the loss suffered by the plaintiff has so filled the screen that the defendant's interests have been almost completely hidden. The accountant takes on a job. His terms may contain exclusions or limitations on his liability. He prices the job at rates which directly or indirectly reflect his exposure to claims by his employer. But this bears no relation to his exposure to the third party, whose loss from buying a company at an overvalue in reliance on a careless audit is likely to be much greater than the loss suffered by the company itself. Moreover, since the common law does not in general recognise a concept of vicarious immunity in tort, the exclusions and limits for which he contracted will not prevail against the plaintiff. This is unfair to the defendant. Yet if we alter the law so as to make the contractual terms bind the plaintiff, he is treated as a quasi-party to the contract of which he may know nothing.

Finally, it has come to be realised that although in theory a generalised principle of negligence has the great benefit of being

24 *Ultramares v Touche* 174 NE 441 (1931).

directly applicable to all new problems, in practice those put forward in *Donoghue, Hedley Byrne* and *Anns* have needed so much restraint by qualifications of policy rather than logic that their intellectual validity has been fatally compromised.

Another juristic revolution

By the beginning of the present decade the time was ripe for another juristic revolution. The nettle was there to be grasped and in 1990, the House of Lords grasped it in *Caparo Industries v Dickman*[25] with a vigour which has disconcerted many commentators. The facts were simple. The defendants were the auditors of a company, and produced various reports and accounts regarding the company's financial position. In reliance on these, the plaintiffs bought the company's shares in the market. Later, so they alleged, they discovered that the figures were over-optimistic, and they sued the auditors in negligence. On a preliminary issue as to whether the defendants owed a duty of care, the plaintiffs failed in the House of Lords.

In a graphic phrase, Lord Oliver propounded that "to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the-wisp". Since Lord Atkin's good neighbour principle may be regarded as just such a general test, it seems that the beacon which for decades has illuminated even the dimmest of law students has now been extinguished.

I say nothing about the decision itself. The significance of *Caparo* for present purposes is that it marked a crucial new step in the reappraisal of the general principle of liability in negligence. It had two aspects. First, the notion of "voluntary assumption of risk", which had been at the root of the reasoning in *Hedley Byrne,* and which had subsequently enjoyed a considerable vogue, was bluntly repudiated. Furthermore, to such extent as it had survived earlier judicial assaults, the two-tier process established by *Anns v Merton* of a general presumption of duty flowing from proximity, constrained only on grounds of policy, was firmly extirpated. So indeed was the use of words such as "proximity" to provide any reliable practical

25 [1990] 2 WLR 359.

guidance on when a person owes a duty of care. Most strikingly of all was the flight from broad generalisations which were now to be regarded as a source of difficulty and uncertainty. In a graphic phrase, Lord Oliver propounded that "to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the-wisp". Since Lord Atkin's good neighbour principle may be regarded as just such a general test, it seems that the beacon which for decades has illuminated even the dimmest of law students has now been extinguished.

It seems that the wheel has come full circle. The general theory of the law of negligence has returned to what it was in 1930.

Secondly, there has been substituted an approach already formulated in the High Court of Australia by Mr Justice Brennan[26] in words which it is instructive to recall:

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable "considerations" which ought to negative, or to reduce or limit the scope of the duty or the class of persons to whom it is owed.

This minimalist approach, developing the law on a case by case basis, with each move forward anchored in an established category would have been wholly acceptable to the dissenting Lords in *Donoghue*. It seems that the wheel has come full circle. The general theory of the law of negligence has returned to what it was in 1930—subject of course to the very important practical qualification that some, albeit perhaps not many, instances of negligent misstatement are recognised as at least potentially actionable.

We can thus see that in the space of 60 years the courts have successively embraced six mutually inconsistent doctrines in a field of

26 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424.

great theoretical and practical importance, which the outsider would surely assume to be open to a simple and permanent solution.

1. Before 1930—no general duty of care.

2. In *Donoghue v Stevenson*—a general duty defined by the good neighbour principle.

3. After *Donoghue*—a practice which was much narrower than the good neighbour principle.

4. After *Hedley Byrne*—a general duty, narrower than the *Donoghue* duty, and expressed in terms of the voluntary assumption of risk.

5. After *Anns*—a presumption of duty arising from foreseeability, rebutted on occasion by considerations of policy.

6. At the present day—a repudiation of any general duty, and an enlargement of the duty only on a case by case basis.

Now it involves no disloyalty on my part to the legal system in which I have spent my working life, or to past, present and future colleagues, to say that the picture thus painted is not one of unqualified success.

One cannot help being reminded of the troops of Lars Porsenna in Macaulay's poem[27] of whom it was said that "... those behind cried 'Forward' and those before cried 'Back'."

This is a thoroughly undesirable situation for several reasons. Most obviously it is embarrassing. In some areas of life, the courts are reproached for making bad law. Here the reproach of the financial community might fairly be that there is no settled law at all. And the courts cannot escape by blaming the legislature, or the European

27 Thomas Babbington Macaulay, *Lays of Ancient Rome,* "Horatius".

Community, or anyone else. They have had the field to themselves since liability in negligence emerged from the mists of mediaeval history, yet they have still not been able to stabilise the law.

Furthermore the uncertainty of the law is now posing serious practical problems both to the legal system and those who are drawn into it. Too much precious court time is being spent on massive negligence actions, and on the legal problems which they raise. Too many clients find it hard to settle claims without the means of knowing the extent of their liabilities. The insurers of professional men cannot rate their indemnity policies with any accuracy when the future is so unpredictable.

It is also possible that on a broader economic view even the more restricted scope of liability for third-party claims is too wide. In the United Kingdom the Cadbury Commission on Corporate Governance has recently been receiving submissions from the Institute of Chartered Accountants, emphasising the pressures on auditors, and the risk that they are being ground between the millstones of excessive public expectations and an inability to reduce risks by improving performance.

Now these problems are not peculiar to English law, and I have illustrated them by the English experience only because that is what I know most about. They are I believe endemic in the world of business, and may indeed be inherent in the nature of business itself. How are we to tackle them?

Tackling the future

In posing this question, I must not be understood to stand here this evening with a kit of instructions on how my hosts should organise their law of negligence. That would be discourteous and impertinent. My purpose is not to urge the judicial, legal and business communities of this country to cling to the British decisions, and to distil from them the elixir of a successful law of pure economic loss. Quite the reverse. I

believe that the British authorities are useful for two reasons, and for two alone.

First, because whatever else their deficiencies they do give a tolerably full account of the ways in which third-party claims for pure economic loss might be accommodated within the common law of tort. They furnish a repertory upon which an overseas court might fruitfully draw, without necessarily committing itself to a solution, or to the grounds for arriving at it, which had at some moment of time seemed convincing to the English court.

Secondly, because the history of this topic in the English appellate courts reveals a failure of what I am bound to call methodology, for want of a less ugly word. An overseas legal system can and, I suggest should, profit by the mistakes which have been made elsewhere even if, as I suspect, we cannot in England now escape from our self-made impasse without the help of legislation. If some of the finest minds in the history of the common law have run the doctrine into the sand, may the explanation perhaps be that the whole enterprise is misconceived?

The root of the problem is I believe a reluctance on the part of the judges to accept inwardly, and afterwards to acknowledge outwardly, that decisions in this field are essentially concerned with social engineering.

The root of the problem is I believe a reluctance on the part of the judges to accept inwardly, and afterwards to acknowledge outwardly, that decisions in this field are essentially concerned with social engineering. Conjoined is a failure to articulate the policies to which the judges have given effect so that later courts can recognise that they are dealing, not with the inexorable logical development of a set of legal premises, such as one finds for example in the law of bills of exchange, but with a refraction through the judge's eyes of a set of contemporary economic and political value-judgments. If this could be made more clear, the judge would liberate his successors from the duty to follow in the new world of finance economic norms forged in the old.

So the first step which should be taken by any system which does not want simply to mimic the failures of the British experience is to recognise that we are here concerned with policy; that is to say with an approach to the moulding of the law which begins with a proposition about what remedies the law ought or ought not to give in a situation of which the case before it is an example. Coupled with this should be a willingness to ask some questions which are simply not there to be asked where the legal system has gone as far down the road as in England. Take as an example *Hedley Byrne,* where the banker giving the reference to the intending lender was held potentially liable to him in negligence. In *Smith v Bush* and *Caparo* that decision was endorsed, yet the rationalisation of a voluntary assumption of liability was repudiated. Are we therefore to consider, as some commentators have suggested, that we must now accept *Hedley Byrne* as rightly decided for the wrong reasons? The common law doctrine of precedent will just about accommodate this proposition, and the House of Lords in recent years has gone far in this field to fix the older cases with a sceptical stare. But it would be a much bolder step to say that the result itself in *Hedley Byrne* was wrong, and that Lord Justice Asquith was right after all to number himself with the timorous souls. Yet this is just the kind of proposition which ought to be examined, even if on examination it proves to be unsound.

So I believe that somebody—and we will consider who, in a moment—ought to be asking some questions, as a start to creating a systematic treatment of economic loss. Here are one or two examples:

1. How should accidental loss be distributed between the doer of the act which caused the loss; the state (which means the tax-payer); insurers (which means payers of premiums); and the victim himself?

2. Does the answer to this question depend on whether the doer was at fault; and if so, why?

3 . Should the question whether the victim has an adequate remedy elsewhere—for example by liability insurance, or under a contract—affect his right to recover in tort?

4. Is it (a) in the interests of the community (b) fair that there should be a distinction between damage to property, parasitic economic loss, and pure economic loss, and if so why?

5. If in this field there is a conflict between fairness to the individual, and the general economic and other interests of the community, which should prevail, and how should the line be drawn?

6. In some countries there is no-fault liability for certain types of physical injury. Nobody has ever suggested that similar provision should be made in the case of economic loss. Why is this?

7. Should there be distinctions between types of economic loss: for example between the loss suffered by the ultimate purchaser of an article which later proves defective, and the person who loses through reliance on a defective audit?

8. Should the law on negligent misstatements be broadly aligned with the law on consumer protection, so that the adverse consequences of a careless banker's reference are compensated according to the same principles as the loss flowing from the consumption of a defective foodstuff?

9. Since it is difficult if not impossible to draw any rational line to mark off those consequences of negligent misstatements which are recoverable and those which are not, might it be better to forbid any recovery for negligent misstatement—unless perhaps it causes physical loss?

There are many more questions like this, and although it would be absurd to expect that convincing answers can be found to them all, the simple fact of asking them could be a great benefit: and particularly asking them in advance. The trouble is that they are neither asked nor answered in advance, but only when a conspicuous dispute has already arisen. For tonight, it is enough to say that they are not currently being examined outside the context of individual disputes, and that when they do come to be examined the enquiry is not methodical.

This is partly because the adversarial system is not a good way of examining broad issues of policy, excellent as it is in some other respects. The task of the advocate is to win the client's case; and if this means inducing the court to make some law, the advocate is concerned to make it favourable to his client, irrespective of its social or economic merits. Nor indeed will the advocate or the client necessarily even possess any views on relevant social or economic issues, or any ideas which coincide, Furthermore, even if the advocate wishes to deploy arguments on a more general front, he or she will lack the training to do so, and will not be equipped with the economic data enabling the court to envisage the social consequences of preferring one solution to another. The most one is likely to get from the advocate is a routine reference to "opening the floodgates".

Much the same can be said of the judges. It would be unfair to blame them for giving effect to their own views on policy in situations where the way has not been clearly pointed by prior decisions. After all, in a field which seems to defy logical analysis it is the only method available, and it is the judges who have to use it. Nonetheless, a lifetime spent in the practical application of the law is unlikely to furnish the judge with any but the most imprecise perception of the socioeconomic context in which the problems are being posed. This is not to belittle the willingness of the judges to take the broader implications into account when they can be perceived. Nor is it easy to imagine any panel of one or three or five persons differently selected

who would be more qualified to perform the task. Nevertheless, it is, I believe undeniable that the perspective is too narrow.

One solution, at least in theory, would be to devise a system which would enable the wider issues to be explored in a less intensely adversarial way. The European Court of Justice permits member states to make observations on cases in which they are not directly concerned. Perhaps something on the lines of an American *amicus* brief might be given a trial, although there are obvious practical difficulties. Cases in the world of finance generate large quantities of paper and usually last a long time, even at the appellate level. The prospect of yet more volumes of paper and even longer speeches is not enticing given the great pressures to which the courts are already being subjected. But if the occasions for the use of *amicus* brief, and the manner of use, were both very strictly controlled some good might ensue. This idea would of course have important implications in fields far distant from our subject this evening, and I have detected no signs of such an initiative in the United Kingdom. Nevertheless, the idea should not perhaps be rejected out of hand.

These are questions of practicalities. The methodological problems are not necessarily insuperable, for after all, in some Commonwealth countries, in the United States and in Germany the courts are managing, albeit not without a struggle, to find some less contorted ways of achieving recovery for pure economic loss. Why not take a leaf out of their book? Before answering this question, let me briefly indicate what sort of solutions are in the air.

Some possible solutions

When considering these it is important to distinguish between negligent misstatement and economic loss, since it is possible to have liability for negligent misstatement but not for other forms of economic loss. Or for some form of economic loss, but not for negligent misstatements. So one must choose whether to have one or both or neither; or only in limited circumstances.

This is an essential first step. The choice must be conscious, and made in recognition that it may require deviation from logic.

Let us concentrate for this evening on negligent misstatement, in which I include statements that a job has been carefully done when it has not. In so concentrating, we must always look over our shoulders at the implications which our choices may have for the law relating to economic loss.

Two broad strategies present themselves, which we may call the Victorian and the interventionist. The Victorian calls up the old-fashioned notions of self-reliance and bad luck. The potential victim is expected to do as much as possible to ensure that he does not become an actual victim, and to mitigate the consequences if the worst befalls. Thus, he should be cautious about taking the carefulness of others on trust, and should try to verify what they have done. He should also avail himself to the full benefit of any contractual remedies against third parties—ie, in our illustrations he should enforce rights along the continuous lines. Then, as a long stop, he should try to cover himself by insurance against the consequences.

In effect, therefore, the law should be returned to its state before *Hedley Byrne* and the Misrepresentation Act 1967. Studying the literature, one has the impression that this solution is regarded as unthinkable; so much so that nobody gives it serious thought. But it is not ridiculous. Commercial life was not fatally hindered by the absence of a remedy before the 1960's, when the incentive to alertness had not been masked by the existence of a remedy in tort. Moreover there is real intellectual substance in the distinction between physical and spoken carelessness. In the former, the consequences are frequently thrust upon the victim against his will, as where the motorist runs over the pedestrian. Whereas the person who relies on careless words has chosen to rely on them. To deny the injured party a recovery would not be indefensible intellectually, and it would have the oft-forgotten general economic benefits already mentioned, which might as a matter of social policy be seen to justify the hardship to the individual.

On this view, therefore, one would simply abolish the law of tort, so far as concerned careless misstatements. Attractive as this would be for those who have to administer the law, realism suggests that it is not a practical contemporary option, at least at its most austere extreme. People have become too accustomed to the idea that every injury needs a remedy, and after 35 years, their legal advisers have become too used to this particular kind of recovery, for a return to the old regime to be feasible.

Thus, one must accept that at least to some degree, potential victims cannot be left to their own devices, and that an interventionist strategy must have a part to play, even if combined with constraints on the availability of remedies for pure economic loss. Such strategies, which could be cumulative, might take a number of forms, particularly intervention by the state, by professional bodies, and by the courts, through the development of non-tortious remedies.

Interventionist

Intervention by the state could aim to forestall losses or to compensate victims, or both. The installation of statutory disciplinary measures in the case of bad work by professionals—and that is the source of economic loss with which the business world is most concerned—would do something to raise standards and make losses less likely. But it is expensive to run, and would not help the victim whose adviser has been, notwithstanding his exposure to sanctions, either incompetent in the general, or slipshod in the particular.

Another possibility would be to have a state-run scheme for assuring the victim of compensation. This could operate through a statutory right of action, which would make the existing tortious remedies redundant. It would have the attraction that policy-making would be left in the hands of those who have the time, capabilities and breadth of perspective to devise a workable framework in a way which the courts cannot. But the difficulties of arriving at a formulation which is sufficiently precise to avoid precisely those uncertainties,

oscillations and false starts which have characterised development via the common law, and yet sufficiently flexible to cope with new situations, are formidable indeed. Unless the task is performed with great imagination and skill the courts charged with the administration of the new remedies might find themselves trapped in a regime which is neither practical nor susceptible of change, thus making the position worse, not better.

As an alternative to, or as a reinforcement of, direct state intervention, there could be a strengthening of internal controls, through the medium of either state-sponsored self-regulatory organisations (such as those now installed in the United Kingdom under the Financial Services Act 1986) or through autonomous professional institutions. In whichever shape these could have some general impact in raising standards of competence by weeding out the useless, and a disciplinary function could by making an example of the careless remind the profession from time to time that carefulness is called for. This would do some good, but not, I suspect, very much. Ideally, it could be reinforced by a self-regulatory safety net, guaranteeing to those who have suffered from third-party professional negligence financial compensation for their losses. Admirable as this would be in theory, current experience of these schemes is not encouraging. Claims happen comparatively infrequently, but are very large when they do happen. Unless an arbitrary upper limit was introduced, which largely defeats the purpose of the scheme, the cost to the individual professionals of financing the compensation fund is likely to be more than they are willing, and indeed able, to bear.

Finally, the courts might yet again try to devise a new and more satisfactory solution of their own. This is not an option which holds out much promise in the United Kingdom, for however cosmopolitan the court may wish to be in its receptiveness to foreign solutions it is probably locked by now too firmly into its own precedents to make much progress except (if the expression may be forgiven) at a snail's pace. Statutory intervention may well be the only way of breaking the

log jam, and the record of Parliament in the field of civil law reform is most discouraging.

Consumer protection

Other systems, not so irrevocably in the grip of binding precedents may, however, be better placed, and I therefore offer a few concluding thoughts on how the problem might there be tackled. First of all, the court could dust down *Donoghue* and give it new life, not as a source of general learning on negligence, but as the foundation for a modern law of consumer protection. The auditor's or surveyor's report could be treated simply as a product, with rules relating to damage caused to third parties by products put into circulation transferred directly from *Donoghue*. The report would thus be regarded as directly analogous to a ginger beer bottle. This idea has many attractions, conspicuous amongst them are its economy of intellectual effort, and the fact that it builds upon an area of law which already works quite well in practice.

The problem is that there is one vital difference between the two categories. The ginger beer is intended for one, or at the most two, consumers; so that whereas the population of potential claimants is very large the number of potential claimants per bottle is self-limiting. There are no endless vistas of multiple liability. This is not generally true as regards negligent misstatements. Certainly there can be situations where only one potential claimant exists. *Hedley Byrne* itself was an example, for the bank reference was invited by and directed to the suppliers alone. But there are other documents which are either addressed to the world at large (such as the marine chart) or to a large class of persons whose identity may be unknown and perhaps not yet even determined (for example potential investors in a company). So here again we have the floodgates fear, and the courts will I believe be driven by it into just the same sort of morass as has engulfed them when trying to work through the medium of more general formulations of the duty of care.

Expanded law of contract

A quite different solution would be to develop a new remedy by expanding the law of contract. The German courts have been impelled to this approach by the unsatisfactory features of the Civil Code regarding vicarious liability, and the American courts have been allowed to experiment with it more freely, albeit not very consistently, by their more relaxed approach to the doctrine of consideration. The intellectual structures of the contractual approach are complex and difficult.[28] For present purposes, I need only say that they employ two related concepts. First the proposition that a contract provides an "umbrella of protection" to those whom it was to protect, and second the concept of "transferred loss", which enables the party who is the beneficiary of a promise and the party who has suffered loss from a breach of the promise to be treated as if they were the same person.

These ideas, worthy of close study as they are, are liable to encounter formidable obstacles if presented to the English court—and there is nothing in the reports to suggest that the arguments have been cosmopolitan enough or bold enough even to put them in play. The fact, if it is a fact, that in England the law is inching towards a doctrine of *non-cumul,* whereby as between immediate contracting parties their contract prevails over any liability in tort and the fact, if it is a fact, that in certain very limited situations the contracting party is entitled to recover for losses suffered by another; these are exceptional cases. I find it rather hard to see, in the light of the approach adopted in *Donoghue* how the existence of a contract as part of the factual background could be a help rather than a hindrance, especially as no court, so far as I am aware, has tackled the question of deciding how in triangular situations, the obligor is bound by the terms of his own contract (to which the obligee is not a party), or of the obligee's contract, to which he, the obligor, has never engaged himself. These are however questions into which English law has locked itself, by decided authority, and which courts in Malaysia should feel free to address anew, in the light of fresh ideas coming from Germany, the United States, and other jurisdictions whose work I have had no opportunity to explore.

28
A most valuable introduction to these developments, with particular reference to the law of Germany and the USA, is contained in "An Expanding Tort Law — The Price of a Rigid Contract Law", BS Markesinis (1987) 103 LQR 354.

So far, so reasonably good. By no means so easy however are the practical implications of this new approach. It is true that it would be made to work in the simple triangular situations illustrated in Appendix II, Group G. But how is it to deal with the type of network relationships which generate the really big claims? If we look at Group F, Figure 14, I cannot see any way in which the contracts along the continuous lines could be diverted or expanded so as to create enforceable non-delictual rights along the dotted lines. Nor does this doctrine explain what happens when the contracts in the net are on different terms. Is the plaintiff's contract to prevail, or the defendant's? Or should neither set of terms be applicable? If the latter, what is the justification for treating this as a contractual solution at all?

In truth, we must recognise that every professional man, however generally competent and however conscientious, knows that he must fall victim to error from time to time, and can do no more than hope that the consequences will be slight. No system of training and certification can prevent the occasional disaster.

Conclusion

To sum up: All the possibilities which I have briefly discussed are open to serious objection. It is true that the idea of simply abolishing the cause of action for negligent misstatement, on the ground that it now imposes on the professional men potential liabilities of a size which is simply too great, and which are too erratic in their incidence for them or their liability insurers to sustain, is by no means absurd. But a return to the plainest form of self-help would be psychologically hard to promote, now that we have decades behind us when injured persons have learned to expect to be compensated somehow, by someone, for any form of mishap.

If one looks at the prophylactic methods for dealing with negligent misstatements by forestalling them we must acknowledge that they provide at best only a partial answer. Educative measures, if vigorously pursued, will raise the general level of competence, and certification will filter out the hopeless.

Perhaps the existence of disciplinary powers will promote improved performance, although I suspect that very often the reaction of the professional world at large will simply be relief that the lightning has struck elsewhere.

In truth, we must recognise that every professional man, however generally competent and however conscientious, knows that he must fall victim to error from time to time, and can do no more than hope that the consequences will be slight. No system of training and certification can prevent the occasional disaster.

Should the consequences of such disasters therefore be remedied by the professions at large, or perhaps by the state? The history of professional compensation funds—such as the fund which provides a remedy for defalcations by solicitors—has not been happy. The really large claims tend to stem from activities of large and wealthy firms, and the smaller, less well-endowed practitioners keenly resent the large contributions which they have to make for the purpose of keeping the compensation fund afloat. One possibility is to impose a statutory limit of liability, which for centuries has been found necessary to protect the shipowning industry from extinction. But I am unable to see on what basis a limit could be fixed, given the wide varieties of size and type which claims for negligent misstatement may assume.

As for a state-funded compensatory scheme, it hardly seems a political possibility, at a time when such schemes are absent from fields where the social needs are so much more obviously pressing.

If one turns to remedial methods, the creation of a statutory cause of action, regulating the victim's claim against the careless party, has real attractions. It would liberate the courts at a stroke from the need to live with obsolete and possibly conflicting precedents, and would leave room for a proper exploration and balancing of the complex social, economic and ethical factors which it is beyond the compass of the courts to achieve. Still, the legislature has to be

persuaded to find the time and energy which the task would require; and there is the technical difficulty of drafting a definition of liability in terms sufficiently precise to avoid the generation of a body of court decisions just as numerous and unsatisfactory as those the statute is intended to replace. Most importantly, there is a risk that a statutory formulation would trap the business community into a static legal relationship at a time when the world of commerce is rapidly on the move.

Finally, the evolution by the courts of an entirely fresh juristic approach will be less straightforward than some commentators appear to believe. For the moment I cannot see how these can work in any but the simplest triangular situations. In the large scale networks, the contracts are so numerous and so widely dispersed that there seems no reason to prefer one rather than another as the foundation of the injured party's derivative contractual rights. Indeed if one looks at the much simpler chain that we find in *Donoghue v Stevenson* the notions of the contractual umbrella and transferred loss do not seem to work, since the plaintiff there had no contract at all, and her friend's contract was not with the manufacturers but with the cafe proprietor.

If this all sounds rather pessimistic that is not my intention. I desire only to assure the business community that the conspicuous failure of the courts to produce a solution which is found convincing even by the courts themselves is not due to any want of effort, for there are many obstacles in the way. What the current state of the law does demonstrate is to my mind that if a solution is to be found in my host country—and events will quite soon demand a solution—it is unlikely to emerge from a conscientious study of reported cases in the UK, US, Australia and elsewhere with the aim of extracting the essence of the former learning so as to apply it to the conditions now prevailing on the other side of the globe. As even a glance at the literature will show this effort is likely to be fruitless.

Rather, I suggest that the opportunity should be taken to attack the problem entirely afresh from a different angle, on two fronts. First,

by a general appreciation of the social, economic, cultural and—very importantly—ethical context which a law of negligence should reflect. In other words, the question should be asked and answered: What kind of law of negligence is appropriate to our culture, in our situation, in our times? Is it to be centred on self-reliance, or welfare, or mutuality, or something else?

The second stage is to identify the individual interests of those concerned so that within the general conception of the law these interests may be balanced in the fair and practical way

This is a formidable task, possibly capable of achievement only on a regional rather than a national basis. How it could be performed I am not qualified to say but I am sure of this, that an essential step must be to develop data and to consult those whose interests are at risk. Economists, sociologists and other intellectuals should talk to practical men and women, to bankers, investors, financiers, entrepreneurs, accountants, engineers, valuers, insurers and the like to discover what they want and need, and what the practical consequences of various legal policies in the field of professional negligence might be.

It might well transpire that such a symposium would produce no immediate result, in the sense of a consensus about what the law ought to be. But it would create an armoury of ideas, a store of reliable, as distinct from anecdotal or intuitive or ill-informed, notions upon which the law-makers can draw when they are called upon to lay down principles and to apply them in practice.

Such an effort would be quite new. Nothing of this kind has been attempted in any legal system of which I have knowledge. Is it not nevertheless worth the attempt?

At the conclusion of his Third Sultan Azlan Shah Lecture Lord Oliver of Aylmerton offered the following words, written in the year 1602,[29] as an aphorism to be borne in mind in the administration of the law today:

29 From the Preface to the *Book of Common Prayer.*

> A change in things advisedly established (no evident necessity requiring it) has resulted in inconveniences many more and greater than the evils that were intended to be remedied by such changes.

In response I will end with some words written not long after 1602 by that great essayist and Lord Chancellor, Francis Bacon, which may perhaps speak more directly to the needs of today:

> He that will not apply new remedies must expect new evils; for time is the greatest innovator.[30]

Eight hundred years after Henry Plantagenet, the common law lives on. In this time of innovation it must look forward with imagination and resource.

It is my hope and expectation that the new countries will harness the ancient strength of the common law to subdue the new evils with new remedies.

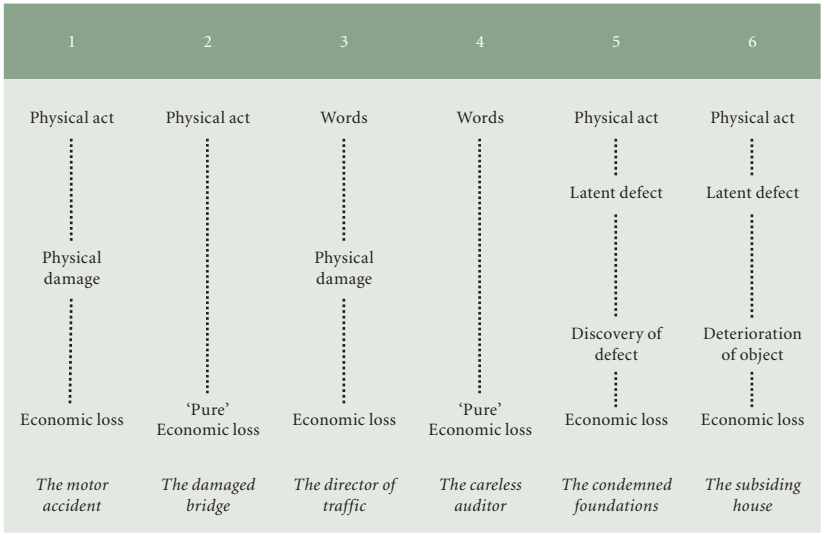
Editor's note

The decision of the House of Lords in *Anns v Merton Borough Council* [1978] AC 728; [1977] 2 All ER 492, was overruled by the House of Lords in the subsequent case of *Murphy v Brentwood District Council* [1991] 1 AC 398; [1990] 2 All ER 908, HL. See also the opinion of Lord Oliver in *Murphy*.

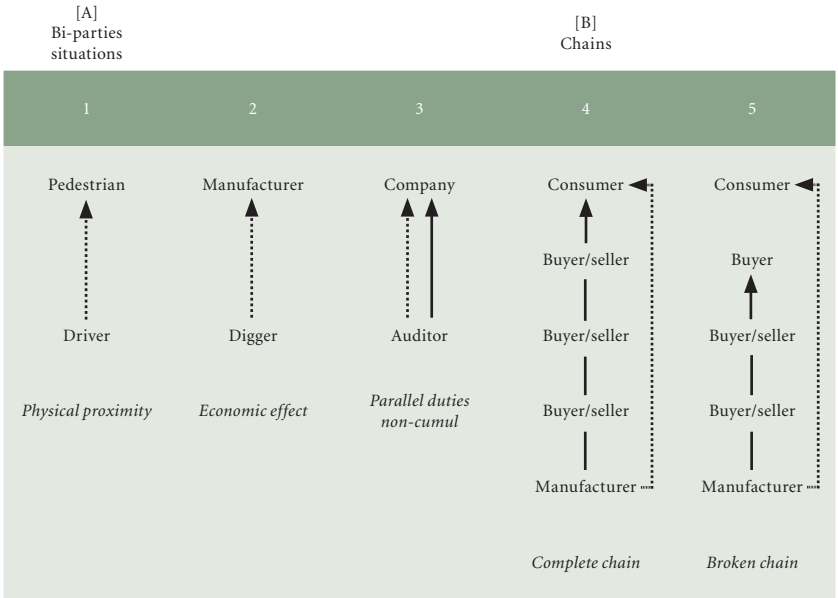
For a more detailed critique of *Anns v Merton Borough Council*, see *Judicial Legislation: Retreat from Anns* by Lord Oliver, chapter 3, above.

30 *Of Innovations* (1625).

Appendix I: Causes of Loss



Appendix II


[A]
Bi-parties
situations
[B]
Chains
1
2
3
4
5
Pedestrian
Driver
Physical proximity
Manufacturer
Digger
Economic effect
Company
Auditor
Parallel duties
non-cumul
Consumer
Buyer/seller
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Manufacturer
Complete chain
Consumer
Buyer
Buyer/seller
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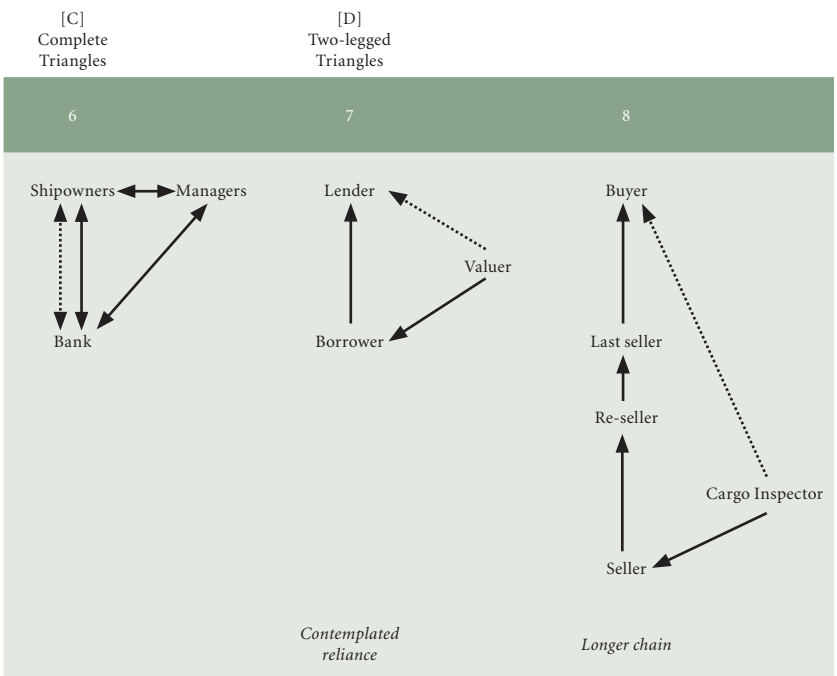
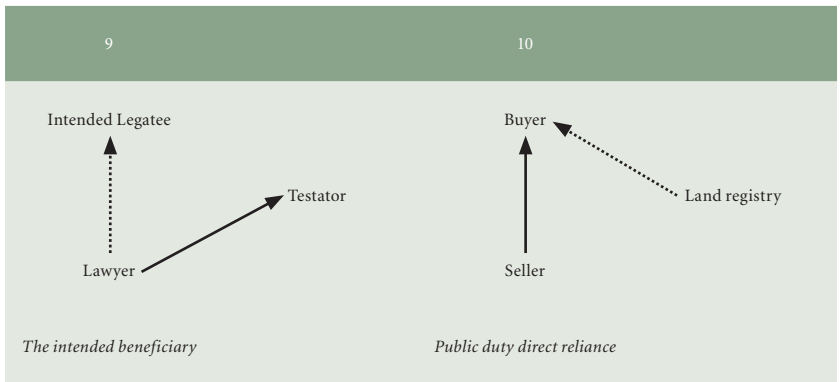
Manufacturer
Broken chain

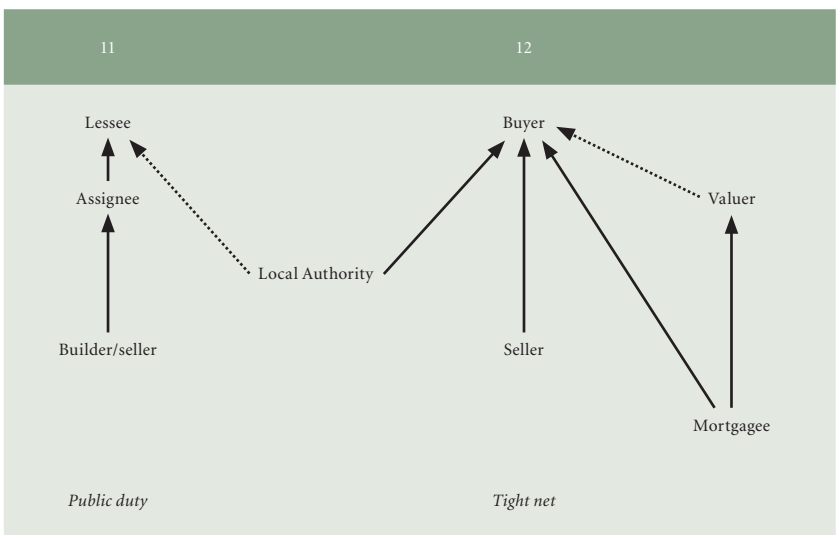

[C]
Complete
Triangles
[D]
Two-legged
Triangles
6
7
8
Shipowners
Managers
Bank
Lender
Valuer
Borrower
Contemplated
reliance
Buyer
Last seller
Re-seller
Cargo Inspector
Seller
Longer chain

Appendix II (*continued*)

[E]
One-legged Triangles



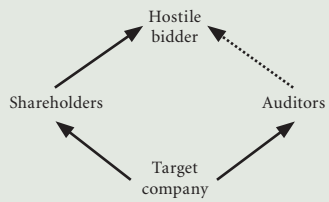
[F]
Nets



Appendix II (*continued*)

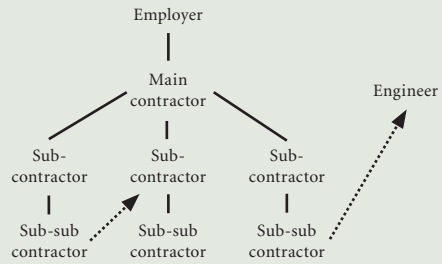
[F]
Nets
(*continued*)

13



Broken polygon

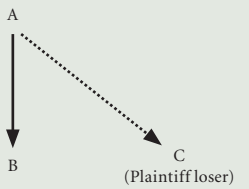
14



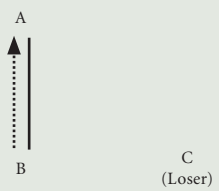
Dispersed net

[G]
Transferred rights

15

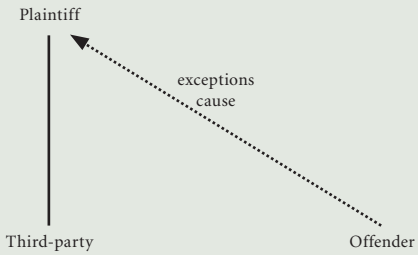


Can a person who has a contract recover the loss which he has suffered?



Can a person who has a contract recover for a loss which he has not suffered?

16



Can a person rely on a defence under the terms of a contract to which he is not a party?

The Right Honourable Lord Donaldson of Lymington

John Francis Donaldson
(*b.* 6 October 1920)

Commercial Disputes Resolution in the 90's

At the conferment of the honorary degree of Doctor of Laws by the University of Southampton in July 1988, Lord Donaldson was described as "one of the country's most distinguished lawyers, and has made a major contribution to the development of maritime law. His recommendations as chairman of the inquiry set up after the Braer disaster have been internationally acclaimed and almost universally enacted in subsequent legislation."

Lord Donaldson studied at Trinity College, Cambridge. He was called to the Bar in 1946, and became a Bencher of his Inn, the Middle Temple, 20 years later. He had an extensive practice at the Commercial Bar, and was made a Queen's Counsel in 1961.

Lord Donaldson became a Judge of the Queen's Bench Division and Commercial Court in 1966. From 1971–1974, he was President of the National Industrial

Relations Court. In 1979 he was elevated to the Court of Appeal and was the Master of the Rolls from 1982–1992. In his long tenure of high judicial office, he was responsible for many groundbreaking decisions in the field of commercial law.

Lord Donaldson has a distinguished extra-judicial career in the field of public service. He was, amongst others, President of the Chartered Institute of Arbitrators from 1982–1986. He did much to make arbitration a more effective means of resolving commercial disputes, and he has written and spoken widely on this subject. He was a Vice-President of the British Maritime Law Association from 1969–1972 and has been President since 1979. He is also the Chairman of the Financial Law Panel.

In October 1997, Lord Donaldson was asked to review the Government's involvement in salvage and intervention in pollution incidents following the grounding and subsequent salvage of the *Sea Empress* at Milford Haven in 1996. His report *Command and Control: Report of Lord Donaldson's Review of Salvage and Intervention and their Command and Control* was presented to Parliament in March 1999.

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Commercial Disputes Resolution in the 90's

Lord Donaldson of Lymington
Master of the Rolls, Court of Appeal

Text of the Seventh Sultan Azlan Shah Law Lecture delivered on 17 December 1992 in the presence of His Majesty Sultan Azlan Shah.

Your Majesty, Sultan Azlan Shah, Your Royal Highness Raja Nazrin Shah, distinguished guests.

May I begin by expressing my appreciation of the honour which you have done me by inviting me to deliver this prestigious lecture. It is an honour which is greatly increased by the gracious presence of His Majesty, a jurist of international distinction after whom the lecture is named.

My wife and I have only once before had the privilege of visiting your country. That was in 1983 and took the form of a very brief recreational visit to Penang on the way to a Commonwealth law conference in Hong Kong. It is both a privilege and a pleasure to be able to come here again and on this occasion to meet professional colleagues and see a different part of your great country.

Previous lectures have concentrated on particular aspects of substantive law. In this lecture I am departing from precedent and want to discuss a system rather than a particular aspect of the law. Let me explain why.

Substantive law, particularly in a commercial context, is complex and wide ranging. It has to regulate rights and liabilities in a very large number of different situations. It follows that any in-depth study of a particular aspect of that law, however valuable and important in itself,

may have only limited application to the daily lives of businessmen. It may be concerned with a problem which they have never met or will only meet rarely.

By contrast, there is one problem with which every businessman is all too familiar and will inevitably continue to be familiar. That is a commercial dispute. The one common need of all businessmen is for appropriate and efficient systems for resolving those disputes. Indeed, a feature which distinguishes such disputes from those between other citizens is that businessmen recognise that bona fide disputes are inherent in business transactions. They accept that their sensible resolution is an integral part of commerce. By contrast, other citizens regard disputes as something which should never have occurred. They regard them as something which are never their fault, but always the fault of the other party. That a dispute should ever have arisen is itself regarded as a personal affront. This fundamental difference in attitude enables special procedures to be developed for the resolution of commercial disputes.

A feature which distinguishes commercial disputes from those between other citizens is that businessmen recognise that bona fide disputes are inherent in business transactions. They accept that their sensible resolution is an integral part of commerce.

My experience in this field has necessarily centered upon London. However, it has also had an international perspective in that London has for at least a century been one of the biggest, and probably the biggest, centre for the settlement of such disputes worldwide. During 20 years as a practising barrister and subsequently 26 years as a judge, I have, so far as possible, specialised in commercial dispute resolution both in the courts and by means of arbitration.

As a result of the huge volume of trade which is undertaken through London or is subject to English law, legal practitioners and judges in England have a particular interest in seeking continually

to modernise and improve our system. It used to be said that "trade follows the flag", but today it would be truer to say that "trade follows the law" and it will the more willingly follow that law if the legal system concerned takes full account of the need to provide for the resolution of disputes.

In discussing commercial dispute resolution in the remainder of the decade, it is worthwhile to look back at previous initiatives for two reasons. First, no wholly new system will be produced. We shall continue to build on what has gone before. Second, there are certain basic requirements which have not altered over the years and are not likely to do so in the foreseeable future. They are five in number:

1. *Speed*—Commercial men need to know quickly what their liabilities are and to be free to move on to the next transaction. For better or for worse they need to close their accounts.

2. *Economy*—Dispute resolution, although an integral part of commerce, produces no element of added value or profit. Money spent on it is, to that extent, rightly regarded as money wasted.

3. *Consistency and therefore a degree of predictability*—There is no room for gambling in commercial dispute resolution in the sense of adopting a system where the outcome will or may depend upon which judge or arbitrator determines the dispute. Once the facts are clear, it should within limits be possible, acting on the basis of precedent, to forecast the outcome of a dispute.

4. *Expertise*—There is a need for specialist expertise on the part of those charged with the task of resolving disputes. Without this there can never be speed, economy or consistency.

5. *A minimum of friction or aggravation*—"One off" transactions between commercial men are a rarity. When the particular dispute has been resolved, they are going to have to continue

to do business together. Any aftermath of bitterness or enmity would be inimical to the long term interests of all the parties to the dispute.

A historical sketch

The first time when specialist commercial dispute resolution was undertaken by the English courts was the period 1756–1788. The Chief Justice of the day was the great Lord Mansfield. He recognised the need for consistency and predictability of decision and also for the expertise in the court. One of the problems facing him was that mercantile law was at that time in an underdeveloped state, particularly in relation to bills of exchange, insurance and shipping. His solution was to empanel a jury of experienced merchants who were familiar with the customs and usages of the City of London. This panel, although referred to as a jury, was quite unlike the modern Anglo-Saxon jury which consists of 12 men or women selected at random from the citizenry and having no particular expertise. Lord Mansfield's jurors were much more like technical commercial assessors.

It would be interesting to know more about the relationship between Lord Mansfield and his panel, but we do know that there were few changes in its membership and that the judge and his so-called jurymen became not only colleagues, but firm friends. Together they set out to clarify and develop the law merchant in the course and as part of the process of resolving disputes. They were supremely successful and achieved something of the status of a specialist legislature, since many of the customs and usages of the City of London, as declared by them, have become part of the law merchant applicable throughout the world. Whilst it will be impossible to re-invent Lord Mansfield and his jurymen as part of the dispute resolution machinery for use during the remainder of this century and beyond, there are those, including myself, who believe that they can be revived in a different form as a means of highlighting legal pitfalls and producing changes in the law with a view to minimising the scope for disputes. To this I will return at the end of this lecture.

With the death of Lord Mansfield, the impetus for providing a specialist commercial dispute resolution service seems to have faded. Commercial cases continued to be tried in the City of London, but this was largely as part of the ordinary civil work of the courts.

A century later, in the 1870's, a Royal Commission was appointed to review the working of the civil courts which had become far too slow and expensive and whose procedures were far too technical to be of real use in determining disputes between ordinary citizens, let alone between commercial men with their special requirements of speed and informality. The Judicature Commission, which reported in 1874, made extensive recommendations for the reform of the courts of law and equity, but it rejected demands from the commercial community for the creation of special tribunals whose members would be merchants rather than lawyers and for a system whereby judges would sit as arbitrators with a greater freedom to act informally. Instead, by a majority, the Commission recommended the establishment of special commercial courts where cases would continue to be tried by judges, but those judges could be assisted by commercial assessors.

The government of the day accepted the general recommendations for a reform of the civil courts, but rejected the recommendation for special courts or procedures for the trial of commercial cases. There followed a very surprising development and one which has had an enormous influence upon the development of London as an international centre for the resolution of commercial disputes. In 1895, the judges of the Queen's Bench Division of the High Court met and decided that if Parliament and the Government would not act, they would. They decided to establish a special list of commercial cases which would be tried by a judge with commercial experience.[1] They could not alter the formal statutory procedures and evidential rules, but concluded that their inherent jurisdiction to control their own courts enabled them, subject to the consent of the parties, to establish new procedures and dispense with the rules of evidence.

1 Colman, *The Practice and Procedure of the Commercial Court*, 2nd edition, page 6.

Now you might think that this approach would not be very successful, because one party might well agree to the dispute being resolved by informal procedures and on the basis of evidence which would not be admitted in the other courts, but his opponent would be unlikely also to agree. This did not in fact happen and I think that I know why.

Even in the 1950's when I was practising in the Commercial Court many of its procedures and its attitudes towards the admissibility of evidence rested upon the consent of the parties rather than upon the official rules of court. For example, in the Commercial Court any evidence was admissible, provided that it was relevant. Any other objection, such as that it was hearsay, went merely to its weight, which the judge was well able to assess. I well remember appearing for a client who wanted to prove that there had been a strike of Australian stevedores at a particular time and place. To prove this, I tendered in evidence a cutting from a local newspaper. My opponent, who was unfamiliar with the ways of the Commercial Court, objected that this was quite inadmissible in evidence. It was blatant hearsay. The judge, later Lord Diplock, thought for a moment and then said, "You're quite right, Mr Smith. This evidence is wholly inadmissible. If you wish we will adjourn this case to enable a commission of inquiry to be sent to Australia to find out whether there was a strike and to report back. That is technically the correct way of proving this fact. However, before you decide what you want me to do, I ought perhaps to remind you that this will be a very expensive and time-consuming process. You must also remember that the judges of this court, like those of any other civil court, have a complete discretion to decide who shall pay the costs of the action. You might well find that I decided to order your clients to pay all the additional costs involved." Mr Smith quickly decided that he ought to withdraw his objection and cooperate in the Commercial Court's way of doing things.

