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Introduction

Christy Rush, Editor-in-Chief

Having just completed Final Examinations in my Jurisprudence degree here at Oxford, it would be easy for me to keep my perspective of legal issues strictly within the bounds—however loose they may be—of the Oxford examination syllabus.

But this Journal reminds us that in the "real world"—a world all graduates will face as we cautiously make the transition out of the classroom—there are no arbitrary limits to the law's reach. Not only can every existing idea be probed deeper, but links between disparate concepts will inevitably be found where none might have been thought to exist.

I hope that the articles laid out across the following pages are testament to this realisation. What started as sparks of ideas—perhaps kindled in a tutorial—have grown into eight mature academic articles, transcripts of (more often than not) heated intellectual debates over contentious areas of the rules that govern us.

By inviting the undergraduates of Oxford to participate in these debates, we hope to have allowed the country's future lawyers to add their bit to the discussions. It is through undergraduate law journals across the country that future members of the judiciary and of legal practice are already beginning to critically consider the legal issues of their day.

And so, for what is for me the final time, it is my pleasure to introduce the latest edition of the Oxford University Undergraduate Law Journal.

I have already commented on the essential role of the writers in forming this product. Without them, there would naturally be no Journal. However, it is not just the writers who make the Journal what it is. Thanks must go to the Editorial Board, who have worked tremendously hard in testing every argument and checking every full stop. The Honorary Board has continued to play an important role in the Journal's identity, and we are continually grateful for their support. Finally, thanks must go to the Oxford Law Faculty, whose members have always been there to assist us in each of our endeavours.

If you are reading this as a student, I hope that the articles inspire you to consider contributing to the many academic debates yourselves. If you are reading this as a legal professional, I hope that the articles can make some contribution to your work. Above all, though, I hope that you find the whole edition entertaining and informative. If you have any comments to make, the Editorial Board would be most grateful to receive them at ouulj@law.ox.ac.uk.

A Promising Idea: Reconceptualising the Formation of Unilateral Contracts

Torsten Cheong*

Winner of the Norton Rose Fulbright Prize
for the Best Article in Contract, Tort, Trusts, and Land Law

A unilateral contract is a promise, not an agreement. It is therefore inappropriate to analyse its formation under the framework of rules relating to bilateral contracts, which comprises of offer and acceptance, consideration and the intention to create legal relations. I offer a critique of the application to unilateral contracts of these three elements seriatim with close reference to two recent cases. First, I attempt to show that the conventional rules on offer and acceptance have been needlessly bent out of shape to accommodate unilateral contracts. Second, I argue that the ease with which the requirement of consideration is met casts doubt on its necessity and prompts a more honest search for the reasons why promises are enforced. Third, I argue that the doctrine of intention to create legal relations is neither a unifying reason nor an appropriate legal test in this respect because it obscures value judgments and overemphasises the value of personal autonomy. Finally, I propose a new two-step analysis of unilateral contracts based on (1) the nature and content of the promise and (2) the reasonable man's perception of that promise. I suggest that this analysis makes the law more transparent, coherent and more adequately protects the modern liberal value of freedom from contract.

I. Introduction

If I put up a notice promising a £100 reward to anyone who finds my lost kitten, why should I honour that promise? Unilateral undertakings occupy a special place in the law of contract because they are irreducibly promissory in nature. The law in this area governs when a promise made by one person to another is legally enforceable, where the promisee does not make a promise in return. The conventional framework of rules relating to contractual formation, consisting of offer and acceptance, consideration and the intention to create legal relations, has been applied equally to both unilateral and bilateral undertakings. Through a close analysis of two recent cases, I argue that the application of this framework to unilateral undertakings face grave conceptual and normative difficulties, and seek to propose a better analysis. It is appropriate to begin with the essential (and not coincidentally, common) facts of the two cases.

II. Background

Dresdner Bank AG ('Dresdner Bank') was a bank incorporated in Germany that had a global investment banking division known as Dresdner Kleinwort ('DKIB'). Dresdner Bank was originally owned by Allianz SE ('Allianz'). In March 2008, the CEO of Allianz announced that Allianz had decided to separate Dresdner Bank's investment banking and commercial banking businesses by either selling DKIB, reducing the size of its operations, or winding it down. As news of this was made public, Dresdner Bank's senior management was concerned that uncertainty about the bank's future would result in the loss of key employees unless steps were taken to retain staff. The Financial Services Authority ('FSA') also expressed the concern that there was no comprehensive strategy for the future, and placed the bank on its watch list because of the risks posed by the proposed restructuring. So on 18 August 2008, Stefan Jentzch, the CEO of DKIB, announced a retention plan, which involved the creation of a minimum bonus pool of €400m for 2008 to provide a financial incentive to keep

* Magdalen College, Oxford. I am grateful to Dr Katharine Grevling for her insightful comments on an earlier draft. Any and all errors remain my own.

employees from leaving. This announcement was made at a company 'town hall' meeting and simultaneously broadcast on the bank's intranet.

In September 2008, the bankruptcy of Lehman Brothers precipitated a crisis in the banking sector. Allianz had to receive substantial sums from a state stabilisation fund. The DKIB employees were nevertheless told that the bonus pool remained in place. Then in 19 December 2008, a letter was sent to all DKIB employees, which included a 'material adverse change' ('MAC') clause, providing that the bonus award was provisional and subject to the condition that DKIB's earnings position for 2008 did not deteriorate materially. On 12 January 2009, Dresdner Bank and DKIB were sold to Commerzbank AG ('Commerzbank'). On 18 February 2009, the CEO and CFO of Commerzbank announced that no bonuses would be paid for 2008. The new CEO of DKIB then emailed all DKIB employees announcing that the provisional bonus awards issued on 19 December 2008 would be reduced by 90% pro rata.

The claimants in the cases I will be discussing were these DKIB employees. In the English case of *Attrill v Dresdner Kleinwort Ltd* ('*Attrill (CA)*'),[1] on appeal from *Attrill v Dresdner Kleinwort* ('*Attrill (HC)*'),[2] the claimants, 104 in number, worked in the 'front' and 'middle' office of DKIB, and were employed by Dresdner Kleinwort, a service company wholly owned by Dresdner Bank. In the Singapore case of *Daniel John Brader v Commerzbank AG* ('*Brader*'),[3] the claimants, 10 in number, formerly worked in the Singapore branch of Dresdner Bank ('DB Singapore'). The key issue in both cases was whether or not the claimants had a legally enforceable right to the bonus pool as a result of the town hall announcement on 18 August 2008. The English Court of Appeal and the Singapore High Court held that the respective claimants did have such a legally enforceable right. The *Attrill* and *Brader* claimants argued their cases in a similar manner, on two grounds. First, the announcement on 18 August 2008 was a binding unilateral variation by Dresdner Bank on their terms of employment under variations clauses of their employee handbooks. Second and alternatively, the announcement gave rise to a *separate unilateral contract* between themselves and Dresdner Bank.

Owen J in the English High Court accepted both grounds. On appeal, Elias LJ in the English Court of Appeal, with whom Kay and Beatson LJJ agreed, affirmed Owen J's judgment; his Lordship accepted both grounds too, but for a different reason with respect to the second. Judicial Commissioner Lionel Yee ('Yee JC') in the Singapore High Court rejected the first ground but accepted the second, placing particular emphasis on the intention to create legal relations. Although Yee JC referred to the *Attrill* decisions,[4] his Honour thought that because the variation clause[5] in the *Attrill* claimants' Employee Handbook differed from the variation clause[6] in the *Brader* claimants'

1 [2013] EWCA Civ 394, [2013] 3 All ER 607.

2 [2012] EWHC 1189 (QB), [2012] IRLR 553.

3 [2013] SGHC 284, [2014] 2 SLR 81.

4 *Attrill (HC)* was published on 9 May 2012 and *Attrill (CA)* on 26 April 2013. *Brader* was heard in March, April and November 2013 and published on 7 January 2014.

5 *Attrill* claimants' Employment Handbook, Section 1.4: 'The Company reserves the right to vary the terms and conditions described in this handbook and the terms and conditions of your employment generally. Such changes can only be made by a member of the Human Resources Department and must be communicated to you in writing. When the change affects a group of employees, notification may be by display on notice boards or Company Intranet.': *Attrill (HC)* (n 2) [24] (Owen J).