However the consents were obtained, the "Commercial List", as the court was then called, was an immediate success. The first judge of the court, Mr Justice Matthew, adopted an entirely novel attitude

towards disputes resolution. The procedures in the ordinary courts were based upon the assumption that litigants were truly hostile to one another. It also assumed that they were inherently dishonest. It followed that everything, beginning almost with the identity and existence of the parties, had to be proved strictly. Mr Justice Matthew assumed, unless and until the contrary appeared to be the case, that litigants in the Commercial Court were not hostile to one another and were more honest than not. They were indeed in dispute, but they knew the width of the area of dispute and had no interest in widening it. He also assumed that they would be represented by expert and responsible lawyers.

Against this background it was usual for the parties and their lawyers to be invited to attend upon the judge within a short time after the writ was issued. There would then be a discussion in which the precise nature and extent of the dispute was defined. Often—indeed it was probably the usual practice—the judge would dispense with any written pleadings, instead merely make a note of the issues. I confess that I do not know how documentary discovery was arranged, but it was probably left to the lawyers. Certain it is, and this can be verified from the first volume of the *Commercial Cases Law Reports,* that the final hearings were brief, and judgment was often delivered within a short time of the writ having been issued.

Commercial litigation in the 90's is, I regret to say, neither as speedy nor as simple as it was in those days. This is due, in part at least, to the complexity of modern commerce and the unbelievable quantities of paper which are generated by modern equipment. In Mr Justice Matthew's day, people thought in their heads. Today they seem to think on paper and to preserve every scrap of that paper. However, it is important that every new generation of commercial lawyers should be reminded of the Matthew approach for two reasons. The first is that the basic approach is sound and needs to be applied to all commercial dispute resolution, whether in the courts, in arbitration or in any other form. The second is that it underlines the importance of the judge or arbitrator who will eventually decide the dispute being

personally involved in the interlocutory proceedings leading up to the final hearing. No other judge can persuade the parties to take sensible short cuts, because they would always have a suspicion that a different trial judge might see the case differently. No other judge has the same persuasive authority in suggesting a settlement, because he alone can drop convincing hints as to the likely outcome if the dispute proceeds to judgment.

The Commercial Court

It was not until 1970[2] that the Commercial Court was formally established as such with its own special rules which are contained in Order 73 of the Rules of the Supreme Court. Nevertheless, the tradition has continued of "persuading" the parties to consent to a departure from the rules where this seems likely to speed the resolution of the dispute or to reduce costs. There are now ten High Court judges who are recognised by the Lord Chancellor as having the special expertise required for the hearing of commercial actions and at any one time six of these are normally engaged in the work of the Commercial Court. Regretfully I have to report that at this moment things are not normal because, for a variety of reasons, the number of judges available to sit in that court has temporarily been reduced, and the court has been plagued with a succession of very long cases. However, strenuous efforts are being made to overcome this problem and I trust that normal service will be resumed shortly.

The international character of the work of the court is demonstrated by the fact that in the calendar year 1991, in 65% of the cases tried in the court all parties came from outside the United Kingdom. In a further 23%, there was at least one foreign party and it was only in 12% of trials that all the parties were English.[3]

The other key factor in the work of the Commercial Court is that it has always sought to resolve disputes by amicable agreement between the parties rather than by judgment. That it is extremely successful in achieving this objective is shown by the fact that some

2
Administration of Justice Act 1970, section 3, now Supreme Court Act 1981, section 6.

3
Statement in open court by Evans J on 21 December 1991.

2,000 actions are begun in the court each year, but only about 100 of them come to trial.

Some of these actions would no doubt settle without the intervention of the court. However, the fact that there are some 3,000 interlocutory applications each year suggests strongly that the intervention of the court in clarifying the issues and drawing attention to the fundamental strengths and weaknesses of each party's case is a major factor in inducing a frame of mind in which settlement becomes a real option. In this context, I should draw attention to a feature which is unique to the Commercial Court, namely, that all interlocutory applications are heard by High Court judges and not by masters, that is to say junior judges. Furthermore, where possible, although this cannot always be achieved, they are heard by the judge who will ultimately try the case if it is not settled by agreement between the parties. The strength of this system lies in the fact that a High Court trial judge has the standing and authority to make suggestions as to ways in which the case can be tried more economically and, indeed, as to settlement which would not be so persuasive if they came from a more junior judge. It is, however, costly in the use of High Court judge power since it calls for six judges to be sitting simultaneously in different courts at any one time.

International trade tends to be centred on London—hence the need for the London Commercial Court and the fact that so much of its work is concerned with overseas disputes. But what might be described as "domestic" commerce is carried on both in London and in a number of provincial centres, such as Liverpool, Manchester, Leeds, Birmingham and Bristol. It is therefore somewhat surprising that similar specialist courts have until recently never been established in those centres. A start has now been made in Liverpool and Manchester and there are plans for such courts near London and in Bristol. There is some argument as to what they should be called in order to avoid confusion with the Commercial Court, and the current thinking favours "Mercantile Court".

But I would not like you to think that it is only the Commercial Court which is mindful of the special needs of the commercial community.

Panel on Take-overs and Mergers

In 1986, the High Court was faced with an application by Datafin plc seeking the judicial review and quashing of a decision of the City of London Panel on Take-overs and Mergers.[4] This had ruled that there had been no breach of its Code of Conduct in the course of the take-over battle which was still in progress.

The Panel is a unique body. It has no legal personality. It has no legal powers, whether derived from the common law, statute or the prerogative. It has no contractual rights. It is composed of a number of senior individuals representative of the London Financial Market and appointed by the Governor of the Bank of England. It promulgates, amends and interprets its Code of Conduct. It rules on whether there has been a breach of the Code, yet it has no power to impose sanctions.

However, de facto, it is a body of immense power. I say that because the Secretary of State for Trade and Industry, the International Stock Exchange and the various professional bodies will almost automatically accept its rulings that the Code has been breached and will impose severe disciplinary sanctions on all concerned in the breach.

The High Court ruled, correctly on the existing authorities, that it had no jurisdiction to judicially review the decision of a body of persons which was not exercising statutory or prerogative powers. The Court of Appeal reversed this decision, holding for the first time that the true test was whether the body was performing a public duty, which the Panel undoubtedly was. Whilst the court dismissed the appeal on its merits, it also laid down how this jurisdiction should be exercised in future.

4 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] 1 All ER 564

In take-over and merger situations, speed and certainty are of the essence. There was clearly a risk that parties to a take-over or merger would make applications to the court for purely tactical reasons in order to produce delay or uncertainty. The court therefore ruled that such applications should not be entertained until after the take-over or merger battle had been concluded. Only at that stage would it consider reviewing rulings by the Panel. In doing so, it would not quash those decisions, even if it considered them to have been clearly erroneous, for to do so would re-open the take-over or merger. Instead, it would give a declaratory judgment giving guidance to the Panel for the future. The furthest that it would go by way of injunctive order was to prohibit disciplinary action against anyone whom the Panel had wrongly held to have acted in breach of its Code.

The Panel on Take-overs and Mergers is a body of immense power. I say that because the Secretary of State for Trade and Industry, the International Stock Exchange and the various professional bodies will almost automatically accept its rulings.

The House of Lords refused leave to appeal and the Court of Appears decision is thus definitive of the law.

This novel development was welcomed by the financial markets. It was also welcomed by the Panel itself, since it headed off the very real possibility of statutory control being imposed on the Panel. The only criticism came from a few academic writers who complained that this amounted to legislation by the judiciary, which it probably did. "Judicial engineering" is perhaps the more apt description.

Arbitration

I have been talking about courts as a means of resolving commercial disputes in the 90's, but it is almost certainly the case that the majority of such disputes are and will continue to be resolved not by litigation, but by arbitration. Here again, London has established

itself as one of the leading centres. Arbitrations can be divided into two classes—trade arbitrations and general arbitrations. A typical example of a trade organisation which supplies arbitration services for its members and for those using its forms of contract is the Grain & Feed Trade Association (GAFTA). In recognition of the fact that disputes are an integral and inevitable concomitant of commerce and that the existence of a trade arbitral tribunal benefits everyone in the trade, suitably qualified traders rather than lawyers form an arbitration panel and charge purely nominal fees for their services. The procedures adopted depend upon the nature of the dispute. Thus if the issue is whether a shipment was of "fair average quality" or conformed to sample, one arbitrator appointed by each party and an umpire appointed by the two arbitrators may need only to look at the grain or smell it. On the other hand, if the dispute concerns the true meaning of a trade contract, the tribunal will often have a legal adviser and will be addressed by lawyers, often at length.

GAFTA's arbitration rules, like the rules of some other trade associations, provide for appeals to an appeal arbitral tribunal, also consisting of experienced traders advised where necessary by a lawyer. The number of arbitrations undertaken each year varies according to whether there are natural phenomena which affect the flow or quality of grain and feeding stuffs. In the year ending 30 September 1991 there were 214 arbitrations and 49 appeals, but this figure is, I think, untypically low. Certainly at the time of the great US soya bean export prohibition in the 1970's, there were thousands of arbitrations. Unlike litigation, trade arbitrations normally end in an arbitral award, rather than in a consensual settlement. The reason for this is not clear, but it is probably related to the low cost of the procedure since, in a typical case, both parties will argue their own cases without the assistance of lawyers and, as I have pointed out, will not be required to pay significant sums to the arbitrators.

But besides trade associations whose arbitration services are ancillary to their principal activities, there are bodies whose sole

purpose is to provide arbitration services, usually on an international basis. Some, like the London Maritime Arbitrators Association, specialise in particular types of dispute. Others, like the London Court of International Arbitration (LCIA) and the Chartered Institute of Arbitrators, undertake the resolution of commercial disputes generally. Although some of the arbitrators on their panels are English, many are drawn from other countries, thus enabling a tribunal to be appointed consisting entirely of "neutrals" in terms of nationality. Very large sums of money are involved. Thus 45% of the disputes handled by the LCIA come in the US$1–10 million range, the smallest sum in dispute having been US$20,000 and the largest so far US$600 million. In addition, there are organisations such as the International Chamber of Commerce in Paris which have London-based panels of arbitrators.

I have been speaking of the arbitration services based upon London, because they are those with which I am most familiar and they are, I believe, the most extensive which exist anywhere. However, as you will know, there are other smaller regional and national arbitration centres throughout the world. One is here in Kuala Lumpur. Others are in Singapore, Hong Kong and Australia.

The advantages of arbitration over litigation in the courts are fourfold:

1. *Privacy.* Although the English courts will seek to conceal commercially sensitive information when trying cases, this is more easily achieved by arbitration. In addition, resort to arbitration may well assist the parties by concealing from their competitors the very fact that there is a dispute in existence.

2. *Speed.* Although the courts can, if the need arises, move with startling speed, arbitration is in general quicker, because the supply of arbitrators is much larger than that of judges.

3. *Expertise.* By a suitable choice of arbitrator the parties can ensure that the tribunal itself has whatever specialised expertise

is considered desirable in the light of the subject matter of the dispute.

4. *Enforceability.* There are often difficulties in the way of enforcing the judgments of the courts of one country in the courts of another country. The existence of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for the systematic enforcement of arbitration awards in the many countries which are parties to it. These, of course, include Malaysia.

The great potential disadvantage of arbitration is the fact that unless there is some supervisory control by the courts, arbitrators would be free to depart from the law and apply their own often idiosyncratic views as to what the justice of the case required. As a result, awards would become unpredictable and predictability of result is one of the prime requirements of commercial dispute resolution. Arbitrators also need to be able to call upon the power of the State to summon witnesses and obtain disclosure of documents, if those concerned are not minded to co-operate.

Both these points have long been recognised in England, and English law provides in the Arbitration Acts 1950–1979, following earlier Acts, for the courts: (a) to come to the assistance of arbitrators if so requested; and (b) to rule on questions of law which may arise in the course of an arbitration. Prior to 1979, this right to seek rulings on questions of law was widely abused, parties seeking a ruling on trifling or peripheral points simply in order to obtain delay and then appealing to the Court of Appeal against the High Court's ruling. Section 1 of the 1979 Act and judicial decisions following upon it—notably *The Nema*[5]—have severely restricted this right of appeal by confining it to cases in which the ruling "could substantially affect the rights of the parties" and by introducing a requirement for leave to appeal being obtained from the High Court. Furthermore, the right to take such a ruling to the Court of Appeal has been further restricted

5 *Pioneer Shipping Ltd v BTP Tioxide Ltd, Nema, The* [1982] AC 724; [1981] 2 All ER 1030; [1981] 3 WLR 292, HL.

to cases in which the High Court itself certifies that the issue is one of general public importance (see section 1(7)).

Alternative Disputes Resolution

But straightforward litigation or arbitration are not the only means of resolving commercial disputes in the 90's. Much attention has recently been directed towards what is known as Alternative Disputes Resolution (ADR). Essentially, this describes systems which are designed to assist the parties to a dispute in a search for an amicable settlement. Their current popularity owes much to the cost both of litigation and of formal arbitration and to a recognition of the real commercial advantage of maintaining good business relationships notwithstanding the existence of the dispute. The various bodies "marketing" ADR, and I use the word "marketing" advisedly, all seek to make their own form appear different from, and better than, those of their competitors. However, they all fall into one or other of two broad categories.

It is not the function of a mediator to express any concluded view as to who is right or who is wrong and still less to give a binding decision. His function is to explain to each party the weaknesses of that party's case and the strengths of the case of the opposing party.

The first is mediation or conciliation. The terms are interchangeable, and for convenience, I will refer only to mediation. It is in the nature of a commercial dispute, like most other disputes, that each party considers that he has a far better case than his opponent. It is also a feature of human nature, in commerce as elsewhere, that no amicable settlement is possible if both parties think that they will win. It is not the function of a mediator to express any concluded view as to who is right or who is wrong and still less to give a binding decision. His function is to explain to each party the weaknesses of that party's case and the strengths of the case of the opposing party. Ideally, he will persuade each party that they are likely to lose.

Having thus induced a frame of mind which makes settlement possible, he may make suggestions for a compromise. But if he does, they remain only suggestions. Neither party is under any obligation to accept them. However, it is claimed that this process does in fact produce settlements.

The second category of ADR is the mini-trial. This is designed to achieve the same result, but by a slightly different method. The key requirement is that senior executives of the parties, whether or not accompanied by their lawyers, shall appear before a neutral person. Each then deploys his case in summary form. It is an essential requirement that the executives have authority to settle the dispute and the theory is that, having appreciated the strengths and weaknesses of the respective cases as they emerge in the course of the mini-trial, they will be minded to settle. As with mediation, the neutral presider may tell the parties what, having heard the parties' cases, he thinks of each and may suggest a compromise settlement, but nothing that he says is in any way binding upon the parties.

It is of the essence of ADR that if it does not lead to a consensual settlement, there will have to be further proceedings leading to a decision binding upon the parties. It therefore merely adds to the costs unless there is, or is likely to be, a will to settle. My own view is that it is better offered as a voluntary and preliminary part of litigation or arbitration. There is then greater pressure to settle as the stage is set for a binding decision should no settlement result.

Ombudsmen

No review of commercial disputes resolution in the 90's would be complete without a reference to the Ombudsmen appointed by the English banks, building societies and insurance companies. Their scope is limited in the sense that they only deal with complaints by individual customers, as contrasted with companies. The whole cost of the scheme is met by the industries concerned. They are a special blend of mediation and arbitration. Complaints are investigated

and the parties informed of the Ombudsman's preliminary decision. The complainant can, if he wishes, accept that decision, whereupon it becomes binding upon him and upon the bank, building society or insurance company concerned, since these organisations have agreed to accept any preliminary decision which is accepted by a complainant. Alternatively, the complainant can enter into negotiations based upon the preliminary decision, although these are unlikely to be successful. In the further alternative, he can litigate his claim, but very few complainants do so.

Financial Law Panel

Last, but by no means least, I should like to give you news of the return of Lord Mansfield and his jurors, albeit in a new form. It is a pioneering enterprise designed not to resolve commercial disputes, but to avoid them. It is called the Financial Law Panel and is being set up by the Bank of England, the Corporation of the City of London and the London Wholesale Financial markets. It will consist of a legally qualified Chairman, three other lawyers and eight very senior and highly respected lay members who are involved in the financial markets on a day-to-day basis and will have supporting staff. Its purpose will be to identify problem areas in the law with which the financial markets are concerned. By "problem areas", I mean situations in which the law is not clear or in which the law prevents, or may prevent, business being transacted in ways to which no reasonable objection could be raised. Having identified such problem areas, the first task of the Panel will be to warn the market. It is thought that if the Panel had been in existence, it would have warned that recent borrowings by local authorities—the so-called interest swap transactions—might be held to be *ultra vires* the authorities concerned, and that the transactions would then not have been undertaken or would only have been undertaken in a different form. Having warned, it will seek to have the law clarified by test cases in the courts or amended by legislation.

There is reason to believe that where such test cases are brought before the English courts, those courts will depart from precedent and

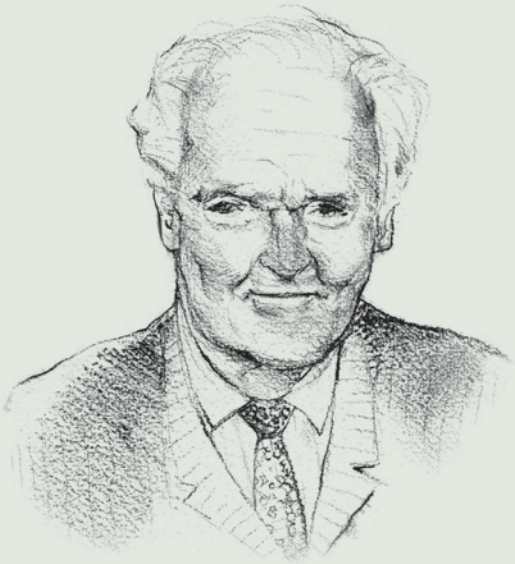
welcome the submission by the Panel of what is known in the United States as a "Brandeis Brief". This is a document which does not seek to express any view as to the merits of the views of the parties to the test case, but informs the court of the consequences for the markets of alternative decisions which may be open to the courts.

There is also reason to believe that if a legislative remedy is contemplated, it may be possible to avoid the inaction which seems to follow upon recommendations for changes in the law formulated by the Law Commission, a statutory body with a general responsibility for law reform. The basis for this belief is the specialised nature of the Financial Law Panel's remit, the economic importance to the nation of the London Wholesale Financial markets and the fact that the Panel will have government "observers" who, if convinced of the sense of the Panel's proposals, will wish, and be in a position, to promote remedial legislation as a matter of urgency. The Panel will also be able to give the Government authoritative advice on the commercial consequences of legislation which the Government may of its own initiative be minded to promote, and on draft European Community directives.

So far as I am aware, there is no similar body anywhere else in the world. I wish I could tell you more about its working, but the concept is so novel and so recently conceived that at present it has only reached the stage of the Panel's Chairman being appointed. He is addressing you at this moment. If in the years to come I again visit Malaysia, I will tell you how it has worked out.

The Right Honourable Lord Mackay of Clashfern

Commercial Fraud Trials: Some Recent Developments



James Peter Hymers Mackay
(*b.* 2 July 1927)

Lord Mackay of Clashfern, Lord Chancellor 1988–1997, was born James Peter Hymers Mackay in Edinburgh on 2 July 1927.

He was educated at George Heriot's School, Edinburgh and at Edinburgh University, where he graduated with a Masters in Arts with Honours in mathematics and natural philosophy. He then lectured in mathematics at the University of St Andrews and did post-graduate work in mathematics at Trinity College, Cambridge.

Lord Mackay graduated from Edinburgh University with an LLB in 1955, and in the same year, he was admitted to the Faculty of Advocates (the Scottish Bar). He became a Queen's Counsel in 1965. In 1976 he was elected Dean of the Faculty of Advocates (leader of the Scottish Bar). From 1976–1979 he was also a part-time member of the Scottish Law Commission.

In 1979, the Prime Minister (Mrs Margaret Thatcher) invited Lord Mackay to become Lord Advocate. The Lord Advocate is the Senior Law Officer of the Crown for Scotland in charge of all public prosecutions in Scotland, as well as legal adviser to the Government. He became a Life Peer in the same year. In 1984 Lord Mackay was appointed a Senator of The College of Justice in Scotland (ie, a Member of the Court of Session, Scotland's highest court).

In 1985 he became a Lord of Appeal in Ordinary, one of the two Scottish members of the Appellate Committee in the House of Lords. In October 1987, Mrs Thatcher appointed him as the Lord Chancellor, and a member of her Cabinet. This unprecedented appointment of a "non-English" lawyer as head of the English judiciary and legal system was a singular honour for Lord Mackay, and a mark of the respect in which he was held—both by the judiciary and by his political colleagues.

His ten years as Lord Chancellor were turbulent and controversial as he pushed through fundamental reforms to the English legal profession, for instance, the abolition of barristers' monopoly rights to plead in the higher courts. One of the leading cases he heard in the House of Lords was *Pepper v Hart* [1993] 1 All ER 42, HL, where he delivered the sole dissenting judgment.

Among the judgments delivered by Lord Mackay in the Privy Council on appeal from Malaysia are *Manilal & Sons (M) Sdn Bhd v Mahadevan Mahalingam and Another* (1986) 4 PCC 535 (a case dealing with limitation of actions); and *Peter Anthony Pereira and Another v Hotel Jayapuri Bhd and Another* (1986) 4 PCC 563 (a case dealing with contracts of employment). Lord Mackay also delivered the judgment of the Privy Council in the well-known case on negligence in *Dr Underwood S v Ong Ah Long* (1986) 4 PCC 613.

Lord Mackay retired as Lord Chancellor in 1997. He is currently Chancellor of Heriot-Watt University, and the present Editor-in-Chief of *Halsbury's Laws of England*.

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Commercial Fraud Trials: Some Recent Developments

Lord Mackay of Clashfern
Lord Chancellor

Text of the Eighth Sultan Azlan Shah Law Lecture delivered on 1 April 1993 in the presence of His Majesty Sultan Azlan Shah.

Your Majesty, Vice Chancellor, distinguished guests, ladies and gentlemen, it is a great honour and privilege for me to have been invited to give this lecture, the Sultan Azlan Shah Law Lecture, which was founded in Your Majesty's honour, as a distinguished lawyer, and which Your Majesty has supported since its foundation.

This not only allows me to speak to you about a very topical subject in the United Kingdom but also to visit your beautiful country and to learn more about developments in the law in Malaysia. The fact that your senior judge bears the title of Lord President and that is the title by which the senior judge is known in Scotland, makes me feel very much at home here. I also know a little about Malaysian law and cases from the appeals that I heard as a member of the Privy Council. I joined the Privy Council after appeals from Malaysia had ceased to come to that forum, but there were some still to be heard and I came to know something of the Malaysian system in that way. I had the privilege of giving the judgment of the Board in some of these cases.

I have chosen as my subject this afternoon an area of law and court procedure which has raised many problematic issues in Great Britain. I know that there are many distinguished lawyers amongst the audience and I hope that what I have to say will prove of some interest to them. I hope that it will also prove of interest to those who may come from other fields. I have tried to make what I have to say stimulating for the former

and at least intelligible for the latter. I have, however, assumed a fair degree of knowledge of the English legal system since I understand that many of you will be familiar with the way in which it operates.

I should emphasise that I shall speak only about the situation in Britain and my remarks relate to the situation there. A significant difference between our two systems is the fact that the evidence in these long trials in Britain is assessed by a jury. Some consider this a drawback in our system and I shall refer to that later. But I believe that what I have to say may have some relevance for your system as well since my lecture raises issues related to the conduct of these trials, the resources they should consume, how the time that they take can be limited, whether and how the judges should control the timetable without causing injustice, and what procedural avenues are possible to deal with these matters. These issues are necessarily important in any court process.

Long fraud trials

Long fraud trials were examined by the Committee on Fraud Trials, chaired by Lord Roskill, which reported in 1986, and by Parliament in the United Kingdom during the passage of the Criminal Justice Act 1987. In recent months, however, the problem of very long trials has received renewed attention. In this lecture, I shall look at ways of improving the conduct of the prosecution and defence, improving pre-trial procedures and increasing the powers of the judge to control the proceedings once the trial has started.

Some complex trials will inevitably be long but, in the interests of justice, no trial should last longer than is required to explore the issues and for a true verdict to be returned. As the trial continues, the strain on all participants (judge, jury, defendants, lawyers and witnesses) becomes greater—sometimes intolerably so—whilst the recollections of witnesses and jurors inevitably dim. Equally, the cost to the public purse is unjustified if a trial lasts longer than is necessary. It is arguable that many trials could be shortened; it is

also arguable that there should be a maximum time for a jury trial and that it should be fixed having regard to the factors that I have mentioned.

As many of you will know, in the light of concerns about a recent series of Court of Appeal decisions in which earlier convictions were set aside, a Royal Commission is currently studying the criminal justice system in England and Wales. It is due to report this summer. It is considering a number of matters of general importance. We look forward to its report with great interest. However, in these circumstances, it would not be right for me to speak about a number of options which are relevant but are more specifically under consideration by the Royal Commission or other bodies. These are such matters as the removal of many technical cases of fraud from the criminal justice system to allow them to be dealt with by, for example, professional or trade bodies; the creation of a general fraud offence; removing the right of jury trial in such cases; the creation of a formal system of plea bargaining; the replacement of committal proceedings; the use of information technology to present evidence in court; and perhaps most controversial of all, the abolition or restriction of the right of silence. I would say, however, in relation to jury trial that this was considered very carefully by the Roskill Committee, which formed persuasive arguments for removing juries from fraud trials and placing the assessment of the facts in hands of a specialist tribunal headed by a judge. This was not the point of view accepted by the Government nor by Parliament, so jury trial has remained for these cases.

First, may I give some background information. While the average length of contested Crown Court trials is falling, there are a growing number of individual trials which last for many months; some exceed years. With a number of further potentially lengthy cases likely to be tried soon, it is clear that, unless steps are taken, what would only very recently have been regarded as unacceptably long trials may become more commonplace. Not all long trials involve fraud. In 1991, of the 14 trials identified as lasting more than 200

court hours (approximately two months), only eight could be classed as fraud. Other cases included offences of sexual abuse of children, burglary and armed robbery. Clearly, there are factors which can lead to any criminal trial lasting a long time. It may involve complicated and lengthy investigation.

In addition, there is a perception that apart from the obvious "long" trials, many criminal trials take considerably longer than they should. This may, in part, be a result of the longest trials affecting the culture of the criminal trial generally so that some types of trial last longer than they need to, even though, as I have said, the average length of all trials around the country is getting just a little shorter.

Two examples

Some brief facts on recent trials may help. As examples I shall refer to *Guinness 1* and *Blue Arrow. Guinness 1,* more properly, *The Queen v Saunders and others*[1] was the first trial in which full use was made of the procedures under the Criminal Justice Act 1987. Saunders, the former Chairman and Chief Executive of Guinness, faced charges arising out of an alleged share support operation mounted by Guinness in its bitterly fought takeover battle with Argyll in the ultimately successful £2.7 billion bid for the drinks group Distillers. The trial took place between February and August 1990, and lasted 113 days. Numerous preparatory hearings took place between October 1989 and February 1990. There were 73 witnesses and ten days of speeches. Saunders himself gave evidence for over five weeks. The jury deliberated on an indictment with 20 counts for a total of 34 hours spread over six days. All four defendants were convicted and Saunders was sentenced to five years' imprisonment, though this was later reduced by the Court of Appeal. The costs to legal aid were £1.3 million. Like a popular film, *Guinness 1* was followed by *Guinness 2*, *3* and *4*. *Blue Arrow* began in December 1990 and ended more than a year later in February 1992. It involved ten defendants (three companies and seven individuals). There were 123 witnesses and

1 [1990] Crim LR 820.

611 statements running to 4,464 pages. The principal charge related to a conspiracy to defraud by the professional advisers to Blue Arrow PLC in relation to a share rights issue in 1987, at the time of the sharp fall in the London Stock Exchange. There were 15 counsels in all. Four of the defendants were legally aided; the total amount of these costs so far (the final bills have not yet been settled) is over £865,000. The remaining six defendants, since they were found not guilty, can claim costs from the State. These are estimated to be in the region of £16 million. Four defendants were found not guilty by order of the court, five not guilty by direction, one not guilty by the jury, and four were convicted but these convictions were quashed on appeal.

The increase in the number of lengthy fraud trials may be directly (but only in part) as a result of the creation of mechanisms which result in the prosecution of more of these offences. Accepting that these cases should continue to be tried, it is clear that trials lasting as long as a year, or even six months, are likely to impose an enormous burden on the system. The issues will become blurred in the minds of all participants and it must be questioned whether any participant will be able to recall the precise nature of evidence given many months before. As Lord Justice Mann said in the *Blue Arrow* appeal,[2] referring to the earlier trial,

> The awesome time-scale of evidence, speeches and retirement and not least the two prolonged periods of absence by the jury (amounting to 126 days) could be regarded as combining to destroy a basic assumption. This assumption is that a jury determines guilt or innocence upon evidence which they are able as humans both to comprehend and remember, and upon which they have been addressed at a time when the parties can reasonably expect the speeches to make an impression upon the deliberation.

Allied to this is the physical and psychological strain that such trials place on all concerned. The defendant may well have been subject to investigation for some years prior to the trial. There is a danger that

2 *R v Cohen and others* (1992) Unreported (CA Crim). See *The Independent*, 29 July 1992; *The Times*, 9 October 1992.

the trial itself may be a punishment. Irrespective of whether jurors are capable of trying the cases, is it reasonable to expect them to suffer the personal inconvenience of doing so during such a period?

Costs of long trials

The costs of such proceedings are also a matter of widespread concern. The vast majority of criminal trials are publicly funded. Contributions to legal aid are negligible, and orders for costs infrequent. A trial day, excluding the costs against the defence of legal representatives and police witnesses etc, costs the taxpayer approximately £1,900. Each prosecution and defence counsel might typically be paid daily refreshers of between £250 and £500. A senior solicitor attending court might be paid £200 per day. These figures do not include the very substantial brief fees paid to counsel or the payments in respect of preparation paid to witnesses or the fees of expert witnesses. Moreover, some trials will involve use of information technology equipment to assist the presentation of evidence.

From these figures, we can see that a single trial day involving four defendants (two defence Queen's Counsels, four defence juniors and four senior solicitors, with one prosecution QC and junior counsel), without witnesses, travel expenses or information technology, might cost the taxpayer £5,500. Over a five-month trial that would total at least £550,000. I have already referred to the millions of pounds spent providing legal representation in *Guinness 1* and *Blue Arrow.*

Causes of long trials

What are the causes of long trials? Many long trials involve complex allegations of fraud occurring over a considerable period of time and involving a number of transactions. It is reasonable to expect that they will take longer than an average criminal trial where the issues are simpler. Nevertheless, it is necessary to consider more precisely

why they last as long as they do. Reasons seem to include the failure to identify key issues at an early stage; the absence of adequate procedural rules to assist the speedy resolution of issues; the absence of a general requirement of defence disclosure resulting in the ability of the defence to refuse, for whatever reason, to cooperate; the indictment being too long, too complex or unclear; lawyers who are verbose or take poor points, call inessential evidence or ask too many questions; the absence of judicial powers to control the course and manner of proceedings effectively.

The competence, style and methods of lawyers involved in a complex case determine to a large extent its length. It may not happen in this country but it is suggested in England that some of our lawyers do lengthen proceedings unnecessarily through unfamiliarity or inefficiency. I make no judgment on that question.

The competence, style and methods of lawyers involved in a complex case determine to a large extent its length. It is suggested in England that some of our lawyers do lengthen proceedings unnecessarily through unfamiliarity or inefficiency.

All manner of work, if done inadequately, may result in unnecessarily long trials—for example, the initial preparation of the case by both prosecution and defence solicitors, including advice given to clients about the chances of success and the options for pleas; the preparation of indictments and case statements; the preparation of instructions to counsel; the initial preparatory work by counsel; the conduct of pre-trial reviews and preparatory hearings; and the conduct of the trial proper.

In addition, the late return of briefs, owing to listing or other difficulties, may well affect the ability of counsel to handle the subject matter of these complex trials. All these areas are matters of basic professional competencies and apply to both prosecution and defence.

I certainly believe that there may be scope to improve professional training for handling long trials generally and fraud trials

in particular. There are also skills which are particularly important for all long trials—identification of the key issues, making points succinctly and the inculcation of good practice generally. Even in very complex prosecutions there are usually some essential key points. It is also for consideration whether rights of audience or the grant of legal aid should be limited to practitioners who have satisfied their professional bodies as to their competence to handle these complex trials.

The prosecution

Let us consider the case of the prosecution. Obfuscation and lack of clarity can never benefit a prosecutor. Long trials will usually, but not inevitably, be those of very serious allegations and will call for the prosecuting authority to instruct the most experienced of counsel. Experience alone, however, may not necessarily provide the skills needed to limit a trial to the essentials that the prosecution requires to prove their case.

Both the Crown Prosecution Service and the Serious Fraud Office evaluate the performance of counsel involved in their cases. In the past, insufficient attention may have been paid to counsel's ability to prosecute a case effectively but succinctly. More attention is now being paid to this ability.

The prosecution should always bear in mind that they are not conducting a free-ranging enquiry. They are laying before the court evidence to support the case in question, and by the time of the trial their case should be sufficiently defined.

The prosecution bears the primary responsibility for deciding the eventual shape and length of a case. Decisions taken at the early stages of proceedings concerning which issues and which defendants are to be tried will inevitably influence the likely duration of the case and the response of the defence. Often, but by no means always, counsel will be involved in the early decision-making, but it is for the prosecuting authority which instructs counsel to ensure that cases are prepared in a manner reflecting the criteria set out in the Code for Crown Prosecutors.

When proceedings are under way, the prosecution must also play its part in controlling the progress of the case. Activity by the prosecution requires to be directed towards clearly defined objectives, with performance subject to regular monitoring and review. The prosecution should always bear in mind that they are not conducting a free-ranging enquiry. They are laying before the court evidence to support the case in question, and by the time of the trial their case should be sufficiently defined.

The defence

So far as the defence is concerned, it must be right to consider whether inadequacies in defence lawyers can be addressed without affecting a defendant's rights or the proper conduct of the trial. It has always to be borne in mind that the onus of proof is on the prosecution.

This can mean that there is very little incentive for the defence to be cooperative. Defence lawyers are employed to advise their clients and take their instructions on the conduct of their defence. Defendants may perceive that their chances of an acquittal would be strengthened by adopting delaying tactics and might put considerable pressure on their lawyers. In the last resort, these can include dismissing all or part of the team of lawyers, which will almost inevitably lengthen the trial. Against this background, it is understandable that, in protecting their client's interest, defence lawyers may not feel able to proceed as quickly as otherwise they might wish.

Orders made under section 19 of the Prosecution of Offences Act 1985 (commonly referred to as "unnecessary costs orders") are available when either party has incurred costs as a result of an unnecessary or improper act by the other party. The order is made against the defendant or the prosecuting authority. A new power has been introduced under section 19A to make what are called "wasted costs orders". These can be made against a legal representative as a result of an improper, unreasonable or negligent act or omission.

Comparatively few orders under either section have been made, and it may be that there is a reluctance to make a section 19 order against a defendant when it was really the fault of his legal representative. Section 19A is a comparatively recent introduction but it is not clear whether the power to make such order is yet being used appropriately and sufficiently. It has to be said, however, that in long cases so much depends on the circumstances of the case that it may be very difficult to use these powers effectively. They can, in any case, only be used after the costs have been incurred and therefore the damage has already been done.

Very few defendants in long trials are unrepresented. Cases in the past have had to be abandoned because the judge decided that the litigant in person was unable to continue his defence. The reasons why a litigant decides to represent himself may include lack of confidence in existing legal representatives, lack of funds, an unwillingness to take legal aid on the conditions prevailing or, at worst, a desire to wreck the trial. It cannot be right that a trial should be abandoned because the defendant refuses to be adequately represented.

Defendants do not have an unfettered right to conduct their own defence in the manner they choose. Their evidence, and questions on their behalf, must satisfy the criteria of relevance and admissibility.

I am aware of the difficulties that may be involved in obliging a defendant to accept a lawyer he has not chosen. Defendants do not, however, have an unfettered right to conduct their own defence in the manner they choose. Their evidence, and questions on their behalf, must satisfy the criteria of relevance and admissibility. Further restrictions are included in section 34A of the Criminal Justice Act 1988, inserted by the Criminal Justice Act 1991. A recent suggestion is that the court should have the power to appoint an *amicus curiae* to represent an unrepresented defendant. This power would exist where the defendant has been offered but has refused legal aid, and where in the opinion of the judge, the interests of justice require it.

There are obvious difficulties about establishing the role of such an *amicus,* particularly since he might well have no instructions and therefore be unable to cross-examine witnesses.

It could however provide a helpful solution in some cases. It would be no solution in a trial where the defendant is bent on disrupting the proceedings. Indeed, in some cases, a trial might be lengthened by the presence of an *amicus* and there is a possibility of an increase in the number of appeals.

It is envisaged by those that suggest this that some contribution may need to be levied from the defendant to cover the costs of the *amicus.* Normally, if the defendant is acquitted, defence costs will come out of State funds. If found guilty, it is possible that the defendant may not have funds to make any contribution.

Possibly the trial judge should have the discretion to require the defendant to pay such contributions as are appropriate, taking into account all the circumstances.

Lawyers' remuneration

That leads me to the difficult subject of lawyers' remuneration—I say difficult because the rapid rise in the legal aid budget in England and Wales, which has now risen to more than £1 billion a year, has presented me, as the Minister responsible, with no end of difficulties. Under the present system, legal fees in these types of cases are paid after the trial is completed in the light of all the work done. Counsel is paid a brief fee, and amongst other amounts, refreshers to cover his daily appearances in the case. Solicitors are paid the costs of preparation and attendance. The prosecution endeavours to set fee parameters before the trial either by pre-making the brief fee or by agreeing an hourly rate payment for preparation plus the payment of refreshers to cover daily appearances. In some cases, however, prosecution fees are also negotiated ex post facto.

It may well be that a change in the way that the professions are remunerated for long cases could prove one of the means by which the length of trials could be reduced. I suppose it depends on your view of human nature. It has been suggested, for example, that if defence briefs were pre-marked (either inclusive or exclusive of refreshers), there would be considerable (but not improper) pressure on counsel and clients to ensure that cases are kept within the expected time estimates. Further, the process of fixing fees in advance would focus minds more precisely than at present on the expenditure of public money involved in pursuing a case in a particular way.

Improvements to pre-trial procedure

I should now like to consider improvements that might be made to the procedure before a trial commences. A trial on indictment starts with the empanelling of the jury, except in cases where a preparatory hearing is ordered (under section 7 of the Criminal justice Act 1987) when the trial starts with the preparatory hearing. Quite apart from saving costs, there are very strong arguments in favour of limiting the length of the portion of the trial which takes place before the jury.

The judge is in control of the proceedings and has considerable powers to affect the conduct of a case. In long complex trials, he or she may be faced with difficulties in the following areas: the issues will be complicated and technical, and the ramifications of any rulings made early in the trial may not be immediately apparent; there will often be a large number of lawyers some of whom may have difficult clients and some of whom, as I said earlier, may have no particular interest in cooperating; the jury will be required to follow the case over a long period; the length of the trial might affect the ability of the judge to control it as rigorously as he or she would wish; and the judge's health may be adversely affected if the proceedings go on too long.

It is necessary to consider whether anything more can be done to help judges control the trial and its length. The following areas seem crucial: the initial choice of judge to try a case; the assistance

to judges who are likely to try these cases; and the powers of judges to limit the length of the trial.

In my view, it is essential that the trial judge be appointed at the earliest possible stage and that he or she conducts all pre-trial reviews and preparatory hearings. I am currently discussing the mechanisms to ensure that this takes place with the senior judiciary and the prosecuting authorities as part of my ongoing responsibility to monitor the overall allocation of judges. Judicial studies on the handling of long fraud trials presently comprise occasional seminars on accounting run by the Judicial Studies Board. There are currently no seminars specifically directed towards the handling of a long trial. I believe that it is important to ensure that judges have the right expertise in terms of knowledge of accounts, knowledge of banking and other financial practices, familiarity with information technology in courts and management of long trials. One way in which such expertise could be developed would be through seminars with judges experienced in conducting long trials. The development of these skills and the selection of judges whose strengths lie in this field cannot be too restrictive, however. I believe that it is important that the burden of these trials should be shared amongst a reasonably wide number of judges.

At present, it is open to the judge to request the prosecution to reduce the number of counts on an indictment where it appears to him that the indictment is overloaded. The judge has power to direct an amendment of counts which are expressed imprecisely or even quash counts which are found to be defective. Furthermore, he has power to order separate trials of any counts in an indictment, which in turn may lead to defendants being tried separately. As Lord Justice Mann said in the *Blue Arrow* appeal,

> ... the problem presented by the overloaded indictment can be solved only by a robust and early use of the judge's power of severance ... it is the only power available to limit (as opposed to identify) issues (as opposed to evidence) in order to secure a manageable and therefore fair trial. Judges must not be reluctant to exercise their power in order to secure that end.

I have to say, however, that I am concerned that the existing powers may not always be used sufficiently.

Preparatory hearings

Following the Roskill Report, a new regime was introduced for dealing with cases of serious and complex fraud. There is provision for a case to be transferred direct to the Crown Court so avoiding committal proceedings. Additionally, there is a system for a preparatory hearing to be held prior to the empanelment of the jury. The judge may order such a hearing on the application of any party or of his or her own motion and decisions made at such hearings are binding on the subsequent jury trial. Save with the consent of the judge, arguments cannot be reopened once they have been decided at the preparatory hearing. This is the main difference between preparatory hearings and pre-trial reviews, although the latter do have a useful function in enabling the judge to require the prosecution to reduce or clarify the indictment.

Preparatory hearings can only be ordered in serious fraud cases and even then only where the case is of "such seriousness and complexity that substantial benefits are likely to accrue". The hearings can be used to identify the issues likely to be material to the verdict of the jury; settle legal points, including admissibility of evidence, prior to the trial, and require both the prosecution and defence to make statements of their case. The aim of the hearing is to isolate the issues in a case and settle as much legal argument as possible so as to reduce the time spent during the jury trial.

Preparatory hearings do have some disadvantages. Where case statements are produced by the defence, the judge has no power to order cross-service with other defendants without the agreement of the defendants. Also, the requirements which the judge can make of the defence to disclose its case, together with the sanctions for non-compliance, are frequently ineffective. Before considering whether the

procedure should be extended, it is necessary to consider how these problems can be addressed.

The purpose of ordering the defendants to state the nature of their defences is to help identify issues which are likely to be material to the verdict of the jury and to expedite the proceedings before the jury. In cases involving a number of defendants, there is no power to order one to disclose to the other.

The requirements that a judge can impose on the prosecution and the defence to state their cases (under sections 9(4)(a) and 9(5) of the Criminal justice Act 1987) are different. The Crown's case statement must contain the principal facts of the prosecution case; the witnesses who will speak to those facts; any exhibits relevant to those facts; any proposition of law on which the prosecution proposes to rely, and the consequences in relation to any of the counts in the indictment that appear to the prosecution to flow from the matters stated in pursuance of the matters listed as I have just done. Failure to provide such a statement may result in a further order to make a statement, with the ultimate sanction being a finding of contempt. There is also a power for the judge, or any other party with the judge's leave, to comment on such a failure or on any departure from the case as set out in the case statement. The judge may also order the Crown to prepare their evidence and "other explanatory material" in a form to help the jury's comprehension and to give notice of any matter which the Crown thinks ought to be admitted.

By contrast the judge may require a defendant to give a statement in writing setting out in general terms the nature of his defence and indicating the principal matters on which he takes issue with the prosecution; notice of any objections that he has to the case statement; notice of any point of law (including a point as to the admissibility of evidence) which he wishes to take and any authority on which he intends to rely for that purpose, and a notice stating the extent to which he agrees with the prosecution as to matters which the

Crown say ought to be admitted and the reason for any disagreement (if the judge regards the reasons as inadequate he may require further or better reasons). The defendant, in complying, need not state who will give evidence, unless he would have to under the provisions relating to alibi or expert evidence which are generally applicable.

Practice in relation to prosecution case statements has varied. The Crown has an interest in explaining its case to the judge from an early stage and has generally done this through the statement of evidence (served with the transferred papers where the case is transferred) or through the case statement. In cases which are not transferred and where there is no preparatory hearing this is usually done through the provision of an opening note to the judge and the defendants.

There has been less variation over the content of defence case statements, which often seem to reflect a desire to disclose as little as possible. The language of the relevant section perhaps allows a defence case statement to be short and general. There is little incentive for the defendant to disclose his case where there is perceived to be a tactical advantage in delaying such disclosure until the last possible moment, and sometimes, such disclosure is never made at all. If two of the purposes behind ordering a preparatory hearing are to identify issues which are likely to be material to the verdict and to expedite the proceedings before the jury, then those can easily be frustrated by the lack of full disclosure and cooperation by the defendants.

There are only limited requirements, in English Law, which can be made of a defendant to disclose his case to the Crown. The principal provisions relate to alibis and expert evidence. I have referred to this already. Whilst the Royal Commission is considering the respective obligations of both prosecution and defence in criminal cases, the existing provisions relating to serious fraud and recent calls for there to be greater powers to order defendants to disclose their cases lead to an examination of this issue.

Disclosure of case by defendants

Inadequate defence disclosure is seen by many practitioners as the basic problem adding to the length of trials. The following problems are thought to lie with the present powers: the scope of what the judge can order may be too restricted; orders for disclosure are often inadequately complied with; the sanction against non-compliance or inadequate compliance rests only in the power of the judge to comment or permit comment and the jury being invited to draw an inference. A number of options exist if it is desirable to give the judge a power to order greater defence disclosure: the provision of a case statement with the same level of detail as that required of the prosecution; the provision of a "pleading" in defence to the prosecution's case statement; or the provision of a line by line rebuttal of the case statement.

In tandem with these powers, new sanctions for inadequate disclosure or failure to disclose could be preclusion from cross-examination; preclusion from cross-examination or calling evidence relating to matters not disclosed in pre-trial disclosure; and financial penalties imposed on the defendant or his legal advisers.

Matters not relevant to juries

Matters which are not relevant to the jury should be settled, wherever possible, before jurors are empanelled. This principle applies to all classes of cases. Preparatory hearings, if the disadvantages referred to above can be reduced, are aimed at achieving these very objectives. One possibility would be to extend preparatory hearings beyond serious and complex fraud cases. The options for this extension appear to be: to extend them to all criminal cases; in all criminal cases subject to the judge being satisfied that the matter merits a preparatory hearing; in cases involving serious or complex fraud only; or in criminal cases estimated to last longer than a given time, say two weeks; or in criminal cases estimated to last longer than a given time if the judge is satisfied that the matter merits a preparatory hearing.