6 *Brader* claimants' Employee Handbook, clause concerning the 'Variation of Terms and Conditions': 'The terms and conditions of this handbook may be amended at any time and from time to time, at the Bank's sole discretion.': *Brader* (n 3) [26] (Yee JC).

Employee Handbook,[7] the latter could not be similarly relied on to support the first ground of argument.

This paper will focus on the second ground. In consideration of this ground, all the cases involved the examination of three elements of contract formation: (i) offer and acceptance, (ii) consideration and (iii) the intention to create legal relations. It is noted that the cases also considered the requirement of certainty of terms, but that is not immediately relevant to my purpose in this paper. Accordingly, I will offer a critique of the application to unilateral contracts of these three elements *seriatim* with close reference to the cases. My aim will not be to dispute that the result was correct, but to show that these three elements are not suited to analyse the formation of unilateral contracts.

III. THE FORMATION OF UNILATERAL CONTRACTS ACCORDING TO *ATTRILL* AND *BRADER*

III.1 Offer and acceptance

A basic requisite of a contract is that parties reach an agreement. This occurs when one party accepts an offer made by another. In a bilateral contract, this 'acceptance' takes the form of a communication by the offeree of his counter-promise.[8] The special feature of a unilateral contract is that it arises without the offeree's having communicated any counter-promise to perform the act or forbearance required by the offer.[9] But to be precise, is communication the same as acceptance? The cases concerning bilateral contracts clearly show that the answer is 'No'. The general rule is that acceptance has no effect, not that it does not exist, until it is communicated to the offeror.[10] The same distinction exists for the purposes of unilateral contracts. This is clear from the courts' approach in modern cases like *Daulia v Four Milibank*[11] ('*Daulia*') and *Harvela Investments Ltd v Royal Trust of Canada* ('*Harvela*').[12]

The courts in *Attrill (HC)* and *Brader* were not too careful with this distinction. Two aspects of their judgments are pertinent here. The first concerns the relationship between communication and acceptance. In considering the second ground, Owen J first said, 'In my judgment there was an implied waiver of *a requirement to communicate* an acceptance of the offer contained in the promise made by Dr Jentzsch.'[13] But a later sentence in the judgment suggests that his Lordship regarded communication and acceptance as synonymous: 'But if, on a proper analysis, acceptance of the offer contained in promise made by Dr Jentzch on 18 August was not waived, it is necessary to consider whether there

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7 Yee JC was not persuaded that the variation clause in the *Brader* claimants' Employee Handbook afforded Dresdner Bank the power to exercise its discretion to amend the terms of the claimants' employment contracts in respect of 'such weighty matters as remuneration'; rather the clause was 'more likely to apply to routine matters of administration, with which the Employee Handbook [was] largely concerned': *Brader* (n 3) [27] (Yee JC).

8 E Peel, *Treitel: The Law of Contract* (13th ed, Sweet and Maxwell 2011) para 2-051.

9 ibid para 2-051.

10 'It is the law in the first place that, *prima facie*, acceptance of an offer must be communicated to the offeror': *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155, 157E (Russell LJ). On the issue of inferring an acceptance from silence, it has been said, '[There] appears to be no basis from drawing the inference of an acceptance in response to the supposed offer, *still less of the communication of that acceptance* to the offeror': *Allied Marine Ltd v Vale do Rio Doce SA (The Leonidas D)* [1985] 1 WLR 925, 937D (Robert Goff LJ) (emphasis added). It might nevertheless be argued that communication is part of the meaning of acceptance, but it is tolerably clear that a meaningful distinction may be drawn between the two.

11 [1978] Ch 231, 238F-H (Goff LJ).

12 In *Harvela*, acceptance, for the purposes of the unilateral contract's arising, was characterised as 'the doing by the promisee of *an act* which was of such a nature that it might be done by either promisee or neither promisee but could not be done by both': [1986] AC 207, 224E-F (Lord Diplock) (emphasis added).

13 *Attrill (HC)* (n 2) [162] (Owen J) (emphasis added).

was acceptance.'[14] On contrary, I would suggest that it is always necessary to consider whether there is acceptance because the law treats communication and acceptance as distinct. Yee JC was guilty of a similar conflation. His Honour said, 'A waiver of the *requirement of acceptance* is often part and parcel of a unilateral offer.'[15] His Honour then attempted to support this proposition by citing the judgment of Bowen LJ in the famous case of *Carlill v Carbolic Smoke Ball Co* ('*Carlill*').[16] But Bowen LJ's analysis identifies and places the moment of acceptance as the moment when Mrs Carlill completed the three-week period of use stipulated by the directions on the product she bought.[17] In the same case, Lindley LJ stated in clearer terms that 'the *performance* of the conditions *is the acceptance* of the offer.'[18] More importantly, all that *Carlill* decided in this regard was that insofar as '*notification* is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with *notice* to himself.'[19] Thus, contrary to Owen J's and Yee JC's analysis, whereas the offeror may waive the requirement of communication of acceptance, the requirement of acceptance itself is never abrogated in the formation of unilateral contracts. Acceptance must be identified independently, and it is notionally distinct from its communication. In the English Court of Appeal, Elias LJ applied *Carlill* correctly[20] and as a result, had to find acceptance on the basis of a fiction. His Lordship cited the relevant passage from Bowen LJ's judgment and said, '[I]t is plain that the employer had dispensed with the need for any response to the offer'.[21] His Lordship then said, 'the only sensible implication is that all the employees who might potentially benefit from the promise would be *deemed to have accepted it*.'[22]

This leads me to the second aspect of the decisions in *Attrill (HC)* and *Brader*. It is trite law that if there is no acceptance, there is no contract. Thus the question here is whether, apart from Elias LJ's fiction, Owen J and Yee JC had any factual basis for finding acceptance on the part of the *Attrill* and *Brader* claimants respectively. After Owen J and Yee JC left their waiver analysis to consider acceptance by conduct, they thought there was no such basis. The only possibility, *viz* the claimants' continued employment,[23] was rejected as capable of constituting acceptance of Jentzch's offer in August 2008 by way of conduct. Owen J applied the 'only referable' test in *Solectron Scotland v Roper*.[24] His Lordship asked whether the employees' conduct, by continuing to work, was only referable to their

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14 ibid [166] (Owen J).

15 *Brader* (n 3) [64] (Yee JC) (emphasis added). His Honour did use the phrase 'implied waiver by the Defendant of the requirement for acceptance to be communicated', but it is clear that he considered acceptance and communication to be one and the same, or worse, knew that they were separate but fudged the distinction: *Brader* (n 3) [65] (Yee JC). Notably, his Honour concluded his analysis on the waiver argument by saying at [67], 'Accordingly, I find that *the element of acceptance* is waived.' (emphasis added) On a slightly separate note, his Honour observed that there was 'no evidence that any of DKIB's employees had approached the HR department or management to register their acceptance', and said at [65] that this observation was dependent on 'an intention to enter into legal relations', which is the subject of §III.3 of this paper.

16 [1893] 1 QB 256.

17 *Carlill* (n 16) 270 (Bowen LJ).

18 ibid 262 (Lindley LJ) (emphasis added).

19 ibid 269 (Bowen LJ) (emphasis added). Similarly, Lindley LJ said at 262-3 that in a case like *Carlill*, the offeree 'does not expect and does not require notice of the acceptance apart from notice of the performance'.

20 This is clear from his Lordship's statement that 'In that case [*viz Carlill*] the mode of acceptance was held by implication to be actually performing the conditions attached to the offer': *Attrill (CA)* (n 1) [98] (Elias LJ).

21 ibid [98] (Elias LJ).

22 ibid [98] (Elias LJ) (emphasis added).

23 *Brader* (n 3) [68] (Yee JC); *Attrill (HC)* [166] (Owen J).