Whilst the reform of pre-trial procedures may ensure that there are fewer issues to take up time at the jury trial itself, it is necessary to consider the extent to which it is possible to reform the procedures within the jury trial itself in order to reduce its length.

The judge is of course master of the criminal trial, and it is his or her responsibility to ensure that it is conducted properly A judge may ask questions of witnesses, and indeed, call or recall witnesses, assist unrepresented defendants and exclude evidence if it is inadmissible or irrelevant. The judge has an overriding duty to ensure that the trial is fair to both prosecution and defence. There is, however, no power to refuse to allow relevant evidence simply because it is repetitive or unnecessary. The adequacy of these powers to ensure a short but just trial has been questioned.

In his Child Lecture, Mr Justice Henry, who was the final judge in the *Guinness* trial, drew attention to Rule 403 of the American Federal Rules of Evidence. This states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cummulative evidence.

The trial judge, while securing fairness, is required "to eliminate unjustifiable expense and delay to the end that the truth may be ascertained and the proceedings justly determined" in accordance with Rule 102. It is for consideration whether the trial judge in our system should have these powers.

Support for judges

As I said earlier, it has been noted that the length and complexity of the trial may place the judge under particular strain, and it may be that for these cases, particular support for the judge is needed. Several areas

suggest themselves: the assistance of a law clerk to provide advice and support; the assistance of an expert in accounting or other relevant areas; the provision of proper secretarial facilities to assist him; and the provision of information technology support. This assistance could relieve the judge of work that he himself would otherwise have to do. The need for such support would have to be discussed with the senior judiciary and the resource implications would certainly need to be examined very carefully.

Time limits

Given the necessary statutory powers, it would be possible for a judge to set time limits on the various parts of the criminal trial. "Time limits" occasionally exist in practice in criminal cases where, for example, a judge is only available for a limited period and the case must necessarily finish within that period. However, time limits for various parts of a trial would be a radical departure from the present practice where the time taken is in effect determined by the parties and their legal advisers. There is a strong argument that it is not in the public interest that all trials should have as much time as the participants desire, without any real control. Obviously some provision would need to be made for the occurrence of unexpected events which lengthen proceedings.

There is a strong argument that it is not in the public interest that all trials should have as much time as the participants desire, without any real control.

There might be difficulties, particularly in trials with more than one defendant, where time allotted for a particular witness or argument had all been used by one or more counsel.

Similarly, the larger the trial the more difficult it is to estimate its length. However if judges and counsel are experienced, and longer trials, as I said, tend to attract more experienced lawyers, they should be capable of estimating how long parts of a particular case will last. For

time limits to be effective, the sanction for exceeding the time set aside, subject to the right of a judge to extend the period, would be that no more arguments or no more questions would be permitted.

An alternative to setting time limits for each stage of a trial would be to limit only selected parts. Essentially, these are areas in which it is especially reasonable to expect competent lawyers to put their points and arguments succinctly. It is suggested that such parts of the trial could be the preparatory hearing; opening and closing speeches by counsel, which could be supplemented by the provisions of written material to the jury; legal arguments, which could not reasonably have been anticipated before the opening speech. All of these could be subject to time limits.

Assistance to juries

In his Child Lecture, Mr Justice Henry suggested that the judge should have power to give greater assistance to the jury in understanding the case. He suggested that the judge should make the opening speech to the jury in which their respective roles would be outlined, the case of each defendant would be summarised and the jury would be given written directions on the law and a list of the issues; and the parties and the jury would be given a daily or weekly running summary of the evidence on each issue by the judge.

At present, the opening speech gives prosecuting counsel an unlimited opportunity to set out to the jury the prosecution's case. Sometimes opening speeches have been thought to be overly partisan and designed to make headlines for reporters. This may make the defence reluctant to state its case early on for fear that the prosecution may discredit its arguments.

There would appear to be substantial advantages in the case being opened by the judge in the way I have outlined. Fairness to both parties would ensue and the jury would have a much clearer understanding of the issues involved. The jury would be better placed

to evaluate the evidence and to assess it in the light of the known issues.

Full implementation of this proposal would require greater defence disclosure—and it may be that this is the best incentive to making disclosure. If the trial judge formed the opinion that the defence had not made proper and adequate disclosure, the extent to which he or she should comment on that is a matter of debate. Also open to question is the extent to which inferences could be drawn by the jury if there were departures from the case as disclosed or, where no positive case had been put forward, if some sort of positive case emerged later in the trial.

Instead of the judge opening the case, or in addition to it, case statements could be given to the jury. There are, however, a number of practical disadvantages. If a case statement was too long then it would be of little use to a jury who would be discouraged from reading or referring to it. If the case statements for prosecution and defence were arranged differently then it might become difficult to see how the same point was dealt with in the different statements (and this would be exacerbated if there was more than one defendant). It might be better for the jury to have a summary of the case statements or a list of key issues setting out the positions of the different parties.

Lord Justice Bridge, as he then was, in *Novac* said that:

> In jury trial brevity and simplicity are the hand-maidens of justice. Length and complexity its enemies …[3]

Conclusion

I believe that long trials of the sort that have recently been seen are damaging to the whole fabric of the criminal justice system. They place an unacceptable strain on all parts of the system, not least on the judge, who has to ensure a fair trial and, more particularly, that the jury is placed in the position of not being able to give a true verdict. I

3 *R v Novac* (1977) 65 Cr App R 107 at 118–119.

accept that, with the increasingly complex nature of fraud trials, issues of great complexity will need to be tried and that this will, necessarily, take time. Not all of those issues, however, are suitable for a jury to decide, and I believe that it is important that as much as possible should be settled before the trial begins so that it can be completed as expeditiously and efficiently as possible. The primary aim of this approach is to achieve that end and to save time on unnecessary argument and surprise at other stages by increasing the power of the judge to control the progress of the trial.

The matters to which I have referred are all the subject of current debate in Britain. As I read in *The Times* on my journey to Kuala Lumpur, the outgoing Commander of the Metropolitan Police Fraud Squad has suggested specialist, properly trained, judges and barristers for cases involving complex fraud. He has emphasised the need for proper management of these cases, something I have also emphasised in my lecture this evening.

I hope that the issues that I have raised in my talk this evening have proved interesting and of relevance, notwithstanding the absence of juries in your system. As I said at the beginning, the question of controlling long trials whilst ensuring fairness is of relevance to the court process generally. Although you have no juries in these cases and therefore what I have said about the effect of long trials on jurors does not apply here, most of the other considerations do apply The determination of the verdict in your system rests with the judge. Lord Justice Mann said that jurors are only human and naturally have certain limits. But this also applies to judges. There are limits to the capacity for absorbing, mastering and therefore properly weighing the issues of fact that may be raised. If the length of the cases goes beyond these limits, then injustice is likely to result. These limits vary from judge to judge, and no doubt for long trials judges should

There are limits to the capacity for absorbing, mastering and therefore properly weighing the issues of fact that may be raised. If the length of the cases goes beyond these limits, then injustice is likely to result.

be chosen for whom the limits are most generous. This may itself not always be easy to determine. I am sure that as you in Malaysia face up to these problems and deal with them, your decision may be helpful to us in Britain in coping with them.

I should like to end by referring to a subject which has little to do with long trials, though it is a matter close to the hearts, or rather heads, of some practitioners involved in them. I refer to the wearing of wigs. Some of you may have seen reports that they are not to be abandoned after all in British courts. Well, speculation is a fine tradition in the British press. The fact of the matter is that the Lord Chief Justice and I have issued a consultation paper on court dress and my officials are assessing the response. No decisions have yet been made but it does seem that those who responded to the consultation exercise, not least the members of the public, are to a large extent favouring the retention of some aspects of current court dress. Change comes slowly in the law, some people say, and we shall have to see whether, quite apart from the possible changes I have outlined in the main part of my lecture, the British system is ready for all the changes, including the abandonment of wigs, that I have referred to this evening.

I began by saying what an honour and privilege it is to be invited to give this lecture. Although the Malaysian system is not now linked to the British system by any formal mechanism for appeals, I think that it is very important for both our systems that we should each take an interest in, and learn from developments in, the other. I know that Your Majesty has taken a deep interest in the progress of the legal system in the United Kingdom and it has been my privilege also to be deeply interested in developments in Malaysia. I am profoundly convinced that the Rule of Law administered by a strong, wise and independent judiciary is fundamental to the health of a society. I would like to express my good wishes to Your Majesty and to the Government and people of Malaysia.

The Right Honourable Lord Keith of Kinkel

Henry Shanks Keith
(7 February 1922 – 21 June 2002)

The Modern Approach to Tax Avoidance

Lord Keith was born into a distinguished Edinburgh legal family. His grandfather had been named a Knight Grand Cross of the British Empire. His father, Baron Keith of Avonholm, was also a Law Lord, with a penchant for dissenting opinions. Harry Keith became the top classics scholar—or dux—at the Edinburgh Academy.

After the war (where he had been commissioned in the Scots Guards and saw action in North Africa and Italy), Lord Keith was demobbed as a Captain, and resumed his studies at Magdalen College, Oxford. After graduation, he acquired an LLD from Edinburgh University. He became an Advocate at the Scottish Bar in 1950 and a Barrister at Gray's Inn in 1951.

He first went on the Bench in 1970 as Sheriff Principal of Roxburgh. A year later he became a Senator of the College of Justice, where he displayed an unexpected ability to deal with criminal trials. In 1974, he was named one of the two Scottish Judges on

the Judicial Committee of the Privy Council. On the nomination of the Callaghan Government, he became a Privy Councillor in 1976, and a Lord of Appeal in Ordinary in the House of Lords in 1977. In 1986 he became Senior Law Lord presiding over one of the two appellate committees of the Judicial Committee of the Privy Council. He retired as a Law Lord on 19 September 1996, after which he was awarded the Knight Grand Cross of the British Empire.

In the House of Lords, Lord Keith showed an independent mind. He gave leading judgments in many well-known cases, such as *Spycatcher*, and his judgments in a number of appeals involving economic loss resulting from negligence were seen as a determined attempt to halt the creeping advance of that branch of the law into new and unexplored fields. As *The Times* obituary noted, "his judgments made an important contribution to the law, notably reinforcing press freedom".

Lord Keith also delivered a number of judgments in the Privy Council on appeals from Malaysia, notably on land law and revenue law. In the leading cases dealing with forfeiture of land under the National Land Code, *United Malayan Banking Coporation Berhad and Johore Sugar Plantation and Industries Berhad v Pemungut Hasil Tanah, Kota Tinggi* (1984) 4 PCC 313, and fraud under the National Land Code, *Datuk Jagindar Singh, Datuk P Suppiah and Arul Chandran v Tara Rajaratnam* (1985) 4 PCC 505, the judgments were delivered by Lord Keith.

Lord Keith also delivered the judgments of the Privy Council in the following appeals from Malaysia: *Mamor Sdn Bhd v Director General of Inland Revenue* (1985) 4 PCC 465 (revenue law); *Garden City Development Berhad v Collector of Land Revenue, Federal Territory* (1982) 4 PCC 67 (land law); *Lam Wai Hwa and Another v Toh Yee Sum and Others* (1983) 4 PCC 213 (family law); *Pan Choon Kong v Chew Teng Cheong and Loh Kian Tee* (1984) 4 PCC 231 (contract); and *Pemungut Hasil Tanah v Kam Gin Paik and Others* (1986) 4 PCC 545 (land law).

Lord Keith died on 21 June 2002.

9 The Modern Approach to Tax Avoidance

Lord Keith of Kinkel
Lord of Appeal in Ordinary, House of Lords

The Ninth Sultan Azlan Shah Law Lecture delivered by Lord Keith of Kinkel in 1994, has been irretrievably lost.

It is replaced in this volume with *Policy Considerations in Judicial Decision Making,* a lecture delivered in Kuala Lumpur in 1987 by Lord Hailsham of St Marylebone, Lord Chancellor .

The Right Honourable Lord Hailsham of St Marylebone

Policy Considerations in Judicial Decision Making

Quintin McGarel Hogg
(9 October 1907–12 October 2001)

Lord Hailsham, born Quintin McGarel Hogg on 9 October 1907, was educated at Eton College and Christ Church, Oxford. Lord Hailsham then embarked on an academic career, becoming a Fellow of All Souls in 1931. He then trained in law, and was called to the Bar in 1932.

Lord Hailsham was a Conservative Member of Parliament for Oxford (1938–1950). In 1950, he succeeded his father as Viscount Hailsham and sat in the House of Lords; but in 1963, he renounced the title and returned to the House of Commons as Member of Parliament for St Marylebone, London, where he served until 1970.

He was First Lord of the Admiralty (1956–1957), deputy party leader and then leader in the House of Lords (1957–1960 and 1960–1963), and Minister for Science and Technology (1959–1964).

With the encouragement of the then resigning Prime Minister Harold Macmillan, he contested the party leadership (1963), but lost to Sir Alec Douglas-Home. Unsuccessful, he went back to his law career. He accepted a life peerage (1970) and served two terms as Lord High Chancellor (1970–1974) under Prime Minister Heath, and subsequently under Mrs Margaret Thatcher (1979–1987).

His writings include an autobiography, *A Sparrow's Flight: The Memoirs of Lord Hailsham of St Marylebone* (1990), and two political works, *The Purpose of Parliament* (1946) and *Science and Politics* (1963).

Lord Hailsham was the Editor-in-Chief of *Halsbury's Laws of England*.

Lord Hailsham died on 12 October 2001.

Policy Considerations in Judicial Decision Making

Lord Hailsham of St Marylebone
Lord Chancellor

Public lecture delivered on 22 April 1987 in conjunction with the Fourth International Appellate Judges' Conference, Kuala Lumpur. Reproduced from Law, Justice and the Judiciary: Transnational Trends, *295–299, editors: Salleh Abbas and Visu Sinnadurai, 1988.*

I am delighted to have had this opportunity of visiting Malaysia and seeing something of it at first hand. Like many in Britain, I have been greatly impressed by all that I have read and heard about the dynamic developments in this country over recent years. The steady development of agricultural and natural resources and the recent strides made in high technology industries are achievements which have caught the attention of the world.

Malaysia is an independent non-aligned country. The long tradition of friendship and cooperation which exists between us was built up in different historical circumstances. Yet the strong ties between us endure because there are sound reasons for maintaining and extending them. Britain and Malaysia are both democratic nations with a strong commitment to industrial development, investment and trade. We understand the fundamental importance of a free enterprise system and the dangers that protectionism pose for our trade and economic growth. We are both oil and gas exporters, and are both involved in promoting new technology. We have many shared perceptions in international affairs. We also share a fundamental commitment to the rule of law. Close similarities exist between our legal systems, and strong friendships exist within our legal communities.

Our ties are reflected in our close relationship in commerce and investment, in the large number of Malaysian students who are currently

studying in the United Kingdom, and in unofficial exchanges at all levels. My own visit, at the invitation of the Lord President of the Supreme Court, is one small example of these exchanges.

In raising the question of policy considerations in judicial decision making, you have opened a chink in a very wide door indeed and, introducing the subject within the confines of a short speech my difficulty will be to avoid writing a book instead of introducing a short discussion.

But I will start with a very practical consideration. Judges do not select the cases which come before them. The litigants and the authorities do that for them. Nevertheless they have to decide every case which does come before them in one way or the other. There is no such thing as "no bid" in the game of judicial auction bridge. Judges mark up the score and do not indulge in the bidding.

Therefore there is a sense in which judges cannot avoid being law makers. Nevertheless, there is virtue in the mythology of judicial jurisprudence. The mythology is that judges do not make law. They only interpret it. This is very sound sense. If they were once to admit that they made law they would very soon find themselves in trouble. They would be in trouble with the legislature which claims the monopoly of law making. They would be in trouble with the teachers of law, a highly respectable and very powerful body. They would be in trouble with the students one of whom wrote to *The Times* when Lord Denning was still Master of the Rolls imploring him not to make any more new law until she had passed her Bar examinations. Worst of all, they would be in trouble with the profession who, after all have the duty of advising their clients as to what the courts are likely to decide in the particular circumstances of a given concrete case. For them at least a certain degree of certainty and a certain

There is a sense in which judges cannot avoid being law makers. Nevertheless, there is virtue in the mythology of judicial jurisprudence that judges do not make law. They only interpret it.

degree of durability are excellencies preferable even to abstract justice when this is to be measured by the uncertain length of an unknown judge's foot. So as Lord Radcliffe once observed somewhere or other, if the judges cannot avoid making law, let them at least never admit that they are making it. Mythology is at least an important factor in decision making.

But, at least let it never degenerate into outright hypocrisy. Whatever the mythology, at least let us be frank with one another. As the old Latin tag has it: "Times change and we change with them."

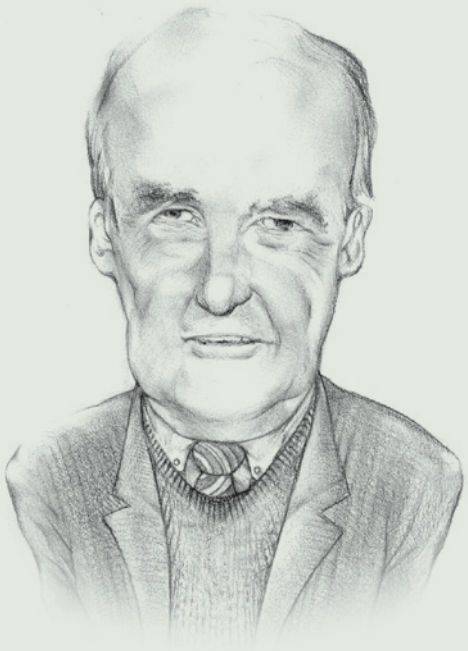
Let anyone who doubts this and is research minded compare the decisions of Lord Coke as Chief Justice or Lord Eldon as Lord Chancellor in any given term with a list of the reported cases based on customary law in the comparable term of 1986 and ask them how in any of the first two volumes are in any way relevant to the decisions of the third. Or let him look, let us say, at the judgments of Lord Reid based on English customary law in the volume of 1964 Appeal Cases and reflect on the extent to which English customary law has developed in the 20 years preceding and the 20 years following that year. The fact of the matter is that the common law is changing all the time with contemporary opinion and contemporary changes. The fact that we do not notice the change or underestimate its extent is due to the fact, as the Latin tag suggests, that we are merely the fishes in the stream. We may notice the eddies, but not the current. The discipline upon us is that we have to make our decisions within the existing fabric of the common law so that each decision leaves a coherent body of doctrine available for our successors which is also compatible with that left us by our predecessors. The Good Book assures us that one cannot tack a new piece of cloth to patch an old garment. But, in interpreting the common law we do practically nothing else. This is because the metaphor is inexact. We are not dealing with a piece of cloth, but with a living body of doctrine of which, though we may not discern it, there are growing points and withering points. In time the withered boughs must be sawn off and discarded, but the growing points need to be carefully tended, at times ruthlessly pruned, but only so that they may branch and flourish.

When we are dealing with statute law we are dealing with a totally different problem. In dealing with customary law we are adapting inherited doctrine to current needs. When we are dealing with statute law we are handling words—other people's words—laid down in advance by our parliamentary masters with their confident sense of supernatural wisdom. All cases deal with something which has happened. But statutes deal, sometimes with excessive confidence, with the legal consequences of what is expected to happen in the future. But, alas for mice and men, the *casus omissus,* the unexpected instance, only too often forcibly intrudes itself upon our attention, or else the legal consequences may involve disagreeable repercussions which the zealous legislator never contemplated. So then the judge has to decide to which of two schools of statutory interpretation he is to adhere, the *literalists,* who claim that the natural grammatical meaning is what Parliament must have intended, however absurd its consequences may be, and the *mischievites,* seeking what Lord Coke described as the "mischief" which the Act was intended to combat, and giving a purposive construction based on the perception of the judge as to what Parliament must have intended, however inconsistent with the grammatical sense of the words. Both agree that the will of Parliament must be respected. But what was the will of Parliament? The two sides differed. For a long time, the literalists had it all more or less their own way in the English courts. But of recent years the mischievites and their purposive interpretation have staged something of a comeback. To some extent the battle rages round the question to what external material the construing court may have recourse. I once presided in an appeal which turned on the construction of a statute based on the report of a committee on which two of my four judicial brethren and both leading counsel instructed on behalf of the opposing parties had sat as members. The literalists had a rough time in that debate, and on the whole the mischievites have now more or less won the day and look with impunity on blue books, Law Commission reports, and other travaux preparatoires, but never, pace Lord Denning, at *Hansard,* or the notes on clauses or instructions to Parliamentary Counsel.

At the end of the day it is wise for judges to have studied as part of their training, or at least read widely, material outside their speciality. They ought at least to have a nodding acquaintance with history, not least of their own country, and it may be perhaps have thought or read a little about political or moral philosophy, and, I would suggest even a little theology as contained in their own religion. Justice may be blind, but she is not as blind as she is painted, and, though many attempts have been made, and continue to be made, to divorce law and morality (between which there can never be either a direct correspondence or a one-for-one relationship) all have ended in failure, and, in principle, are bound to fail. For, in the end, law exists to give effect, though with suitable limitations for human fallibility and human differences, to the moral judgments of mankind and not simply the command of the ruler, or the interests of the mighty. A law which is not protected by the sanction of conscience as well as the words of a statute is not a law likely to be literally obeyed, and a judge who is not sensitive to the social atmosphere and moral judgments of his contemporaries is not likely to leave a permanent mark on his country's jurisprudence.

Law exists to give effect to the moral judgments of mankind and not simply the command of the ruler, or the interests of the mighty. A judge who is not sensitive to the social atmosphere and moral judgments of his contemporaries is not likely to leave a permanent mark on his country's jurisprudence.

The Right Honourable Lord Browne-Wilkinson



Nicolas Christopher Henry Browne-Wilkinson
(*b.* 30 March 1930)

Equity and Commercial Law: Do They Mix?

Having obtained a Bachelor of Arts degree from Magdelan College, Oxford, Lord Browne-Wilkinson was called to the Bar, Lincoln's Inn, in 1953.

In 1972 he was made a Queen's Counsel and from there became a Judge of the Courts of Appeal for Jersey and Guernsey in 1976. He moved on to the High Court, Chancery Division in 1977 and sat there till 1983, a task he fulfilled in conjunction with being the President of the Senate of the Inns of Court and the Bar (1981–1983).

From 1983–1986, Lord Browne-Wilkinson was a Lord Justice of Appeal; and from 1985–1991 was Vice-Chancellor of the Supreme Court, the judge responsible for the Chancery Division of the High Court.

At this point he was made a life peer, as Baron of Camden, when he became a Lord of Appeal

in Ordinary from 1991–2000. In 1999, the Queen approved that the Right Honourable The Lord Browne-Wilkinson be appointed as the Senior Lord of Appeal in Ordinary (the UK's most senior permanent judicial position) in succession to the Right Honourable The Lord Goff of Chieveley.

Lord Browne-Wilkinson retired as Senior Law Lord in 2000.

In 2002, the Bank of England appointed him Chairman of the newly established Financial Markets Law Committee. One of the tasks of this Committee is to "act as a bridge to the judiciary to ensure that UK courts remain up-to-date with developments in financial markets practice".

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Equity and Commercial Law: Do They Mix?

Lord Browne-Wilkinson
Lord of Appeal in Ordinary, House of Lords

Text of the Tenth Sultan Azlan Shah Law Lecture delivered on 22 December 1995 in the presence of His Royal Highness Sultan Azlan Shah.

More than 400 years ago and some 9,000 miles away from Kuala Lumpur a new legal system, the English common law, was developing. The dominant factor of its land law was the feudal system of tenure imported at the time of the Norman Conquest. Feudal tenure of land gave rise to unfortunate consequences for the owners of such land, and in consequence a device was invented whereby land was conveyed to one person to the use of another, the beneficiary.

The beneficiary had no title to the land at common law; but they were enforced by the Lord Chancellor. The device of the use, which was financially disadvantageous to the feudal lord, was rendered ineffective by the Statute of Uses 1536 which provided that the legal title should vest in the beneficiary. Not to be thwarted, the ever ingenious lawyers created the use upon the use: land was conveyed to A to the use of B to the use of C. The legal right to the land was vested in B; C did not enjoy any protection at law because he did not have the legal title. Again, the Lord Chancellor intervened to protect the rights of the ultimate beneficiary, C.

The device of a use upon a use came to be known as a trust. The Lord Chancellor, and subsequently the courts of chancery, enforced these trusts against the holder of the legal title. Over the years the principles applicable by the Lord Chancellor in the Court of Chancery—the

principles of equity—were developed primarily in relation to land. The methodology adopted was for the courts of chancery to hold that it was contrary to good conscience for the legal owner of the land not to give effect to the trusts upon which he had accepted the transfer of the land. Thus conscience lies at the very root of equity. Further, the Lord Chancellor enforced this law against the owner of the legal title by making orders directly against the legal owner which, if not obeyed, gave rise to severe sanctions for contempt. Thus the second strand of equity emerged, namely that it acts in personam against the individual. Finally, the courts of chancery moved to the position whereby, since the legal owner could be forced to give effect to the rights of the beneficiaries under the trust, the beneficiaries were themselves to be treated as enjoying beneficial interests in equity in the land, ie, a proprietary interest. Thus developed the system of land law under which there were two types of proprietary interest: the legal estate and the equitable interest.

At the same time, the courts of equity were developing remedies much superior to those obtainable in the common law courts. Effectively the only relief obtainable at common law for breach of contract, trespass, nuisance and other torts was an award of damages. But equity, again acting against the person of the defendant, developed the remedies of specific performance and injunction. If the defendant refused to perform a contract, equity would order him to perform it in certain circumstances, the penalty for failure to do so being again imprisonment for contempt of court. If a defendant was committing a continuing trespass, or nuisance, the court of equity would grant an injunction requiring him to desist.

Down to 1875 these two systems of law, common law and equity, were largely administered in separate courts. Since 1875 both law and equity have been administered in the same courts: but since the principles of law and the principles of equity had been developed separately, the two strands, law and equity, remain distinctively separate. One hundred and twenty years after the so-called fusion of law and equity, the two streams of English law remain identifiably distinct.

I must apologise for this short, and inaccurate, survey of the history of the development of law and equity which is probably well known to most people here. But an understanding of this history is essential to the understanding of the current interaction between law and equity in 1995 in Kuala Lumpur. It is necessary to appreciate that equitable doctrines were developed primarily in relation to land and that equity acted on the conscience of the individual who held the legal interest. It is also necessary to understand that equity, being based on good conscience, only exercised its remedies by way of injunction or specific performance in cases where good conscience required the remedy to be enforced. Unlike the right of a litigant at law to damages, many equitable remedies are discretionary and are tailored to what is just in the circumstances.

Status of equity in the commercial world

In every legal system there is a tension between the requirements of certainty on the one hand and justice on the other. A businessman needs to know with certainty what his legal rights are and what the consequences of his acts will be. His primary concern is with this certainty rather than with the justice or injustice of the legal result: if he knows what the risks are he can cover himself against them by insurance or business practices. As Lord Diplock (quoting Lord Goff) has said:

A businessman needs to know with certainty what his legal rights are and what will be the consequences of his acts.

> It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position, if necessary with the aid of advice from a qualified lawyer, because it may be commercially desirable for action to be taken without delay, action which may be irrevocable and which may have far-reaching consequences. It is for this reason, of

> course, that the English courts have time and again asserted the need for certainty in commercial transactions—for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly.[1]

In general, the hard-nosed principles of law favour certainty. The more flexible principles of equity, based on concepts of good conscience enforced by discretionary remedies, tend to greater justice but less certainty. It is for that reason that the commercial courts have, for some time, been resistant to the introduction of the concepts of equity. Although the approach of equity is normally more consistent with justice in any given case, that is not the primary concern of commercial law which is to have fixed and inflexible rules which, although no doubt producing hard results in some cases, produce certainty for those engaged in commerce. In the case from which I have quoted Lord Diplock's words, the charterer of a ship was four days out of time in paying a sum due under the charter party. Under the charter party the owner had the right to withdraw his vessel in the event of such breach. The owner exercised that right and the charterer applied for relief against forfeiture, founding himself on the long line of cases in equity where such relief is permissible (particularly in relation to leases) if it would be contrary to the conscience of the other party to stand on his strict legal rights. The House of Lords decisively rejected the introduction of this equitable doctrine into the commercial field for the reasons which I have stated.

However, the rejection of equitable principles by businessmen is by no means uniform. There are aspects of equity which the businessman is only too keen to exploit. For example, the equitable principles of fiduciary duties owed by agents, company directors and others are fundamental in our legal systems. The right to call upon an agent for a full account is an equitable right. The fiduciary duties owed by a director to his company prevent him profiting from his position and, in the event of his being fraudulent, enables equitable rights to trace companies' property into the hands of third parties to be enforced. Again, the injunction to restrain the threatened breach

1 *Scandinavian Trading Tanker Company AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 at 704.

of contract or, as in the case of the Mareva injunction, to secure that the defendant does not dissipate his assets, are rights of the utmost importance in the modern commercial world. Therefore, not all principles of equity operate adversely to commercial expediency. The difficulty is to ensure that those elements in the rules of equity which are beneficial to the commercial world operate in a manner which is not detrimental to such interests. That is the question that I am going to address today.

There is no doubt that equitable doctrines—and in particular concepts of trusteeship and fiduciary duties—are becoming ever more common in transactions of a commercial nature. What I propose to do is to give an example of an old-fashioned trust and the principles which have been developed over the centuries relating to such trusts and then go on to consider the modern counterparts of such a trust, pointing out the way in which the old concepts have been modified and adjusted to meet, so far as possible, the dictates of commercial expediency.

First, the example of the old-fashioned trust. A settlor, S, by way of gift vests a piece of land, Blackacre, in a trustee, T, on trust for B1 for life and after his death on trust for B2 absolutely. S reserves to himself a power to rescind or vary the trust. T, in breach of trust, sells Blackacre at an undervalue to P Ltd in which T has an interest. The features of such a trust which, for present purposes, I want to emphasise are the following:

1. S the settlor was giving away his property for the benefit of B1 and B2, the beneficiaries. The beneficiaries are mere recipients of the settlor's bounty.

2. The property is held on an express trust, ie, there is a trust deed setting out the powers and duties of the trustee. There is no doubt that a trust exists; there is not much doubt about the scope of the trustee's duties. In particular, it is a basic rule that the trustee, T, must not put himself in a position where his

personal interest conflicts with his duty as trustee. He must act single mindedly for the benefit of his beneficiaries.

3. The subject matter of the trust is land. The beneficiaries under the trust, B1 and B2, have a proprietary equitable interest in Blackacre which they can enforce against the whole world except a bona fide purchaser for value of the legal estate without notice of their interests. Thus, the land sold in breach of trust to P Ltd will be recoverable if P Ltd had actual or constructive notice of the breach of trust. P Ltd will have constructive notice of the rights of the beneficiaries under the settlement if, in investigating the title to Blackacre, they would have discovered the existence of the trust if they had made proper enquiries. However, since we are dealing with land, the steps that have to be taken in order to conduct a proper investigation of title are well known and well established.

4. The trustee, T, will be personally liable for his breach of trust in selling the land at an under-value. If the land is not recovered from P Ltd, the measure of T's liability for breach of trust will be to pay back into the trust fund by way of compensation a sum equal to the open market value of Blackacre.

Although old-fashioned trusts of this kind continue to exist, their importance is minor compared with commercial trusts (for example, pension funds and investment trusts) and the wide range of relationships into which concepts of trusteeship or fiduciary obligations have been introduced. It is instructive to see how the four factors that I have isolated in the old-fashioned trust are represented in the modern law.

Trusts established not by way of gift but for consideration

In the United Kingdom a very large proportion of private wealth is now concentrated in pension funds established by employers to provide retirement benefits for their employees. Although the trust is

established by the employer, as settlor, the position of the employer is in no way comparable to that of the settlor under the old-fashioned trust. The benefits provided for the employees out of the pension fund are part of the remuneration which the employees receive for their work. In some cases, the employees themselves as well as the employing company make financial contributions to the fund. The beneficiaries are giving value for the benefits they receive under the trust. Accordingly, it is not possible simply to lift the old law of trusts applicable to the old-fashioned type settlement made out of the bounty of the settlor and apply it lock, stock and barrel to the position of beneficiaries under pension trust deeds who have given consideration.

I can illustrate the distinction by reference to the power which, it will be remembered, the settlor under the old-fashioned trusts had reserved to himself to rescind or vary the trust. Since in such old-fashioned trusts the settlor was making a gift, he could reserve to himself out of such gift such rights and powers as he thinks fit. Having reserved the power to rescind or vary, he can exercise such power in any way he thinks fit, without having any duty to anyone else. However, as *Imperial Group Pension Group Ltd v Imperial Tobacco Ltd*[2] illustrates, the same is not true in relation to pension funds. In that case the rules of the pension scheme reserved to the employer company the right to give or withhold its consent to an increase in the pension benefits payable to members of the fund. Although there was a very substantial surplus in the pension fund, the employer company was refusing to give its consent to any increase in pension benefits because, so it was alleged, they were seeking to extract a large amount of the surplus for their own benefit. It was held that because a pension scheme is provided for consideration, the employer company could not exercise its power to give or withhold consent in a completely self-regarding manner. It was held that, as part of the employer's duty to act in a way which did not destroy or seriously damage the relationship of confidence and trust between employer and employee, the employer company in exercising its power to give or withhold consent had to act bona fide for the benefit of the

2 [1991] 2 All ER 597.

beneficiaries under the scheme and could not simply have regard to its own self-interest. Thus, the old equitable rules as to the exercise of powers under settlements made by way of gift were modified to reflect the commercial reality of the position, namely that the pension scheme was part of a commercial arrangement between employer and employee in relation to which mutual duties were owed and had to be observed in relation to the exercise of powers.

Constructive trusts and fiduciary duties

In contrast to the old-fashioned trust with its express declaration of trust and clear duties which a trustee had to perform, most of the modern litigation involving trusts is concerned with constructive trusts or fiduciary duties owed by agents, company directors and others. For example, over the last ten years there has been a huge upsurge in litigation flowing from frauds committed upon limited companies. Frequently, the directors of defrauded companies have, in one way or another, been party to the frauds. The law has developed, to my mind beneficently, so as to hold that companies' money abstracted by directors in breach of their fiduciary duties to the company are subject to a constructive trust in the hands of third parties who have either received the trust property with notice of the directors' breach of fiduciary duty or have themselves been dishonestly parties to the directors' breach of trust: see *Royal Brunei Airlines v Tan*.[3]

It is these trusts, arising by operation of law in circumstances which are by definition murky, which raise the greatest problems for the businessman. For the same equitable principles apply to these informal, constructive trusts as apply to express trusts. In particular, the beneficiary under a constructive trust (in the example which I have given, the company which has been defrauded) has a beneficial interest in the moneys of which it has been deprived. Since this beneficial interest is enforceable against third parties into whose hands the moneys come, other than the purchaser for value of a legal interest without notice, the commercial man is faced with an area

3
[1995] 3 WLR 64.

of great uncertainty. The original moneys of which the company was fraudulently deprived will, in the normal course, be paid into a bank account. But under the equitable rules of tracing, the moneys in that bank account can be traced into other money and property which for the time being represents it: *Agip (Africa) Ltd v Jackson*.[4] The consequences can be very serious, particularly in the case of insolvency.

I can illustrate this risk by reference to a company to which bankers have advanced moneys on a floating charge and which goes into insolvent liquidation. In the ordinary case, the company's assets at the date of liquidation will be applied first in paying off the bank's secured loan and then distributed amongst the other creditors. But, say that amongst the insolvent company's assets were moneys which, under the equitable rules of tracing, could be traced as being the products of a fraud on a wholly different company. Those moneys which can be traced are held on a constructive trust for the defrauded company and, as trust assets, do not form part of the insolvent company's assets available for distribution either to the secured bank lender or to the other trade creditors. Therefore those who had been dealing in good faith with the company on the basis that its ostensible assets were its real assets and its book liabilities were its real liabilities suddenly find themselves faced with a position where the apparent assets are found to belong not to the creditor of the insolvent company but to some third party, the defrauded company.

There is another species of trust which, if eventually established as part of the law, presents similar problems to commercial men. In *Chase Manhattan Bank v Israel-British Bank (London) Ltd*,[5] Chase Manhattan paid the Israel-British Bank twice in respect of the same liability. The second payment was, of course, a mistake. Shortly thereafter, the Israel-British Bank became insolvent. Chase Manhattan claimed that the second payment, having been made under a fundamental mistake, was refundable and (this is the important point) Israel-British Bank held the second payment and the assets representing it at the date of insolvency on a constructive

4
[1991] Ch 547, CA, affirming [1990] Ch 265, Ch D.

5
[1981] Ch 105; [1979] 3 All ER 1025, Ch D.

trust for Chase Manhattan. This claim was upheld by the judge. In consequence Chase Manhattan was entitled in priority to all the other creditors of the Israel-British Bank to be repaid in full the moneys it had paid by mistake; in equity the assets representing the mistaken payment were trust moneys held in trust for Chase Manhattan.

That process was taken a stage further in *Westdeutsche Landesbank Girozentral v The London Borough of Islington*.[6] In that case the German bank had paid a large sum of money to a local authority pursuant to a swap agreement. Subsequently, it was held that the swap agreement was ultra vires the local authority. The German bank therefore sought repayment of the moneys it had paid under a void contract. The Court of Appeal held that the moneys were recoverable not only at law (as moneys had and received) but also in equity on the ground that the local authority held the moneys which it had received under the void contract on a resulting trust for the German bank. Although no question of priorities arose in that case, since the local authority was solvent, if it is correctly decided the consequence will be that wherever moneys have been paid under a contract void as being ultra vires or on a consideration which has wholly failed, the recipient of the moneys holds the moneys so paid on trust. In consequence, those moneys will not be available for the creditors of the recipient.

It will be apparent that these trusts, arising in circumstances of great informality and indeed often secrecy, are capable of being very prejudicial to the conduct of ordinary business.

It will be apparent that these trusts, arising in circumstances of great informality and indeed often secrecy, are capable of being very prejudicial to the conduct of ordinary business. Those who deal with a company have to form a view as to the credit worthiness of the company. They will be guided by their experience of that company, its ostensible assets, its balance sheet and the reports of credit societies. All of this information will be rendered valueless if, under the principles of constructive and resulting trusts which I have discussed, the apparent

6 [1994] 1 WLR 938.

assets of the company do not belong to it at all, but are held in trust for a third party. Such trusts cut across the ordinary assessments of commercial risk. There is no way in which a bank or trader can be aware of the circumstances which give rise to these trust interests since they may well relate to the fraudulent activities not of the company with which they are dealing but of another company, the defrauded company of which they have no knowledge but whose moneys have come into the hands of the company with which they are dealing. There is no way in which the businessman can protect himself against these risks by adopting appropriate practices or by insurance. For these reasons it is important that courts dealing with claims that there are constructive or resulting trusts should proceed with extreme caution in holding that such a trust arises in a purely commercial context. The creation of such a trust operates like some loose cannon depriving third parties of their legitimate expectations and operating unfairly between the competing claims of creditors.

Such trusts cut across the ordinary assessments of commercial risk.

Constructive notice in commercial dealings

I remind you that, if trust property gets into the hands of a third party, it is recoverable from that third party unless he is a purchaser for value of the legal interest without notice. Thus in the example of the old-fashioned trust which I have given, Blackacre will be recoverable from P Ltd if P Ltd had notice of the breach of trust, actual or constructive. Constructive notice in relation to dealings with land includes notice of all those matters which, if the purchaser had made due enquiry, he would have discovered. As I have said, in relation to dealings in land everybody knows what the enquiries which ought to be made are. But how is this doctrine of constructive notice to be applied in a case where the trust interest is alleged to exist in a sum of money received by a clearing bank or somebody engaged in a commercial transaction? What degree of enquiry is such a commercial man expected to make in order to avoid being held to have constructive notice of a flaw in the title of the person from whom he received the moneys?

In *Manchester Trust v Furness*[7] Lindley LJ said:

> As regards the extension of the equitable doctrine of constructive notice to commercial transactions, the courts have always set their face resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates and land, title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country.

These are fine sentiments, robustly stated. Unfortunately, there was a period starting with the decision in *Selangor United Rubber Estates Ltd v Craddock (No 3)*[8] where this sound advice came to be ignored. Banks and other finance houses were held to have notice of the fact that sums they had received were tainted with frauds committed on another company. Too easily was it held that the receiving bank had been put on enquiry by some minor factor as a result of which it was held to have constructive notice of facts which it would have discovered if it had made due enquiry. I am glad to say that the tide has turned and that the courts are now again reverting to the views of Lindley LJ. In *Eagle Trust plc v SBC Securities Ltd*[9] and *Cowan de Grow Properties Ltd v Eagle Trust plc*[10] the law was re-established that, in commercial transactions, the recipient of a payment is not to be taken as having notice unless he has actual knowledge or wilfully shuts his eyes to the obvious or wilfully and recklessly fails to make such enquiries as an honest and reasonable man would make. In effect, in the commercial context a recipient of moneys is not to have notice attributed to him

If we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country.

7 [1895] 2 QB 539 at 545.

8 [1968] 1 WLR 1555.

9 [1992] 4 All ER 488.

10 [1992] 4 All ER 700.

unless he actually knows the relevant facts or otherwise behaves in a commercially reprehensible way in failing to make enquiries.

It is contrary to any form of business efficiency to require commercial men to make detailed investigations of the myriad transactions in which they are involved in the course of a year. Equity must recognise the commercial reality in the sphere in which it is operating.

In my view this reassertion of common sense in the commercial sphere is absolutely right and is likely to be upheld in the higher courts. Although it is right that a businessman who deliberately acts unconscionably in a commercial sense should be held liable to recoup what he has received to the true owner, it is contrary to any form of business efficiency to require commercial men to make detailed investigations of the myriad transactions in which they are involved in the course of a year. Equity must recognise the commercial reality in the sphere in which it is operating.

The scope of fiduciary duties

In the old-fashioned trust which I have taken as an example, there is little doubt as to the duties which T, as an express trustee, has to perform. He has to hold the fund under his control in proper investments; he must not profit from his trust nor put himself in a position where his duty to his beneficiaries conflicts with his own personal interest.

But how are such principles to be applied to, for example, those who are said to be in a fiduciary position and to owe fiduciary duties otherwise than under an express trust, for example, agents and company directors? The agent owes fiduciary duties to his principal; the directors owe fiduciary duties to their company. But to impose on such fiduciaries the full panoply of duties applicable to old-fashioned trusts is completely incompatible with the requirements of their role as agents or directors. Take for example the modern stock exchange where the same market maker may be on both sides of the bargain.

Applying the strict equitable principles applicable to an express trustee, the position of the market maker is untenable. He is acting in a position where his own self-interest competes with that of his clients and he is serving two masters, the seller and the buyer, whose interests conflict.

Some light is thrown on the problem by the decision of the Privy Council in *Kelly v Cooper*.[11] In that case the defendant was an estate agent who had two separate clients, the plaintiff and X, both of whom were selling property. The agents, in their capacity as agent for X, acquired information which was relevant to the affairs of the plaintiff. The plaintiff alleged that since the defendant was his agent, the defendant owed to the plaintiff fiduciary duties which included, inter alia, the duty to disclose to the plaintiff all information relevant to the plaintiff's affairs including the information which the defendant had obtained from his other client, X. This was plainly a ludicrous claim since it was incompatible with what everybody knew to be the case, namely that estate agents by definition have a number of clients on whose behalf they are acting in the sale of properties. Since all vendors are selling into the same market, the interests of the estate agent's clients must, to an extent, conflict. The information received from one client in confidence cannot be made available to another. The Privy Council pointed out that merely to describe somebody as a "fiduciary" did not mean that the fiduciary owed all the duties of a trustee. Where, as is frequently the case in agency and in other spheres, the fiduciary relationship arises out of a contract between the principal and the agent, the extent of the fiduciary duties owed has to be shaped so as to accord with the terms of the underlying contract. Thus, even though the defendant was the agent for the plaintiff, the plain commercial common sense precluded the importation of a duty to make full disclosure to the principal of confidential information acquired by the agent in the course of carrying on his general agency business. It is not enough to label

Merely to describe somebody as a "fiduciary" did not mean that the fiduciary owed all the duties of a trustee.

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[1993] AC 205.

someone "a fiduciary" and to say that a whole list of consequences necessarily and in all cases flow from that statement. In each case, the extent of the fiduciary duty owed depends upon the relationship between the parties and particularly upon to the underlying contract which gives rise to the agency relationship. See also *New Zealand Netherlands Society "Oranje" Inc v Kuys*;[12] *Hospital Products Ltd v United States Surgical Corporation*.[13]

I believe that if this principle is kept well in mind, the equitable doctrine of fiduciary duties is a valuable one in upholding the integrity of commercial dealings and ensuring that agents, directors and others in a fiduciary position are accountable for any improper profit that they make from their position. The equitable principle is a sound one and in no sense incompatible with commercial expediency provided that the extent of the duty is defined by reference to the relationship which exists in the particular case.

Damages for breach of trust

In the case of the old-fashioned trust, the trustee T would be liable for his breach of trust in selling the trust property at an under-value. If the property, Blackacre, was not recoverable, he would be bound to pay back into the trust fund by way of compensation the value of Blackacre. The basis for such liability to recoup the trust fund is the fact that the damage is suffered by all the beneficiaries under the trust, ie B1 and B2 in succession. Only by restoring the trust fund can compensation be made to both of them for their loss.

Recently, an attempt was made to apply the same measure of compensation to a breach of fiduciary duties in a commercial context. In *Target Holdings Ltd v Redferns*,[14] the defendants were a firm of solicitors who were acting for the purchasers of a property. They also acted for the plaintiff, a finance house, which was advancing the money to finance the purchase, such advance to be secured on a mortgage of the property being acquired. The plaintiff finance house paid the money to the defendant solicitors pending completion on the

12
[1973] 1 WLR 1126.

13
[1984] 156 CLR 41 at 97.

14
[1995] 3 WLR 352.

basis that the defendant solicitors would only disburse the moneys on receipt of a valid conveyance to the borrowers together with a mortgage on the property executed by the borrowers. The moneys went into the defendant firm's client account and it was common ground that the moneys in the current account were trust moneys. Unknown to the plaintiffs, they were the victim of a mortgage fraud and the property being acquired was worth much less than the valuation on the basis of which they were making the advance. For reasons which were not explained, the defendant solicitors made a series of payments to the borrowers out of the moneys on client account before the necessary documents had been executed. This was a plain breach of trust by the solicitors. However, subsequently the defendant solicitors obtained from the borrowers exactly the security which the plaintiffs had thought they were going to get, ie, a valid mortgage on the properties acquired. The fraud having been discovered and it having emerged that the property on which the plaintiff had a mortgage was worth much less than the sum advanced, the plaintiffs started proceedings for breach of trust against the defendant firm. They alleged that, since the defendant firm was a trustee of the money on client account and those moneys had been distributed in breach of trust, the defendant firm was liable to repay at once the total sum wrongly distributed, ie, the plaintiff firm was seeking to recover on the basis of breach of trust the total sum that they had advanced even though the loss that they had incurred was due, not to the breach of trust by the solicitors, but to the fraud of a third party who had persuaded them to advance too much money.