24 [2004] IRLR 4.

having accepted the new terms imposed by their employer.[25] Given that movement in the job market generally occurred at the start of the year, and that hiring was scarce post-Lehman, Owen J held that the test was not satisfied.[26] Yee JC simply held that in the absence of more specific knowledge that the claimants had other employment opportunities, 'Dresdner Bank would not have been able to infer acceptance from [the claimants'] omission to resign'.[27] Therefore, on a correct analysis of *Attrill (HC)* and *Brader*, although there appeared to have been a waiver of the requirement to communicate acceptance, there was in fact no acceptance the communication of which could have been waived. If so, there should have been no contract. This analysis is supported by the judgments of Isaacs ACJ and Starke J in Australian case of *R v Clarke*, which also approvingly referred to Lindley and Bowen LJJ's view of acceptance through performance in *Carlill*.[28]

What the judgments of Owen J, Elias LJ and Yee JC demonstrate is that the offer and acceptance model was never designed to analyse unilateral contracts. Stephen Smith has argued that whereas a bilateral contract embodies an agreement, a unilateral contract embodies a promise.[29] It is worth examining this conceptual distinction before returning to *Attrill* and *Brader*. It is useful to begin with the orthodox proposition that bilateral contracts are pairs of promises.[30] A promise, ordinarily understood, is a voluntary obligation that binds only *one* person, the promisor.[31] Thus it has been argued that bilateral contracts are more accurately described as 'agreements' given that they bind two parties.[32] By contrast, unilateral contracts are straightforwardly promissory in the sense I have just defined.[33] With this in mind, I suggest that it is strange to ask whether a promisee 'accepts' a promise. As Smith observes, the typical and appropriate response to a promise is not 'I accept' or 'I agree', but 'thank you'.[34] Conceptually, a promise is not an offer. Any attempt to locate acceptance will naturally

25 *Attrill (HC)* (n 2) [169] (Owen J).

26 ibid (n 2) [172]-[175] (Owen J).

27 *Brader* (n 3) [68] (Yee JC).

28 '[A]cceptance and performance of condition, as shown by the judicial reasoning quoted [from *Carlill* and another English case: *Offord v Davies* (1862) 12 CBNS 748], involve that the person accepting and performing *must act on the offer*': (1927) 40 CLR 227, 234-5 (Isaacs ACJ) (emphasis added), 244 (Starke J).

29 S Smith, *Atiyah's Introduction to the Law of Contract* (6th ed, OUP 2009) 37, 57; S Smith *Contract Theory* (OUP 1999) 56-7, 180-1.

30 For example, Charles Fried's schematic example of a bilateral contract was this: A wishes to be bound to B by a promissory obligation *x*, but only if B will be bound to him by promissory obligation *y*. For Fried, who sought to establish a coherent *moral* basis of contractual obligation, the question that must be answered is how can one bind oneself to do something that was previously morally neutral by simply expressing one's will to do it in the future. Fried's answer was a teleological account of the moral obligation to keep one's promises, which afforded a powerful and comprehensive account of central features of contract law including *inter alia* the freedom of contract and the various standards of measure for damages—expectation, reliance and restitution. See generally C Fried, *Contract as Promise* (Harvard University Press 1981), esp 14, 17, 46-7; P Benson, 'Contemporary Contract Theory' (1988-89) 10 Cardozo Law Review 1082, 1096, 1098. On the inadequacies of the 'sanctity of promise theory' see M Cohen, 'The Basis of Contract' (1932-33) Harvard Law Review 571-5.

31 Smit (n 29) 56.

32 ibid (n 29) 64. In addition, agreements require the active participation of two or more persons; each of the parties to an agreement undertakes obligations.

33 Owen J and Yee JC would agree. 'The central issue is whether the announcement amounted to a promise that gave rise to a contractual obligation owed by DKL to those employed in DKIB': *Attrill (HC)* (n 2) [108] (Owen J). 'The 18 August Announcement was also a classic case of a unilateral contract. It was a promise on the part of DKIB to do *something* […] in return for the Plaintiff's continued employment and performance at DKIB': *Brader* (n 3) [66] (Yee JC).