The House of Lords rejected this claim. It was pointed out that the old rules for assessing the quantum of compensation for breach of trust were established in relation to funds held for persons by way of succession. In such a case it is essential to reconstitute the fund if all the beneficiaries are to be put back into the same position as if there had been no breach of trust. This reasoning has no application to the case of moneys held as bare trustees as part of a wider commercial transaction. In such a case the liability of the defendant firm to pay compensation was to pay the loss actually suffered by reason of the breach of trust. Such loss was, in the event, nil. The solicitors' breach of trust had caused

no loss to the plaintiffs who were in exactly the position they had always intended to be, *viz* they had advanced a large sum of money on the security of a first mortgage on the property. The breach of trust, as such, had not given rise to any actual loss suffered by the plaintiffs: such loss was due to the fraud of a third party.

Again, this decision shows a willingness in the courts to appreciate the commercial realities surrounding trusts and fiduciary duties in a commercial context. The placing of moneys and investments in the hands of nominees is an essential feature of modern commercial life. It is right that such nominees should be treated as trustees. But the nature of the trusteeship is wholly different from that occupied by T as trustee of the old-fashioned settlement which I am using as comparator. The basic equitable concept of trusteeship and liability to account is a sound commercial principle. What is not sound is to import into such a commercial trust the detailed rules applicable to trusts of quite a different kind.

Conclusions

What conclusions then are to be drawn from these examples? I think they are the following:

First, that it is no use for commercial lawyers and commercial men to seek to exclude equitable principles from commercial transactions. The English legal system, which you have for better or for worse inherited, has two limbs: common law and equity. Because of the historical existence of the courts of equity which modified, ameliorated and improved the rigidities of the common law, the common law itself never developed a whole range of concepts which are an essential part of any legal system. Any adequate legal system is going to have to find means whereby obligations taken on for the benefit of third parties are enforceable. The trust is the machinery in English law which achieves that purpose; the failure of the common law to develop the law of contract or tort to provide protection for such third parties means that common law by itself is inadequate.

Similarly, the requirement of the utmost good faith in certain relationships is a feature of all developed legal systems but, for the most part, forms no part of the common law. The lack in the common law is provided by the equitable principles of fiduciary duties. Any attempt to have a sector of the law, commercial law, which omits one whole strand of English law as a whole, is doomed to failure.

Second, although the principles of equity are a necessary constituent element in commercial law they must be applied with an appreciation of the commercial realities into which they are being imported. It is profoundly detrimental to lift detailed rules developed in the context of settlements made by way of gift for persons by way of succession and apply them lock, stock and barrel to commercial transactions to which they bear no resemblance. The concepts of trusts and fiduciary duties are sound ones relevant to the commercial sphere: but they must be applied in a way relevant to commercial transactions and which takes account of commercial realities

Third, judges must exercise extreme caution in extending the categories of constructive trust and resulting trust which lead to the existence of hidden property rights incapable of being discovered by third parties whose interests can be most severely affected by their existence. I believe that the way forward may lie in the development of a new form of constructive trust, the remedial constructive trust, which is already part of the law of the United States and Canada and which shows signs of emerging also in Australia and New Zealand. The difficulty of the conventional constructive trust, the institutional constructive trust, is that it arises automatically at the moment at which the constructive trustee is guilty of the conduct which gives rise to the imposition of the constructive trust. At the same moment, the beneficiaries under the constructive trust obtain a property interest. As a result the property which is the subject of the constructive trust may come into the hands of third parties or the recipient constructive trustee may become insolvent. In either event third parties are, possibly unfairly, prejudiced by the existence of the equitable proprietary interest. The remedial constructive trust, if adopted in English law, would not suffer from this drawback. A

remedial constructive trust is imposed by the court at the date of trial so as to impose fiduciary obligations on an individual who should be accountable, or on property which, should be recoverable. Dealings with the trust property prior to the court order will not have given rise to equitable proprietary interests which are enforceable. The court, in imposing the remedial constructive trust, can impose it as against those people whom it is just to make accountable and not as against those who are innocent of any wrongdoing and who might be prejudiced by the imposition of such a trust. I believe that the development of such a remedial trust is of considerable commercial importance since it will enable property wrongfully extracted from companies and others to be recovered from wrongdoers without prejudicing the innocent third party recipient and giving rise to the uncertainty which is so antipathetic to commercial efficiency.

Fourthly, equitable concepts of fiduciary duties, damages for breach of trust and no doubt many other equitable principles must be applied in the commercial sphere with a proper understanding of their impact on the commercial community. The equitable principles are sound; their application in a commercial context must be tailored to that context. In particular, I believe the widespread use of the words "a fiduciary" is calculated to give rise to confusion. There is no such person as "a fiduciary": apart from a trustee there are people who owe fiduciary duties. The nature and scope of those duties depend upon the relationship in each case and will be determined by the commercial realities of that relationship.

In sum, commercial expediency requires that the law should, so far as possible, be certain and foretellable. This commercial imperative must inform the application of equitable principles in a commercial context. But provided that is done, equity has an important contribution to make which is in no way inconsistent with the requirements of commercial certainty.

The Right Honourable Lord Steyn

Contract Law:
Fulfilling the Reasonable Expectations of Honest Men

Johan Steyn
(*b.* 15 August 1932)

Lord Steyn, Lord of Appeal in Ordinary, is said to be "a contemporary judge greatly respected for his humanity and zeal for the protection of the human rights of the citizen". He has also been described as "progressive, strong-minded and speaks out publicly … Astute and well-liked. Liberal." (*The Times*, 27 October 1998.)

He is an ardent supporter of the independence of the judiciary, and one of the few Law Lords to publicly argue on several occasions that the power of the Lord Chancellor to choose which cases he sat on, and to preside as a judge over the country's highest court, the Appellate Committee of the House of Lords, breached the right to a fair trial by an "independent and impartial tribunal" enshrined in the European Convention on Human Rights.

He was born on 15 August 1932, and educated in Cape Town, South Africa, and was subsequently a Rhodes Scholar at University College, Oxford.

In 1958, he commenced practice at the South African Bar and rose to become Senior Counsel of the Supreme Court of South Africa in 1970. In 1973, upon settling in the United Kingdom, he commenced practice at the English Bar and was made Queen's Counsel in 1979.

He was appointed as a Judge of the High Court, Queen's Bench Division, in 1985. In 1992 he was made a Lord Justice of Appeal of the Court of Appeal. With a strong commercial law background, he had an impressive rise, reaching the House of Lords ten years after appointment to the Bench, when, in 1995, he was made a Lord of Appeal in Ordinary.

Lord Steyn served on a number of important Committees. He was a member of the Supreme Court Rule Committee from 1985–1989, and Chairman of the Race Relations Committee of the Bar from 1987–1988.

In 1993, he served on the Lord Chancellor's Advisory Committee on Legal Education and Conduct, and from 1993–1994, he was the Chairman of the Advisory Council, Centre for Commercial Law Studies, Queen Mary (and Westfield) College, University of London. He was also President of the British Insurance Law Association, and served on the Committee on Arbitration Law.

Lord Steyn is currently one of the more senior Law Lords in the House of Lords.

11 Contract Law: Fulfilling the Reasonable Expectations of Honest Men

Lord Steyn
Lord of Appeal in Ordinary, House of Lords

Text of the Eleventh Sultan Azlan Shah Law Lecture delivered on 24 October 1996 in the presence of His Royal Highness Sultan Azlan Shah.

It is a great honour for me to be invited by His Royal Highness to deliver the eleventh in a series of annual lectures which bear his prestigious name. I am the more honoured since His Royal Highness is both a distinguished jurist and an eminent former judge whose valuable contribution to the law is widely known beyond the frontiers of this country.

At the same time, it is a daunting experience for me to give this lecture in his presence. I only wish I could produce a lecture which is a worthy response to the gracious hospitality of His Royal Highness who invited my wife and myself to your wonderful and beautiful country.

A thread runs through our contract law that effect must be given to the reasonable expectations of honest men. Sometimes this is made explicit by judges; more often it is the implied basis of the court's decision. Tonight, I would like to examine what this means, and to relate it to some parts of English contract law. It is an important subject for the future of the English law of contract, which is part of our common heritage. It may be of interest in this commercially vibrant country.

The modern view is that the reason for a rule is important. The rule ought to apply where reason requires it, and no further. But often, the real purpose of a rule is debatable. The question can then only be

solved by rational argument, and a judgment by an impartial judge. Once the purpose of a rule has been identified by effective and proper adjudication, it is an important and legitimate matter to enquire whether the particular rule fulfils that purpose. If it does not, it is defective. At the very least a judge, and particularly an appellate court, is entitled to re-examine the law to make doubly sure that the law indeed commands something that does not make sense. Usually, it will be found, on conscientious and rigorous re-examination, that the common law solution is one which is meaningful and in accord with common sense. Simple fairness ought to be the basis of every legal rule, and in a common law case, the presumption in favour of the fair solution is powerful. These considerations are the framework in which one must approach the propositon that in contract law effect must be given to the reasonable expectations of honest men.

That leads me to a preliminary distinction. It is a defensible position for a legal system to give predominance to the subjective intentions of the parties. Such a policy can claim to be committed to the ideal of perfect individualised justice. But that is not the English way. Our law is generally based on an objective theory of contract. This involves adopting an external standard given life by using the concept of the reasonable man. The commercial advantage of the English approach is that it promotes certainty and predictability in the resolution of contractual disputes. And, as a matter of principle, it is not unfair to impute to contracting parties the intention that in the event of a dispute, a neutral judge should decide the case applying an objective standard of reasonableness. That is then the context in which in English law one should interpret the proposition that effect must be given to the reasonable expectations of honest men.

Reasonable expectations

It is possible to refine the meaning of the proposition. Once one uses the external standard of reasonableness, the reference to honest men adds little. Although the hypothetical reasonable man pursues his own commercial self-interest, he is by definition not dishonest. The

proposition can therefore be re-defined simply to say that the law must respect the reasonable expectations of the contracting parties. That brings me to consider what the reasonable expectations of the parties means. The expectations that will be protected are those that are, in an objective sense, common to both parties.[1] The law of contract is generally not concerned with the subjective expectations of a party. The law does not protect unreasonable expectations. It protects only expectations which satisfy an objective criterion of reasonableness. Reasonableness is a familiar concept and no definition is necessary. But it is, of course, right to stress that reasonableness postulates community values. It refers not to the standards of Lord Eldon's day. It is concerned with contemporary standards not of moral philosophers, but of ordinary right thinking people. Sometimes those standards will receive their distinctive colour from the context of a consumer transaction, a business transaction or even a transnational financial transaction. And the usages and practices of dealings in those disparate fields will be prime evidence of what is reasonable.

The law of contract is generally not concerned with the subjective expectations of a party. The law does not protect unreasonable expectations. It protects only expectations which satisfy an objective criterion of reasonableness.

It is now of some relevance to consider the status of our proposition. It is certainly not a rule of law. It is possible to argue that it is a general principle of law, such as, for example, the principle that no man may benefit from his own wrong. I prefer to regard it as the central objective of the law of contract. The function of the law of contract is to provide an effective and fair framework for contractual dealings. This function requires an adjudication based on the reasonable expectations of the parties. It is right to acknowledge, however, that the reasonable expectations of parties cannot always prevail. Sometimes they must yield to countervailing principles and policies. For example, other values enshrined in law and public policy may render the contract defeasible. Nevertheless, the aim of protecting reasonable expectations remains constant.[2]

1
Reiter and Swan, "Contracts and the Protection of Reasonable Expectations", in *Studies in Contract Law,* ed by Reiter and Swan, 1980, Toronto, 1–22, at 7.

2
Reiter and Swan, ibid, at 6.

It is now possible to examine how the English law of contract measures up to this policy. Inevitably, I will have to be selective. But I hope to look at topics that are of considerable practical importance. The first relates to the formation of contracts.

Formation of contracts

The classical doctrine is that a contract can only come into existence by the congruence of a matching offer and acceptance. As a general proposition this makes sense, but it does not solve all cases satisfactorily. Take, for example, the so-called battle of the forms cases notably in the field of negotiations for the conclusion of building and engineering contracts. Each party insists on contracting only on his own standard conditions. In the meantime the work starts. Payments are made. Often it is a fiction to identify an offer and acceptance. Yet reason tells us that neither party should be able to withdraw unilaterally from the transaction. The reasonable expectations of the parties, albeit that they are still in disagreement about minor details of the transaction, often demand that the court recognise that a contract has come into existence. The greater the evidence of reliance, and the further along the road towards implementation of the transaction is, the greater the prospect that the court will find a contract made and do its best, in accordance with the reasonable expectations of the parties, to spell out the terms of the contract.[3]

Privity of contract

That brings me to a serious blemish in the English law of contract. Some 80 years ago, in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [4] the House of Lords held that English law does not recognise a contract for the benefit of a third party. Despite condemnation by many judges and academic writers, this rule lingers on. The rule was laid down as being a self-evident proposition of logic. But the logic was flawed. It is indeed obvious that a bilateral contract cannot impose a burden on a stranger. But if for commercial or other good reasons two parties agree that one will confer a benefit on a third

3
G Percy Trentham Ltd v Archital Luxfer Ltd [1993] 1 Lloyd's Rep 25.

4
[1915] AC 847. See also *Midland Scruttons Ltd v Silicones Ltd* [1962] AC 446 and *Kepong Prospecting Ltd v Schmidt* [1968] AC 810.

party, and the latter accepts the benefit, no legal logic demands that the stipulation be denied effect. Certainly, the doctrine of consideration poses no problem: ex hypothesi the stipulation for the benefit of a third party is part of an agreement involving an exchange of promises between the contracting parties. The ruling in *Dunlop Pneumatic* is inconsistent with the prime function of the law of contract which is to facilitate commercial dealings. It ignores the fact that parties in good faith rely on the agreement for the benefit of a third party. It fails to take into account that businessmen, for sensible reasons, sometimes wish to enter into such promises in favour of third parties.

Confidence in promises is the lifeblood of commerce; and there can be no confidence if parties are not obliged to perform the promises. The privity rule causes particular difficulties where the main contractors, subcontractors and consultants are linked in a network of contracts. The privity rule also frequently prevents a party to a bilateral contract from taking out an insurance policy for the benefit of a third party. Where there is no statutory inroad on the privity rule such a stipulation is unenforceable. Take also the common example of a buyer of goods from a distributor. As part of the distributorship agreement between the manufacturer and distributor, a manufacturer's warranty is given for the benefit of the buyer. No consideration passes from the buyer to the manufacturer. The manufacturer's warranty is a classic contract for the benefit of a third party. It would be absurd to deny efficacy to it. It would be a serious defect in our contract law if businessmen were precluded by legal doctrine from conferring such benefits on third parties.

Not surprisingly, judges display much ingenuity in inventing exceptions to the rule to avoid the inconvenience and unfairness of the rule. It is also noteworthy that a contract for the benefit of a third party is recognised in the legal systems of most European countries, as well as in much of the common law world, including the United States, New Zealand and parts of Australia. In an excellent report, the English Law Commission has recommended that the rule be reversed

by statute.[5] Given decades of procrastination, one would hope that the proposed legislation will now be enacted speedily. It is to be noted, however, that the Bill provides that the legislation should not be construed as preventing judicial development of third party rights. That is important because the legislation may not be comprehensive. The Law Commission's proposals require identification of the third party by name, as a member of a class or as answering a particular description. It may not give a remedy in the manufacturers' warranty case. It may therefore still be desirable for the House of Lords to review *Dunlop Pneumatic* in a suitable case.

Consideration

That brings me to the related topic of consideration. The classic model of English contract law is a bargain: and a bargain postulates an exchange. Consideration is therefore historically a fundamental doctrine of English law. Almost 90 pages are devoted to it in the ninth and latest edition of Professor Treitel's book on contract law.[6]

Why should the law refuse to sanction a transaction for want of consideration where parties seriously intend to enter into legal relations and arrive at a concluded agreement?

At first glance, it seems a highly technical doctrine. On the other hand, the question may be asked why the law should refuse to sanction a transaction for want of consideration where parties seriously intend to enter into legal relations and arrive at a concluded agreement. If the court refuses to enforce such a transaction for no reason other than that the parties neglected to provide for some minimal or derisory consideration, is it not arguably a decision contrary to good faith and the reasonable expectations of the parties? Some of these considerations may have led Lord Goff of Chieveley in *The Pioneer Container* to say that it is now open to question how long the principles of privity of contract and consideration will continue to be maintained.[7] In my view, the case for abandoning the privity rule is made out. But I have no radical proposals for the wholesale

5
Privity of Contract: Contracts for the Benefit of Third Parties, Law Commission No 121, Cm 3329.

6
Treitel, GH, *The Law of Contract*, 9th edition.

7
[1994] 2 AC 324 at 335; see also *White v Jones* [1995] 2 AC 207 at 262–263, per Lord Goff of Chieveley.

review of the doctrine of consideration. I am not persuaded that it is necessary. And great legal changes should only be embarked on when they are truly necessary. First, there are a few cases where even in modern times courts have decided that contractual claims must fail for want of consideration. On the other hand, on careful examination, it will usually be found that such claims could have been decided on other grounds, for example, the absence of an intention to enter into legal relations or the fact that the transaction was induced by duress. Once a serious intention to enter into legal relations and a concluded agreement is demonstrated in a commercial context, there is virtually a presumption of consideration which will almost invariably prevail without a detailed search for some technical consideration.[8] On balance, it seems to me that in modern practice the restrictive influence of consideration has markedly receded in importance. Secondly, it seems that in recent times the courts have shown a readiness to hold the rigidity of the doctrine of consideration must yield to practical justice and the needs of modern commerce. The landmark case is the decision of the Court of Appeal in 1990 in *Williams v Roffey Bros and Nicholls (Contractors) Ltd*.[9]

The doctrine of consideration should not restrict the ability of commercial contractors to make periodical consensual modifications, and even one-sided modifications. The reasonable expectations of the parties should prevail over technical and conceptualistic reasoning.

The important question arose whether there is sufficient consideration where the contracting party promised to pay an additional sum to the other contracting party simply in return for a further promise by the latter to perform his already existing contractual obligations. The orthodox view would have been that there was no consideration. But the Court of Appeal unanimously held that the defendants were bound by their promise since the promisee obtained a practical benefit. The court was obviously concerned that the doctrine of consideration should not restrict the ability of commercial contractors to make periodical consensual

8
The Eurymedon [1938] P 41; [1938] 1 All ER 122.

9
[1991] 1 QB 1.

modifications, and even one-sided modifications, as the work under a construction contract proceeded. The reasonable expectations of the parties prevailed over the technical and conceptualistic reasoning.

Good faith

Next, I turn to the approach of English law to the concept of good faith. In the *jus commune* of Europe is a general principle that parties must negotiate in good faith, conclude contracts in good faith and carry out contracts in good faith.[10] The Principles of International Commercial Contracts published by Unidroit provide that in international trade, parties must act in accordance with good faith and fair dealing, and that they may not exclude or limit this duty.[11] In the United States, the influential Uniform Commercial Code is explicitly and squarely based on the concept of good faith. Elsewhere in the common law world, outside the United Kingdom, the principle of good faith in contract law is gaining ground. It is the explicit basis of many international contracts.

Since the English law serves the international market place, it cannot remain impervious to ideas of good faith, or fair dealing. For my part, I am quite confident that the City of London, and English businessmen generally, have no problem with the concept of good faith, or fair dealing. But English lawyers remain resolutely hostile to any incorporation of good faith principles into English law. The hostility is not usually bred from any great familiarity with the way in which the principle works in other systems. But it is intense. My impression is that the basis of the hostility is suspicion about what good faith means. If it were a wholly subjective notion, one could understand the scepticism. If it were an impractical and open-ended way of fastening contractual liability onto parties, it would deserve no place in international trade. But it is none of these things. While I accept that good faith is sometimes used in different senses, I have in mind what I regard as the core meaning.

Undoubtedly, good faith has a subjective requirement: the threshold requirement is that the party must act honestly. That is an

10 *Principles of European Contract Law, Part I: Performance, Non-Performance and Remedies,* prepared by the Commission on European Contract Law, edited by Ole Lando and Hugh Beale, Article 1.106, at 53.

11 Article 1.7, at 16–17.

unsurprising requirement and poses no difficulty for the English legal system. But good faith additionally sets an objective standard *viz* the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned. For our purposes that is the important requirement.[12] Used in this sense, judges in the greater part of the industrialised world usually have no great difficulty in identifying a case of bad faith.

It is not clear why it should perplex judges brought up in the English tradition. It is therefore surprising that the House of Lords in *Walford v Myles*[13] held that an express agreement that parties must negotiate in good faith is unenforceable. As the Unidroit principles make clear, it is obvious that a party is free to negotiate and is not liable for a failure to reach an agreement. On the other hand, where a party negotiates in bad faith not intending to reach an agreement with the other party he is liable for losses caused to the other party. That is the line of reasoning not considered in *Walford v Myles*. The result of the decision is even more curious when one takes into account that the House of Lords regarded a best endeavours undertaking as enforceable. If the issue were to arise again, with the benefit of fuller argument, I would hope that the concept of good faith would not be rejected out of hand. There is no need for hostility to the concept: it is entirely practical and workable.

Indeed from July 1995 the EC Directive on Unfair Terms in Consumer Contracts has been in operation in England.[14] The Directive treats consumer transactions within its scope as unfair when they are contrary to good faith. It is likely to influence domestic English law. Given the needs of the international market place, and the primacy of European Union law, English lawyers cannot avoid grappling with the concept of good faith. But I have no heroic suggestion for the introduction of

The introduction of a general duty of good faith in our contract law is not necessary. There is not a world of difference between the objective requirement of good faith and the reasonable expectations of the parties.

12 Farnsworth, "Good Faith in Contract Performance", in *Good Faith and Fault in Contract Law,* edited by Beatson and Friedman, 1995, 154–190.

13 [1992] 2 AC 128. It is important to note that at best the remedy for the breach of the undertaking to negotiate in good faith is the waste of costs of the injured party caused by the bad faith negotiations of the other.

14 Unfair Terms in Consumer Contracts Regulations, SI 1994/3159.

a general duty of good faith in our contract law. It is not necessary. As long as our courts always respect the reasonable expectations of parties, our contract law can satisfactorily be left to develop in accordance with its own pragmatic traditions. And where in specific contexts duties of good faith are imposed on parties, our legal system can readily accommodate such a well-tried notion. After all, there is not a world of difference between the objective requirement of good faith and the reasonable expectations of the parties.

That brings me to the interpretation of written contracts. Disputes about the meaning of contracts is one of the largest sources of contractual litigation, notably in respect of international contracts. The reason is, in the words of Oliver Wendell Holmes, that a word is not a transparent crystal. Clarity is the aim, but absolute clarity is unattainable. And it is impossible for contracting parties to forsee all the vicissitudes of commercial fortune to which their contract will be exposed. Moreover, and quite understandably, business bargains have to be struck under great pressure of events and time. In passing, I add that it is therefore particularly tiresome for lawyers to expatiate on the quality of draftsmanship of commercial contracts. Judges must simply do the best they can with the raw materials they are given. Given the intractable nature of problems of construction, the solution of English law is not to ask what the parties subjectively intended but to ascertain what, in the context of the contract, the language means to an ordinary speaker of English. By and large, the objective approach to questions of interpretation serves the needs of commerce. It tends to promote certainty in the law and predictability in dispute resolution.

But I must examine the matter in a little more detail. There is the rule that the court is not permitted to use evidence of the pre-contractual negotiations of the parties or their subsequent conduct in aid of the construction of written contracts even if the material throws light on the subjective intentions of the parties. Logically, these rules follow from the primary rule that the task of the court is simply to ascertain the meaning of the language of the contract. And the rationality of the law is important. But, if these rules were

absolute and unqualified, the primary rule would sometimes defeat the reasonable expectations of commercial men. Pragmatically, it has been decided that if pre-contractual exchanges show that the parties attached an agreed meaning to ambiguous expressions that may be admitted in aid of interpretation.[15] That is a substantial inroad into the primary rule in aid of the protection of the reasonable expectations of the contracting parties.

More importantly, the courts have resorted to estoppel to temper the rigidity of the orthodox rule regarding the inadmissibility of subsequent conduct. Thus in *The Vistafjord,* the Court of Appeal authoritatively held that a party may be precluded by an estoppel by convention from raising a contention contrary to a common assumption of fact or law (including the interpretation of a contract) on which they have acted.[16] The operation of the estoppel is flexible: it only prevails so far as it would be unjust if one of the parties resiled from the agreed assumption. By this, it means the reasonable expectations of the parties can fairly be met. This is simply one of many examples of the percolation of promissory estoppel into contract law. Promissory estoppel is often used to soften the rigidity of classical contract law solutions in order to give effect to the reasonable expectations of parties.

Promissory estoppel is often used to soften the rigidity of classical contract law solutions in order to give effect to the reasonable expectations of parties.

The general approach of courts to problems of interpretation has undergone a substantial change in the last 25 years. There has been a shift away from a black-letter approach to questions of interpretation. The literalist methods of Lord Simmonds are in decline. The purposive approach of Lord Reid and Lord Denning, Master of the Rolls, has prevailed. Two questions can be posed. First, what is literalism? This is easy. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them alive.[17] That is literalism. It has no place in modern law. Second,

15
The Karen Oltmann [1976] 2 LIoyd's Rep 708.

16
[1988] 2 Lloyd's Rep 343.

17
This example is given in *The Works of William Paley,* 1838 edn III, 60. Paley's moral philosophy influenced thinking on contract in the last century.

the significance of the trend towards purposive construction must be considered. It does not mean that judges now arrogate to themselves the power to re-write contracts for parties. It signifies an awareness that a dictionary is of little help in solving problems of construction. Often there is no obvious or ordinary meaning of the language under consideration. There are competing interpretations to be considered. In choosing between alternatives, a court should primarily be guided by the contextual scene in which the stipulation in question appears. And speaking generally, commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties.

Implied terms

That brings me to the implication of terms. In systems of law where there is a general duty of good faith in the performance of contracts the need to supplement the written contract by implied terms is less than in the English system. In our system, however, the implication of terms fulfils an important function in promoting the reasonable expectation of parties. Three categories of implied terms can be identified. First, there are terms implied by virtue of the usages of trade and commerce. The assumption is that usages are taken for granted and therefore not spelled out in writing. The recognition of trade usages protect the reasonable expectations of the parties.

The legal test for the implication of a term is the standard of strict necessity. The courts ought not to supplement a contract by an implication, unless it is perfectly obvious that it is necessary to give effect to the reasonable expectations of parties.

Secondly, there are terms implied in fact, ie, from the contextual scene of the particular contract. Such implied terms fulfil the role of ad hoc gap fillers. Often the expectations of the parties

would be defeated if a term were not implied, for example, sometimes a contract simply will not work unless a particular duty to cooperate is implied. The law has evolved practical tests for the permissibility of such an implication, such as the test of whether a term is necessary to give business efficacy to the contract or the less stringent test whether the conventional bystander, when faced with the problem, would immediately say, "Yes, it is obvious that there is such an implied term". The legal test for the implication of a term is the standard of strict necessity. And it is right that it should be so, since the courts ought not to supplement a contract by an implication, unless it is perfectly obvious that it is necessary to give effect to the reasonable expectations of parties. It is, however, a myth to regard such an implied term as based on an inference of the actual intention of the parties. The reasonable expectations of the parties in an objective sense are controlling: they sometimes demand that such terms be imputed to the parties.

The third category is terms implied by law. This occurs when incidents are impliedly annexed to particular forms of contracts, for example, contracts for building work, contracts of sale, hire, etc. Such implied terms operate as default rules.[18] By and large, such implied terms have crystallised in statute or case law. But there is scope for further development. In such new cases, a broader approach than applied in the case of terms implied in fact, must necessarily prevail. The proposed implication must fit the generality of cases. Indeed, despite some confusion in the authorities, it is tolerably clear that the court may take into account considerations of reasonableness in laying down the scope of terms to be implied in contracts of common occurrence: *Liverpool City Council v Irwin;*[19] *Scally v Southern Health and Social Services Board.*[20] This function of the court is essential in providing a reasonable and fair framework for contracting. After all, there are many incidents of contracts of common occurrence which the parties cannot always be expected to reproduce in writing. This type of supplementation of contracts also fulfils an essential function in promoting the reasonable expectations of the parties.

18
There is an excellent discussion of terms implied by law in Rakaff, "Implied Terms: Of 'Default Rules and Situation Sense' ", in *Good Faith and Fault in Contract Law,* edited by Beatson and Friedman, 191.

19
[1977] AC 239.

20
[1992] 1 AC 294.

Conclusion

By way of conclusion, I would acknowledge that the English law of contract is far from perfect. There is never a last and definite word on the law. Yet there has been progress. In a more formalistic era, courts sometimes neglected to consider the reason for a rule. But formalism is receding. Modern judges usually have well in mind the reason for a rule, and in a contract case that means approaching the case from the point of view of the reasonable expectations of the parties. Where contract law is still deficient it will usually be found that the cause is that the reasonable expectations of the parties have been ignored or given inadequate weight. The most serious structural defect in English contract law is the privity rule. Otherwise English contract law is generally capable of safeguarding the reasonable expectations of parties by its own pragmatic methods. It is therefore not surprising that English standard form contracts are widely used in international transactions. Even more important is the fact that English proper law clauses are widely used in international trade. Businessmen tend to be knowledgeable and they vote for the legal system of their choice with proper law clauses. They recognise that the English law of contract is admirably designed to cope with the challenges of a modern and changing business world. It draws its strength and vitality from a close adherence to the reasonable expectations of contracting parties.

The Right Honourable Lord Woolf

Judicial Review
of Financial Institutions

Harry Kenneth Woolf
(*b.* 2 May 1933)

Born in Newcastle in 1933, Lord Woolf attended Fettes, the Edinburgh public school, and read law at University College, London. He then embarked upon a career in law that eventually saw him rise to the position of Lord Chief Justice of England and Wales.

Lord Woolf was called to the Bar in 1954, practising at the Inner Temple. After spending time as a Recorder of the Crown Court and Junior Counsel for the Inland Revenue, he became a Judge of the High Court of Justice in 1979. Five years later he became a Lord Justice of Appeal of the Court of Appeal. By 1992, at the young age, for a judge, of 59, he became a Law Lord. In 1996, Lord Woolf became Master of the Rolls, and finally rose to his current position as Chief Justice in 2000.

Lord Woolf has always displayed phenomenal energy. He is extremely receptive to ideas and is

well-known for his humanitarian views. Of all the judges, it is primarily he who has been outspoken about the need for judicial review to check the power of government. Lord Woolf's great sense of morality is said to come from his family roots. His great grandfather, who emigrated from Eastern Europe to Newcastle upon Tyne, had a sense of duty and diligence which has permeated his descendants.

Lord Woolf is the author of *Protecting the Public—The New Challenge*, published in 1990 in the Hamlyn Lecture Series. He is joint-editor with his son, Jeremy Woolf, of *Zamir and Woolf: The Declaratory Judgment* (now 3rd edition, 2001); and the joint-editor (with Professor Jeffrey Jowell QC) of *De Smith, Woolf & Jowell: Judicial Review of Administrative Action* (now 6th edition, 2002).

He has served as Chairman of a number of committees, including the Civil Justice Council. In 1991, together with Judge Tumin, he completed a report on prison disturbances, following the Strangeways riots.

He served as the Chairman of the Board of Management of the Institute of Advanced Legal Studies from 1986–1994; President of the Association of Law Teachers from 1985–1989; and Chairman of the Lord Chancellor's Advisory Committee on Legal Education between 1986–1991.

In 1994, Lord Woolf was appointed Pro-Chancellor of the University of London. He is also currently a Member of the World Bank International Advisory Council on Law and Justice, Washington DC.

Lord Woolf is, of course, well-known for his recommendations for changes in the civil justice system in England and Wales. His report made history: see *Access to Justice, Final Report to the Lord Chancellor (The Woolf Report)*, July 1996, HMSO, London.

12 Judicial Review of Financial Institutions

Lord Woolf
Master of the Rolls, Court of Appeal

Text of the Twelfth Sultan Azlan Shah Law Lecture delivered on 28 August 1997 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highness, it is an immense privilege to be asked to give this lecture. I am well aware of the distinction of my eleven predecessors and the role these lectures have already played in developing the heritage which Malaysia shares with my country and other members of the Commonwealth, namely the common law and respect for the Rule of Law.

I am also conscious of the immense pains to which Dato' Dr Visu and others have gone to make our visit a success. While I feel far from confident of my ability to maintain the standards of my predecessors, I am at least fortunate that I start off with two advantages. The first, being that the ancient office going back to the 12th century that I hold of Master of the Rolls, means that I have the ideal vantage point from which to observe how our joint heritage is continuing to develop within my jurisdiction. The second is that the subject of my talk this evening is one of serious significance for both our countries. This should mean that it will be difficult for me to fail to say something which is of a modicum of interest to my audience.

Certainly my subject has ingredients which are capable of being of interest. It concerns the review by the courts of institutions whose decisions can have a massive effect on the wealth of individuals and the economics of a nation.

The rise of regulatory bodies

Over the last few years, in the UK, we have had to learn some harsh economic lessons. The lessons are now learnt, and in general, accepted across the political spectrum. The lessons involve the recognition:

1. that financial and commercial markets and undertakings need freedom from government control, if they are to operate effectively;
2. that those very same markets still require regulation if they are not to act in a manner which is incompatible with the public interest;
3. that the control is best provided not by governments or governmental bodies but by regulatory bodies which have a practical knowledge of the way the market in which they operate works.

Across the financial and commercial spectrum in the UK there are now a range of these regulatory bodies. Some are self-regulatory, in that their members are appointed and their powers prescribed by the markets themselves. Some are wholly statutory and others are part statutory and part self-regulatory. Some are long established and historic institutions, such as the Bank of England or the Stock Exchange. Others are of much more recent origin, such as the Take-over Panel. In England we have recently gone through a period when the privatisation of what were formerly nationalised industries and institutions was a high priority of the government. Some of the sources of the supply of water, electricity, gas, telecommunications, road and rail transport have been transferred from national to private ownership. State monopolies have become private monopolies.

The advantages of the freedom of the private sector have had to be married to the need to protect public and national interests. The usual solution adopted to meet this need was to place over a newly privatised utility a watchdog in the form of a regulator. The

watchdog's task would not be fulfilled if its role was confined to barking. It has to have sharp teeth so that it can bite in a way which really hurts when necessary. This form of regulation is much more satisfactory than that which could be supplied by the courts. It is more expert, more expeditious, more flexible and more proactive than the courts can be. The same solution has been adopted in relation to the financial sector of the economy. To differing degrees the regulators which have been established have in common:

1. that how they perform their role is of great importance to the public and the economy of the UK;
2. that they exercise immense power and how they exercise that power can be a matter which seriously affects the bodies which are subject to their power. If they fail to exercise or exceed their power or exercise it unfairly or unreasonably this can cause injustice and dramatic financial consequences;
3. that to perform their roles effectively the regulatory bodies require considerable freedom of action. They need to be able to respond to rapidly changing situations.

Those to whom the decisions relate require to know that their decisions have to be obeyed. Uncertainty can be inconsistent with good regulation.

The courts' dilemma

The establishment of this regulatory framework has created an acute dilemma for the courts within my jurisdiction. I believe, as a result of what I have learnt about the situation in Malaysia, the same is true for the courts in this jurisdiction as well.

It is reasonably clear that as these regulatory bodies exist it is preferable for the courts not to become involved in disciplining or reviewing directly the activities of the bodies which are the subject of the regulation. To take an example, it is better for the regulatory body which has been established to discipline the underwriting members

of Lloyd's than for the courts to attempt to do so. Here there is no dilemma. The dilemma is the extent to which the courts should regulate regulators. If the courts were to abrogate any responsibility for reviewing the regulatory activities then that would mean they were above the law. They would not be subject to the Rule of Law.

If, on the other hand, the courts exercise their power to review, how are they to avoid interfering with the regulators' role, thus undermining their authority and creating undesirable uncertainty?

The dilemma is especially acute in the case of financial markets. Over-regulated, the markets will suffocate. Too little regulation and the reputation of the markets will suffer. This is true of the City of London.

That infrastructure includes the courts. The courts can enhance or seriously damage that reputation. Here I believe we are indeed fortunate although we cannot afford to be complacent. We have still the two critical features that civil justice must have if it is to enhance the reputation of an international financial centre:

1. We have a strong and independent legal profession.
2. We have a judiciary of unquestionable integrity, appointed and promoted on merit.

Of course our civil justice system is capable of improvement—I have recommended over 300 improvements in my recent report, *Access to Justice*.[1] That what I say is basically correct is confirmed by a visit to the Commercial Court in London any day of the working week. In half of the cases coming before that court only one party has, and in a third of the cases neither party has, any connection with England. They have elected to have their commercial disputes resolved in London presumably because of the quality of justice they receive. My concern, however, in this lecture is with the other leading part which the civil justice system has to play. This is to supervise the bodies to which I have referred, bodies that need to

1
Lord Woolf, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, July 1996, HMSO, London.

exist to regulate the markets and other financial and commercial activities of any developed trading nation. These regulators require and must have, for reasons I have already explained, very wide and important powers. When the powers are exercised constructively they are wholly beneficial. The regulators, however, amount to no more than the individual or individuals appointed to exercise these powers. As is the case with any human institution, they can be fallible. If, as a result, they make a defective or otherwise unlawful or unjust decision, there needs to be some form of mechanism to correct this.

If regulators make a defective or otherwise unlawful or unjust decision, there needs to be some form of mechanism to correct this.

In the case of the United Kingdom, as in Malaysia, that mechanism is now operated by the courts on judicial review. It is part of my message this afternoon that the way in which judicial review has been developed in the United Kingdom and in Malaysia (according to the very interesting and instructive cases with which I have been provided) makes it an ideal procedure for achieving this purpose.

The need to intervene

In many areas in which the courts are required to intervene in order to uphold the rule of law they have to do so with delicacy and sensitivity, but in no area is this more true than in relation to the activities in which regulatory bodies of the type to which I have referred are involved.

Wisely in both our jurisdictions there have been established bodies such as the Stock Exchange, the Monopolies and Mergers Commission, Panels on Take-overs and Mergers, Securities and Futures Authorities and so on. It is their direct responsibility to ensure the probity and well-being of the market within the area of activity for which they have responsibility. Bodies of this sort have

an understanding of the workings of the operation of their markets which judges, even experienced commercial judges, cannot match. Frequently they have to take extremely rapid action. Their decisions can have enormous financial implications on those to whom the decisions relate. These are areas in which the involvement of the courts can create undesirable uncertainty. Often their effectiveness depends on the moral authority which their position and expertise command. It is important that the courts do not unintentionally undermine that authority. However, while this is true it is also true that situations do arise where it is essential that the courts are able to, and do, intervene. If there has been real injustice, the courts have to intervene. Regulatory bodies are not entitled to confer on themselves power to inflict injustice on those who operate in the markets which it is their responsibility to supervise.[2] If they were able to do so, without those involved having any possible remedy, this would result in the regulatory authorities, which should enhance the reputation of their particular market, undermining that reputation.

It is therefore of the first importance that the courts should protect punctiliously their jurisdiction to intervene when it is appropriate to do so. Parliament can limit the circumstances when intervention is appropriate but, as the House of Lords made clear in the landmark *Anisminic* case,[3] the courts cannot be excluded from intervening to prevent even a statutory body exceeding the jurisdiction it has been given by Parliament. This is but a reflection of Your Royal Highness' statement made almost two decades ago that, "Every legal power must have legal limits, otherwise there is dictatorship,"[4] a principle reaffirmed by Lord Browne-Wilkinson in *Payne*.

It is also a reflection of a decision of the Federal Court over which Your Royal Highness presided as Lord President in *OSK & Partners v Tengku Noone Aziz & Anor*[5] and the Court of Appeal in England's later decision in *R v Panel on Take-overs and Mergers, ex parte Datafin*.[6] In the *OSK* case, Abdoolcader J, in giving a judgment of your Royal Highness' court, had to consider as a point of principle

2
See *R v Take-over Panel, ex parte Guinness PLC* [1989] 2 WLR 863 at 901.

3
Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969] 1 All ER 208, HL.

4
See *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise* [1979] 1 MLJ 135, at 148.

5
[1983] 1 MLJ 179, FC & HC.

6
[1987] QB 815; [1987] 1 All ER 564, CA.

whether the Kuala Lumpur Stock Exchange Committee was subject to the control of the High Court's supervisory jurisdiction. At the outset of his judgment the judge set out with admirable clarity the issue involved by asking:

> How far can the long arm of certiorari reach? To whom can it extend? These are the central questions which radiate from and constitute the core of the sole issue on a preliminary point of law posed for resolution in this appeal as to the amenability of decisions of the Kuala Lumpur Stock Exchange Committee to orders and directions of this nature.[7]

These words were uttered only five years after the new procedure of judicial review had been introduced in England by the making of a revised new Order 53 of the Rules of the Supreme Court, and a year after its statutory reaffirmation by section 31 of the Supreme Court Act 1971. The provisions of that Order and that section are not part of the law of Malaysia but their source, which is the old prerogative orders, was and is part of Malaysian law. Having examined the English authorities dealing with very different bodies, your Royal Highness's court reversed the decision which the judge at first instance had understandably come to and held the Committee of the Stock Exchange was within the reach of certiorari.

Today, in both my jurisdiction and yours, this decision would cause no surprise. I do not know whether the decision was regarded as being radical in Malaysia at the time it was given. However, I can say that if it had been given in England in 1982 it would have been treated as a landmark decision of the greatest significance, marking a new step forward in what was by then the already rapidly developing field of judicial review. In England at that time the conventional approach would have been very much the same as that of the judge at first instance in the *OSK* case. It would have been to focus on the contractual and commercial relationship which the appellant stockbroker had with the Stock Exchange, under which he undertook to be bound by the rules of the Exchange. This would be treated as preventing him from seeking to obtain a remedy of certiorari

7 [1983] 1 MLJ 179 at 182.

for the breach of natural justice which he alleged. However, rightly anticipating developments in England and elsewhere, the Federal Court adopted a more sophisticated approach to certiorari and thus to judicial review. It went back to the principles enunciated by the House of Lords in *Ridge v Baldwin*.[8] Applying those principles, it declared that the Stock Exchange was a hybrid body with "an element of public flavour superimposed on the contractual element in relation to its members"; that as the Committee "is responsible for the management of the affairs of the Exchange [it] is accordingly a body of persons having legal authority to determine the rights of persons licensed under the [Company's] Act to carry on business as stock brokers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the administration of that power and it is therefore subject to judicial review by way of certiorari and prohibition".[9]

This reasoning involves looking not only at the source of a body's authority—whether it was a statutory or contractual body—but also the functions it performed in deciding whether it was subject to the ancient prerogative remedies. It was a decade later, in *R v International Stock Exchange of the UK and Ireland Ltd, ex parte Else (1982) Ltd*,[10] that the Court of Appeal of England treated our Stock Exchange as the proper subject of judicial review for the first time. Our law had developed and there was by then no argument to the contrary.

In between the two Stock Exchange cases came the decision in 1987 of *R v Panel on Take-overs and Mergers, ex parte Datafin*.[11] The distinction between *Datafin* and the *OSK* case was that in the *OSK* case the court was considering the Malaysian hybrid statutory contractual body, while in the *Datafin* case the body was a self-regulating body, whose powers had neither a statutory nor contractual source. The Take-over Panel, lacking any powers de jure, exercises immense powers in fact. As Lord Donaldson said:

> Perched on the 20th floor of the Stock Exchange building in the City of London, both literally and metaphorically, it oversees and regulates a

8
[1964] AC 40.

9
[1983] 1 MLJ 179 at 186.

10
[1993] QB 534.

11
[1987] QB 815; [1987] 1 All ER 564, CA.

> very important part of the UK's financial markets. Yet it performs this function without visible means of legal support.[12]

This being the nature of the body, the Master of the Rolls early in his judgment stated that "the principal issue in [the] appeal and the only issue that may matter in the longer term is whether this remarkable body is above the law".[13] That issue the members of the court, for slightly differing reasons, answered unanimously. The Panel was not above the law but was subject to judicial review. The Panel did not have a free hand to decide issues irrespective of the law. Interestingly, having regard to the earlier Malaysian *OSK* decision, the Master of the Rolls, like the Federal Court, considered this answer depended upon whether the old supervisory jurisdiction of the Queen's courts would "extend to such a body discharging such functions". The second member of the court, Lloyd LJ, based his reasoning more on the statutory provisions to which I have already referred, but this passage from his judgment demonstrates the breadth of his approach in these words:

> So long as there is a possibility, however remote, of the Panel abusing its great powers, then it would be wrong for the courts to abdicate responsibility. The courts must remain ready, willing and able to hear a legitimate complaint in this as in any other field of our national life.[14]

Lloyd LJ also clearly enunciated the functional test, to which I referred earlier. Having made clear that if the source is solely statutory the power will almost certainly be public and if the source is solely contractual the power will almost certainly be private, he went on to say:

> … in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may … be sufficient to bring the body within the reach of judicial review.[15]

12
[1987] 1 All ER 564 at 566.

13
Ibid, at 568.

14
Ibid, at 582.

15
Ibid, at 583.

On this approach there should be little risk of a regulatory body making decisions which could have material implications being wholly beyond the supervision of the courts. Of course, Parliament may with complete legitimacy limit the circumstances in which it is appropriate for the courts to grant relief, but I am totally committed to the view that, in a parliamentary democracy governed by the Rule of Law, even Parliament cannot prevent all resorts to the courts. For this reason I would respectfully commend the decisions of your Supreme Court in the protracted litigation involving your Panel on Take-overs and Mergers and Lee Kian Chan and others. As you know, the Malaysian Panel is a creature of statute. I note that the Companies Act 1965 in section 179(8) provides that:

> The acts and decisions of the Panel in the exercise of its functions in respect of the general principles and rules in the Code shall be final and not capable of being challenged in any court.

However, I commend the decision in the *Lee Kian Chan* case which concluded that this provision could not protect the Panel from having an opinion it had expressed corrected by the court when the opinion was wrong and made outside its jurisdiction.[16]

It would be unthinkable that the decisions, if taken by government would be reviewable, but they would not be reviewable if taken by regulators.

The leading counsel whom the Take-over Panel in England retained in the *Datafin* case to argue that the Panel was not subject to judicial review was Robert Alexander QC. Lord Alexander, as he subsequently became, went on to be the Chairman of the Take-over Panel. Later he became chairman of one of our largest banks. It is not without interest to note that, with his distinguished legal and commercial background, he has publicly acknowledged that he is wholly in favour of the Panel being subject to the courts' powers of review.

16
See *Petaling Tin Bhd v Lee Kian Chan & Others* [1994] 1 MLJ 657.

The effect of the policy to establish regulators has been to transfer to the regulators what previously had been much of the business of government itself.[17] It would be unthinkable that the decisions, if taken by government would be reviewable, but they would not be reviewable if taken by regulators. This is not what the UK government intended and the government (I have to admit with some qualification) has welcomed the protection for the public which judicial review has provided.

At present it appears that the English courts and, so far as I am aware, the Malaysian courts as well are resolving the dilemma satisfactorily. They are achieving the right balance.

Discretionary nature of judicial review

The courts have been assisted in doing so by the way judicial review operates. It is redolent of discretion. The position is not the same as when the courts are intervening to protect private rights. Then the courts' discretion is strictly limited. If you have a private right, normally you are entitled to insist that it should be enforced. In the case of judicial review the courts are concerned with ensuring that public bodies fulfil their public duties or responsibilities in the interests of the public. If, in any particular situation, it is not desirable for the courts to become involved or interfere then they should not do so because the traditional prerogative remedies available on judicial review are discretionary. They enable the courts not to become involved when this is not desirable. In public law, until the court has determined that an act or decision is invalid in proceedings properly constituted for that purpose, that act or decision remains perfectly effective. There is no undesirable uncertainty; if the court refuses relief this remains the position. The situation was made absolutely clear by Lord Radcliffe in *Smith v East Elloe RDC* [18] in his celebrated statement:

> … an order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless

17
See *R v Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909 at 931 (Hoffmann LJ).

18
[1956] AC 736 at 769–770.

> the necessary proceedings are taken at law to establish the cause of the invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

The advantage of this when compared to the position in private law is demonstrated by the litigation over swaps entered into by local authorities in the United Kingdom when they have no power to do so. The local authorities were able to rely on their own wrong (the fact that they had exceeded their powers) to have the actions to enforce the contracts set aside.[19] In public law proceedings the court could refuse to treat an action or decision, even if ultra vires, as invalid in whole or in part.

The discretionary nature of judicial review, which enables the flexibility of action to be achieved which is so desirable when reviewing the actions and decisions of financial institutions, is supported by the procedural safeguards built into judicial review in England. The features of the procedure are well-known; I understand they are the same in Malaysia, although your Order 53 has not been revised in the way that has happened in England. I draw attention to:

1. the requirement of leave;
2. the obligation to bring proceedings promptly;
3. the need for the application to be made by a person "affected" (ie, a person who has a sufficient interest);
4. the expeditious and simple procedure;
5. the fact that all the remedies are discretionary; and
6. the fact that the cases are heard only by High Court judges who are selected for their experience of judicial review.

Whether to give leave to make and, if so, whether to grant a remedy are frequently decisions which are finely balanced. In the financial markets in particular any intervention by the courts, even the consideration of an application for leave, can have disastrous consequences which cannot be undone. The courts have had to accept that, by even opening their doors a fraction in the field of take-over

19
See also *Credit Suisse v Allerdale Borough Council* [1996] 3 WLR 894.

bids, they have made themselves into a potential weapon which a party may be tempted to abuse. Fortunately, however, so far in our courts if there has been any abuse it has been limited. Thus, the Securities & Investment Board (SIB) has been in existence for over ten years,[20] yet it has only had to respond to about five applications. This, I believe, is due to the safeguards to which I have just referred as well as the foresight of Lord Donaldson in the *Datafin* case. In his judgment, Lord Donaldson emphasised that in the normal course of events the courts would not be prepared to interfere with rulings of the Take-over Panel during the progress of a take-over battle. Usually, if it would interfere at all, it would do so after the battle was over by granting declarations to provide guidance for the future after examining historically the facts which had occurred. This may not be the most attractive remedy for the applicant particularly as damages are not usually available in public law proceedings. It is, however, better than no remedy at all.

The advantage of declaratory relief is that it can be provided in a restrictive or broad manner. It can achieve exactly the result the court wishes, no more and no less. It can apply only in the future leaving past decisions intact, or it can apply retrospectively as well as prospectively. Lord Donaldson's successor as Master of the Rolls took much the same approach in *R v Securities and Futures Authority, ex parte Panton*[21] saying:

> ... these bodies are amenable to judicial review but are, in anything other than very clear circumstances, to be left to get on with it. It is for them to decide on the facts whether it is, or is not, appropriate to proceed against a member as not being a fit and proper person and it is essentially a matter for their judgment as to the extent to which a complaint is investigated.

There are, of course, difficulties in reviewing the activities of a body if it is not subject to any statutory or contractual restraints on its powers. This naturally causes the courts to adopt a restrictive approach.

20
Financial Services Act 1986.

21
(1994) Unreported (CA civil).

Restrictive approach in judicial review

However, it is not difficult to find statements advocating caution in relation to interfering with the decisions of regulatory bodies which have more conventional constitutions. This was the approach of Hirst J in *A v B Bank (Bank of England intervening)*[22] and Henry LJ in the *Television Commission* case[23] (he said he did not regard the judgments of the Commission as being "readily reviewable"). The courts also recognise that the urgency with which the regulators must act inhibits them from being as sensitive as would otherwise be required in relation to consulting third parties prior to reaching a decision which affects them.[24]

Similarly, the inquiries of regulators will not usually be postponed by courts to await the outcome of civil or criminal proceedings. Thus, the auditors of Robert Maxwell failed in their attempt to have disciplinary proceedings against them stayed pending the resolution of civil proceedings.[25]

The relatively small number of challenges in the case of the SIB may also be due to the fact that the Financial Services Act 1986 requires a combination of self-regulation and public accountability by those who are authorised to conduct "investment business". In this way, the SIB can avoid having to police the conduct of authorised bodies. It can leave this to be done largely through the self-regulatory bodies (SROs) and professional bodies (RPBs). Furthermore, those bodies can in turn delegate their roles and if they do this it may mean that they are not subject to review at all. Thus, LAUTRO (the Life Assurance and Unit Trust Regulatory Authority) has delegated part of its investigatory and complaints functions to the Insurance Ombudsman Bureau. The members of LAUTRO make themselves subject to the Bureau's jurisdiction by contract. You would not expect this action of LAUTRO to affect the courts. However, in *R v Insurance Ombudsman Bureau, ex parte Aegon Life*[26] the Divisional Court decided that the Ombudsman Bureau was not subject to judicial review. Rose LJ in his judgment referred to the fact that:

22
[1992] 1 All ER 778.

23
Editor's note:
Now reported as *R v Independent Television Commission, ex parte Virgin Television Ltd* [1996] EMLR 318, DC.

24
R v LAUTRO, ex parte Ross [1993], QB 17.

25
R v Chance, ex parte Smith [1995] BCC 1095.

26
[1994] COD 26.

> ... even if it can be said that the [IOB] has now been woven into a governmental system the source of the IOB's power is still contractual, its decisions are of an arbitrate nature in private law and those decisions are not, save very remotely, supported by any public law sanction.

If this case is followed by higher courts this will be an in-road on the reach of judicial review. In my judgment it involves an approach which is less attractive than that adopted in the *OSK* case to which the English court was not referred. The ombudsmen are a success story, but their attractions must not be tarnished by the non-availability of judicial review. It is one thing for the court to make use of its ample discretion to decline to intervene; it is a different thing altogether for the court not to have the jurisdiction to intervene. As long as the court has the necessary jurisdiction, this will be a significant deterrent to the regulator adopting standards which would warrant intervention. Judicial review has an important day-to-day influence on the manner in which regulatory bodies perform their functions.

As long as the court has the necessary jurisdiction, this will be a significant deterrent to the regulator adopting standards which would warrant intervention.

Judicial review is as concerned with promoting the principles of good administration on the part of regulators as it is concerned with enforcing "public rights".

In England there are already indications that, as anticipated, the new labour government will make the European Convention on Human Rights part of domestic law. This will significantly affect the manner in which judicial review operates because of its emphasis on individual rights. Thus, while the English courts have been supportive of the investigatory role of regulatory bodies and allowed the evidence obtained as a result of their investigations to be available for criminal proceedings, a more restrictive approach was adopted by the European Court of Human Rights. This has been demonstrated by Mr Saunders of Guinness fame and his success before the European Court of Human Rights after he failed before the Court of Criminal Appeal.[27] Making

27 *Saunders v United Kingdom* (1997) 23 EHRR 313; [1996] IIHRL 107, ECHR (17 December 1996).

the Convention part of English domestic law could alter the balance between those who regulate and regulators.

Generally, the courts' approach on applications for judicial review of the conduct of the regulators of financial institutions is not significantly different from that in relation to other bodies. Standards of fairness will be required of the institutions which take account of the interests of third parties and a liberal approach will be adopted on any issue as to standing by English courts. As to standing, it is not necessary to adopt a restrictive approach because, on an application for judicial review, the court has ample discretion to prevent abuse of court proceedings without relying on technical rules. I know of no English case which had merit being refused relief because of a lack of standing on the part of the applicant.

On this last point it may well be that the approach of the English courts is more liberal than those of the Malaysian courts, but I would certainly not be critical of this difference without more knowledge of the Malaysian situation. I also note that, at least in the case of judicial review decisions in the employment field, Malaysian courts are more willing not only to quash flawed decisions but to make the decisions themselves than would be the English courts.

That, while we have so much in common, there should also be these differences does not surprise me. Indeed I welcome them as signs of the continuing vitality of the Malaysian judiciary and the common law. For us to always keep in step would inhibit progress.

I have attempted to give you a bird's eye view of how the English courts see their role today in relation to the regulation of financial institutions. The majority of what I have had to say no doubt contained nothing which was novel to my audience. However, the same would be true in most other common law jurisdictions. To the shores of each of those jurisdictions the common law has arrived like an incoming tide from England.

Thirty, forty, fifty years or more later, that tide is now turning and returning to England, enriched by the influence of the legal systems of about one third of the world, including of course Malaysia. Just as I hope you have benefited from that tide, so now are we in England doing so in our turn.

The importance of these occasions is that they give us an opportunity of benefiting from the experience of each other. Already in the course of this visit I have learnt much. I am sure I am going to continue to do so until the end of my visit. I only hope that I have been able to repay in some small part the warm and generous hospitality my wife and I have enjoyed since we have been here by contributing to this process.

The Right Honourable Lord Nolan

Certainty and Justice: The Demands on the Law in a Changing Environment

Michael Patrick Nolan
(*b.* 10 September 1928)

Lord Nolan was educated at Ampleforth in Yorkshire and at Wadham College, University of Oxford where he has been an Honorary Fellow since 1992.

Called to the Bar, Middle Temple, in 1953, Lord Nolan was appointed a Queen's Counsel in 1968. He was a Judge of the High Court of Justice from 1982–1991 and was Presiding Judge on the Western Circuit from 1985–1988. He was a Lord Justice of Appeal from 1991–1993.

He was knighted in 1982 and became a Privy Counsellor in 1991. In 1994 Lord Nolan was made a Life Peer and a Lord of Appeal in Ordinary.

Lord Nolan retired as a Lord of Appeal in Ordinary on 30 September 1998.

A leading expert on ministerial ethics and standards of conduct, Lord Nolan was appointed by

the then Prime Minister, John Major, to chair the Committee on Standards in Public Life, established in 1994 (Lord Nolan, *Standards in Public Life: First Report on Standards in Public Life* (1995) Cm 2850-1, HMSO: London). The Committee was set up in response to concerns about the conduct of some politicians following the "cash for questions" scandal in which it was alleged that some MPs were taking cash for putting down parliamentary questions. The Committee specifically looked at the practices of those who serve the public including MPs, civil servants and appointees to non-departmental public bodies such as the BBC.

Following reports from the Committee, the House of Commons set up new machinery to oversee members' conduct. Lord Nolan retired from the committee in 1997.

In 2000, he once again chaired another review committee: Review of Child Protection in the Catholic Church in England and Wales. At the invitation of Archbishop Cormac Murphy-O'Connor, Archbishop of Westminster, and with the consent of the Catholic Bishops of England and Wales, Lord Nolan agreed to chair the group whose remit was "to examine and review arrangements made for child protection and the prevention of abuse within the Catholic Church in England and Wales, and to make recommendations". The review was set up following a series of allegations of child abuse by Catholic priests. The final report of the inquiry made a total of 83 recommendations to protect children and was welcomed by welfare organisations across the UK.

Lord Nolan also takes a keen interest in academia having sat as Chairman of the Board, Institute of Advanced Legal Studies, University of London from 1994–2000; and being Chancellor of Essex University since 1997.

Lord Nolan, together with Sir Stephen Sedley, authored *The Making and Remaking of the British Constitution*, Blackstone Press Limited, London, 1997.

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Certainty and Justice: The Demands on the Law in a Changing Environment

Lord Nolan
Lord of Appeal in Ordinary, House of Lords

Text of the Thirteenth Sultan Azlan Shah Law Lecture delivered on 28 August 1998 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highness, you have conferred upon me a great honour by inviting me to give this, the Thirteenth Sultan Azlan Shah Law Lecture. I am very proud that my name should be added to those of my distinguished predecessors. The privilege of being invited to give this lecture is one which I value all the more highly because it comes when I am about to end my full-time service as a Law Lord.

It will be the last public utterance on legal matters which I shall make in that capacity. I could not have hoped for a happier or more celebrated occasion upon which to do so. I am very grateful to Your Royal Highness for the extremely generous and thoughtful hospitality which you have extended to my wife and myself. May I also take this opportunity of thanking Dato' Dr Visu Sinnadurai and all of those who have gone to so much trouble to make the arrangements for my visit.

All privileges carry corresponding responsibilities. I am deeply conscious of the responsibility which I bear to try to be worthy of the opportunity to give this lecture, and in doing so to try to address matters of common importance and concern. I say this with diffidence, because my direct personal experience of Malaysian law is limited to the tax cases in which I was concerned while at the Bar. But I am encouraged by my profound conviction that the basic principles of law, and in particular the common law, to which Malaysia and the United Kingdom subscribe

derive their strength from the sharing of experience. In *Raja Mokhtar bin Raja Yacoob v Public Trustee Malaysia*,[1] Your Royal Highness stressed the importance of the court in the different Commonwealth jurisdictions applying the same principles so that "the common law and its development should be homogeneous in the various sections of the Commonwealth". That is certainly the view which we hold in the United Kingdom.

The advance of technology has gone far towards eliminating the boundaries of time and space. The law can only continue to play its proper part in the service of the community—and in particular the commercial community—if it can match the requirements of an increasingly complex and demanding world, a world which now works a 24-hour day. By this I do not mean that the courts should try to reach their decisions at the speed at which decisions are made on the Stock Exchange. What I mean is that the pace of events increases the need for the law to fulfil its traditional role of providing the essential elements of certainty and continuity, and of making available, in addition to its armoury of injunctions and other instant holding measures, a reasonably prompt, but balanced and thoughtful response to the problems and crises of daily life. To this end, communication and dialogue between the lawyers of countries with similar traditions and ideals is more important now than it has ever been.

I have spoken of the sharing of experience, and of the common law tradition which both Malaysia and the United Kingdom have inherited. What is the common law? We find it defined in the 1641 edition of *Termes de la Ley* as "that body of law which has been judicially evolved from the general custom of the realm", and custom in turn is there defined "to be a law or right not written, which, being established by long use and a consent of our ancestors, has been and daily is put in practice". It was modelled from the outset upon the behaviour and the standards of the "*liber et legalis homo*", the "free and lawful man" who is first to be found in *Glanville's Treatise*. He was conceived to be a reasonable man, innocent of crime and wrongdoing,

1 [1970] MLJ 151.

honest in his dealings, efficient in his work, of good repute among his neighbours, a man of firmness and courage animated by a spirit of friendship for his fellow men.[2] In this list of qualities one sees the origins of such familiar concepts as the presumption of innocence in criminal cases, the principles underlying the law of contract and the implication of contractual terms, the torts of libel and negligence, and the general rule that in each area the burden lies upon the complainant to prove that his adversary has fallen below the level of conduct which the common law requires.

The free and lawful man was the forerunner of the reasonable man of later years. He was sometimes referred to as "the man on the Clapham Omnibus", but this, to my mind, tended to disguise the reality that when a judge invokes the wisdom of a reasonable man he is in fact inevitably invoking his own alter ego. The definition of the common law which I have quoted correctly makes it clear that the law has been judicially evolved. It is for the judges, as the prerogative is for the monarch in the United Kingdom, an infinite source of authority whose output is constrained only by statute.

Developing common law

The great strength of the common law has been to promote certainty by following the principle of stare decisis. Its main function is to resolve disputes on new sets of facts by applying the principles derived from earlier decisions on similar facts. But over the centuries it has tended to acquire too long a baggage train of binding precedents, some of which are incompatible with modern notions of justice. If judges are to retain their constitutional role of declaring what the law is, as distinct from making new law and thus usurping the functions of the legislature, the scope for judge-made modifications of the common law is limited. But in *Reg v R*,[3] Lord Keith of Kinkel said boldly that:

The common law is capable of evolving in the light of changing social, economic and cultural developments.

2
See Richard O'Sullivan QC, *The Spirit of the Common Law* (1965) at 142 and the authorities there cited.

3
[1992] 1 AC 599 at 616.

> The common law is … capable of evolving in the light of changing social, economic and cultural developments.

This statement was made in the context of a criminal case. It is precisely in line with the philosophy expressed by Your Royal Highness also in a criminal case, *Public Prosecutor v Massam Bin Abu and others*[4] in the words:

> … the law must aspire at certainty, at justice, at progressiveness. That is so only if the courts from time to time lay down new principles to meet new social problems.

But the limits of such evolution would not extend to the creation of entirely new criminal offences, however great the apparent justification for it. Thus in *R v Bow Street Magistrates Court, ex parte Choudhury,*[5] Watkins LJ regarded it as a "gross anomaly" that the law of blasphemy in England applies only to those who blaspheme against the beliefs of the established Church. But he held that:

> In our judgment where the law is clear it is not the proper function of this court to extend it; particularly is this so in criminal cases where offences cannot be retrospectively created. It is in that circumstance the function of Parliament alone to change the law.

Parliament and the common law

Over the course of the last two centuries Parliament has been doing precisely that with ever increasingly frequency. As early as 1948 Lord Macmillan, in his Andrew Lang Lecture on Law and Custom,[6] said that:

> The lover of our ancient laws and institutions … cannot but look with some dismay at the process which we see daily in operation around us, whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws

4
(1971) 4 MC 192 at 193.

5
(1990) 91 Cr App Rep 361 at 403.

6
The Times, 6 April 1948.

> which have no regard for the usages and customs of the people, but are dictated by "ideological theories".
>
> There will soon be little of the common law left in either England or in Scotland, and the Statute Book and vast volumes of statutory rules and orders will take its place. The work of our courts is more and more concerned with the interpretation of often unintelligible legislation and less concerned with the discussion and the development of legal principles.

I would respectfully agree that, even by 1958, the area formerly dominated by the common law had been largely inundated by the flood of reforming legislation, though much of the legislation was concerned with the promotion and pursuit of political and social ends rather than with substantive alterations of the common law. Since 1972, when the European Community Act of that year made the Treaty of Rome 1957 part of English law, another flood of legislation has threatened to submerge not only our common law but also part of our statute law. As early as 1974, in *Bulmer Ltd v Bollinger SA*,[7] Lord Denning MR said:

> But when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.

He continued:[8]

> The statute is expressed in forthright terms which are absolute and all-embracing. Any rights or obligations created by the Treaty are to be given legal effect in England without more ado. Any remedies or procedures provided by the Treaty are to be made available here without being open to question. In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law, of Community rights and obligation and we must give effect to them. This means a great effort for the lawyers. We have to learn a new system.

7
[1974] 1 Ch 401 at 408.

8
Ibid, at 419.

The acceptance thus accorded to the introduction of supervening Community law has been dutifully maintained by the courts throughout the 1980s and 1990s. Relations between judges and other lawyers in the United Kingdom and on the Continent are closer and friendlier than they have ever been. The public mood, however, has developed rather differently. And it came as something as a shock to those inside as well as outside the legal profession when, in the *Factortame* case,[9] the House of Lords was, for the first time, required to ignore or "disapply" a United Kingdom Act of Parliament, the Merchant Shipping Act 1988, in deciding how to deal with the case before it. The requirement followed a ruling by the European Court of Justice in reply to a question referred to it by the House. The effect of the ruling was that, in a case concerning Community law, in which an application was made for interim relief, if the national court considered that the only obstacle which precluded it from granting such relief was a rule of national law, it had to set that rule aside. It is something of a historical irony that the United Kingdom, the home of the Judicial Committee of the Privy Council which has for so long acted, and still does act, as the final court of appeal for many other jurisdictions throughout the world, should now find itself subject to rulings made from the Continent. The House of Lords, having considered the ruling, decided that section 14 of the Merchant Shipping Act, which deals with the requirements for the registration of fishing vessels, was the only obstacle to the grant of interim relief. Apart from the requirements of that section, the claim for relief was made out. The section was therefore set aside and relief granted. This was no more than a consistent and logical development of the law as enacted in the 1972 Act, as Lord Bridge in *Factortame* was at pains to make clear; but the practical result of the case, namely that the House of Lords granted an injunction to forbid a Minister from obeying an Act of Parliament, was seen by many as a revolutionary development.

Interpretation—future scope of the common law

What scope remains then for the common law when almost every department of life is governed to some extent by domestic or European legislation? What purpose can the common law now serve? Part of

9 *Factortame Ltd and others v Secretary of State for Transport (No 2)* [1991] 1 AC 603; [1991] 1 All ER 70, CJEC and HL.

the answer lies in the consequences which have followed Lord Macmillan's complaint that "the work of our courts is more and more concerned with the interpretation of often unintelligible legislation and less and less concerned with the discussion and development of legal principles".

The amount of help given by statutes themselves to their interpreters is strictly limited. Almost always, the interpretation of a statute depends upon the meaning given to it by the courts, using methods of interpretation which have been built up over the centuries as part of the common law. The precise approach will depend upon the subject matter of the statute. For example, in the case of penal and fiscal measures, the Act will in general be strictly construed, though subject now in the fiscal area to the *Ramsay* principle[10] which I shall discuss later. In other branches of the law the courts in the last 50 years have tended towards the "purposive" approach, the approach which (rather in the Continental manner) looks for the principles underlying the legislation, and attempts to construe the words used in a manner which will give effect to these principles. Save in cases where the statute is clearly designed to amend the common law it will be assumed, especially if it affects fundamental concepts, to be consistent with it. Thus in his 1996 John Maurice Kelly Memorial Lecture Lord Hoffmann said:

Save in cases where the statute is clearly designed to amend the common law it will be assumed, especially if it affects fundamental concepts, to be consistent with it.

> For centuries the principles which protect individual rights have been part of the common law. The American Bill of Rights is based upon the common law. And while in theory these common law rights can be overridden by statute, the fact that they are embedded in the history and culture of the United Kingdom makes the courts assume, when they have to interpret legislation, that Parliament intended to respect them.

Further, despite Lord Macmillan's fears, the process of judicial interpretation has gone beyond mere translation and has resulted in

10 See *Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300.

the development of important new legal principles. Let me give three examples.

The first was mentioned by Lord Woolf when giving this lecture last year.[11] It arose in the case of *Anisminic Ltd v Foreign Compensation Commission*.[12] Anisminic sought to challenge a determination made by the Commission. The Commission objected, pointing out that under section 4(4) of the Foreign Compensation Act 1950:

> The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.

The House of Lord, by a majority, decided that the word "determination" must be construed so as to apply only to a determination which the Commission had jurisdiction to make. This determination having been made (as it was held) without jurisdiction section 4(4) could not prevent the court from quashing it.

Commenting upon *Anisminic* in *O'Reilly v Mackman*,[13] Lord Diplock said:

> The breakthrough that *Anisminic* made was the recognition by the majority of this House that if a tribunal … mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, ie, one into which it was not empowered to enquire and so had no jurisdiction to determine. Its purported "determination", not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.

The second example which I would call to mind is the decision of the House of Lords, again by a majority, in *Pepper v Hart*.[14] That was the case in which the House decided that, in order to construe an ambiguous provision in a Finance Act 1976, they were entitled to refer to the Hansard report of debates in the House of Commons, so as to see whether the words with which the responsible Minister

11
See chapter 12, *Judicial Review of Financial Institution*s, above.

12
[1969] 2 AC 147.

13
[1983] 2 AC 237 at 278.

14
[1993] AC 593; [1993] 1 All ER 42, HL.

introduced the measure resolved the ambiguity. The Attorney General had strongly opposed the taxpayer's argument, on constitutional grounds and on grounds of comity between the Houses. He suggested that the proposed reference to Hansard might infringe Article 9 of the Bill of Rights 1689, which provides "that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". The Lord Chancellor, Lord Mackay of Clashfern, however, who gave the sole dissenting speech, did not "find the objections in principle to be strong". He was more concerned with the practicalities of finding reliable illumination amongst the speeches made in the debates, and concerned also about the amount of time and money which litigants would have to expend on what might turn out to be fruitless searches.

These concerns, I believe, have proved to be fully justified, and I know of no subsequent case in which *Pepper v Hart* researches have produced crucial guidance. The *Pepper v Hart* decision was undoubtedly influenced by the obvious injustice of the Executive explaining a taxing measure to the House of Commons on the basis that its scope was intended to be limited, and subsequently proceeding to argue in the courts that it had a wider effect. This was not the first occasion upon which such a thing had happened; see my reference to the case of *Congreve v Inland Revenue Commissioners*[15] in my speech in *IRC v Willoughby*.[16] The question at issue in *Congreve* was whether section 18 of the Finance Act 1936, which was designed to prevent the avoidance of tax by means of the transfers of assets abroad, applied only in the case where the transfer had been effected by the taxpayer concerned. When the 1936 Finance Bill was being debated in the House of Commons, the Finance Secretary to the Treasury had made it plain that, for liability to arise under the section, the transfer of assets must have been made by the individual who was to be assessed. But assessments for the years 1935/1936 to 1940/1941 were made upon Mr Congreve on the basis that the section applied irrespective of the identity or residence of the person who made the relevant transfer of assets. The free and lawful man would not approve of such behaviour.

15 [1948] 1 All ER 948.

16 [1997] 1 WLR 1071 at 1075.

The assessments were upheld both by the Court of Appeal and by the House of Lords. It is interesting to note, that even if the *Pepper v Hart* approach had been permissible in those days, the result would have been the same because the House of Lords could detect no ambiguity in the statute. The argument of the taxpayer was rejected because, in the words of Lord Simonds, "the language of the section is plain".

My third example again takes us into tax law. It represents a new approach to tax avoidance devices, designed to bring them within the scope of taxing provisions which, if normal methods of construing contracts and fiscal statutes were followed, they would or might escape. The principle was first elaborated by the House of Lords in *WT Ramsay Ltd v Inland Revenue Commissioners*.[17] It was carried forward by the House in *Furniss v Dawson*[18] where Lord Brightman described its essential features in these terms:

> First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (ie, business) end … Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax—not "no business effect". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. A court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.

As the principle has developed, however, in these and other cases, it has come to be described by a number of Members at the House of Lords not just as a means of eliminating the bogus element from artificial transactions designed to avoid tax, but as a development of the purposive approach to statutory construction. This development is to be seen most clearly in the speeches of the members of the House of Lords in the recent case of *Inland Revenue Commissioners v McGuckian*,[19] to which I was not a party. At the risk of over-

17
[1982] AC 300.

18
[1984] AC 474.

19
[1997] 1 WLR 991, HL.

simplifying a complex issue, I would describe the views expressed as calling for the application of such general terms as "income", "capital gain" and "capital loss" to the commercial substance rather than the legal effect of the particular transaction.

The facts of *McGuckian* were straightforward. As part of a tax avoidance scheme, a non-resident company sold the right to receive a particular dividend to another company for a price equal to 99% of the dividend. It claimed that the price received was capital, but the House of Lord held, applying the *Ramsay* principle, that it was income within the meaning of section 478 of the Income and Corporation Taxes Act 1970, the successor to section 18 of the Finance Act 1936 which I have already mentioned with reference to the *Congreve* decision. Lord Steyn cited the speech of Lord Wilberforce in *Ramsay* to the effect that, even in the case of a taxing Act, the court is not confined to a literal interpretation, and added that "there may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded".

Lord Cooke,[20] strongly supporting the purposive approach, added:[21]

> I suspect that advisors of those bent on tax avoidance, which in the end tends to involve an attempt to cast on other taxpayers more than their fair share of sustaining the national tax base, do not always pay sufficient heed to the theme in the speeches in the *Furniss* case especially those of Lord Scarman, Lord Roskill and Lord Bridge of Harwich to the effect that the journey's end may not yet have been found.

This development has caused considerable controversy in both professional and political circles. The one area in which the courts, in particular the House of Lords, have always been especially careful to apply the canons of strict construction is the area of tax, lest it be said that the judges were taking it upon themselves to usurp the historic and jealously guarded role of the elected House of Commons.

20
See chapter 5, *Administrative Law Trends in the Commonwealth*, above, delivered by Lord Cooke in December 1990.

21
[1997] 1 WLR 991 at 1005.

The judicial doctrine exemplified by the *Ramsay* and *McGuckian* decisions has also been criticised by the Tax Law Review Committee, a large and influential committee drawn from representatives of the judiciary and the professions, the political parties, the Inland Revenue and business, under the chairmanship of Lord Howe. In a recent report, the Committee, while acknowledging that this doctrine has played an important role in counteracting some of the most uncommercial tax avoidance operations concluded nevertheless that "innovative judicial anti-avoidance techniques are unsatisfactory", for two main reasons. The first was that a judicial doctrine fashioned on a case by case basis through the hierarchy of the courts produces considerable uncertainty. The second was that a developing judicial doctrine, however radical, operates retrospectively and offers no clear framework within which it shall operate or not. The report favoured the introduction of a general anti-avoidance provision, fashioned to take account of the not always satisfactory experience of such provisions in other jurisdictions and supplementing rather than replacing specific anti-avoidance measures. The debate continues.

Let me make clear my belief that the United Kingdom judges are not by reference to the Ramsay principle or in any other way seeking to extend their power. They are rather seeking to remedy what they see as the inadequacies of the statute law, and of too literal an approach to the interpretation of statutes, when measured by reference to common law concepts.

Let me make clear my belief that the United Kingdom judges are not, by reference to the *Ramsay* principle or in any other way, seeking to extend their power. They are rather seeking to remedy what they see as the inadequacies of the statute law, and of too literal an approach to the interpretation of statutes, when measured by reference to common law concepts. If I may be permitted a quite general personal observation, based on my acquaintance with judges from most parts of the common law world, judges are not interested

in the pursuit of power. If they were, they would not have become judges. The danger that I foresee for the judges is that of becoming overloaded by the community with responsibilities for the solution of problems which go beyond the traditional bounds of the law. I should like to say a little more about this point, but in the meantime let me return to the present.

Other areas of common law development

It is not solely in the development of new principles and doctrines based upon the interpretation of statutes that the common law remains alive and kicking. There are still important areas of the law in which the common law continues to play its historic role of incremental development, confronting new problems as they arise, solving them by reference to the principles established in earlier cases, and in doing so adding to the store of case law and precedent. One of these is judicial review, a subject upon which I shall touch only lightly because it has been fully, and so much better dealt with by others, including Lord Woolf in last year's lecture. The one aspect which I wish to mention is the extent to which, despite their different terminology and different methods of approach, administrative law in the United Kingdom and the *Continental droit administrative* have tended to converge and combine. Thus the Continental notion of proportionality, which was said by Lord Diplock to mean "not using a steam hammer to crack a nut", appears on examination to be remarkably similar to the concept of reasonableness as understood in the common law. The matter is still one of dispute amongst those more learned than I, but I cannot help feeling that the differences are largely semantic. I only hope that, in the interests of euphony, the word "proportionality" will not have to be added to the ugly trio "illegality", "irrationality" and "procedural impropriety".

The law of negligence continues to develop incrementally, but by no means uncontroversially. No other branch of the law has occupied so much of the House of Lords' time during the last ten years. One of the most elusive and troublesome concepts in that

branch of the law is the third of the elements now recognised as being necessary in order to establish the existence of a duty of care. As Lord Bridge put it in *Caparo plc v Dickman*,[22] after reviewing the earlier cases:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.

In the case of disputes between individuals, the question of what is "fair, just and reasonable" may not be too difficult to answer. But in the context of a claim against, for example, the police, or the auditor of a public company, or a local authority it may involve the courts in considering the public interest and issues of public policy in the broadest sense, with little assistance save for that provided by the opposing parties and by the judges' experience. It is not an area in which precedents can normally help because the different departments of public life vary so widely. For example in *Hill v The Chief Constable of West Yorkshire*[23] it was held that as a matter of public policy the police were immune from actions for negligence in respect of their activities in the investigation and suppression of crime. In *Caparo* itself the same considerations led to the auditors of a public company being held to have no responsibility towards non-shareholders contemplating investment in the company in reliance on the published accounts. And in the group of cases reported under the title *M v Newham LBC*,[24] the House of Lords held that it would not be fair, just and reasonable to superimpose a common law duty of care on a local authority in relation to the performance of its statutory duties to protect children against ill-treatment; but that such a duty did arise in relation to the provision of psychological advice by the local authority, albeit that the advice was provided in the exercise

22
[1990] 2 AC 605 at 617.

23
[1989] 1 AC 53.

24
[1995] 2 AC 633.

of a statutory power. Sometimes the courts, including the House of Lords, have permitted and indeed welcomed the intervention of a Government Department, not so much as an *amicus curiae* but as a source of evidence as to where the public interest lies. In a very recent case concerning issues of public policy, *In re L* (not yet reported),[25] which concerned the right and/or duty at common law of a local authority hospital to detain, in his own interest, but against the wishes of the family with whom he lived, a mental patient who was incapable of consenting to his detention, the House of Lords was greatly assisted by interventions from not only the Secretary of State for Health, but also the Mental Health Act Commission and the Registered Nursing Homes Association. This resort to sources of expert knowledge independent of the dispute was widely welcomed and may point the way ahead.

An earlier case, in which I was not concerned, but in which I have no doubt that my fellow Law Lords would have been glad of such assistance, was that of *Airedale NHS Trust v Bland*.[26] That was the case in which the courts were asked to, and did, declare that it was lawful for the doctors to discontinue life-sustaining treatment for a patient whose injuries suffered some years previously had left him in a vegetative state from which, according to the evidence, he could not recover. I, for my part, would not have agreed; but no one could question the sincerity or thoroughness of the anxious consideration which all of the judges concerned, in the House of Lords and below, gave to their decision. The point which I am making, however, is that the courts were entrusted with the responsibility for resolving an issue which raised not only a question of law but questions of profound social, moral and ethical significance.

One unfortunate, but I think inevitable, consequence of the growth and complexity of the problems being brought before the courts is to throw a greater burden upon those presenting and preparing the cases. Advocates are expected to be able to put before the courts materials going infinitely wider than the boundaries of legal textbooks. Modern technology presents us with almost

25
Editor's note: now reported as *R v Bournewood Community and Mental Health Trust (in re L)* [1998] 3 All ER 289, HL.

26
[1993] AC 789.

unlimited possibilities for research. Much of this research, like much of the research prompted by the *Pepper v Hart*[27] decision, will prove to be fruitless, but it still has to be carried out. The presentation of the products of successful research takes up much valuable court time, because it is often virgin territory so far as the judges are concerned. The burden of cost thrown upon litigants (and upon the legal aid fund) is in danger of becoming truly prohibitive. The old legal joke that "the courts are, like the Ritz Hotel, open to everyone" has long lost whatever humour it ever had. It is not surprising, and may be something of a palliative, that new bodies are coming into existence with the aim of producing procedures less formal than those of the courts, including not only arbitration but mediation and impartial expert advice. But I see no signs of any reduction in the expectations placed upon the courts by the public and the corresponding responsibilities borne by the judges. Let me refer by way of example to the ordinary working lives of the Law Lords.

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There are twelve of us, the theory being that on each working day we shall sit in two committees of five, one in the House of Lords and one in the Privy Council, the two remaining Law Lords being free to prepare judgments and fulfil outside commitments. The practice works out rather differently. At the time of my appointment in 1994, Lord Woolf was scarcely ever available to sit, because of his responsibilities for preparing his lapidary report on civil procedure, *Access to Justice*.[28] I myself was almost at once asked to take on the role of Commissioner under the Interception of Communications Act 1985, with the responsibility for monitoring and reporting upon the telephone-tapping and other interception activities of the Government agencies, a task which occupies about four working

27
[1993] AC 593;
[1993] 1 All ER 42, HL.

28
Lord Woolf, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*, July 1996, HMSO, London.

weeks in the year. Later in 1994 I was asked to become Chairman of the Committee on Standard in Public Life, a three-year appointment which took up almost half of my working time. Almost immediately on his appointment last year, Lord Saville was entrusted with an enquiry, expected to last at least a year, into the "Bloody Sunday" shooting incident which took place in northern Ireland some 16 years ago. In 1996 Lord Lloyd was away for three months or more preparing a report on the anti-terrorist legislation. For most of the last year, Lord Nicholls has been devoting almost the whole of his time to the Chairmanship of a joint select committee of both Houses of Parliament looking at the question of parliamentary privilege. These are only some of the interesting diversions in which we have become engaged, and which no doubt add much to our store of general knowledge, but which also make it very difficult to get through our ordinary case load of appeals. We are only able to do so because of the extremely welcome and regular assistance which we get from Lord Cooke and from the retired Law Lords and also from the Commonwealth judges and the retired Court of Appeal judges who are eligible to sit in the Privy Council.

Surprising as it may seem, the Privy Council still takes up nearly half of our time, the bulk of the work coming from New Zealand and from the Caribbean jurisdictions. The disappearance of appeals from Hong Kong will undoubtedly lessen the load, but two of our members, Lord Nicholls and Lord Hoffman, may be called upon at any time to sit (as Lord Hoffman already has) on the new final court of appeal in Hong Kong.

On the domestic front, in addition to the topics which I have mentioned, the incorporation of the European Convention on Human Rights into United Kingdom statute law has raised fears of the unelected judges having too great an influence upon social and even political decision making. This, added to great growth in the judicial review of Government action and the number of cases—not a large number, but magnified by the media—in which Ministers have been overruled by judges on legal grounds, and occasionally criticised,

has led to previously unheard-of suggestions that the personal lives and any political inclinations of the judges should be explored by an independent commission before they are appointed or promoted. This proposal, though widely canvassed before the last election, has not, or at any rate not so far, been favoured by the Government.

Is there, then, a danger or even room for legitimate concern about what is sometimes called "the judicialisation" of British public life? I would answer this question by borrowing the title of a recent lecture given by Lord Steyn, which described the judiciary as "the weakest and least dangerous department of Government". Lord Steyn, in turn, had borrowed that description from the writings of the late 18th century American statesman, Alexander Hamilton, the Federalist, and opponent of Jefferson. Like Lord Steyn, I believe that the description is as true of the United Kingdom today as it was of the United States courts 200 years ago. I have said before that in my experience judges generally do not seek power, and indeed in a democracy judges have no power, save that which is conferred upon them by Parliament, by the support of the Government and by the respect of the community which they serve. I have no doubt that, in serving the community, the judges of Malaysia and the United Kingdom will remain conscious of their responsibility to provide the combination of stability, certainty and justice, based upon tried and trusted common law principles, which the frantic world of today requires. They will continue to apply the standards of the free and lawful man.

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The Right Honourable Lord Slynn of Hadley

Gordon Slynn
(*b.* 17 February 1930)

The Impact of Regionalism: The End of the Common Law?

Educated at Sandbach School in Cheshire, Goldsmith's College of the University of London (where he took a degree in modern history) and Trinity College, Cambridge, Lord Slynn was called to the Bar, Gray's Inn, in 1956, and became a Bencher in 1970. Much of his early career was spent in public service, first as junior counsel at the Ministry of Labour and then at the Treasury as, first, junior and then leading counsel. He was appointed Queen's Counsel in 1974.

In 1976 Lord Slynn was appointed a Judge of the High Court of Justice, Queen's Bench Division, and, two years later, was made President of the Employment Appeals Tribunal.

He then moved from the Queen's Bench Division to the Court of Justice of the European Community in Luxembourg as an Advocate General. He was the first English judge to go there, where he

was one of six Advocates General. Subsequently, in 1988, he became a Judge at the European Court of Justice. On his return to the United Kingdom in 1992, he was appointed as a Lord of Appeal in Ordinary.

In all the many positions that Lord Slynn has held, the quality demanded above all else has been complete impartiality and independence, together with a meticulous (a word often applied to him) observance of the law. Regarded as a person of liberal inclination and someone of warm humanity, he has nonetheless sometimes placed his perception of the proper interpretation of the law before popularity and has been fearless in his interpretation of it.

Lord Slynn was Chairman of the House of Lords Select Sub-Committee on European Law and Institutions from 1992–1995; Chairman of the Executive Council, International Law Association since 1988; Honorary Vice-President, Union International Des Avocates since 1976; and a Fellow of the International Society of Barristers, USA.

More recently in May 2003, he was appointed Chairman by the House of Lords and House of Commons of the Joint Committee to consider the Draft Corruption Bill (Cm 5777) published by the Home Office on 24 March 2003.

In the world of academe, Lord Slynn held several visiting lecturerships at universities around the world, ranging as far as British Columbia, Sydney, Australia, Cornell University in the United States, the National Law School of India, as well as King's College, London and the University of Durham, where for seven years he was Visiting Professor of Law.

Lord Slynn retired as a Law Lord in October 2002.

14 The Impact of Regionalism: The End of the Common Law?

Lord Slynn of Hadley
Lord of Appeal in Ordinary, House of Lords

Text of the Fourteenth Sultan Azlan Shah Law Lecture delivered in on 7 December 1999 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highness and Chancellor; Your Excellencies; Dean, Professor Dato Visu Sinnadurai; ladies and gentlemen:

It is a great honour and privilege to be asked to give the Fourteenth Sultan Azlan Shah Lecture, a lecture seen both here and in England as of considerable prestige. It is not surprising that it should be so regarded since the tributes to His Royal Highness, when an honorary LLD was recently conferred on him by Her Royal Highness, The Princess Royal, as Chancellor of the University of London, recognised his great contribution to the law in Malaysia and to the high regard in which he is held as a jurist there and here.

It is also for me a particular pleasure to be invited to visit Malaysia for the first time—though for the first time in fact, I have to say that through my encounters with Malaysian lawyers at International Law Association conferences and with Malaysian students at English universities (particularly at the University of Buckingham) and at Gray's Inn, I have always had the feeling that I had already been here. That feeling may be due partly to the warm relations between our two countries and the warmth which your people show to us.

Previous Sultan Azlan Shah Lectures have addressed various aspects of the common law, a topic which is plainly relevant and important to both our countries. As this millennium ends we should not overlook that one of its great achievements has been the creation and development of the common law—a system built on the decisions of the judges on a case-by-case basis from which principles slowly emerged and were refined, a system which produced the concept of the Rule of Law and the independence of the judiciary which, as one eminent Indian jurist wrote to me, has "given to India one of its greatest possessions". Jurists of other countries may feel the same.

This so-called common law, beginning in England with the judgments of the King's Courts, has had a profound influence on the development of many parts of the world—so much so that only 60 years ago Professor Norman Bentwich could write[1] that the Judicial Committee of the Privy Council heard appeals from 25% of the earth's surface. It began as a one-way process. The House of Lords and the Judicial Committee of the Privy Council spoke and local courts applied the law as they declared it. But the common law is not static and over the years the process became not one-way but two-way. The courts of England, not least the House of Lords, and the Privy Council, looked at the judgments of the courts of other Commonwealth countries. These judgments—particularly of the supreme courts and appeals courts—together with the writings of academic lawyers throughout the Commonwealth have had and increasingly have an influence on the development of the common law. This reciprocal process, even when supreme courts diverge from the House of Lords to take account of local conditions, I know, has been of great importance in England. I believe it has been no less so elsewhere. There has been reciprocity but there has also been diversity. I was reminded last night by one of your colleagues of a striking example. The House of Lords in *Rookes v Barnard*[2] in 1964 imposed limits on the award of exemplary or punitive damages but in 1967 the Privy Council said that in Australia the principle of exemplary damages was so well-established that it would be wrong to interfere with an award of such damages in Australia.[3]

1
Bentwich, Norman, *The Practice of the Privy Council in Judicial Matters*, 1937, Sweet & Maxwell, London.

2
[1964] AC 1129; [1964] 1 All ER 367, HL.

3
Australian Consolidated Press Ltd v Uren [1967] 3 All ER 523, PC.

The common law, of course, has not stood alone and increasingly in this century, the last of the millennium, parliaments have regulated our lives, sometimes moving into new territory (taxation, social security, labour law, the environment), sometimes changing the rules established by the common law, sometimes starting new trails which it fell to common law judges to take forward as a matter of statutory interpretation and to develop on common lines.

But all this is domestic national law and, you may think, well-travelled ground. Thus it seemed to me that it was an appropriate time in this series of lectures to deal with a new factor on the English legal scene—what effect has the United Kingdom's membership of a regional grouping, the European Community, had on the practice of the law and thereby on the lives of the people, on the affairs of men in finance, commerce and industry and on the work of the courts in England? What other international movements have begun to influence the common law?

This is not a parochial subject. We have already seen other endeavours at regional economic, even political, grouping: the Andean Pact; Nafta with the United States, Canada and Mexico; Mercosud in South America; Asean; and other discussions for economic cooperation in Southeast Asia and the Pacific. All of these have looked at the experience, the successes and indeed the mistakes of the European Community, not only in respect of economic and political matters but no less at the construction of a regional system of law for such an economic grouping.

Not only is this subject not parochial, it is not marginal or as lawyers in England still say, despite the contemporary discouragement of the use of Latin, *de minimis*.

The European Community

The Treaty of Rome setting up the European common market was adopted by the founding States in 1957. Like the European Convention

of Human Rights it was a reaction to the previous turmoil in Europe and the horrors of the Second World War. We in the United Kingdom did not join until 1973—partly because of our hesitation as to its effect on our links with the Commonwealth, partly because of doubts as to whether it was a good idea which would work, partly because of the intransigence of General de Gaulle who did not want us in.

One of the main objectives was to ensure peace between the member states. But it had other and wider aims which I doubt if many people fully appreciated at the time. Indeed it was said during a debate in the House of Lords by a Government minister that he doubted if joining the Community would "affect the lives of ordinary people".

How different that has proved.

True it began as an economic community, an economic regional grouping; and a *common market* was the emphasis. We would trade freely without barriers between the States with the objective of expanding trade, improving the economy and increasing people's standard of living. But we should have realised that the Treaty went much further. It said so. There was to be a *closer union* of the peoples of Europe—these were not only economic but social and political aims.

As a result, the effect of Community law on the lives of the people, the affairs of commercial men and the work of judges and lawyers has been considerable. This came, firstly, from the Treaty as amended from time to time and subordinate legislation made by the Institutions of the Community. Secondly, it came from decisions of the European Court of Justice.

As to the first, the Treaty provided for what are called the four freedoms:

1. Free movement of goods with no quantitative restrictions on imports or exports inside the Community;

2. Free movement of workers with allied rights of movement for families coupled with social security rights;

3. Freedom of establishment for professionals and businesses including related rules breaking down barriers, eg, for lawyers, doctors, architects and accountants to practise in a host State under their home State title and rules;

4. Free movement of capital—the slowest to develop but which has become increasingly important with monetary union and, for some States, a common currency soon to be in operation.

But this is only the beginning. There are ancillary provisions: an effective anti-trust competition code; a common external commercial policy; a social policy to improve working conditions; an emphasis on environmental protection; and now cooperation in police procedures on home affairs and justice.

As to the second, the European Court of Justice in addition to ensuring that all these freedoms and ancillary provisions are effectively interpreted and applied has laid down general principles of Community law which national courts must apply in a Community law context. So English judges have a dual role: they are common law judges in a domestic law situation; they are Community law judges in a Community law situation. When they apply Community law they must give effect to those Community law general principles.

What happens if the two branches of law are not the same? What if there is a conflict? The European Court had no doubt as to the answer. National law had to give way to Community law.

Those general principles began with the answers to two obvious questions. The first question was: What happens if the two branches of law—Community and national—are not the same? What if there is a conflict? The European Court had no doubt as to the answer. To

achieve a uniform application of the law in all States, national law had to give way to Community law. Community law took precedence and national judges had to give effect to it at the expense of national law—in our case the common law and United Kingdom statute law. The second obvious question was: Can the citizen or the trading company go direct to the judge in his own State and insist that the national judge applies Community law even if local parliaments have not legislated or if that law was in conflict with national law? The European Court said that if Articles of the Treaty and generally applicable regulations made under it were sufficiently clear and precise, they could be enforced directly in the national court. Decisions of the European Court itself also must have direct effect in national courts. In England that principle was incorporated into an Act of Parliament but even without that it was an essential part of European Community law as developed by the European Court of Justice.

The European Court has equally laid down general principles to protect the legitimate expectations of business men who have arranged their affairs on a particular basis, and to prevent executive and administrative powers in the Community being disproportionate or used in an unreasonable or unnecessary way.

The extent of all this in its effect on the substantive law has been remarkable. Huge volumes have been written about it and I can only illustrate briefly. The Community rules on equal pay and the European Court's judgments have produced a dramatic effect on equal pay for men and women doing the same job and jobs rated of equal value. They have had a similar effect on the equal treatment of men and women in employment, appointment, promotion and dismissal. Discrimination on the grounds of sex is out unless for extremely limited reasons. Where mergers or takeovers happen in industry or commerce the workers' rights are protected. A Directive on product liability has given rights (still to be worked out in detail) which it would have taken national legislatures and courts dealing with claims in negligence years to achieve. The laws governing

insurance, banking, financial dealings and companies which have been laid down have had considerable effect on the work of the courts and the regulatory bodies. The rules on agriculture and the Common Fisheries Policy have led to many decisions of courts throughout the Community and there has been a great body of regulatory material.

Sometimes the cases have involved sensitive areas. Nations do not like their habits being interfered with, even habits of food and drink. Thus in one case the European Court was called upon to declare and did declare that German rules prohibiting the importation of beer from other countries and its sale were contrary to the free movement of goods. It was a case which caused great resentment in Germany where they had followed for centuries restrictive rules as to the manufacture and sale of beer. The European Court declared that this rule was contrary to the whole notion of a common market and that it must be possible for other countries to sell their beer in Germany and to call it beer without necessarily complying with the German statute so long as the imported goods were not harmful to health.

But these measures taken by the Community have also had a profound effect on the procedures of the national courts.

The Treaty of Rome established a new procedure with which we were unfamiliar. There had to be some way, as I have already said, in which Community law would be interpreted and applied consistently throughout the Community. It would have been possible to set up a system of appeals which would allow the European Court to reconsider the decisions both in fact and in law of national courts. For administrative and no doubt political reasons this was not adopted since it was not attractive for the decisions of national supreme courts to be reversed or reviewed by an intra-national court. And so the Treaty provided that when a judge in a national court found that it was necessary to decide questions on the meaning of the Treaty or the meaning and validity of subordinate legislation in order for the judge to give judgment in the case then he might refer the question of law

to the national supreme court. A supreme court is obliged, except in cases where the answer has already been indicated by the European Court or is absolutely obvious, to refer the question to the European Court. The European Court answers the question and the national judge applies their answer to the facts of the case. So he still gives judgment but his decision has to be in compliance with the European Court's ruling.

In a sense this is a surrender of sovereignty but it is one that has certainly not caused resentment in the House of Lords even if there has been disagreement as to the scope of this procedure between the European Court on the one hand and the German Constitutional Court, the Italian Constitutional Court and the *Conseil d'Etat* on the other. This is a procedure which national judges in England now apply regularly and without conflict with the European Court.

Initially the European Court held that the national judge must, when he decided a question of Community law, adopt remedies and procedures similar to those which he applied in domestic law. But in time it was held that these legal remedies had not only to be similar but they had also to be effective to achieve the result intended by Community law. That meant that the British courts had to adopt procedures which they would not have applied in domestic law. Thus it was held that the certificate of the Secretary of State, conclusive in domestic law before the national judge, might not be conclusive in a Community law situation. It was necessary that there should be some judicial review of the procedure adopted by the Secretary of State and of the law which he had applied, even if the European Court should not interfere with the discretion of the judge as to matters which fell only for him to decide. The European Court held that where a State was in breach of its Treaty obligations there may be a remedy in damages which national courts must recognise even if damages would not have been available in domestic law taken alone. Perhaps most significant of all, the European Court held that if a judge found that an Act of Parliament was contrary to Community law, the judge must refuse to apply it and if necessary have the power

to grant interlocutory relief. This was a great change since hitherto the courts had accepted that Parliamentary sovereignty prevented them from declaring an Act of Parliament to be void or unlawful. When the European Court said that this was the law, the House of Lords accepted and applied it without further question.

The two systems of law—domestic law, ie, the common law, and Community law—are thus in one sense distinct. Can they remain so or will the common law and the procedure of our courts in domestic situations absorb ideas from Community law and procedure just as Community law has absorbed its general principles and procedures from the various domestic laws of the Member States? I think it likely that the national law systems such as the common law will begin to absorb ideas from European Community law since judges are applying both and they have to give precedence to Community law. Already "the principle of proportionality", which guides the European Court in deciding whether administrative action is excessive and unnecessary, has been referred to in the national courts. We have as your lawyers know well, the principle called "*Wednesbury* reasonableness" which essentially asks whether a reasonable minister acting reasonably would have done what the minister has done to achieve his executive purpose. There is a difference between these two approaches as applied by the European Court, but it is in my view far less great than is sometimes supposed. I notice that English judges now frequently refer to proportionality and I think in time proportionality should replace "*Wednesbury* reasonableness".

If a judge found that an Act of Parliament was contrary to Community law, the judge must refuse to apply it. This was a great change since hitherto the courts had accepted that Parliamentary sovereignty prevented them from declaring an Act of Parliament to be void or unlawful.

The Community law principle of "legitimate expectations" is also referred to in domestic cases. The principle was already there in a slightly different form but legitimate expectations are now said to be expectations which should be protected by the courts against excessive

administrative action in domestic as well as Community law. As I have said, the European Court held that there should be a power for national courts to grant interim injunctions to protect the position in Community law, pending a decision of the European Court. That was never available against the Crown in domestic proceedings but since the European Court's decision the English courts have accepted that an interim injunction may be granted against the Crown in a purely domestic law case.

I think thus that European Court procedures will have effect on our domestic procedures. There is already more emphasis on written arguments and on summaries of argument; there is a tendency to encourage shorter hearings, particularly in appellate procedures where the written pleadings and statements of case should virtually indicate what the case is all about and in which direction the parties are going. I think too that the English courts will increasingly adopt a system of purposive interpretation of domestic statutes very similar to that adopted by the European Court so that "black letter law" is not literally followed. I do not think that the literal approach was followed strictly during recent years but the emphasis now undoubtedly is on the purposive approach.

The English courts will increasingly adopt a system of purposive interpretation of domestic statutes very similar to that adopted by the European Court so that "black letter law" is not literally followed.

What is happening in the English courts has of course no direct effect on the common law as applied in other countries but if the common law changes and common law procedures change in England in ways which are seen to be sensible, it is not impossible that the effect of these changes will spread to other common law countries. Modern methods of communication—by scholars travelling, lawyers attending the multitude of conferences which we now have (not least in the Commonwealth as was seen by the recent Commonwealth Law Conference so successfully held here)—lead to a cross-fertilisation of ideas. We have seen it, not only in the Commonwealth but in our

study of other systems of law dealing with administrative law (the French), anti-trust law (the German and the American) and in other ways. A new law series of textbooks on the law in various Member States of the Community encourages this kind of comparison and cross-fertilisation.

Other external influences

What I have dealt with so far is not of course the only external influence on English law. The United Kingdom's accession to the European Convention on Human Rights has meant that decisions of the European courts against the United Kingdom have had to be complied with by the Government and by Parliament. This has sometimes meant that our laws have had to be changed. This was so even though the Convention was not and will not until October 2000 be enforceable directly in our courts. But from then, all United Kingdom national courts will have to apply the Human Rights Act 1998 which incorporates the Convention. They must interpret, as far as possible, national legislation so that it is read as being in compliance with the rights set out in the European Convention. Where there is a violation by legislation or executive action, courts will have the power to make a declaration to that effect and in appropriate cases to award compensation. Governments will have the power to introduce fast-track legislation to remedy violations where they think it appropriate.

There will still in some cases be a right to go to the European Court of Human Rights where the alleged victim claims that a domestic court has not given him the rights to which he is entitled under the Convention but it is hoped that decisions of the English courts will substantially reduce the number of such cases going to the Court of the European Convention in Strasbourg.

This, it is thought, will have a tremendous effect on the work of our courts and we shall have to re-examine many of our rules and procedures. It seems to me that the most likely areas are those relating

to access to justice—a fair trial with all its procedures—to freedom of expression and assembly, and to non-discrimination on the ground of race, sex and religion.

It is, however, curious that though national courts can disapply legislation contrary to Community law, because Community law says the European Court must have that power, they cannot disapply or annul legislation which is contrary to the Convention of Human Rights.

We shall in due course be affected, as all legal systems will be affected, by the rules of the World Trade Organisation and the decisions under the Disputes Settlement Procedures. It is remarkable that in the first three years, as many decisions were given by that body as judgments were given by the International Court in the first 50 years of its history.

It is a rule of the common law that where legislation is introduced pursuant to an international convention, it is to be assumed that Parliament intended to give effect to the convention and that the legislation should be interpreted to achieve the object and purpose of the convention.

And there are many other international conventions introduced in the domestic law by legislation which have far-reaching implications for our common law and statute law. Indeed it is a rule of the common law that where legislation is introduced pursuant to an international convention, it is to be assumed that Parliament intended to give effect to the convention and that the legislation should be interpreted to achieve the object and purpose of the convention.

But there is yet another factor to be taken into account. I believe that our courts and other courts are beginning to be more aware of, and to be influenced by, rules of international law both public and private. This process is only just beginning but it seems to me to merit encouragement. It is very desirable that our rules of private

international law should be harmonised—the common law, the civil law and other legal systems need common rules as to the recognition and enforcement of judgments, as to *forum conveniens*, as to State and other immunity. In the field of public international law, principles may be recognised by treaties or by customary international law which deserve incorporation in some way or another into domestic law. I think in the House of Lords we reflected this trend when we were asked to grant an injunction to prevent the relatives of people killed in the Bangalore Airbus crash from suing in Texas on the ground that Texas had no connection with the accident or the parties. While recognising the force of the defendant's arguments that they ought not to have to go to Texas to defend the claim, we equally recognised that if the plaintiffs could not have the benefit of the American practice of contingency fees they would not be able to have legal representation anywhere. In the end we cut through all the technical arguments. We said that the comity of nations required that we should not prohibit persons within our jurisdiction from suing in another State, however little connection there was with that State, unless there were special reasons for thinking that a fair and proper trial could not be possible there.

End of the common law?

So to revert to the European Community, there are two systems of law in operation, with one taking precedence. Does that mean the end of the common law? A recent article of Professor Beatson, "English Contract Law—A Rich Past and Uncertain Future",[4] appears to take a somewhat pessimistic view. In my opinion Europe is not at all the end of the common law. There are still whole areas where Community law plays no or very little part and even in areas in part covered by Community law there is still scope for the application of common law rules. In the courts most cases are thus still decided solely on the basis of our national, common or statute law. Moreover, it is to be remembered that statute law, national statute law, already occupies much of the field which was or in time would have been developed by

4
Beatson, J, *Has the Common Law a Future?*, 1997, Cambridge University Press.

the common law. You will find many cases in the law reports which have been of importance but in which Community law has played no part. Thus, as to the measure of damages for a failed sterilisation of a man where various different results were contended for by the parties; the liability of a local authority for failure properly to place or check on the progress of a child in care; the right of the press to comment on the private rights of a public figure; judicial review to cover a failure to produce evidence; in these areas the common law is still flourishing.

Moreover it has a role in developing European Community law. As a judge I found that when we sat down to work out the Rule of Law most appropriate for the European Community we put side by side the civil law and the common law ideas (and those in between). It was important that the common law should play its part in developing this regional law. It did so for example in developing the law of legal professional privilege and in recognising that *audi alterem partem* was a principle of Community law as understood in the English courts.

It is equally important that the common law approach and common law procedures should have full impact on the drafting of international conventions, be it in relation to arbitration, to commercial contract, to carriage of goods, or to the enforcement and recognition of judgments.

The common law springs from a case-by-case approach that will continue and in large measure has had its influence on and is followed by the European Court of Justice. We shall continue to recruit our judges from those experienced in practice rather than adopting a career judiciary and many civil lawyers and judges regret that they do not have a parallel system. There will be harmonisation both internally and internationally through, for example, the Uncitral Model Arbitration Law and contract law, but the common law is far from being abandoned whatever the external influence is.

The common law is still vigorous and developing. It remains the strongest link which binds the Commonwealth together.

Lord Scarman in 1983 said,

> The common law is delightful but it is now of marginal importance.

I agree with the first part but the second part of his sentence in my view goes much too far. The common law is still vigorous and developing. Moreover it remains, apart from the personal role of the present Queen, the strongest link which binds the Commonwealth together.

The Right Honourable Lord Clyde

Construction of Commercial Contracts: Strict Law and Common Sense

James John Clyde
(*b.* 29 January 1932)

Baron Clyde of Briglands in Perthshire and Kinross has had a long and distinguished judicial career, culminating in his appointment in 1996 as a Lord of Appeal in Ordinary in 1996. He comes from a judicial dynasty—his father was President of the Court of Session in Edinburgh, as was his grandfather.

He was born in Edinburgh and was educated at Corpus Christi College, Oxford and at Edinburgh University. He was called to the Scottish Bar in 1959, and made a Queen's Counsel in 1971. He became a Judge of the Courts of Appeal for Jersey and Guernsey, where he served from 1979–1985 and then returned to his native Scotland to serve as a Senator of the College of Justice until 1996.

In 1996, together with Lord Hope of Craighead, he was promoted to the House of Lords, to succeed Lord Keith of Kinkel and Lord Jauncey of Tullichettle as the Scottish Lords of Appeal in Ordinary.

The Times of London described Lord Clyde as "industrious and pleasant with a human touch" (27 October 1998).

He retired as a Lord of Appeal in Ordinary on 1 October 2001.

Lord Clyde has been widely involved in promoting and sustaining the legal and academic institutions of his homeland, Scotland. He was Honorary President of the Young Scottish Lawyers' Association from 1988–1997; Vice Chairman of the Court of Edinburgh University from 1993–1996; President of the Scottish Universities' Law Institute from 1991–1998; as well as Director of the Edinburgh Academy from 1979–1988. He is also an Honorary Fellow of Corpus Christi College, University of Oxford.

Lord Clyde has served on a number of official tribunals and public inquiries, including serving as Chairman of the Orkney Children Inquiry (Child Abuse Inquiry) 1991–1992. More recently, he was appointed as the Justice Oversight Commissioner of the newly established Oversight Commission which is to provide independent scrutiny of the implementation of the Criminal Justice Review in Northern Ireland.

Lord Clyde is the author of *Judicial Review*, 1999, W Green under the auspices of the Scottish Universities Law Institute.

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Construction of Commercial Contracts: Strict Law and Common Sense

Lord Clyde
Lord of Appeal in Ordinary, House of Lords

An amended version of the Fifteenth Sultan Azlan Shah Law Lecture delivered on 7 December 2000 in the presence of His Royal Highness Sultan Azlan Shah.

A considerable time ago when I was a law student at the University of Edinburgh the class on Roman law was required to read the *Institutes of Gaius*. I fear that much of it has slipped from my consciousness, but one passage has remained alive in my memory, no doubt because of the vivid impression which it created on my mind at that time.

The passage is in Book IV where the author is dealing with the older forms of action in the Roman law. It concerned the case of an action brought by someone complaining about the cutting down of his trees. The trees in question were vines. The claim failed because the claimant in formulating his claim had used the word vines, when he should have said trees. Now that seemed to me to be taking rules of procedure to an absurd length and using technicalities to deny justice when the substances of the claim was perfectly evident.

This lecture is concerned with the tension which may exist between the strict application of legal rules and the need for mitigation of those rules to meet the evident needs of justice. The immediate context is that of the law of commercial contracts. My reference to the *legis actio* about cutting down trees is of course a far cry from commercial contracts. But it may be that rules of procedure can inspire a cast of mind which inclines to a rigid formulism and can produce unfairness and unreality in the practice of the law. So this lecture is concerned with

the way in which the exercise of a judicial function may modify the strict application of legal rules to achieve a result which accords with common sense. Just as the excessive technicality of the early Roman procedures gave way to more equitable methods of proceeding, so may rigidities in the law of contract give way to more realistic approaches.

It is appropriate at the outset to make four observations by way of setting the scene.

First, it has been said that words are the tools of a lawyer. But on the contrary I think that words are the raw material of the law. It is in language that our rights and our obligations are prescribed and defined. The understanding, let alone the application of those rights and obligations, is a matter for the reading and the understanding of what has been written, whether it be in legislation or in any form of written deed, public or private. So it is with words and phrases with which so much of a lawyer's time is engaged. The work of commercial lawyers significantly involves the preparation of legal texts. The work of drafting requires a high degree of care in securing that the meaning is clearly expressed. The resolving of legal problems is very often a matter of the construction of a legal text. Among the lawyer's tools are principles and rules, such as the principle of *contra proferentem*, or *ejusdem generis*, but it is essentially with a particular problem in a particular context that he is involved. More often than not the cases in this area of the law provide examples and illustrations rather than precedents which will exactly conclude other cases.

It may be that rules of procedure can inspire a cast of mind which inclines to a rigid formulism and can produce unfairness and unreality in the practice of the law.

Secondly, problems of construction only arise where there is a dispute between the parties to the contract. There may be many cases where contracts are entered into which contain obscurities, ambiguities or even errors, but these pass unnoticed and fade harmlessly into history because the performance of the contract

proceeds in a way which is acceptable to both parties so that no one requires to invoke the critical provision. It is usually only when things go wrong that the rights and obligations require to be examined more precisely. Even then it is always possible for some agreement or compromise to be reached so that the lawyers or at least the courts do not come to be involved. Written contracts may of course in certain circumstances be rectified by the court, but it is with matters of construction rather than rectification that we are presently concerned.

Thirdly, we are concerned here properly with commercial contracts, and indeed with written contracts, because in the case of oral contracts questions of construction do not so easily arise. But in relation to written commercial contracts the approach to be adopted and the principles to be applied will be found in many respects to be followed in the case of other kinds of contracts and other kinds of written deeds, so reference can be made to problems of construction in other kinds of case. Such differences in construction as there may be between mercantile and other deeds are substantially due to the different context and purpose of the deeds or agreements in question. They relate rather to the intensity with which the rules are applied than to the substance of the rules themselves.

Finally, in these introductory remarks I must say a word about the basic principle of construction. The grand rule of construction is that effect is to be given to the intention of the parties. But how is the intended sense of the deed to be discovered? It is certainly not to be discovered directly from the authors of the document. One party cannot be allowed to escape a contractual obligation on the easy plea that he did not mean what he said. The law requires an objective and not a subjective approach. And in finding an objective construction the intention must be sought in the first place from the deed itself. Long ago it was said, "One must consider the meaning of the words used,

The law requires an objective and not a subjective approach. And in finding an objective construction the intention must be sought in the first place from the deed itself.

not what one may guess to be the intention of the parties."[1] But the words are not to be read in isolation. If an objective approach is to be adopted then the court must have a sufficient understanding of the surrounding circumstances to put itself in the position of the parties when they reached their agreement. That is a point to which I shall return.

The strict approach

With these introductory observations may I turn to consider the strict approach. On that approach, effect must be given to the words if they are clear and unambiguous. The court must not search for ambiguities and evidence cannot be admitted to show an ambiguity where it is not evident from the ordinary meaning of the words. And so far as slips or mistakes in the text are concerned, the strict rule requires that, provided that the deed has some meaning, then the court cannot intervene, even if the mistake defeats the intention of the author and even if no one has in fact been misled by the mistake.

In order to illustrate the point I shall refer to certain cases where there has been some possible mistake in identification. The problem here is to decide whether the thing or person identified by the author of the deed is or is not clear and certain. Is there or is there not error?

Let me take first the case where there is a reference to someone or something which does not exist, so that the deed as it stands is meaningless. In such a case, the court has been able to construe the deed so as to overcome the error. For example, on the face of it the deed may seem to make sense, but when one comes to apply it, a problem arises. Such a case can occur where there is a misdescription of a place or a person. In one early case,[2] the landlord of a public house in Limehouse called The Bricklayer's Arms, gave notice to the tenant to quit. The notice required the tenant to quit "the premises which you hold of me … commonly called or known by the name of

1
Sir George Jessel MR in *Smith v Lucas* (1881) 18 Ch D 531 at 542.

2
Doe d Cox v Roe (1803) 4 Esp 185.

The Waterman's Arms". Evidence disclosed that the only premises let by the landlord to the tenant were The Bricklayer's Arms and that there was no public house called The Waterman's Arms. The notice was held to be effective, despite the error.[3] A like line of reasoning can be found in a more recent case[4] where the words "bill of lading" were read as inferring to a charterparty. The House of Lords held that in the circumstances of the case the reference was a misnomer. It did not make sense.

If the name given in the deed does not reflect any reality, it may be easy to intervene and give effect to the presumed intention. But if the name is held by an identified body, can the courts ignore that reference? What if the words are not meaningless? What if they have a meaning?

I begin with a Scottish case concerning the construction of a will.[5] Alexander Hogg Nasmyth was a Scotsman. Apart from occasional visits to England, said to be for his health or for business purposes, he had lived all his life in Scotland. He died in 1911. His interests and associations were exclusively Scottish. His will was drawn in Scotland, by Scottish solicitors and his testamentary trustees were Scottish. Among other provisions he left a legacy to "the National Society for the Prevention of Cruelty to Children". That was precisely the title of an English body. They claimed the legacy, but that was challenged by a Scottish body called the Scottish National Society for the Prevention of Cruelty to Children. The Scottish court in the first place took the view that the word "National" in the will was ambiguous and accordingly allowed evidence to establish the sense in which the word was being used by the testator. From the evidence which was then led it appeared that the deceased had taken some notice of the Scottish society before his death on account of some incident which had occurred on his own lands and further that the operations of the claimants, the English Society, had never extended to Scotland. The Scottish courts held, in light of the background evidence, that the deceased had intended to benefit the Scottish

3
In that kind of case the doctrine of *falsa demonstratio non nocet* might be invoked. One part of the reference was perfectly clear and correct and the other applied to no subject at all (cf *Cowen v Truefitt Ltd* [1899] 2 CLJ 309).

4
Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co [1959] AC 133.

5
Nasmyth's Trustees v National Society for the Prevention of Cruelty to Children [1914] SC(HL) 76.

Society and the legacy should go to it. But that decision was reversed by the House of Lords on appeal. Lord Dunedin, one of the Scottish judges sitting in the House of Lords, recognised an ambiguity in the fact that the name used by the testator could fit the Scottish Society, but held that strong evidence was needed to displace the accurate description which exactly fitted the English body. The other four of their Lordships held that there was no ambiguity in the designation of the beneficiary and considered that extrinsic evidence should not have been allowed.

The second example is the English case of *In re Fish (Ingram v Rayner)*.[6] There a testator left the residue of his estate to his "niece Eliza Waterhouse". He had no such niece but his wife had both a legitimate and an illegitimate grand-niece, each of whom was called Eliza Waterhouse. It was held that the description could extend to the legitimate relation, but not to the illegitimate one. There was thus no ambiguity, and accordingly evidence was not admissible to establish the claim by the illegitimate grand-niece that she was the person whom the testator intended to benefit. That case may be contrasted with that of *In re Jackson*.[7] The testatrix in that case left a share of the residue of the estate to "my nephew Arthur Murphy". The evidence disclosed that she had two legitimate nephews of that name. That then gave rise to an ambiguity justifying the leading of evidence about the state of the family with a view to identifying which of the two was intended to benefit. That evidence however disclosed not only that there was no likely intention to prefer one of the two to the other but also that there was a third nephew, who was illegitimate and who was also called Arthur Murphy, and who from his close connection with the testatrix was the most likely person to have been the intended beneficiary. *Fish* was distinguished on the ground that in that case there had been no ambiguity, there having been only one legitimate relation of the correct name.

The subtle distinctions which these cases display and the questionable fairness of the results to which the strict approach may

6
[1894] 2 Ch 83.

7
Re Jackson, Beattie v Murphy [1932] All ER Rep 696; [1933] 1 Ch 237.

lead, give rise to questions about the validity of the approach. In the Scottish case an express regret was voiced, by Lord Dunedin, because as he put it, "I cannot help having the moral feeling that this money is probably going to a society to which, if we could have asked him, the testator would not have sent it." In *Fish* Lindley LJ said, "This is one of those painful cases in which it is probable that the testator's intention will be defeated, but the rule of law is too strong for the appellant".[8] If the grand purpose of the law in construction is to give effect to the intention of the author of the deed then it might be thought that something has gone wrong with the law. The supposition must be that the parties intended what the court decides as a matter of construction they must have intended. The words of Mr Bumble in *Oliver Twist* come to mind, "If the law supposes that, the law is a ass, a idiot."

The cases which I have been considering have concerned the identification of persons or objects. But they illustrate a much more general problem of approach. I turn next to look at the adoption of the strict approach in relation to the construction of a notice seeking to terminate a lease. I do so because it is in this context that the earlier approach has been challenged. I deal first with an example of the strict approach.

In *Hankey v Clavering*[9] under a lease for 21 years from 25 December 1934 either party could terminate it at the end of seven years on giving six months' notice. The landlord gave the tenant notice as from 21 June 1941 purporting to terminate the lease on 21 December 1941. He should of course have referred to the 25th and not the 21st of the month. It was held that the notice was ineffective.

Lord Goddard observed:

> The whole thing was obviously a slip on (the landlord's) part, and there is a natural temptation to put a strained instruction on language in aid of people who have been unfortunate enough to make slips. That, however,

8
Above, note 6, at 84.

9
[1942] 2 KB 326.

> is a temptation which must be resisted, because documents are not to be strained and principles of construction are not to be outraged in order to do what may appear to be fair in an individual case.[10]

Later he said:

> It is perfectly true that in construing such a document as in construing all documents, the court in a case of ambiguity will lean in favour of reading the document in such a way as to give it validity, but I dissent entirely from the proposition that where a document is clear and specific, but inaccurate, on some matter, such as that of date, it is possible to ignore the inaccuracy and substitute the correct date or other particular because it appears that the error was inserted by a slip.[11]

Hankey was distinguished in a later case[12] where the notice specified an impossible date: it was served in 1974 to come into effect in 1973. That was an impossibility. It was meaningless. That was a slip which would be obvious to a reasonable tenant reading it and knowing the terms of the lease to which it related. So it was interpreted as relating to 1975. In *Hankey* the erroneous date could make sense. But is that a sufficient reason for refusing to recognise the error? The House of Lords have now held that it is not and I turn to a case which has now overruled the decision in *Hankey*.

This is the case of *Mannai Investment Company Limited v Eagle Star Life Assurance Company Limited*.[13] Here the tenant was entitled in terms of clause 13(7) of the lease to terminate the lease "by serving not less than six months' notice in writing to the Landlord … such notice to expire on the third anniversary of the term commencement date". The commencement date was 13 January 1992. The third anniversary of that date was 13 January 1995. The tenant sent a notice which stated, "Pursuant to clause 13(7) of the lease we as tenant hereby give you notice to terminate the lease on 12 January 1995". Two of the judges in the House of Lords held that the notice to be effective had to conform strictly with the requirements specified in the clause, that the law was well-settled, and that the specification of 12 January was fatal to the validity

10
Ibid, at 328.

11
Ibid, at 330.

12
Carradine Properties Ltd v Aslam [1976] 1 WLR 442; [1976] 1 All ER 573, Ch D.

13
[1997] AC 749; [1997] 3 All ER 352, HL.

of the notice. The majority however held that the notice was effective and that *Hankey* should be overruled. The question was whether the notice construed in its contractual setting unambiguously informed a reasonable recipient how and when the notice was to operate.[14]

In the circumstances this notice did so. One point which was particularly emphasised by Lord Hoffmann was that it is not just the ordinary meaning of words which matters but also the way in which words are ordinarily used in everyday life:

> If one meets an acquaintance and he says, "How is Mary?" it may be obvious that he is referring to one's wife, even if she is called Jane. One may even, to avoid embarrassment, answer, "Very well, thank you" without drawing attention to his mistake. The message has been unambiguously received and understood.[15]

The context and the background enables us to understand the meaning of what has been said, even if the speaker has used the wrong words.

The speeches in *Mannai* appear to recognise a shift in the approach to be taken in the construction of commercial contracts. Lord Steyn observed, "Nowadays one must substitute for the rigid rule in *Hankey v Clavering* the standard of commercial construction".[16] So also the rule of construction which was faithfully observed in such cases as *Naysmith* and *Fish,* that if the reference is clearly made to someone or something which does exist then no evidence can be admitted to show that the author was intending to refer to someone or something else, can now barely survive the decision in *Mannai.* That the words used can be given content is no longer the end of the matter. That the notice in *Mannai* specified a date which was a real date, albeit the wrong one, was not conclusive.

So far I have been dealing with cases where the source of the problem was a name or a description or a date. The test preferred in *Mannai* is by reference to how a reasonable recipient of the notice, in the

14
In relation to the notice Lord Steyn stated, "The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene". [1997] 3 All ER 352 at 369.

15
Ibid, at 375.

16
Ibid, at 372.

context and circumstances of the case, would have understood it. But that approach is by no means confined to notices to terminate leases. It is of quite general application, including its application in the construction of commercial contracts. If I may quote Lord Hoffmann:[17]

> Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background, knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

I turn then to consider the application of the approach in the more general cases of construction.

Ordinary meaning

It is useful first to recall the traditional rule of construction, namely that words should be given their ordinary English meaning. Reference has often been made[18] to the ordinary rule of construction, namely that words should be read and understood in their "ordinary and natural sense". If the ordinary meaning gives the only reasonable sense then there will almost certainly be no room for dispute. Even if there is an ambiguity then one may lean towards the ordinary meaning, on the basis that people generally will be expected to use words in their ordinary sense. But particularly in light of the decision in *Mannai* reference to the ordinary and natural sense of the words may require further elaboration. Let me mention four particular matters.

Dictionaries

The first point to be made is about dictionaries.

One possible danger in looking at once to the ordinary and natural sense of the words may be that it diverts attention from the contract and focuses too strongly upon particular words. One must

17 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114; [1998] 1 WLR 896 at 912.

18 Eg, Lord Halsbury LC in *Crosse v Bankes* 13 (HL) 30.

beware of confusing construction and definition. The construction of a deed is not solved by recourse to a dictionary. What a dictionary does is to provide the meaning or a range of meanings for particular words and expressions. The meaning of an expression in that sense "can be seen as a question of fact and not a question of law".[19] There are cases where the parties may attach a particular meaning, perhaps an unusual meaning, to a particular expression. Or they may use words which have some established technical meaning. Or there may be some custom of trade which colours or explains the particular words used. Or they may make use of a foreign language. But these kinds of cases do not, at least primarily, give rise to problems of law.

The words are of course important, but it is the deed which has to be construed. The meaning of a word may be a matter of fact, but where the word admits of several meanings then it is a matter of law, a matter for a court, to decide which is the meaning to be preferred.[20] We should not allow the attention to be so concentrated on particular words as to lose sight of the purport of the document as a whole.[21]

The difficulty about a rule which looks to the ordinary and natural meaning of the words is that the ordinary meaning of a word may vary according to the context. The immediate grammatical context and the wider setting of the contract may add a colour which determines the meaning so that it may be difficult to attribute an ordinary and natural meaning to a word in the abstract without any context at all. The dictionary endeavours to do that. But as I have already sought to explain, dictionaries give definitions, not interpretations.

Ambiguities

The second point arising from *Mannai* relates to the question whether or not the text of the contract is ambiguous. If there is now a greater awareness of the importance of the context of the contract in the understanding of its terms then ambiguities in the words used may more readily be identified and more satisfactorily resolved.

19
Lord Reid in *Cozens v Brutus* [1973] AC 854 at 861; [1972] 2 All ER 1297, HL.

20
The meaning of a letter, or a deed, is not a matter of fact but a matter of law: *Wodhouse Ltd v Nigerian Produce Ltd* [1972] AC 741.

21
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 at 115. Lord Hoffmann in *West Bromwich* said, "The meaning a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of the words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against a relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax."

The question whether there is or is not a plain meaning, or what is the plain meaning, arose sharply in *Investors Compensation Scheme Ltd v West Bromwich Building Society.*[22] That case concerned the misfortunes which certain investors had suffered through entering home income plans under which they had taken out mortgages on their homes with certain building societies and then invested the advances in equity-linked bonds. Thereafter the value of equities fell and the level of interest rates rose with consequent grave financial problems for the investors. The investors were compensated by a statutory body set up for that kind of purpose, the Investors Compensation Scheme (ICS), and the ICS sought as assignees of the investors to recover from the building societies. In the deed by which the assignation was contained there was excepted from claims transferred to ICS and so retained by the investor "any claim (whether sounding in rescission from undue influence or otherwise) that you may have against the … Building Society in which" certain abatements were claimed. The difficulty arose because of the words in parenthesis. One of their Lordships took the view that the clause in question had a plain meaning and that there was no ambiguity. The clause was intended to cover all claims. The words in parenthesis were otiose, merely showing that all claims were to be covered. The majority of the House of Lords, however, took the view that that was too odd a result to be acceptable, that the words in parenthesis were to be construed as identifying certain particular kinds of claims, namely claims sounding in rescission, which alone were not to pass to ICS, and that accordingly the claims for damages and compensation could be properly maintained by ICS.

Now it can certainly be stated that the words "any claim" in the natural and ordinary use of language can be taken to mean all claims. And when the words are followed by a parenthesis which can certainly be taken, in the ordinary use of words, to be emphasising the comprehensive scope of the reference to "any claim", an application of the rule that the ordinary use of words should be preferred is initially attractive. But the concept of a natural and ordinary meaning is not very helpful when on any view the words have not

22
[1998] 1 All ER 98;
[1998] 1 WLR 896.

been used in an ordinary and natural way. Critical to the decision was the consideration that the alternative reading of the clause made commercial nonsense. Common sense was preferred to a strict interpretation of the words.

Extrinsic evidence

The third point which arises concerns the use of evidence extrinsic to the contract.

Evidence extrinsic to the contract itself may of course be permitted in order to see whether the written deed in fact constitutes or comprises the extent of the agreement between the parties. Whether there was agreement, whether there was mistake, or duress, or fraud, are open to investigation on extrinsic evidence. So also the truer nature of the agreement can be elucidated by evidence. But we are concerned here with the use of extrinsic evidence in the construction of the contract, once it is accepted that there was intended to be a contract in the terms expressed in the deed.

If the courts are now to be more conscious of the possibility of the recognition of ambiguities, it may be that there will now come to be a greater readiness on the part of the courts to allow consideration of evidence extrinsic to the contract. But that does not mean that there should be an open inquiry into anything which might throw some light, however remote, on the meaning of the contract. The evidence here is essentially restricted to the factual background against which the parties contracted, with the one possible exception of pre-contract negotiations. In the words of Lord Wilberforce: [23]

> No contracts are made in a vacuum; there is always a setting in which they have to be placed … In a commercial contract it is certainly right that the court know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

23 *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 995–996; [1976] 1 All ER 570, HL, at 574.

I should mention in this context an observation by Lord Hoffmann in the *West Bromwich Building Society* case which has given rise to what I consider to be a misplaced alarm. Lord Hoffmann said of the background material that, subject to the exception of pre-contract negotiations, "it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man". This observation has been received with some concern. It has been suggested that the statement is expressed far too widely (eg *National Bank of Sharjah v Delborg,*[24] and *Scottish Power plc v Britoil (Exploration) Ltd*[25]). But just as expressions in contracts should be construed in their context, so also it is proper to read the whole of Lord Hoffmann's statement. There is an express limit on the phrase "absolutely anything" in the words which follow. Those words confine the scope of the evidence to matters which would have affected the way in which the language would have been understood by a reasonable man, and that is to say a reasonable man in the position of the party to the contract. One cannot then ignore any of the considerations relevant to the contract which would reasonably have weighed with the parties when they concluded their agreement. Lord Hoffmann's observation simply serves to emphasise the need to construe commercial documents in a wider context than that defined by the documents themselves.[26]

Absurdity

The fourth and last of the comments arising from *Mannai* has to do with cases where the text appears to be meaningless. Where the court finds itself able to say that one reading of a clause leads to a result which is patently absurd, what may be seen as the ordinary meaning of the words can be rejected. The desire to achieve a workable contract, rather than see it fail altogether points to the propriety of adopting a construction which will enable it to survive.

But such a course is not limited to cases where the text is absurd or meaningless. Intervention is also recognised where on a lower standard a case of unreasonableness can be identified. This approach

24
9 July 1997, Unreported.

25
[1998] TLR 616.

26
LAW Construction Co Ltd and Others v LAW Holdings Ltd and Others, Court of Session, Lord Penrose, 9 April 1998.

is by no means new. In *Glynnn v Margetson & Co*[27] a bill of lading contained a deviation clause framed in wide terms. It allowed the ship to proceed to and stay at any port or ports in any rotation in several named seas and coasts for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever. The ship went 350 miles in the opposite direction to that of its destination before turning round and heading for the home port. Strictly, and adopting the ordinary use of words, such a deviation could be seen as within the scope of the clause. But the House of Lords imposed a construction which limited it to a deviation to ports which were in the course of vessel's route to its destination. In that case the counter-construction might not properly be labelled as nonsensical or absurd, but what the House did consider was that the construction sought by the shipowners defeated the object of the contract. The Lord Chancellor observed , "it seems to me that the construction contended for would be an unreasonable one, and there is no difficulty in construing this clause to apply to a liberty in the performance of the stipulated voyage to call at a particular port or ports in the course of the voyage".[28] It may be noted that in a much later case (*Wickman Machine Tools Ltd v Schuler AG*[29]) Lord Reid was influenced by the "very unreasonable result" to which one construction would lead. He added, "The more unreasonable the result the more unlikely it is that the parties can have intended it."

It has been said in one case that the reasonableness of the provision cannot be the starting point for construing a contract.[30] But in some cases the unreasonableness of the immediately obvious reading will be evident at the outset of the exercise. On the other hand, the initial reading may disclose a meaning which at first sight is clear, obvious and unambiguous on an ordinary use of language. But the context in which the expression appears, even without reference to evidence to explain the point, may show that the apparently normal meaning is not a true reflection of the parties' intention. Thus, for example, in one recent case[31] the words, "the sum actually paid" were held in light of the context of the contract of reinsurance to mean not the actual disbursement of funds but the finally ascertained amount

27
[1893] AC 351.

28
Ibid, at 355.

29
[1974] AC 235 at 251.

30
Saville J in *Palm Shipping Inc v Kuwait Petroleum Corporation, The Sea Queen* [1998] 1 Lloyd's Rep 500 at 502.

31
Charter Reinsurance Co Ltd v Fagan [1997] AC 313.

of the liability, a meaning far from the ordinary meaning of the words.

May I then offer some reflections by way of conclusion.

Conclusion

The decision in *Mannai* has been greeted in some quarters with surprise. One writer has said that two basic rules of construction have begun to experience seismic disturbances through the decision in *Mannai*.[32] It, and the *West Bromwich* case, have been described as landmark decisions.[33] Indeed Lord Hoffmann has observed:

> I do not think that the fundamental change which has overtaken this branch of the law … is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all of the old intellectual baggage of "legal" interpretation has been discarded.[34]

While the words which commercial people use are still the focus to which construction is directed, the emphasis is not on literalism, but on the expectation of commercial people. Commercial contracts "must be construed in a business fashion".

But is this anything new? What we have been seeing in recent years is I think a move away from strict formality to a degree of realism which I characterise as common sense. While the words which commercial people use are still the focus to which construction is directed, the emphasis is not on literalism, but on the expectation of commercial people. It was recognised over a hundred years ago that commercial contracts "must be construed in a business fashion".[35] More generally it has long been accepted that the court has to endeavour to place itself in the position of a reasonable and disinterested third party, duly instructed, if necessary, as to the law.[36] As Lord Diplock has observed:[37] "There must be

32
PF Baker (1998) 114 LQR 55.

33
Paul Morgan QC, "The Construction of Leases and Other Documents" (1999) 3 L&T Rev Issue No 4.

34
[1998] 1 WLR 896 at 912.

35
Southland Frozen Meat and Produce Export Co Ltd v Nelson Brothers Ltd [1898] AC 442 at 444.

36
Gloag on Contract, 398.

37
Miramar Corporation v Holborn Oil Ltd [1984] 1 AC 676 at 682.

ascribed to the words a meaning that would make good commercial sense." In another case[38] he stated that "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must yield to business common sense".

In the context of statutory interpretation, one can discern a leaning towards a greater regard for the purpose of the legislation. This is a tendency which no doubt has been influenced by the jurisprudence of the European Court of Justice. Something of a similar trend can be seen in the recognition of a purposive construction of contracts, although the use of such an expression in this context has been deprecated.[39] That there has been a change in approach to construction there can be no doubt, and in practice this has been referred to as a purposive approach.[40] It has been said that "language is a very flexible instrument and, if it is capable of more then one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement".[41]

In the changes which have taken place in the construction of contracts there has not been any changing of the goal posts, nor any seismic upheaval of the pitch, but rather a greater role has been given to the performance of some of the players. The development of the law has been not to depart from established principles, but to focus more strongly upon the commercial reality of the situation which lies behind the dispute. The changes which have taken place in the approach to construction are changes of emphasis. Nor have they occurred suddenly or instantaneously. The development of the approach to construction which was noticed and affirmed in *Mannai* began at least 20 or 30 years before that case.[42] Even the idea of a purposive construction is by no means a novelty. Over 150 years ago it was observed that "greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent".[43] Even ten years ago the approach to the construction of a pension scheme was agreed by the parties to be one which was "practical and purposive rather than detached

38
Antaios Cia Naviera SA v Salen Rederierna [1985] AC 191 at 201; [1984] 3 All ER 229 at 233.

Lord Steyn has said, "Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language" (*Mannai* [1997] 3 All ER 352 at 372).

39
Antaios Cia Naviera SA v Salen Rederierna [1985] AC 191.

40
Examples can be found where express reference has been made to the need to give effect to the basic purpose of a rent review clause (*British Gas Corporation v Universities Superannuation Scheme Ltd* [1986] 1 WLR 398 at 401) or what is normally the commercial purpose of such a clause (*Basingstoke and Deane BC v Host Group Ltd* [1988] 1 WLR 348).

41
Co-operative Wholesale Society Ltd v National Westminster Bank plc [1995] 1 EGLR 97 at 99.

42
See Lord Wilberforce in *Prenn v Simmonds* [1972] 1 WLR 1381 and *Reardon Smith Line Ltd v Yugvar Hansen-Tangen* [1976] 1 WLR 989.

43
Ford v Beech (1848) 11 QBD 852 at 866.

and literal".[44] The shift towards a more relaxed approach was already reflected in the words of Sir Thomas Bingham MR (as he then was)[45] several years ago:

> To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive; the instrument must speak for itself, but it must do so in situ and not be transported to the laboratory for microscopic analysis.

There is of course a strong case which can be presented for an approach which follows strict legal rules, even at the expense of the actual intention of the parties.

In the world of commercial affairs speed is usually of the essence. The demands of commercial business can rarely tolerate the lengthy delays which recourse to legal processes may involve. What is required above all is certainty. So it is important that commercial contracts should be clear and precise in their terms. If the text is obscure then it is necessary that the rules by which such problems are to be resolved should be clear and certain. What the court would say, if the matter comes before it, should be predictable. If the matter is left to a judicial interpretation which is not governed by strict rules, then commercial interests may be ill-served. If, to use Selden's expression, the measure of the law becomes the measure of the Chancellor's foot, then the law is failing the needs of the commercial world.

If, to use Selden's expression, the measure of the law becomes the measure of the Chancellor's foot, then the law is failing the needs of the commercial world.

But, on the other hand, commercial interests will not be well-served if the intention of parties can be sufficiently clearly seen to have been frustrated by a slip. Bad drafting may often be due to the speed at which the drafting has been done. One of the features of modern life is the speed of communication. Telecommunications in all their forms, whether fax or e-mail, enable, and so come to require, that drafting is done in hours where it once would have taken days.

44 *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587.

45 *Arbuthnot v Fagan*, 30 July 1993, quoted by Mance J in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 326.

The relative leisure under which earlier generations worked gave a far greater opportunity for reading and re-reading drafts without undue pressure and so reduced the risk of error. Now that that risk must be significantly higher, it is not unreasonable that the courts should recognise that there is the greater room for mistakes to occur.

But it is not to be thought that a more relaxed approach to the construction of contracts should allow a more relaxed standard of draftsmanship. As Lord Bridge has said:

> [bad drafting] affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention …[46]

That the court may be more ready to come to the rescue does not mean that parties should not still strain to express themselves accurately and precisely.

Furthermore, the modifications which can be identified have their limits. The courts may not rewrite the contracts which the parties have made. And however boldly the purposive approach may be proclaimed, beyond the limited field of rectification the court cannot "re-write the language which the parties have used in order to make the contract conform to business common sense".[47] As Lord Mustill has observed, "to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court".[48] The warning on the limit to the court's power is timely. But it might be thought that there is no question but that the court will endeavour to enforce the contract. The problem is: What does the contract mean? What are the rights or obligations which are to be enforced? The parties require not only to have the

46
Mitsui Construction Co Ltd v AG of Hong Kong (1986) 33 Buil LR 14.

47
[1995] 1 EGLR 99.

48
Charter Reinsurance Co Ltd v Fagan [1997] AC 313 at 388.

confidence that the court will enforce their bargain but also that it will spell out a construction of the agreement which accords with their intention.

Rules of procedure should not be allowed to defeat the substantial complaints of litigants and deprive them of the opportunity to have the court resolve their disputes. Nor should rules of construction be formulated or applied in terms so strict as to fail to recognise the real intention of the authors of a deed. If there has in the past been a tension between strict law and common sense in this area of the law, I would hope that the developments which have been occurring particularly in the last decade or so have served to reduce that tension and restore the traditional equation between common law and reason. Results which may appear to the ordinary person to be technical or absurd diminish the standing of the courts and do little to serve commercial interests. The developments which I have sought in this lecture to describe should help to meet the requirements of the present age and to secure that the courts will not insist upon so strict an observance of forms or rules as to allow the forms and rules to override reason and common sense.

The Right Honourable Lord Bingham of Cornhill

Thomas Henry Bingham
(*b.* 13 October 1933)

The Law as the Handmaid of Commerce

Lord Bingham's distinguished contributions to law are demonstrated by his current appointment as the Senior Law Lord, and by his earlier appointments to the highest judicial offices as Master of the Rolls and as Lord Chief Justice.

At Balliol College, Oxford, Lord Bingham took a first degree in modern history. He topped the Bar Finals and was called to the Bar, Gray's Inn, in 1959, becoming a Bencher in 1979. He became a Queen's Counsel in 1972.

He proceeded to serve as a Judge of the High Court of Justice, Queen's Bench Division in 1980, while simultaneously being a Judge of the Commercial Court from 1980–1986. In 1986, he was elevated as a Lord Justice of Appeal of the Court of Appeal before being appointed as the Master of the Rolls in 1992.

In 1996, he was appointed as Lord Chief Justice of England and Wales, and in June 2000, he was made a Lord of Appeal in Ordinary, and at the same time became the Senior Law Lord, succeeding Lord Browne-Wilkinson.

Lord Bingham has been an ardent supporter for changes to be made to the appellate court, having also suggested the establishment of a Supreme Court to replace the Appellate Committee of the House of Lords.

His services to academic institutions have been signal, including chairmanship of the Royal Commission on Historical Manuscripts and the Council of Management of the British Institute of International and Comparative Law. In 2003, he was elected as an Honorary Fellow of the British Academy. Lord Bingham keeps a close relationship with his alma mater, Oxford University: he has been a High Steward of the University since 2001, and a Visitor at Balliol since 1986. He is also a member of the Advisory Council of the Institute of European and Comparative Law, University of Oxford.

Lord Bingham is the author of *The Business of Judging: Selected Essays and Speeches*, 2000, Oxford University Press, London.

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The Law as the Handmaid of Commerce

Lord Bingham of Cornhill
Senior Law Lord, House of Lords

Text of the Sixteenth Sultan Azlan Shah Law Lecture delivered on 5 September 2001 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highness, in giving the Sixteenth Sultan Azlan Shah Law Lecture I am doubly honoured, first by the unique eminence of the jurist whose name the lecture bears, and secondly by the great distinction of the fifteen lecturers who have preceded me. I am most grateful to you for admitting me to this elite company, and for giving my wife and me this opportunity to visit, for the first time, this exciting and beautiful country.

It was an attractive Victorian practice to adorn the entablature of their public buildings with a series of togaed or bedraped figures respectively representing Manufacture, Agriculture, Commerce, Science, Art, Law and perhaps, if the building was big enough, Architecture, Music, Philosophy and so on. The underlying idea was, as I infer, that all these activities are mutually supportive and together contribute towards the creation of a prosperous, progressive, well-governed and civilised society. This evening I seek to touch on the relationship between two of these figures—Commerce and Law. But I do so in a one-sided manner. I shall not consider what Commerce has to offer the Law or the practice of law; many would anyway think these were quite commercial enough. My subject is the contribution which the law, properly developed and wisely applied, can make to the successful conduct of business, using that word in its widest sense.

The suggestion that the law has any contribution to make might surprise those businessmen, of whom there are many, who tell one that their unswerving ambition is to have as little to do with the law and lawyers as they possibly can and that they would rather go to the stake than permit their company to become involved in any litigated dispute. There are two responses to this, apart from an expression of admiring congratulation. The first is that given by Lord Donaldson of Lymington in his Sultan Azlan Shah Law Lecture in 1992:

> Indeed a feature which distinguishes commercial disputes from those between other citizens is that businessmen recognise that bona fide disputes are inherent in business transactions. They accept that their sensible resolution is an integral part of commerce. By contrast, other citizens regard disputes as something which should never have occurred. They regard them as something which are never their fault, but always the fault of the other party. That a dispute should ever have arisen is itself regarded as a personal affront. This fundamental difference in attitude enables special procedures to be developed for the resolution of commercial disputes.[1]

If those engaged in business are able to make and perform contracts and resolve differences without constant resort to lawyers and without plunging into unwelcome litigation, this is likely to be because the legal framework within which they transact their business is well-adapted to its end of achieving clarity and certainty.

The second answer is even more germane to my theme. It is that if those engaged in business are able to make and perform contracts and resolve differences without constant resort to lawyers and without plunging into unwelcome litigation, this is likely to be because the legal framework within which they transact their business is well-adapted to its end of achieving clarity and certainty, and giving effect to what businessmen themselves regard as the common sense commercial answer, the answer which the parties intended, whether they expressed it accurately or not. If the rules are unclear, there is always room for argument. If the rules are subject to constant change it will

1 See chapter 7, *Commercial Disputes Resolution in the 90's*, at page 186, above.

always be tempting to discard the lessons of past practice in the hope that a different answer may be given this time. If the rules are too subtle or too complex they are unlikely to reflect the expectations of those who are market practitioners not metaphysical philosophers. If the rules in one place are significantly different from those in another, the opportunities for misunderstanding and confusion, followed by legal manoeuvring and forum-shopping, are obvious.

Features of a sound commercial law

In thus describing the features of a sound commercial law it may be thought that I am doing little more than repeat what Lord Mansfield, sitting in the court of Queen's Bench, said over 200 years ago. That is quite right. But I would like to linger on the achievement and legacy of that remarkable man, both because of the striking modernity of his utterances and because his vision of what commercial law should be and how it should operate remains as pertinent to us in the 21st century as it was in the 18th.

The striking modernity of Lord Mansfield's utterances and his vision of what commercial law should be and how it should operate remains as pertinent to us in the 21st century as it was in the 18th.

In *Hamilton v Mendes*[2] he said that

> the daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.

In *Vallejo v Wheeler*[3] he declared:

> In all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon.

2 (1761) 2 Burr 1198 at 1214.

3 (1774) 1 Cowper 143 at 153; Lofft 631 at 643.

Thus, if no settled rule had been laid down, evidence of mercantile custom could be received, and if the custom was accepted as reasonable it could be embodied in the law, but once a mercantile custom had been accepted as part of the common law no evidence to prove a contradictory custom could be admitted,[4] and in one case Mansfield admitted that he had been wrong to admit evidence of mercantile practice when the law on the point had already been clearly laid down.[5] In *Pelly v Royal Exchange Assurance Co,*[6] a case concerned with a policy of marine insurance, he observed that

> the mercantile law, in this respect, is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.

Maritime law similarly was not the law of a particular country, but the general law of nations.[7] He regarded good faith as the basis of all dealings.[8] He recognised the proper role of the judge in this very important legal sphere. As Professor Fifoot put it:

> He realised that the merchant was more competent than the lawyer to prescribe the form of a charter-party or to direct the incidence of paper credit. The function of the judge was not to dictate, but to interpret and to sanction.[9]

In Mansfield's day, as in our own, the form of many commercial contracts left much to be desired, among them policies of insurance and charter-parties. Of the former he said:

> The ancient form of a policy of insurance, which is still retained, is, in itself, very inaccurate, but length of time, and a variety of discussions and decisions have reduced it to a certainty. It is amazing when additional clauses are introduced, that the merchants do not take some advice in framing them, or bestow more consideration upon them themselves. I do not recollect an addition made which has not created doubts on the construction of it.[10]

4
Holdsworth, *A History of English Law,* volume 12 at 527-528.

5
Edie v East India Company (1761) 2 Burr 1216.

6
(1757) 1 Burr 341 at 347.

7
Luke v Lyde (1759) 2 Burr 882 at 887.

8
Bexwell v Christie (1776) 1 Cowp 395 at 396.

9
Fifoot, *Lord Mansfield* (1936), at 118.

10
Simond v Boydell (1779) 1 Dougl 268 at 270.

But his approach was clear:

> The charter-party is an old instrument, informal and, by the introduction of different clauses at different times, inaccurate and sometimes contradictory. Like all mercantile contracts, it ought to have a liberal interpretation. In construing agreements, I know no difference between a Court of Law and a Court of Equity. A Court of Equity cannot make an agreement for the parties, it can only explain what their true meaning was; and that is also the duty of a Court of Law … [11]

Few judicial tributes can have been better deserved than that of Mr Justice Buller to Lord Mansfield in 1787:[12]

> Thus the matter stood still within these 30 years; since that time the commercial law of this country has taken a very different turn from what it did before. We find in *Snee v Prescot* (1743) 1 Atk 245 that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in Courts of Law all the evidence in mercantile cases was thrown together; they were generally left to a jury and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country.

Lord Mansfield—A biographical sketch

Before turning, as with your indulgence I shortly shall, to two fields in which Lord Mansfield's decision-making provides an outstanding

11 *Hotham v East India Company* (1779) 1 Dougl 272 at 277.

12 In *Lickbarrow v Mason* (1787) 2 TR 63 at 73.

role model for commercial courts, judges and practitioners the world over—marine insurance and negotiable instruments—I would like to draw attention to certain biographical features of his career which seem to me to merit a digression.

First, of the 26 years which separated his call to the Bar of Lincoln's Inn from his appointment as Chief Justice of the Queen's Bench, Mansfield spent more than half as a law officer, latterly as Attorney-General, and it was by virtue of holding that office that he was entitled, according to the custom of the day, to demand the Chief Justiceship when it became vacant in 1756. This is a custom now abrogated in England and Wales, and its passing is unmourned.[13] It is nevertheless a sobering reflection that this now discountenanced practice gave England a Chief Justice whom many would consider the greatest ever holder of that office.

Secondly, it is noteworthy that Mansfield's departure from the Bench was so unwelcomed to the government of which he was a member that he was offered the Duchy of Lancaster (a government office) for life, a tellership in reversion for his nephew and pensions of £2,000, £5,000 and £7,000 a year "if he would retain his seat in the House of Commons for a month, a week, nay, even for a day".[14] He was deaf to all offers and all entreaties. It is not unknown today for judges to dilate on the financial sacrifice involved in accepting judicial office. When allowance is made for changed money values over 250 years and the absence of tax, and even allowing for the sources of income open to an 18th century judge, Mansfield's decision puts these lamentations into a somewhat different perspective.

Thirdly, Mansfield (born Murray) was a Scotsman and in his early days of practice argued a number of Scots appeals before the House of Lords,[15] where appeals from Scotland at that time predominated. Scots law, particularly then, drew heavily on civil law sources, and it seems at least possible that Mansfield acquired by this means a breadth of learning denied to his English colleagues. Holdsworth has recorded that:

13
The last Attorney-General to be appointed Lord Chief Justice was Lord Hewart in 1922, if Lord Caldecote (who had been Attorney-General, but briefly served as Lord Chancellor in 1939-1940) is excepted. But Lord Simon of Glaisdale, who had been Solicitor-General, was appointed to be President of the Probate, Divorce and Admiralty Division of the High Court in 1962.

14
Fifoot, above note 9, at 39.

15
Fifoot, above note 9, at 35.

> … his learning was far wider than that of any other English lawyer … he was familiar with the continental treatises on commercial and maritime law; and … he was learned in Scottish law, in international law, and in ecclesiastical law, as well as in the principles of common law and equity.[16]

Fourthly, it is again noteworthy that although Mansfield has left a generally golden reputation behind him, he was in his day the subject of sustained personal vilification perhaps never suffered by any other judge in any place at any time. I refer to the anonymous *Letters of Junius,* some of which were addressed to him personally and attacked in the strongest terms his partial and pro-government approach in particular to libel trials. During the Gordon riots of June 1780 his carriage windows were smashed by the mob, he was hustled as he left the House of Lords, his house in Bloomsbury Square was burned and his library destroyed. In comparison with penalties such as these the strictures of the press to which the modern judge is exposed may seem a somewhat moderate affliction.

Fifthly, Mansfield served as Chief Justice for 32 years. This is not by any means an international record. John Marshall presided in the Supreme Court of the United States for 34 years and Justice McTiernan sat in the High Court of Australia for nearly 46. But Mansfield's tenure of office was longer than that of any other Chief Justice of the Queen's Bench before or since. This prompts a thought perhaps worthy of consideration by those responsible for appointing judges in the modern world: that those who have made the most lasting and beneficial mark on the law have, on the whole, held high judicial office for very long periods. Lord Denning's now unrepeatable 38-year tenure may be seen as another example. It is of course true that if a judge is appointed to high office very young and turns out to be a nonentity or an embarrassment, the community will have to live with the consequences of that mistaken appointment for a very long time. There is no doubt a balance to be struck between a bold appointment which may pay rich dividends but may disappoint and a cautious and safe appointment which is unlikely to prove disastrous but even more unlikely to produce a Marshall or a

16 Holdsworth, above note 4, volume 12 at 526.

Mansfield. Where it is possible to identify a candidate of outstanding intellect, unimpeachable integrity and complete independence there is, I would suggest, much to be said for boldly appointing such a judge at an age young enough for the full potential of his or her genius to be realised.

My sixth point follows from the fifth. Mansfield's exceptional period of service had the consequence that there came before him a huge number of cases, many of them in the fields of law in which he was particularly interested. Taking account of reported cases, cases of which only his manuscript notes survive and cases of which no written record survives, it seems likely that he dealt with well over a hundred cases dealing with insurance (mostly marine insurance) and (it has been calculated) over 450 concerned with bills of exchange and promissory notes.[17] He also had that appetite for business which has characterised all the greatest judges: at the age of 75, presiding at the trial of Lord George Gordon, he sat at 9.00 am and continued to sit until he concluded a two hour summing-up to the jury at 4.30 am the next morning.[18] It may of course be that the fate of his house in Bloomsbury Square gave him a heightened interest in the outcome of this trial. But it is plain that his long tenure of office, his unflagging energy and his intense interest in certain areas of law, commercial law pre-eminent among them, gave him an opportunity denied to all but a very few judges not merely to decide cases but to develop a coherent, rational and principled body of law. As the *Dictionary of National Biography* puts it, "He thus converted our mercantile law from something bordering on chaos into what was almost equivalent to a code." An obvious analogy may be drawn with the constitutional legacy of Chief Justice Marshall in the United States.

This brings me to the seventh and last point in this biographical digression. Just as Marshall's genius could never have had the effect it did save in the early years of the young American republic, so Mansfield's genius was ideally matched to the time in which he flourished. For these were the years in which Britain, hitherto a poor, backward and little-regarded island on the periphery of Europe,

17
See *The Mansfield Manuscripts,* ed. Oldham (1992), volume 1, at 479.610; Samson, "Lord Mansfield and Negotiable Instruments," Dalhousie Law Journal (1988) 11 no. 3 at 931–944.

18
The Mansfield Manuscripts, volume 1 at 42.

moved into the front rank of maritime trading nations. It was an era of unprecedented expansion. Mansfield's outlook fully reflected the expansive optimism of the times. He was a free-trader before Adam Smith. In some respects his attitudes would cause raised eyebrows today. As Solicitor-General, for example, he opposed a bill to "prevent the insurance of French ships and their loading during the war with France", warning the House of Commons that its only effect would be

> to transfer to the French a branch of trade which we now enjoy without a rival; for I believe there is a great deal more of the insurance business done now in England than in all Europe besides. Not only the nations we are in amity with, but even our enemies, the French and Spaniards, transact most of their business here in London.[19]

So Mansfield's judicial work was boosted by a rising tide of mercantile activity and imbued with an internationalist outlook which had become increasingly unusual since the rise of nation states; but it was also fired by a lively sense of the advantage which accrues to a state where the laws are conducive to the effective discharge of business.

Contracts of insurance

Contracts of insurance were not of course a product of Mansfield's time. They had been known in England since before the 16th century.[20] In 1601 the Lord Chancellor had been empowered by statute to appoint a standing commission consisting of the admiralty judges, the recorder of London, two doctors of the civil law, two common lawyers and eight "grave and discreet merchants" "to hear all cases arising upon all policies of insurance entered in the London Office of Insurances".[21] But the effective operation of this tribunal had been thwarted by the jealousy of the common law courts, which by their reliance on general verdicts made it almost impossible to ascertain the grounds on which the case had been decided. As Park, writing in 1787 of the pre-Mansfield period, said,

19
Fifoot, above note 9, at 83.

20
The Mansfield Manuscripts, volume 1, at 451.

21
Ibid, at 452.

> Nay, even if a doubt arose in point of law, and a case was reserved … it was afterwards argued in private at the chambers of the judge who tried the cause, and by his single decision the parties were bound. Thus, whatever his decision might be, it never was promulgated to the world; and could never be the rule of decision in any future case. [22]

If these principles, which it is unnecessary to elaborate, now seem very familiar and very basic, that is a measure of Mansfield's contribution to the conduct of marine insurance business.

Mansfield replaced this inarticulate *in pectore* jurisprudence—if it may charitably be described as jurisprudence at all—by principles which were later, in substance, to be codified in the Marine Insurance Act 1906. Thus the contract of insurance required the utmost good faith, since "the special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only".[23] Non-disclosure of these facts would therefore void the policy. But "either party may be innocently silent, as to grounds open to both, to exercise their judgment upon": [24]

> The question therefore must always be "whether there was, under all the circumstances at the time the contract was underwritten, a fair representation; or a concealment; fraudulent if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run".[25]

Since,

> by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract.[26]

While "a representation may be equitably and substantially answered", he held that "a warranty must be strictly complied with".[27] If the risk is altered by the fault of the ship owner or his master, the insurer is discharged from his obligation,[28] so (for example) an unnecessary deviation avoids the policy.[29] The contract of insurance

22 *Park on Insurances,* xiv.

23 *Carter v Boehm* (1766) 3 Burr 1905 at 1909.

24 Ibid, at 1910.

25 Ibid, at 1911.

26 *Pawson v Watson* (1778) 2 Cowp 785 at 788.

27 *De Wahn v Hartley* (1786) 1 TR 343 at 345.

28 *Pelly v Royal Exchange Assurance Co* (1757) 1 Burr at 341.

29 *Lavabre v Wilson* (1779) 1 Dougl 284 at 291.

is one of indemnity: thus "the insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss: and the insured ought never to gain more".[30] But because the contract is one of indemnity against a risk, the foundation of the contract fails if the risk has, for whatever reason, never been run; if the risk has been run there can be no return of the premium.[31] If these principles, which it is unnecessary to elaborate, now seem very familiar and very basic, that is a measure of Mansfield's contribution to the conduct of marine insurance business. They were not so before.

Negotiable instruments

As with insurance, so with negotiable instruments. By the beginning of the 18th century, bills of exchange and promissory notes were recognised as negotiable instruments, the rights and duties of the parties to these instruments were beginning to be defined and some of the characteristics of negotiability were beginning to emerge.[32] But much was unclear, and it had yet, crucially, to be decided that a bona fide holder for value of a negotiable instrument has a good title, even though he takes it from a person who has none. Building on the decisions of Chief Justice Holt,[33] Mansfield so held in a series of important cases.[34] In *Peacock v Rhodes* in 1781 he said:

> The holder of a bill of exchange or promissory note is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties.[35]

Thus was established the simple principle upon which an infinity of commercial transactions has depended ever since. Nothing could better illustrate the benign role which the law can play in giving effect to the expectations of businessmen, bringing clarity and uniformity to everyday business transactions and facilitating the conduct of business.[36]

30
Hamilton v Mendes (1761) 2 Burr 1198 at 1214.

31
Stevenson v Snow (1761) 3 Burr 1237 at 1240; *Tyrone v Fletcher* (1777) 2 Cowp 666 at 668.

In this brief account I have drawn on the helpful summary given by Holdsworth, above note 4, volume 12, at 536-540.

32
Holdsworth, above note 4, at 529.

33
In *Bullen v Crips* (1703) 6 Mod 29; *Hussey v Jacob* (1696) 1 Com 4; *Clerke v Martin* (1700) 2 Ld Raym 757, 758 and other cases.

34
Including *Grant v Vaughan* (1764) 3 Burr 1516; *Heylin v Adamson* (1758) 2 Burr 669 and *Edie v East India Company* (1761) 2 Burr 1216.

35
(1781) 2 Dougl 633 at 636.

36
This topic is well-discussed by Samson, "Lord Mansfield and Negotiable Instruments", Dalhousie Law Journal (1988) 11 No. 3 at 931-945.

Business practices and legal principles

The methods used by Mansfield to inform himself of market custom and practice, by consulting closely with a corps of special jurymen experienced and expert in commercial matters, did not outlive him. But happily his philosophy did. And, of course, as new business practices grow up, so a new need arises to try and ensure that reputable business practice and legal principle do not diverge. I consider briefly one example of many. A banker advancing money to an importer to finance the purchase of foreign goods ordinarily seeks security for his advance, which may be given by a pledge of the bill of lading, a document of title and therefore equivalent to a pledge of the goods themselves. But the importer will need the bill of lading to deal with the goods when they arrive or to deal with third parties. How can the banker retain his security while enabling the importer to handle the practical side of the transaction? The answer, first used by Baring Brothers' agent in Boston in the 1830s, was for the importer to sign a trust receipt, undertaking that in consideration of the bank releasing the bill of lading to him, he would hold it on trust for the bank, together with the goods and the proceeds of their sale. This arrangement, if legally watertight, appeared to serve the interests of both parties. But would it withstand legal scrutiny? Justice Story, the great American judge, followed the Mansfield approach in holding that it did:

> It was as fair and honest a commercial transaction in its origin and progress, and consummation, as was probably ever entered into. How, then, it is against the policy of the law, I confess myself unable to perceive, unless we are prepared to say, that taking collateral security for advances, upon existing or future property, on the part of a creditor, without taking possession of the property at the same time, or when it comes *in esse*, is per se fraudulent. Possession is ordinarily indispensable at the common law to support a lien; but even at the common law it is not indispensable in all cases.[37]

In due course the House of Lords reached a similar conclusion[38] and lower courts also upheld the commercial efficacy of the transaction.

37 *Fletcher et al v Morey* (1843) 9 Fed Cas 266.

38 *North Western Bank Ltd v John Poynter, Son & Macdonalds* [1895] AC 56.

In one case it was said:

> The object of these letters of trust was not to give the bank a charge at all, but to enable the bank to realise the goods over which it had a charge in the way in which goods in similar cases have for years and years been realised in the City and elsewhere.[39]

Lord Justice Mackinnon in the Court of Appeal put the matter very clearly:

> The truth is that almost every aspect of commercial dealing is not proof against the possible results of the frauds, that a lawyer, thinking of the possibilities of such things, might suppose to be so easy, but which in business in fact occur so rarely … I have no doubt that this very convenient business method will continue, and can do so because the whole basis of business rests upon honesty and good faith, and it is very rarely that dishonesty or bad faith undermines it.[40]

So again market practice was legally validated. But of course this is not always the outcome. There are occasions when transactions entered into in good faith for a legitimate financial purpose are held to be unlawful. Such was the effect of the House of Lords' decision in *Hazel v Hammersmith and Fulham London Borough Council,*[41] a case concerning interest rate swap transactions entered into in the market by a local authority. Some commentators, including myself, thought this an unfortunate decision, but since I was a member of the Court of Appeal with whom the House disagreed my own opinion is not altogether surprising.[42]

A transnational approach

I have lingered for so long in the past not, or not only, out of antiquarian zeal but because I suggest that the lessons of the past—the legal virtues of clarity, simplicity, intelligibility, uniformity, the alignment of sound market practice and legal principle, purposive interpretation, the overriding requirement of good faith—provide

39
In re David Allester Ltd [1922] 2 Ch 211 at 218, per Astbury J.

40
Lloyds Bank Ltd v Bank of America National Trust and Savings Association [1938] 2 KB 147 at 166. In this account I have gratefully drawn on Cranston, "Doctrine and Practice in Commercial Law" in *The Human Face of Law* (1997) at 200-206.

41
[1992] 2 AC 1.

42
[1990] 2 QB 697. This case is interestingly and objectively discussed by McKendrick, "Local Authorities and Swaps: Undermining the Market?" in *Making Commercial Law* (1997) at 201-237.

the surest guide in the rapidly changing commercial world in which, businessmen and lawyers alike, we now live. The rise of truly transnational corporations, the revolution in global communication technology, the massive increase in global financial flows and the creation of global financial and capital markets have made the world a different place.

A European author has pointed to a series of legal developments directly relevant for the transnationalisation of commercial law: the victory of the doctrine of party autonomy; the realisation that in many cases the technicalities of domestic legal rules do not fit for international trade; the informal nature of much law-making in the fields of private and public international law; the increased significance of non-governmental organisations; the success of the UN Convention on Contracts for the International Sale of Goods and other international uniform law instruments; the decreasing significance of private international law; the emphasis on fairness and reasonableness in international contract law; the acceptance of comparative law as an independent legal science; the gradual convergence of civil and common law; the growth of a modern common law of Europe and the development towards a European Civil Code; the transnationalisation of areas which have so far been reserved for domestic legislatures such as antitrust and bankruptcy law; the growth of arbitration and alternative dispute resolution mechanisms in international trade; the equation of arbitration and state courts as genuine adjudication procedures and the emergence of a genuine arbitral case law.[43] The author concludes:

> All of these factors have a basic common denominator: the erosion and irrelevance of national boundaries in markets which can truly be described as global or "transnational" and the decreasing significance of state-sovereignty for rule-making and rule enforcement.[44]

So the challenge is clear. Home-grown solutions and rules, however serviceable in their own day, may no longer serve. A broader transnational approach, drawing on the experience and

43 Berger, "Transnational Commercial Law in the Age of Globalisation" (*Centro di studi e richerche di diritto comparato e straniero*, Rome, 2001), at 4-5.

44 Ibid, at 5.

wisdom of businessmen and lawyers all round the world, is called for. Mansfield's close attention to the laws and customs of foreign countries points the way. And the building blocks are being put into place. Some, like the Uniform Customs and Practice for Documentary Credits, have been in existence for many years and have proved admirably effective. Others, like the International Sales Convention, the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law[45] are of more recent vintage. The Commission on European Contract Law, responsible for formulating these European Principles and liberated from the constraints of any national law, has formulated two propositions dear to the heart of Lord Mansfield. Article 2.101(1) provides that the contract is concluded if the parties intended to be legally bound and have reached a sufficient agreement without any further requirement. So the doctrine of consideration with all its artificialities is discarded. And Article 1.106 simply provides: "Each party must act in accordance with good faith and fair dealing."

The challenge in this new and bracing transnational environment is to ensure that in the future the law acts as the handmaid of commerce and not as an adversary, a fetter or an irritant.

The challenge, for the business community, for legal practitioners, for arbitrators and for courts in this new and bracing transnational environment is, I suggest, immense but clear: to ensure that in the future, as (on the whole) in the past, the law acts as the handmaid of commerce and not as an adversary, a fetter or an irritant.

45 Discussed by Bonell, "The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law", and Lando, "Eight Principles of European Contract Law" in *Making Commercial Law* (1997) at 91, 103.

The Right Honourable Associate Justice Kennedy

Human & Economic Rights: Their Evolution Under the American Constitution

Anthony McLeod Kennedy
(*b.* 23 July 1936)

Widely viewed by conservatives and liberals alike as balanced and fair, Justice Kennedy was sworn in as an Associate Justice of the United States Supreme Court on 18 February 1988, upon President Ronald Reagan's nomination.

His appointment to his current judicial office would appear to have been charted from his youth. Born in central California in 1936 to Anthony J Kennedy, a respected private legal practitioner, and Gladys McLeod Kennedy, a leader in Sacramento civic activities, Justice Kennedy was exposed early in his life to the workings of the law-at age eleven, he worked after school for the state Senate as a page boy; later on he spent time in his father's law office proofreading wills and accompanying his father at counsel table while Kennedy Senior tried cases.

After attending public school in Sacramento, Justice Kennedy went on to Stanford for his bachelor's

degree, spending his final undergraduate year at the London School of Economics. Like many of his fellow Supreme Court Justices, Justice Kennedy went from Stanford to Harvard for his law degree and graduated cum laude.

After law school, Justice Kennedy went to work for a private law firm in San Francisco. His father unexpectedly died in 1963 and Kennedy returned to Sacramento to run his father's law firm, a post he held for the next 12 years. He also served as a Professor of Constitutional Law at the McGeorge School of Law of the University of the Pacific from 1965–1988.

In 1975, upon President Gerald Ford's nomination, Justice Kennedy was appointed to the US Court of Appeals for the Ninth Circuit, at that time the youngest federal appeals judge to be appointed to the bench in the country at 38. Justice Kennedy also served on the board of the Federal Judicial Center and on two committees of the US Judicial Conference.

Unanimously voted by the Senate to the Supreme Court in 1988, Justice Kennedy, through the opinions he has held in the cases that have come before him, has gained a reputation as a judge who is conservative but not confrontational, able to build bridges to more liberal judges. More recently in 2003, he won applause for his criticism of mandatory sentencing laws passed by Congress in April. "A people confident in its laws and institutions should not be ashamed of mercy", he said.

Human & Economic Rights: Their Evolution Under the American Constitution

Justice Anthony Kennedy
Supreme Court of United States of America

Due to insurmountable difficulties, Justice Kennedy was unable to deliver what would have been the Seventeenth Sultan Azlan Shah Law Lecture in 2002, *Human and Economic Rights: Their Evolution Under the American Constitution.*

In its place, *The Office of Lord Chancellor,* a lecture delivered in 1975 by Lord Elwyn-Jones, Lord Chancellor, at the Faculty of Law, University of Malaya, has been included in this volume.

The Right Honourable Lord Elwyn-Jones

The Office of Lord Chancellor

Frederick Elwyn Jones
(14 October 1909–4 December 1989)

"The law and politics have always been intermingled in my career", noted Lord Elwyn-Jones in his autobiography, *In My Time* (1983). His appointment in 1974 as Lord Chancellor, requiring him to wear three hats as Speaker of the House of Lords, Head of the Judiciary and Cabinet Minister, is but one demonstration of this statement in his remarkable life.

Born in Llanelli, Wales on 14 October 1909, Frederick Elwyn Jones was the youngest son of a tin-plate rollerman. From his early education in the South of Wales, he went on to read history in Cambridge from 1928-1931. There he joined the Union Society, rising to become President, honing his skills in debating which would serve him so well as a lawyer and a Parliamentarian.

From Cambridge he went on to read for the Bar at Gray's Inn and was called in 1935. He was

appointed as a Queen's Counsel in 1952. In his early years as a lawyer in the pre-war days, he was called upon by the International Association of Democratic Lawyers to serve as an observer on a number of political trials on the Continent. From his experiences, he wrote three books contributing to the struggle against Nazism: *Hitler's Drive to the East* (1937), *The Battle for Peace* (1938) and *The Attack from Within* (1939).

During the Second World War, he saw wartime service in Britain, Italy and North Africa, serving in various capacities, ranging from Staff Captain in the Department of Army Legal Services to Deputy Judge Advocate.

In 1945, after the war, he was elected as a Member of Parliament for the Plaistow constituency in West Ham, and continued his service as an MP in the West Ham area for the next 29 years. In the same year, he accepted a brief from the Attorney General to be a Counsel for prosecution in the Nuremberg war crimes trial.

Lord Elwyn-Jones was himself the Attorney General from 1964-1970, in which capacity he prosecuted high profile trials, such as the Moors murders, and represented the public interest in major public inquiries, such as that into the Aberfan disaster.

In March 1974, during Harold Wilson's Prime Ministership, he was appointed as Lord Chancellor, an office which he held till 1979, and was sworn in as a peer in the House of Lords bearing the title Frederick Baron Elwyn-Jones of Llanelli and Newham.

Lord Elwyn-Jones died on 4 December 1989.

The Office of Lord Chancellor

Lord Elwyn-Jones
Lord Chancellor

Speech delivered on 14 August 1975 at the Faculty of Law, University of Malaya.

It is a great privilege to be invited to address this great university and particularly to do so under the chairmanship of my old friend the Attorney General.

In England the Attorney General used to be called the bulldog of the Crown. When I was the Attorney General I was called the corgi of the community. The corgi, as you know, is a Welsh dog. You, Mr Attorney, have already explained that, as Lord Chancellor, I wear three hats. You said "caps" I think, but that makes no difference. The important point is that I do not wear them all at the same time. But it is the case that I combine in my office the office of being the head of the judiciary, speaker of the House of Lords and a member of the Cabinet, the heart of the Government of the country. So you see, I defy in my post every honourable and reasonable principle of constitutional propriety. The office, of course, and its functions are a product of history, of the evolution of our constitution rather than any neat and tidy constitutional principles. And I will give you a brief account of the historical processes which led to the present functions of the Lord Chancellor being what they are.

First of all as to the judicial function and that really dates way back in history. The first Lord Chancellor of whom we are really aware was a monk called Ogmundus and he came over to England in the year 596 with St Augustine to convert the English barbarians and I suppose Lord Chancellors have been busy trying to do it ever since. There have been

As Lord Chancellor, I wear three hats. The important point is that I do not wear them all at the same time.

four saints among my predecessors and those saints begin with St Swithin who as you who have resided in England will well know is responsible for all the bad weather we have had in England in every summer, except this one, and I hope therefore that the new Lord Chancellor is establishing a new climatic tradition. Then there was Thomas *a* Becket and Thomas *de* Canterlupe and Thomas More. They were all assassinated. It used to be a very tricky and bloody business to get rid of the Lord Chancellor in those days. I am not quite clear from the Attorney's speech how they get rid of an Attorney General in Malaysia. But nowadays, of course, the Lord Chancellor can lose his post any day by the drop of a ballot paper or any night by telephone call from No 10 of the Prime Minister, saying, thank you very much for the services you have so signally rendered to the nation.

For the ladies who are present, you may care to know that women's lib struck early in the history of my office. There was a woman Lord Chancellor in the year 1253. It was the reign of King Henry III who went off to the wars which were a current fashion and sport in those days. He did not trust any of his barons. As you may know, Mr Attorney, it is always a very dangerous thing for a head of state to leave his country, so when he went away he decided there was only one person he could trust and that was his wife. What a lucky husband he was! And he duly appointed Queen Eleanor as the Lord High Chancellor.

Now the executive role that I mentioned earlier. I started with the judicial role, but in historical terms perhaps I should have started with the executive. From the 11th century on the King had his own secretary and he was known as Chancellor. Even now when I sign statutory instruments as Lord Chancellor I sign them Elwyn-Jones C, representing the historical beginnings of the office. The name Chancellor is derived from that of the usher, a very modest origin indeed, in a Roman law court who habitually sat at the cancellus behind the lattice screens of the court. Until the 16th century, the

time of the Protestant reformation in my country, the Chancellor was invariably in holy orders. He was often a Cardinal or an Archbishop, but since that time Chancellors have nearly always been laymen and lawyers. The Lord Chancellor continued to be a key member of the King's Council and his inner group of advisers. Indeed the Lord Chancellor still takes precedence over all ministers of the Crown, even the Prime Minister. He ranks in precedence after the Royal Family and the Archbishop of Canterbury. You may be interested to know that, although we have abolished the death penalty for murder in my country, it is still the penalty for treason, and to assassinate the Lord Chancellor is an act of high treason, which will be followed by the hanging of the culprit. Whether that gives me any cause for comfort is another matter. With the development of the Cabinet system, the Lord Chancellor came to be a senior member of it as, of course, he is today. The Cabinet, as you know is the heart of the executive deciding all important questions of policy be they domestic or foreign. So there is his role historically cast in a key position in the executive.

As to his judicial function, he is, as I have said, the head of the judiciary. While Her Majesty The Queen appoints all the judges, she does so on the advice of the Lord Chancellor. This is true of all the judges up and including those of the High Court; proposals for the appointment of Law Lords in the House of Lords and the Privy Council, and the Lord Justices who sit in the Court of Appeal, are submitted to the Queen by the Prime Minister, but again on the advice of the Lord Chancellor. The Chancellor also recommends the nominations to the Queen of Magistrates and the multitude of chairmen and members of tribunals up and down the country. He also appoints Queen's Counsel although again the letter patent are signed by The Queen.

Now the judicial functions of the Lord Chancellor originated in his responsibility for issuing and sealing writs and in his membership of the King's Council. He presided over the Court of Chancery and theoretically he still does. There he administers equity which, as you will remember, used to be said to be as long as the Chancellor's foot. I

am happy to say that I have not set my foot in that Court since I have been appointed, but equity still prevails there although there was some time ago a much speaking judge in the Chancery Division and his court was known as the din of inequity. When time permits the Lord Chancellor presides over the House of Lords sitting judicially and over the Judicial Committee of the Privy Council and I will have a word to say about that in a moment.

Until the Great War broke out in 1939, the House of Lords, as the second chamber of Parliament over which the Lord Chancellor presides, met at half-past-four in the afternoon and this made it possible for the Lord Chancellor to preside over the judicial sittings of the Lords, as the Supreme Court of the United Kingdom, which starts at 10.30 am. In those days the Lords of Appeal in Ordinary sat in the Chamber of the House of Lords itself to determine cases, their membership of course being selected from the outstanding judges of the country and very occasionally directly from outstandingly brilliant members of the Bar. But during the war this arrangement became impossible. If the House of Lords did not sit until half past four, especially in the winter, it became impossible to get home before the consistent and terrible air-raids on London started. It was accordingly decided that their Lordships in the House of Lords meeting as a second Chamber should begin their session on Monday, Tuesday, Wednesday and Thursday at half past two and on Friday at 11 o'clock in the morning and appeals to the Lords judicially were then heard by the appellate committee sitting in a committee room upstairs, consisting of the same Lords of Appeal in Ordinary. But they were technically a committee of the House and ever since that time they have sat as an appellate committee, as it is called, in a committee room upstairs. Clearly even the Lord Chancellor cannot be in two places at the same time and it became almost impossible for the Lord Chancellor since the war to sit judicially except for a fortnight in January and a fortnight in October when the courts are sitting, but Parliament is not. If the names of

He administers equity which, as you will remember, used to be said to be as long as the Chancellor's foot.

Lord Chancellors now rarely appear in the law reports, it is for those practical reason rather than from any reticence, or, I hope, lack of expertise on their part.

I now turn to the role of the Lord Chancellor in Parliament. He is the Speaker of the House of Lords which as you know is the second Chamber in our Parliament. It has been attended by Lord Chancellors ever since the 13th century. Up to the 17th century, indeed, the Lord Chancellor sometimes attended the House of Commons as well. And it led to great sessions in our history taking place. There was for instance the remarkable occasion in the year 1523 when Cardinal Wolsey came to the House of Commons aggrieved by the fact that, according to the biographer Thomas More, "nothing was so soon done or spoken in the Commons, but it was immediately blown abroad in every alehouse". That was, of course, before Hansard and the gentlemen of the press were reporting what was happening in Parliament. It came at a time when the King wanted a great subsidy from Parliament. Cardinal Wolsey was Chancellor then. He was the great Cardinal who built Hampton Court and who you will remember from your Shakespeare warned his successor about shunning ambition: "by that sin fell the angels". He sometimes seems a character created by Shakespeare, but he really did exist in fact. He went to Sir Thomas More, who described the occasion, with all his pomp, with his maces, his pillars, his pole-axes, his hat and his great seal too. But when Cardinal Wolsey asked for a subsidy, no one in the House of Commons spoke. The Cardinal said: "Here is without doubt a marvellously obstinate silence." And he departed from the place empty handed. Quite a dramatic confrontation between those great figures it indeed must have been.

But now the Lord Chancellor presides over the House of Lords I am not sure that he any longer has pole-axes or pillars, but he certainly has his mace, his hat and the great seal too. And he still wears the full regalia, the full bottomed wig, the court coat, the silk gown, the silver buckled breeches and the silver buckled shoes. Save on great State occasions when he breaks out into gold.

His role as chairman of the House of Lords is a curious one, because he has absolutely no control over the proceedings at all. Neither the mace nor the woolsack is deemed to be in the House. He does put formal questions to the House, but if he wishes to speak there as a minister, he moves three paces to the left to get as near as he can to the authorised seat of the Lord Chancellor in the House of Lords which is on the Earl's front row and the result is that the Lord Chancellor becomes involved in a curious sort of quadrille. If, for instance, I have to introduce and deal with a Bill in the House of Lords, say a recent Bill on reforming the law of intestacy, the proceedings will begin by the clerk at the table— the Clerk of Parliaments—calling on the Lord Chancellor. I then take three sharp paces to the left and then I move the second reading of the Bill and after I have finished, I say, "I beg to move". I then move three paces to the right back in front of the woolsack and then I say to the House: "The question is that this Bill be now read a second time." I then sit down. Then the debate continues. At the end of the debate, I am entitled to move again three paces to the left to reply to the debate, then I move back to the woolsack and once again put to the House: "The question is that this Bill be read a second time." As many as are of that opinion will say "content", the contrary "not content", and sometimes the "contents" have it. You can see that it becomes an extremely complicated business, Mr Attorney, when you are at the committee stage of a Bill, but at least it gives the Lord Chancellor abundant exercise which he no doubt needs since he has to reside in the House of Lord as well as work there.

If he wishes to speak he moves three paces to the left to get as near as he can to the authorised seat of the Lord Chancellor. The result is that the Lord Chancellor becomes involved in a curious sort of quadrille.

The Speaker of the Commons, of course, has very different powers and functions. During my 29 years as a Member of Parliament, it was my experience that even there the authority of the Speaker was not always accepted, at any rate, in the spirit, even though it was in the letter. There was, for instance, an occasion when one of the Irish members called a minister a liar—which is, of course,

a highly unparliamentary expression no doubt in your Parliament too—and Mr Speaker called upon him to withdraw that statement. And he said: "Very well, if you so command I will, but if on my way home tonight I was to walk across Westminster Bridge and were to see the Right Honourable Gentleman walking across with Ananias on one side of him and Sapphira on the other (the greatest liars in history) I would think he was keeping excellent company."

I turn now to the role of the Lord Chancellor as Minister. As I have said he is a member of the Cabinet and he presides over key committees and when anything of considerable difficulty occurs he is usually called upon to chair the committee of ministers dealing with it. In the Cabinet obviously he takes an active part in discussions, above all on legal and constitutional matters, and on foreign affairs questions with legal implications. He accompanies the Prime Minister abroad on great occasions, and sometimes for negotiations like the negotiation of what turned out to be the Rhodesian non-settlement; although when I took to sea on *Tiger* and *Fearless* for that purpose, Mr Attorney, I did so in my capacity as Attorney General and I am glad to say I did not prove to be a very bad sailor.

You will see from what I have said that the Lord Chancellor occupies a highly sensitive position in the balance of our constitution. When a judge by one of his obiter pronouncements or by one of his extra-mural activities appears to outrage Parliament or ministers or Members of Parliament, I am expected by them to do something about it. When a Minister or a Member of Parliament in turn appears to attack a judge unfairly, and to be threatening his independence by bringing pressure to bear upon him, I am rightly expected by the judiciary to do something about that. When the Government itself or a Government Department is alleged to be breaking the rule of law, I am expected by the public and the press quite rightly to do something about that. I do my best to do all these things and I no doubt end up by pleasing nobody. As my predecessor, Lord Hailsham, has put it, to the student of Montesquieu and the American constitution, the office of Lord Chancellor is thus an anomaly, hard to explain

and at first sight impossible to defend. But an examination of his actual functions shows that in actual practice the anomaly wholly disappears. He is there not because the doctrine of the separation can be safely disregarded, but cannot be disregarded. In particular the independence of the judiciary from political interference is a cardinal principle of liberty to be preserved at the price of constant vigilance. In the absence of a paper constitution the separation of powers is the function of the Lord Chancellor, a task which he can only fulfil if he sits somewhere near the apex of the constitutional pyramid armed with a long barge pole to keep off marauding craft from any quarter. That is the colourful language of Lord Hailsham and you must not ask me how a barge can get near the apex of a pyramid, except possibly in the time of Noah, but then, of course, there were no pyramids. But the gist and essence of what my distinguished predecessor said is absolutely true.

The separation of powers is the function of the Lord Chancellor, a task which he can only fulfil if he sits somewhere near the apex of the constitutional pyramid.

Now the massive duties which I have described as having to be performed by the Lord Chancellor involves a diet of a mass of papers which I am afraid have proliferated even more since the discovery of the photostat machine. The volume of papers is about half political and half judicial administration. The first half consists of papers for the next day's Cabinet or Cabinet Committees, or, of the papers which are in future coming before them. The economic papers as you can imagine are lengthy and complex in the conditions of today; added to these are the telegrams which have flooded in to the Foreign and Commonwealth Office throughout the day because under our doctrine of Cabinet responsibility, I am as much responsible for a decision on foreign policy as any other member of the Cabinet. The other half is departmental. The Lord Chancellor is generally responsible for the administration of justice throughout the country. He is directly responsible for the administration of the Law Courts in the Strand and of all the Circuit Courts and the County Courts in the country. For obvious reasons he has frequently to see the Lord Chief

Justice and indeed, since we have established direct rule over Northern Ireland, the Lord Chief Justice not only of England and Wales, but of Northern Ireland as well. He has also frequently to see the Master of the Rolls, the President of the Family Division, the Vice-Chancellor and, of course, the Attorney General, who is the Lord Chancellor's alter ego and spokesman of the House of Commons.

The Lord Chancellor has what another of my distinguished predecessors, Lord Gardiner, called a scandalous amount of judicial patronage. It is, however, governed by well-established conventions and it is exercised after a most careful consultation and, if I may say so, not inadequate knowledge in the Lord Chancellor himself. I see no harm in disclosing the secret, if it is a secret, that important appointments to the judiciary are recommended to the Queen only after long and careful consultation with, among others, the heads of the Divisions of the High Court, that is the Master of the Rolls, the Lord Chief Justice, the President of the Family Division and the Vice-Chancellor of the Chancery Division. And as I have said, it is the Lord Chancellor who recommends the appointment of the higher judiciary and the Circuit Judges and the Stipendiary Magistrates, of the Recorders and the QCs the Registrars and some 19,000 Justices of the Peace. To help him in this last task, he has Advisory Committees throughout the country which he himself appoints. And this is a curious historical fact, I also appoint 500 clergymen to livings up and down the country, that is a survival from the days of Henry III when he took over the properties, the monastries and the churches of the Roman Catholic Church, kept the best ones for himself and gave the ones he did not want to the Lord Chancellor. But there again great care is taken to find the right man for the right job and I act with the advisement of specially appointed staff and after consulation with the Bishops and the Church Wardens. So this patronage is exercised after most careful examination and thought.

Now there is no time for me to deal with all the other varied activities of the Lord Chancellor. There are a number of responsible bodies outside the Parliament or the law courts which he is responsible for; the Public Trustee who has in his charge the funds in court and

hundreds of millions of money of members of the public. He is responsible for the Land Registry, the Public Record Office, the Court of Protection, the lands tribunals, the pensions appeal tribunals, a myriad of other tribunals and he is also the minister responsible for the Council on Tribunals, for the Judge Advocate General's Department and for the Official Solicitor. He is also responsible for maintaining judicial comity with Commonwealth and foreign judges.

I was appointed to the office of Lord Chancellor at a time of change in the life of the law in my country. There is no harm in that because the law of my country, as I apprehend also of yours, Mr Attorney, is a living law, but it is now subjected more than ever to new external and internal pressures. As to external pressures, there has been the involvement of our law in the international commitments of our country through the United Nations, the Council of Europe with its Convention of Human Rights and its Commission of Human Rights, and finally the European Community and the Treaty of Rome.

Then there are the internal pressures on the shape of the law. Some of these are beneficial in my country as no doubt they are in yours. An example is the demand that the law should be made true to its ideal of justice. Another is that the driftwood in the law should be removed. These are tasks to which Parliament and our excellent and invaluable Law Commission apply their minds to, as well as the other reforming agencies within the professions, both the Bar and the solicitors, and I hope and believe that in your country also your legal profession is astute in the field of law reform. But it may well be that we are still far removed from the aspirations which were so eloquently expressed by my predecessor, Lord Brougham, in his famous speech on law reform in February 1828. He spoke on that occasion for six hours—don't be worried, I will not follow his example—but he concluded his speech with famous words when he said this:

> It was the boast of Augustus that the found Rome of brick, and left it of marble. But how much nobler will be the Sovereign's boast when he could say that he found law dear and left it cheap; found it a sealed book

> and left it a living letter; found it the patrimony of the rich, left it in the inheritance of the poor; found it the two edged sword of craft and depression, left it the staff of honesty and the shield of innocence.

I do not know whether you have achieved that transformation in your country. I am not satisfied yet that we have achieved it in ours, but I do believe that since that time the state of the law itself in my country and the administration of justice are now fairer than they have ever been. I think that we can reasonably claim in my country, and I have little doubt also in yours, that, no man is above the law and no man is below it. That much of the law is still a sealed book is I believe unfortunately true and for this no doubt Parliament itself and perhaps we the lawyers have a large measure of the blame. We are now studying reports which have come from the recommendations of a committee under Sir David Renton, QC, MP, to see if the statute law can be made more comprehensible. For instance, when I was Attorney, we had a Bill on leasehold enfranchisement and I noticed a paragraph in a schedule which said: "for the purposes of this Bill a church is a railway" which does not really make it easy for the laymen fully to understand. There is therefore much to do there.

The obscurity of the law still presents even counsel with difficulties. I heard recently, for instance, this exchange between counsel and the judge. The counsel confidently: "My Lord, the law on this matter is clear and indisputable. It says so and so." The judge, testily: "The law says nothing of the kind." Counsel, humbly: "Well, it certainly was the law up to the moment of your Lordship's intervention." I am sure all lawyers practising here have felt like saying that from time to time. The complexity and uncertainty and obscurity of the law is something that lawyers should be concerned about because clearly we have no vested interest in that state of affairs. We find cases are taking longer to try, and I am bound to say I sympathise with the observation of Lord Parker of Waddington who said:

> A judge is not supposed to know anything about the facts of life until they have been presented in evidence and explained to him at least three times.

I expect the judges who are here have suffered that too from time to time.

Time does not permit me to take the matter very much further, but there is one aspect of legal administration in which I have been greatly concerned and that is the extension of legal services to the poorest in the community who cannot afford legal representation. We have a massive system of legal aid in our country, but I have found since I have been Lord Chancellor that in spite of it lawyers just do not practise in the poorer neighbourhoods of the great cities. So law centres have sprung up manned, I am happy to say, mostly by young people, like some of the young people I see here today, who have seen the need and are filling it. It is clearly quite crucial that legal services should be readily available to the ordinary citizen. Otherwise we cannot honestly and honourably claim that we have equality before the law.

Mr Attorney, on one occasion the great English artist, Sickert, had a guest who talked too much and stayed too long. Sickert said to him: "Do come again when you have a little less time." If I go on any longer you will say the same of me.

Editor's note

On 12 June 2003, it was announced by British Prime Minister Tony Blair that the post of Lord Chancellor which has been in existence for over 1,300 years would soon be abolished.

The Right Honourable Lord Phillips of Worth Matravers

Right to Privacy: The Impact of the Human Rights Act 1998

Nicolas Addison Phillips
(*b.* 21 January 1938)

Nicolas Addison Phillips was educated at King's College, Cambridge and called to the Bar in 1962, where he specialised in admiralty and commercial work. He became a Queen's Counsel in 1978 and a Recorder four years later.

In 1987 he was appointed as a Judge of the High Court, Queen's Bench Division, and presided over several lengthy and complex trials including the Barlow Clowes and Maxwell prosecutions. In his handling of such complex cases, he has won praises from lawyers for his fairness, attention to detail and patience. In 1995, before the Maxwell trial came to an end, he was promoted as a Lord Justice of Appeal of the Court of Appeal.

Lord Phillips is well-known for his role in presiding over the inquiry into the causes of the BSE crisis from 1998–2000. He was also one of the seven Law Lords, after his appointment to the House of

Lords in 1999, who heard the appeal in the extradition proceedings of the former Chilean dictator, Augusto Pinochet.

In 2000, Lord Phillips was elevated to Master of the Rolls, the second most senior judicial office in England and Wales after the Lord Chief Justice. He is also the Head of Civil Justice and is responsible for taking forward reforms to make litigation cheaper, speedier and simpler.

Lord Phillips is a popular judge among lawyers, and is known as a moderniser and information technology buff who pioneered the use of computer technology in the courtroom.

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Right to Privacy: The Impact of the Human Rights Act 1998

Lord Phillips of Worth Matravers
Master of the Rolls, Court of Appeal

Text of the Seventeenth Sultan Azlan Shah Law Lecture delivered on 16 December 2003 in the presence of His Royal Highness Sultan Azlan Shah.

Your Royal Highnesses, Vice-Chancellor, Minister, your Excellencies, fellow judges, distinguished guests, ladies and gentlemen. There are a number of possible milestones of distinction for one who is pursuing a career as a member of the English Bench. Foremost among these is to be invited to deliver the Sultan Azlan Shah lecture. As I stand here I am humbled at the thought of the eminence of those who have preceeded me, including, in 1991, my brother-in-law, Lord Mustill.[1] It is, indeed, a great honour to be invited to give this lecture.

Your Royal Highness, compared to your illustrious judicial career, I am conscious that mine is still almost in its infancy. I was last in Malaysia, appearing as counsel, in 1980, when Your Royal Highness was Chief Justice of Malaya. Kuala Lumpur has changed a little since that time, but what has not changed is the delight that I and my wife have in being back here.

When I chose the subject of this lecture I had no idea quite how topical it would prove to be. Over the last month the British Royal Family have been subjected to quite extraordinary and distasteful intrusions into their private lives. Intensely personal letters written by the Duke of Edinburgh to Lady Diana have been published in the press. Scurrilous

1 See chapter 6, *Negligence in the World of Finance*, above.

and absurd allegations against the Prince of Wales from a totally unreliable source have been published in the foreign press, though not in the United Kingdom. A journalist has gained access in the guise of a footman to Buckingham Palace and Windsor Castle and published in the *Daily Mirror*,[2] with photographs, details of the Royal Family's private apartments and innocuous but personal details about their private lives, such as the programmes that the Queen likes to watch on television.

These incidents have been typical of the intrusive disregard for privacy that is shown by much of the media today. This is by no means a new phenomenon, but I believe that it has become more intense.

Let me take you back over 150 years to the early part of the reign of Queen Victoria. She and her beloved Prince Albert had taken up sketching. Prince Albert decided that it would be nice to have some etchings made of these sketches and so he entrusted them to an etcher. The etcher, a gentleman named Strange duly made the etchings, but then decided that, for his own profit, he would publish a catalogue of these. When Prince Albert learned of this project, he commenced legal proceedings, claiming an injunction restraining the etcher from the proposed undertaking. That he was successful is, perhaps, no occasion for surprise. What is, perhaps, a little startling to the modern judge, schooled in showing impartiality to all litigants, be they prince or pauper, is the language used by the Vice-Chancellor, Sir Knight Bruce, when delivering his judgment:[3]

The intrusive disregard for privacy that is shown by much of the media today is by no means a new phenomenon, but I believe that it has become more intense.

> I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less,

2
20 November 2003.

3
Prince Albert v Strange (1849) 1 Mac & G 25; (1849) 64 ER 293; (1849) 18 LJ Ch 120.

> because it is an intrusion—an unbecoming and unseemly intrusion—an intrusion not alone in breach of convention rules, but offensive to that inbred sense of propriety natural to every man—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country.

The interest of this case lies not so much in its facts as in the basis on which the court granted Prince Albert the remedy of an injunction. It is possible to analyse the judgment as founded on the conventional causes of action of breach of confidence and breach of trust, but the Vice-Chancellor also used the language of breach of privacy. The etcher had the temerity to appeal and he was, not surprisingly, unsuccessful. On the appeal,[4] however, the Lord Chancellor, Lord Cottenham, remarked "privacy is the right invaded".

The potential for electronic storage and dissemination of information has acted as a spur to the protection of private information.

What I propose to do this evening is to explore the extent to which the law of different countries, and particularly the common law countries, recognises a right to privacy. Not only does this have topicality in England. Two months ago there was an important international conference here in Kuala Lumpur to discuss Privacy, Data Protection & Corporate Governance in the Internet Economy and, as we shall see, the potential for electronic storage and dissemination of information has acted as a spur both in Malaysia and elsewhere to the protection of private information. For the moment, however, I intend to remain in the 19th century and to take you to the United States, where we find the foundation of much current thought on the law of privacy.

4
Ibid.

United States

In 1877 there graduated, first in his year, from the Harvard Law School a young man who was to become one of America's great jurists—Louis Brandeis. Second was his great friend, Samuel Warren. He also prospered as a lawyer and married one of Boston's social elite. In due course, he retired from the law to take over the family paper business, and shortly after that he gave his daughter away at a magnificent society wedding. The press were not invited, but contrived to obtain personal details of the event which they lost no time in publishing, for the delectation of their readers.

This unpleasant experience caused Mr Warren to join with his old classmate Mr Brandeis, who had no doubt been one of the wedding guests, to write an article in the *Harvard Law Review*.[5] Their article began with the following protest:

> The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers.

Later they wrote:

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops" ... since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to.

Warren and Brandeis recommended that the judges should take it upon themselves to develop the common law so as to provide the

5 "The Right to Privacy", (1890) 4 Harvard Law Review 193.

necessary protection against the intrusion of the camera. They had no compunction in making this suggestion. They remarked:

> That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature.

Your Highness, I suspect that you and I might both share that sentiment.

Warren and Brandeis went on to advance some propositions, which are echoed in the jurisprudence down to this day. They observed that the right of privacy cannot prohibit publication of a matter which is of public or general interest. Those who seek or achieve eminence must accept that, within their limits, their doings are of legitimate public interest but, having said that, there are "some things that all men alike are entitled to keep from popular curiosity, whether in public life or not".

The right of privacy cannot prohibit publication of a matter which is of public or general interest. Those who seek or achieve eminence must accept that, within their limits, their doings are of legitimate public interest.

The views of Warren and Brandeis proved influential in the development of a common law right of privacy in the United States. At first, however, the States were not united. Some upheld a right of privacy; others would not accept any inroad into the freedom of the press. By 1960, however, writing in the *California Law Review*[6] Dean Prosser identified that there had become established no less than four different varieties of the tort of invasion of privacy. The variety with which I am concerned this evening he described as "public disclosure of private facts about the plaintiff". In the *Second Restatement* published in 1977 this variety of invasion of privacy was described as committed by:

6 "Privacy", (1960) Calf LR 338.

Editor's note: See also Ellen Alderman and Caroline Kennedy, *The Right to Privacy*, 1997.

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy if the matter publicized is of a kind that—
>
> (a) would be highly offensive to a reasonable person; and
> (b) is not of legitimate concern to the public.

You will note the preservation of the right, recognised by Warren and Brandeis, to publish matters of legitimate public interest. Wherever the right of privacy is raised it tends to run head-on into the right of freedom of speech, and it is fair to say that in the United States that right tends to take pride of place. Privacy often founders on the rock of the First Amendment and the rule against prior restraint.

Whether it will do so in the case of those who recently took covert photographs of Michael Jackson in his private jet remains to be seen.

Warren and Brandeis thought that the English courts had led the way in *Prince Albert v Strange*[7] in introducing a common law tort of invasion of privacy. If so, as I shall show, we proceeded to lose our way.

Wherever the right of privacy is raised it tends to run head-on into the right of freedom of speech in the United States. Privacy often founders on the rock of the First Amendment and the rule against prior restraint.

European Convention on Human Rights

But before looking at the common law jurisdictions I would like to touch briefly on how two of England's civil law neighbours have approached protection of privacy and, in that context, to refer to the European Convention on Human Rights, which is now influencing the development of English law.

The Convention, agreed in 1951, but only incorporated into English law by the Human Rights Act 1998, has two relevant provisions. Article 8 provides that:

7 See note 3, above.

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

Article 8 goes on to provide that a public authority shall not interfere with this right, except for certain specified purposes, which include "the protection of the rights and freedoms of others". Those rights and freedoms include those conferred by Article 10, which provides, "Everyone has the right to freedom of expression", which includes the freedom to "receive and impart information". But this right also is qualified by the right to impose restrictions on freedom of expression where necessary "for the protection of the reputation or rights of others or for the prevention of the disclosure of information received in confidence". So the Convention requires a Member State to strike a balance between freedom of expression and the right to privacy.

Germany

The German courts have fashioned protection of privacy out of the first two Articles of their Constitution which provide that "the dignity of the human being is inviolable" and that "everyone has a right to the free development of his personality". The jurisprudence seems largely to have developed in the context of journalistic interest, one might almost say obsession, with the activities of Princess Caroline of Monaco. The German Constitution also protects freedom of expression and the courts have drawn a distinction between photographs taken of her in public, which have been permitted, and photographs taken on a private occasion, secretly or by stealth, which have entitled her to an injunction and damages.

The German courts have fashioned protection of privacy out of the first two Articles of their Constitution which provide that "the dignity of the human being is inviolable" and that "everyone has a right to the free development of his personality".

Last month the European Court of Human Rights at Strasbourg heard argument by Princess Caroline that she should also be protected from intrusive activity when she is carrying out private activities, such as playing tennis or swimming, in a public place.[8] As I understand it, she would probably have received such protection in France.

France

In France the balance leans quite heavily in favour of the right to privacy, at least where the taking and publishing of photographs is concerned. Article 9 of the Code Civil protects "intimate private life" and French law has long paid particular respect to *le droit de l'image*—the right to one's own image. The press cannot take and publish photographs taken on a private occasion. This extends, it seems, to protect the image of one's property. I understand that the owner of an attractive chateau was recently awarded damages in respect of the unauthorised use of a photograph of his home to advertise mineral water.

Lord Bernstein of Leigh must have wished that English law was as protective. In 1975 he was incensed to be offered for sale a photograph of his own farm at Leigh, taken from an aircraft which had flown low over his farm. He brought an action[9] against the photographers in the course of which his counsel conceded that English law imposed no restriction on photographing the property of another. Lord Bernstein sued for trespass into his airspace, but lost because Griffiths J held that the right of a landowner to airspace extends no higher than is necessary to enable him to carry out normal activities on his land.

In France the balance leans quite heavily in favour of the right to privacy, at least where the taking and publishing of photographs is concerned. The press cannot take and publish photographs taken on a private occasion. This extends, it seems, to protect the image of one's property.

8
AFP Report, 6 November 2003.

9
Bernstein v Skyviews Ltd [1978] 1 QB 479.

I am now going to leave civil law and turn to the countries of the Commonwealth that share the common law tradition, starting with Canada.

Canada

The law of Canada has been influenced by French law, and this seems particularly true of the Canadian law of privacy. Canada has its own Charter of Human Rights and Freedoms, known as the Quebec Charter. Article 5 confers a right to respect for family life, which has to be balanced against the right of freedom of expression conferred by Article 3. The two came into conflict when an arts magazine published a charming photo of a 17-year-old girl sitting in the sun on the steps of a public building. The magazine did not ask her permission either to take the photograph or to publish it, and she sued them for breach of her right to privacy.[10]

The Supreme Court found in her favour, holding that there had been a "violation of her privacy and her right to her image". The right of the magazine to freedom of expression did not prevail in circumstances where the magazine could so easily have asked the young lady whether or not she agreed to having her photograph taken and published. Canada's right to privacy is embodied in its Charter. In other Commonwealth countries the judges have been left to fashion protection of privacy by extending the common law.

Australia

At the end of 2001, the High Court of Australia gave judgments in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[11] which ran to 242 pages and contained 638 citations. This was an appeal against the grant of an interlocutory injunction by the Supreme Court of Tasmania. Lenah Game Meats was, as its name suggests, a company which killed, processed and sold game, including the Tasmanian brush-tail possum. Trespassers installed hidden cameras in its abattoir and filmed the way in which the possums were

10
Aubrey v Les Editions Vice Versa Inc [1998] 1 SCR 591.

11
(2001) 208 CLR 199.

slaughtered. The film was passed to the defendants, who were not party to the manner in which it had been obtained and who proposed to broadcast it. Lenah Meats did not view this with enthusiasm. It was not suggested that there was anything unlawful about their operation, but as Gleeson CJ remarked:[12]

> ... a film of a vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion.

The material issue with which the Supreme Court had to grapple was whether Lenah Meats had an arguable claim in tort for breach of privacy.

It looks as though Australia may be set to follow the American jurisprudence in developing a tort of invasion of privacy.

The High Court held that they had not but—and here lies the interest of the case—only because Lenah Meats was a corporation and not an individual. All members of the court were favourably disposed to the development in Australia of a tort of invasion of privacy to protect individuals. Gleeson CJ expressed the view that:

> ... the law should be more astute than in the past to identify and protect interests of a kind which fall within the concept of privacy.[13]

He suggested that:

> The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.[14]

You will note that this test is borrowed from the American tort to which I referred earlier and thus it looks as though Australia may be set to follow the American jurisprudence in developing a tort of invasion of privacy. How about New Zealand?

12 Ibid at 221.

13 Ibid at 225.

14 Ibid at 226.

New Zealand

In 1993, New Zealand passed the Privacy Act. This is essentially concerned with data protection. The common law has not, however, stood still. In a remarkable case tried by the High Court in 1992, Gallen J declared himself satisfied that a tort of invasion of privacy had become established in New Zealand. The case was *Bradley v Wingut Films Ltd*.[15]

The defendants had made a film of a type known as a "splatter film" because so much blood and gore is splattered about in the course of it. One scene was shot in a graveyard. Standing proudly in that graveyard, and clearly visible in the film, was a marble tombstone above a grave in which a number of the plaintiff's close relatives were buried and in which, in the fullness of time, he expected to be buried himself. He was very upset and sought an injunction against the showing of the film relying, inter alia, on invasion of privacy. Gallen J, on reviewing the authorities, identified three strong statements in the High Court in favour of the existence of such a tort and acceptance in the Court of Appeal that the concept was at least arguable. He held that the three elements of the tort were:

(i) that there must be a public disclosure;

(ii) that disclosure should be of private facts; and

(iii) that the matter disclosed should be highly offensive and objectionable to a reasonable person of ordinary sensibilities—here again the court was plainly adopting the American jurisprudence.

The judge held that, on the facts, only the first element was made out. As to the second, he remarked that there could scarcely be anything less private than a tombstone in a public cemetery. As to the third he found that it was not the depiction of the tombstone that the plaintiff found offensive, but the activities going on in the vicinity of the tombstone which were too indelicate to describe in a public lecture.

15 [1993] 1 NZLR 415.

More recently in *H v D*[16] Nicholson J granted an injunction restraining publication of information which he held would be a breach of privacy. The information was that the plaintiff had received treatment at a psychiatric hospital. The judge followed Gallen J in identifying the three factors that had to be established, but held that these had to be balanced against any legitimate public interest in having the information disclosed.

So we now have both Australia and New Zealand moving in the direction of a common law tort of privacy.

Hong Kong

Hong Kong has yet to develop a law to protect the privacy of individuals, although there have been moves in this direction.

In 1996 the Chinese Weekly magazine called *Oriental Sunday* published a photograph of a pop star called Faye Wong. Unlike most pop stars she shunned publicity and this photograph was taken surreptitiously without consent while she was in the baggage claim area in the airport at Beijing. The photograph was said to confirm the rumour that she was pregnant. A Chinese daily newspaper, *Apple Daily*, reproduced this photograph. *Oriental Sunday* sued *Apple Daily* in Hong Kong for breach of copyright and recovered judgment.

In dealing with the issue of damages in the Court of Appeal[17] Godfrey JA commented on the irony that *Oriental Sunday* was recovering damages for reproducing the photograph of Miss Faye without permission, whereas she had no remedy against the *Oriental Sunday* for doing precisely the same. He commented:[18]

> Public sentiment has turned, or seems to be turning, against those who are guilty of invasion of the privacy of public figures by taking their photographs on private occasions without their consent and then selling those photographs for large sums which reflect the cupidity of the publishers and the prurience of their readers. The time may come when,

16
[2000] 2 NZLR 591.

Editor's note: See also the reserved judgment of Randerson J in the New Zealand High Court decision in *Hosking v Runting & Ors*, 30 May 2003.

17
Oriental Press Group Ltd & Anor v Apple Daily Ltd [1997] 2 HKC 515 at 529-530.

18
Ibid.

if the legislature does not step in first, the court may have to intervene in this field.

In 1999 the Law Reform Commission of Hong Kong published two consultation papers. One recommended the establishment of an independent Press Council to protect the privacy of the individual. The other recommended the creation of a statutory tort of invasion of privacy. So far as I am aware no steps have been taken in either direction.

What Hong Kong has done is to enact the Personal Data (Privacy) Ordinance of 1996. This regulates the collection, retention and use of personal data and establishes a Privacy Commissioner, whose powers include the imposition of penalties for breaches of the Ordinance. One of the requirements of the Ordinance is that data should only be collected in a manner that is both lawful and fair. For a while it seemed that this Ordinance might extend to protecting the individual from intrusive photography.

Godfrey JA commented on the irony that Oriental Sunday was recovering damages for reproducing the photograph of Miss Faye without permission, whereas she had no remedy against the Oriental Sunday for doing precisely the same.

In 1997 *Eastweek Magazine*, a glossy with wide circulation in Hong Kong, published a fashion article, illustrated by photographs taken of passers-by in the street. One young lady, photographed without her knowledge or consent with a telephoto lens, was singled out as demonstrating the use of inappropriate accessories, including the comment that her biggest failure was her handbag—had she perhaps taken her mother's by accident? She complained to the Privacy Commissioner, who upheld her complaint on the basis that taking her photograph in such circumstances amounted to collecting data in a manner that was unfair. The magazine challenged this finding by judicial review—unsuccessfully at first instance, but successfully before the Court of Appeal.[19]

19 *Eastweek Publisher Ltd v Privacy Commissioner for Personal Data* [2000] 175 HKCU 1.

The court held that the Ordinance only applied to the collection of data relating to an identified person and could not apply to taking a photograph of an anonymous passer-by. This was not much comfort to the unfortunate lady in question, whose friends had had no difficulty in identifying her from her photograph and who was so embarrassed by their teasing that she had had to consign the clothes and accessories that she was wearing to the dustbin, although they were brand new. As Ribeiro JA remarked:[20]

> She obviously deserves the court's sympathy. Minding her own business and exercising her right as a citizen, without in any way inviting media or public attention, she unwittingly found herself, or more accurately her choice of attire, the object of sarcasm and derision in a widely-circulated magazine.

It seems to me that a strong case can be made out for legal protection against such intrusion upon someone's private life. It is not yet, it seems, to be found in Hong Kong.

Singapore

My researches into the position in Singapore led me to an article by Ravi Chandran in the *Singapore Journal of Legal Studies* for July 2000. This ended with the conclusion that although there was no right of privacy in Singapore privacy could be indirectly enforced, at least in the employment context, by an action for breach of confidence. I found one example of this in the Singapore High Court.[21]

The issues arose as so often at the interlocutory stage and is a classic example of the proposition that "hell hath no fury like a woman scorned". The fury in question was the defendant. She had been the secretary of the plaintiff, who was married, and they had had an affair, which had come to an end. She was replaced in his affections by another lady, whom the plaintiff took off on holiday to Phuket and showered with expensive gifts. The defendant wrote to

20
Ibid at 25.

21
X Pte Ltd & Anor v CDE [1992] 2 SLR 996.

the plaintiff enclosing a draft of a letter which she proposed to send to thousands of people, including his family, his superiors, all the staff of the company, business contacts, clubs and his embassy. The letter was written in intemperate and virulent language.

Although there was no right of privacy in Singapore privacy could be indirectly enforced, at least in the employment context, by an action for breach of confidence.

The judge, Judith Prakash JC, held that the plaintiff had an arguable case for restraining publication about his relationship with his new lady friend, on the ground that this was confidential information which the defendant had obtained by underhand means, such as looking through his personal papers, so that publication would be a breach of confidence. The same was not true in respect of the prior relationship between the plaintiff and the defendant. No relationship of confidentiality existed between sexual partners who were unmarried.

In support of this proposition the judge relied upon the fact that the Duke of Wellington, when threatened with publication of the fact of his relationship with the celebrated courtesan, Harriet Wilson, said "publish and be dammed" rather than attempting the vain task of obtaining an injunction.[22]

I question whether this is the best authority for the proposition that there is no relationship of confidentiality between unmarried partners.

It appears, however, that breach of confidence is the principal basis upon which the court may protect privacy in Singapore.

Malaysia

As I understand it, this is also the position in Malaysia. I am aware of the intention of the Government next year to introduce legislation with the aim of protecting personal data, but I suspect that this will

22 Ibid at 1010.

have similar ambit to the data protection legislation that has been introduced in other jurisdictions, including the United Kingdom, in which case it is likely to have only limited impact on the protection of personal privacy.

England

It is time to return to my own jurisdiction and to see how we have been addressing the task of protecting personal privacy.

The approach of Parliament has been to leave the task to regulatory bodies and to the courts. Thus the Broadcasting Act 1996 established the Broadcasting Standards Commission and gave a right to complain to the Commission for "unwarranted infringement of privacy in, or in connection with, the obtaining of information" by the BBC. An issue arose as to whether this protection extended to secret filming of the business activities of Dixons, a chain of stores which sell hi-fi equipment. Interestingly, in contrast to the approach of the High Court of Australia in *Lenah Game Meats*,[23] the Court of Appeal held that a company could complain of infringement of privacy under the terms of the statute.[24] Both the Broadcasting Standards Committee and the Press Complaints Committee, the other important body in this context, have published codes of conduct. The code of the latter has not proved an adequate restraint on the worst excesses of the press. Nor has the common law proved adequate to fill the gap.

The approach of Parliament has been to leave the protection of personal privacy to regulatory bodies and to the courts.

In 1978, in *Malone v Metropolitan Police Commissioner*[25] the plaintiff sought to rely upon Article 8 of the Human Rights Convention in seeking an injunction restraining the police from tapping his telephone. We had not then incorporated the Convention into our domestic law, but he argued that the State's duties under the

23
(2001) 208 CLR 199.

24
R v Broadcasting Standards Commission, ex parte British Broadcasting Corporation [2001] QB 885; [2000] 3 All ER 989, CA.

25
(No 2) [1979] 2 All ER 620, Ch D.

Convention ought to guide the development of our common law. Sir Robert Megarry VC dismissed this claim. He said:[26]

> It seems to me that, where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations, or to discover for the first time that such rules have always existed.

The nadir of the seeming impotence of our common law was reached in 1990 in the case of *Kaye v Robertson*.[27] Mr Gorden Kaye, a popular television star, was lying in Charing Cross Hospital in a private room recovering from serious brain injuries sustained in a road accident. A photographer from the *Sunday Sport* gained unauthorised access to his room and took a series of flashlight photographs, including photographs of the scarring of his head. He made no objection, for he was in no condition to do so.

Potter J granted an interlocutory injunction against publishing these photos, but the Court of Appeal reluctantly discharged it, holding that there was no arguable cause of action. Bingham LJ remarked:[28]

> If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties. It is this invasion of his privacy which underlies the plaintiff's complaint. Yet it alone, however gross, does not entitle him to relief in English law.

The common law is, however, too robust to ignore injustice as extreme as that experienced by the unhappy Mr Kaye. A straw in the wind was this statement by Laws J in *Hellewell v Chief Constable of Derbyshire*:[29]

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his

26 Ibid at 648.

27 [1991] FSR 62.

28 Ibid at 70.

29 [1995] 1 WLR 804 at 807.

> subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called *a right of privacy*, although the name accorded to the cause of action would be breach of confidence.

This suggestion that the law of confidentiality could be used to protect against intrusive photography was imaginative. It certainly does not seem to have occurred to anyone in the case of *Kaye*. The established authorities had held a duty of confidence to arise where one person conveyed information to another in confidence. "Confidential" did not naturally describe an unauthorised photograph. None the less, as we shall see, Laws LJ's observation has proved prophetic.

If the judges needed authority to develop a law of privacy, they were certainly getting this from the Government.

If the judges needed authority to develop a law of privacy, they were certainly getting this from the Government.

During the course of the debates on the Human Rights Bill the Lord Chancellor Lord Irvine suggested: [30]

> ... the judges are pen-poised, regardless of incorporation of the Convention, to develop a right to privacy to be protected by the common law. This is not me saying so; they have said so. It must be emphasised that the judges are free to develop the common law in their own independent judicial sphere. What I say positively is that it will be a better law if the judges develop it after incorporation because they will have regard to Articles 8 and 10, giving Article 10 its due high value … The experience of continental countries shows that their cautious development of privacy law has been based on domestic law, case by case, although they have also had regard to the Convention.

30 HL Debates, Volume 583, column 784 (24 November 1997).

The Human Rights Act came into force in October 2000. It imposes on public authorities, which include the courts, the duty to respect Convention rights.

In 1998 the Commission at Strasbourg considered an application against the UK Government by Earl and Countess Spencer.[31] This related to a series of articles in the tabloid press the nature of which can be deduced from the headline in the *News of the World*—"Di's sister-in-law in booze and bulimia clinic". The articles were illustrated by photographs of Countess Spencer in the grounds of a private clinic, taken with a telephoto lens. The applicants contended that the United Kingdom had infringed their Article 8 rights by failing to prevent such publications.

Here were indications that the Government was leaving it to the judges to use the tool of the Human Rights Act to build a law of privacy on the foundations of the law of confidentiality.

The Government succeeded in getting the applications ruled inadmissible on the ground that the law of confidence offered the applicants a satisfactory domestic remedy, which they had failed to exhaust. So here were indications that the Government was leaving it to the judges to use the tool of the Human Rights Act to build a law of privacy on the foundations of the law of confidentiality.

There was a problem with that exercise. The Human Rights Convention imposes duties on public authorities, not on private individuals or corporations. How could the courts use it to restrain, for instance, over intrusive journalism?

The answer that some gave was that the courts are themselves public authorities. Their duty to comply with the Convention requires them to make sure that the law that is applied between individuals respects Convention rights. This doctrine gives the Convention what is known as "horizontal effect", and Professor Wade was one who

31 *Spencer v UK* (1998) 25 EHRR CD 105.

espoused it. Others, notably Buxton LJ, writing extra judicially in the *Law Quarterly Review,*[32] expressed the view that the Convention gave the courts no power to alter established law.

In the month after the Act came into force, the Court of Appeal had and seized the opportunity to consider some of these matters. I speak, of course, of the interlocutory application for an injunction in the *Hello* case.[33]

The case received wide press coverage—let me just remind you of the facts. Michael Douglas and Catherine Zeta-Jones, a lady who is well known in Kuala Lumpur, had sold the exclusive rights to photograph their wedding to a magazine called *OK. Hello,* a rival publication published photographs of the wedding taken surreptitiously without permission. Douglas and Zeta-Jones brought an action in which they claimed damages for breach of confidence and breach of privacy.

The court refused the injunction on the ground that, if the facts disclosed a cause of action, damages would be an adequate remedy. That conclusion rendered it unnecessary to explore the question of whether the facts did disclose a cause of action, but nonetheless in the week between the hearing and judgment each member of the court produced his own analysis of the law in terms which were to be quoted by common law courts around the world. They were careful, of course, not to express final conclusions on the issues raised.

The court's duty to comply with the Human Rights Convention requires them to make sure that the law that is applied between individuals respects Convention rights. This doctrine gives the Convention what is known as "horizontal effect".

Brooke LJ, after adverting to both the possibility and the problems of using the Convention as a basis for extending the law,

32
(2000) 116 LQR 48.

33
Douglas v Hello Ltd
[2001] 2 All ER 289, CA.

remarked[34] that he had the luxury of identifying difficult issues but was not obliged to solve them.

Keene LJ referred to Laws LJ's approach in *Hellewell*[35] and commented:[36]

> That approach must now be informed by the jurisprudence of the Convention in respect of Article 8. Whether the resulting liability is described as being for breach of confidence or for breach of a right to privacy may be little more than deciding what label is to be attached to the cause of action, but there would seem to be merit in recognising that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned.

The most radical approach was, perhaps not surprisingly, that of Sedley LJ. He said:[37]

> What a concept of privacy does, however, is accord recognition to the fact that the law has to protect not only those people whose trust has been abused but those who simply find themselves subject to an unwanted intrusion into their personal lives. The law no longer needs to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy.

The case proceeded to trial, before Lindsay J, in the early part of this year. I will turn to consider that judgement a little later.

The next piece in the jig-saw is the decision of the President of the Family Court, Dame Elizabeth Butler-Sloss in *Venables and Thompson v News Group Newspapers*.[38] The claimants were the Bulger killers. Released from prison under new identities they sought permanent injunctions against all the world restraining solicitation or

34
Ibid at 313.

35
[1995] 1 WLR 804.

36
[2001] 2 All ER 289 at 330.

37
Ibid at 320.

38
[2001] 1 All ER 908, Fam D.

publication of information that would lead to the disclosure of those identities. They were successful.

Dame Elizabeth held that the Convention did not give rise to free standing causes of action, but required the court to act consistently with the Convention, when applying existing causes of action. On this basis, the tort of breach of confidence extended to entitling the claimants to the relief that they sought. If their identities were disclosed their lives would be at risk, so their right to privacy was much more important that the right of the press to freedom of expression.

The President subsequently granted similar relief to protect the identity of another child murderer—Mary Bell—and her daughter.[39]

The Convention did not give rise to free standing causes of action, but required the court to act consistently with the Convention, when applying existing causes of action.

These two decisions were daring in that they broke new ground in two respects. They identified a private law right under the law of confidence that was available against all the world. And the relief, in private law proceedings, of an injunction expressly directed against all the world was also without precedent. It had been invented by a Family Court judge, Balcombe J, to protect a ward of court—in fact none other than Mary Bell, when a child. But he emphasised that, had he not been exercising the wardship jurisdiction of the court, he would not have had jurisdiction to make the order.

On 17 December the year before last, a well-known presenter of "Top of the Pops", a single man, had the misfortune to visit a brothel. I say "misfortune" not having regard to the activities that he there indulged in with the assistance of one and in the presence of a number of prostitutes, but because one of the prostitutes took photographs of the activities in question and the photographs and the story were sold to *The Sunday People*. The paper contacted him to seek his

39 *X (a woman formerly known as Mary Bell) v O'Brien* [2003] EWHC 1101 (QB), 21 May 2003.

comments and he applied for an interlocutory injunction restraining publication.[40]

Ouseley J approached the task of applying section 12 of the Human Rights Act with some finesse. He held that there was no relationship of confidence between the claimant and the prostitutes. He further held that as the claimant was someone whom young people might treat as a role model, it was in the public interest that the fact that he had visited a brothel should be made public. Thus, even if the fact of his visit had been private for the purposes of Article 8, this would not prevail over the defendants' right of freedom of expression under Article 10. The fact of the visit could be published.

As to the details of what went on in the brothel, he held that there was no public interest in the publication of those. Nonetheless the claimant was unlikely to establish at trial that any right of privacy that he enjoyed should take precedence over the Article 10 right of the prostitute herself and the *Sunday People* to publish this information. There should be no injunction as to these details.

The photographs fell into a different category. The claimant had not agreed to being photographed. There was no public interest in the publication of the photographs.

The courts had consistently recognised that photography could be particularly intrusive. To restrain publication involved no particular extension of the law of confidentiality. An interlocutory injunction against publishing the photos was granted.

Two days before Ouseley J handed down his judgement, the Court of Appeal reserved judgement in an appeal which raised some similar issues.

In *A v B*[41] a professional footballer had obtained an interlocutory injunction restraining both a newspaper and a young

40
Theakson v MGM Ltd [2002] EWHC 137.

41
[2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545, CA.

lady from publishing details of the footballer's sexual relations with the latter. The Court of Appeal set aside the injunction on the basis that it was most unlikely that a permanent injunction would be granted at trial. Giving the judgment of the court, Lord Woolf CJ said this:[42]

> The applications for interim injunctions have now to be considered in the context of Articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms …
>
> These articles have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified.
>
> The court's approach to the issues which the applications raise has been modified because, under section 6 of the 1998 Act, the court, as a public authority is required not to act "in a way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which Articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.

Whether or not the publication is in the public interest, any interference with publication must be justified.

Lord Woolf then went on to lay down 15 guidelines which, alas optimistically, he suggested would spare the courts from being deluged with authorities on this topic in the future. Of particular interest are the following propositions:

1. Whether or not the publication is in the public interest, any interference with publication must be justified.
2. A duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to

42 Ibid at para [4].

know that the other person can reasonably expect his privacy to be respected.

3. Where an individual is a public figure he is entitled to have his privacy respected in appropriate circumstances. He said:[43]

> A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure.
>
> The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less grounds to object to the intrusion which follows.
>
> In any of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls.

In *Campbell v Mirror Group Newspapers Ltd,*[44] the only case to which I shall refer in which I have been involved, we suggested that last comment had been misunderstood:[45]

> When Lord Woolf CJ spoke of the public having "an understandable and so a legitimate interest in being told" information, even including trivial facts, about a public figure, he was not speaking of private facts which a fair-minded person would consider it offensive to disclose.

43
Ibid at para [11].

44
[2003] QB 633; [2003] 1 All ER 224, CA.

45
Ibid at para [40].

We added:[46]

> For our part we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model without seeking this distinction, should be demonstrated to have feet of clay.

In that case Naomi Campbell sued in respect of the publication in the *Mirror* of an article which disclosed that she was a drug addict and that she was receiving therapy with Narcotics Anonymous. The article was illustrated by photographs showing her in a public street in Chelsea, having just left the meeting. They had been taken surreptitiously with the aid of a telephoto lens.

Miss Campbell sued for breach of confidence and expressly renounced any contention that she could rely on a separate tort of invasion of privacy. She also conceded that the *Mirror* had been entitled to publish the fact that she was a drug addict and was receiving treatment. This was because she had publicly stated in the past that she did not touch drugs. She accepted that the press were entitled to correct misleading public statements. What she did not accept was that the press could disclose the nature of the treatment that she was receiving for her addiction, nor publish the photographs taken of her.

The fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media.

In these circumstances we did not need to consider whether there was a separate tort of invasion of privacy. Applying principles of the law of breach of confidence, we concluded that, once it had been conceded that it was legitimate to publish the fact that Miss Campbell was receiving treatment for drug addiction, it was legitimate to publish the additional information, that this was with Narcotics Anonymous.

46
Ibid at para [41].

The photographs were taken in a public place and we said they were a legitimate, if not an essential part, of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public when she said that she did not take drugs. Our judgment has been criticised by some as being over-conservative.

I now come to the judgment of Lindsay J in the *Douglas v Hello* case.[47] There was almost as much media interest in that judgment as there was in the wedding itself. In the event, some commentators may have been disappointed. Lindsay J declined to invoke a new law of privacy but found that the claimants had been successful in proving an action based on a breach of the existing law of confidence.

Much had been made by some section of the press that an event, albeit a wedding, that was to be attended by some 360 people—a number of whom were world famous celebrities—could not be said to be a private affair. The defendants argued that the exclusive contract reached with *OK!* was more about money than an attempt to prevent media intrusion. Having heard the evidence, Lindsay J disagreed. The judge found:[48]

> On the evidence I hold that the notion of an exclusive contract as a means of reducing the risk of intrusion by unauthorised members of the media and hence of preserving the privacy of a celebrity occasion is a notion that can reasonably be believed in as a potentially workable strategy to achieve such ends and was honestly believed in by Miss Zeta-Jones, Mr Douglas and their advisers.

Noting the steps that had been taken to keep out unwanted intruders and that the security bill alone had been $66,006, Lindsay J concluded that:[49]

> To the extent that privacy consists of the inclusion only of the invited and the exclusion of all others, the wedding was as private as was possible consistent with it being a socially pleasant event.

47
(No 3) [2003] 3 All ER 996, Ch D.

48
Ibid at para [52].

49
Ibid at para [66].

Applying the law to the facts of the case, Lindsay J concluded that the photographic representation of the wedding was a valuable trade asset. This asset had the necessary quality of confidence about it. He went on to hold that, even if he were wrong about the commercial confidence, the Douglases would have had an actionable claim for breach of personal confidence.

Whilst the judge was happy to find that detriment had been suffered through a breach of confidence, he was equally clear that he would not be drawn on a free standing law of privacy. He said this:[50]

> So broad is the subject of privacy and such are the ramifications of any free-standing law in that area that the subject is better left to Parliament which can, of course, consult interest far more widely than can be taken into account in the course of ordinary inter partes litigation. A judge should therefore be chary of doing that which is better done by Parliament. That Parliament has failed so far to grasp the nettle does not prove that it will not have to be grasped in the future.

All this while there was proceeding through the courts a case involving a different kind of invasion of privacy. Mrs Wainwright and her son Alan went to visit her other son, Patrick, who was detained in Armley Prison, in Leeds. Each was subjected to a highly embarrassing strip search. They brought proceedings which included a common law claim for invasion of privacy. This claim succeeded at first instance, but was rejected by the Court of Appeal.[51]

In a decision delivered this summer, the House of Lords[52] agreed with the Court of Appeal and firmly rejected the attempt to establish a common law tort of invasion of privacy. Lord Hoffmann, who gave the leading speech, considered that the right to privacy was too broad a concept to be treated as a principle of law. He observed that "having to take off your clothes in front of a couple of prison officers is not to everyone's taste" but held that the distress caused to

The right to privacy was too broad a concept to be treated as a principle of law.

50 Ibid at para [229](iii).

51 *Home Office v Wainwright*[2001] EWCA Civ 2081.

52 *Wainwright & Anor v Home Office* [2003] UKHL 53, delivered 16 October 2003.

the claimants did not involve any breach of legal duty. He said that whether the law of breach of confidence could be extended so as to afford a remedy in a case such as *Kaye v Robertson*[53] was a question which would have to await another day.

Your Highness, ladies and gentlemen, when that day comes I very much hope that I shall be presiding in the Court of Appeal.

53
See note 27, above.

Professor JAG Griffith FBA

Judicial Decision Making in Public Law

Professor John Griffith was born in 1918 and educated at Tauton School and at the London School of Economics and Political Science (LSE). In 1948 he became a lecturer at LSE. In 1959, he became the Professor of English Law, and in 1970 until his retirement in 1984, he was the Professor of Public Law. He was subsequently appointed as Emeritus Professor of Public Law at LSE. In 1977 he was made a Fellow of the British Academy. He is also a member of the European Group of Public Law.

He is well known for his writing on law, Parliament, politics and government. His classical work (with Michael Ryle), *Griffith and Ryle on Parliament: Functions, Practice and Procedures*, first published in 1989, and now in its second edition (2003), provides a definitive account of the workings of the House of Commons and the House of Lords. The second edition provides an in-depth empirical analysis of the workings of the House of Commons

under the Blair administration, focusing on the many changes which have taken place since 1977, including the new initiatives and procedures aimed at promoting modernisation.

He is the author of a number of leading works, notably, *Principles of Administrative Law* (with H Street); *Central Departments and Local Authorities*; *Government and Law* (with TC Hartley); *Parliamentary Scrutiny of Government Bills, Public Rights and Private Interest and Parliament* (with Michael Ryle); *Government and Law: An Introduction to the Working of the Constitution in Brita*in; and *Judicial Politics Since 1920: A Chronicle*. He was the editor of Public Law from 1956 to 1981.

Perhaps, he is most well known for his book, *The Politics of the Judiciary*, first published in 1977, and now in its fifth edition (1997). Professor Griffith's controversial thesis is that the judiciary cannot act neutrally but must act politically. When first published, the book was described by *The Guardian* as an "instant classic", and *The Times* as "a stimulating and provocative study".

In 1986, Professor Griffith was appointed the Chancellor of the University of Manchester, a post he held until 1993.

At the time when he delivered the pre-inaugural Sultan Azlan Shah Law Lecture on *Judicial Decision Making in Public Law* in 1985, he was an external examiner at the Faculty of Law, University of Malaya (see also [1985] 1 MLJ *clxv*).

The Right Honourable Lord Irvine of Lairg

Commerce, Common Law and the Commonwealth: New Dimensions in Malaysia & UK Law

Alexander Andrew Mackay Irvine
(*b.* 23 June 1940)

Lord Irvine of Lairg was invited to become Lord High Chancellor of Great Britain by Prime Minister Tony Blair on 2 May 1997.

He was born Alexander Andrew Mackay Irvine in Inverness in Scotland on 23 June 1940. Lord Irvine, also known as Derry Irvine, was educated at Inverness Academy and at Hutchesons' boys' grammar school in Glasgow before going to Glasgow University (where he joined the Labour Party). He then went on to Christ's College, Cambridge, where he graduated with first class Honours with distinction in law, and LLB with first class Honours. He was a scholar of his college, and won the university prize in jurisprudence. He is an Honorary Fellow of Christ's College and has an honorary LLD from Glasgow University.

He lectured in law at the London School of Economics from 1965–1969 and was called to the Bar

by the Inner Temple in 1967. He became a Queen's Counsel in 1978 and was head of chambers at 11 King's Bench Walk Chambers from 1981. Among his pupil barristers were Tony Blair and Cherie Booth. He served as a recorder from 1985–1988 and was appointed a Deputy High Court Judge in 1987. He ceased practice on becoming Lord Chancellor on 2 May 1997.

After being appointed Lord Chancellor, he held the following offices: President of the Magistrates' Association; Joint President of the Industry and Parliament Trust; Joint President of the British-American Parliamentary Group; Joint President of the Inter-Parliamentary Union; and Joint President of the Commonwealth Parliamentary Association.

He was also a Church Commissioner; an Honorary Fellow of the Society for Advanced Legal Studies; a Trustee of the Hunterian Collection; Chairman of the Glasgow University 2001 Committee; and a Vice-Patron of the World Federation of Mental Health.

In addition to his traditional role as Lord Chancellor of supervising the legal system, he gained responsibility for a wide range of constitutional issues including human rights and freedom of information.

Lord Irvine retired as Lord Chancellor on 12 June 2003. It was then announced by Prime Minister Tony Blair that the post of Lord Chancellor which has been in existence for over 1,300 years would soon be abolished. He was replaced by Lord Falconer, who will serve in the interim until the post is abolished. As a result of these changes, Lord Irvine was forced to re-prioritise his schedule, making him unavailable to deliver his lecture in 2003.

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