34 S Smith, *Contract Theory* (n 29) 57.

be a wild goose chase. A promise is a unilateral assurance that purports to bind the promisor from its inception. It is therefore unnatural to impose the offer and acceptance model on unilateral contracts.[35]

A common type of unilateral contract is the conditional promise, which *Carlill* exemplifies.[36] To better understand why a contract of this sort can made out, some reference to the context of *Carlill* is helpful. The Carbolic Smoke Ball Company had advertised a reward of 100*l* for any person who contracted influenza while using their product, the carbolic smoke ball. Mrs Carlill bought the ball, used it assiduously according to its instructions, but nevertheless contracted influenza. It is worth setting out the company's reply to Mrs Carlill through her husband, who had written to them three times to claim the reward:

> The Carbolic Smoke Ball Company […] have such confidence in the efficacy of the carbolic smoke ball […] believing it impossible for the influenza to be taken during the daily inhalation of the smoke ball as prescribed. In order to protect themselves against all fraudulent claims, the Carbolic Smoke Ball Company require that the smoke ball be administered, free of charge, at their office, to those who have already purchased it. Intending claimants must attend three times daily for two weeks, and inhale the smoke ball under the directions of the Smoke Ball Company. These visits will be specially recorded by the secretary in a book. 27 Princes St Hanover Square, London.[37]

As Simpson observes, why this was not quoted in the law reports remains something of a mystery, for it goes a long way towards explaining the hostile judicial attitude towards the company.[38] The Court of Appeal was determined to prevent the company from reneging on its promise to pay the reward after Mrs Carlill had fallen ill. Taking the company's promise as an offer, the court held that the company had 'dispensed with' the requirement to communicate acceptance.[39] But as I have argued, it is not conceptually satisfactory, or necessary, to treat a promise as an offer in the first place.[40]

Doing so distorts the concept of offer and acceptance, and invites judges to engage in an artificial waiver analysis, as I have attempted to show through *Attrill* and *Brader*. It seems to me that the solution should be to identify plainly the reasons for enforcing the promise.[41] But perhaps those reasons were accounted for in another way. The doctrine of consideration has been regarded as the reason for the enforcement of a promise or the recognition of an obligation.[42] The reason, Atiyah would say, is simply the justice of the case. Others think that consideration reflects the price or value of the promise. I turn now to see if the application of this doctrine in the *Attrill* cases and *Brader* is of any assistance to our analysis.

III.2 Consideration

All the judges found that consideration had been provided through the claimants' continued employment with the bank.[43] Yee JC began with the traditional analysis of consideration. On this

35 See also *New Zealand Shipping Co Ltd v Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, 167C-E (Lord Wilberforce).

36 'We are dealing with an express promise to pay 100*l* in certain events': *Carlill* (n 16) 261 (Lindley LJ).

37 A Simpson, *Leading Cases in the Common Law* (OUP 1996) 270.

38 ibid 270.

39 *Carlill* (n 16) 269 (Bowen LJ).

40 As it is often urged by counsel for the promisor: *Attrill (CA)* (n 1) [97] (Elias LJ).

41 Bowen LJ's judgment in *Carlill* hinted at this approach. '[I]f a person chooses to make extravagant promises of this kind he probably does so because it pays him to make them, and, if he has made them, the extravagance of the promises is no reason in law why he should not be bound by them': *Carlill* (n 16) 268.

42 P Atiyah, *Essays on Contract* (Clarendon Press 1990) 181-2; cf Peel (n 8) paras 3-002, 3-004 whose orthodox view on consideration I do address below (as did Owen J, Elias J and Yee JC in their judgments).

43 *Attrill (HC)* (n 2) [182] (Owen J); *Attrill (CA)* (n 1) [95] (Elias LJ); *Brader* (n 3) [70] (Yee JC).

view, the promisee provides consideration when confers a benefit on the promisor to the promisee's detriment.[44] His Honour then derived further assistance from the modern analysis in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[45] ('*Roffey Bros*') (which Owen J relied on immediately)[46] by asking whether the promisor had been conferred a 'practical' (as opposed to 'legal') benefit.[47] Yee JC and Owen J found that the claimants conferred on Dresdner Bank a practical benefit in the form of employee stability and the ability to continue operations.

Two observations may be made. First, this finding seems to contradict the judges' rejection of the argument from acceptance by conduct. It is clear that Dresdner Bank had benefited from having a stabilised workforce and having allayed the FSA's concerns. But if it cannot be said with certainty that the claimants' continued employment was only referable to the promise of a minimum bonus pool,[48] then it equally doubtful that consideration has moved from the promisee to the promisor, which is a legal requirement.[49] Owen J does not seem to notice this inconsistency. Yee JC denies it by distinguishing acceptance and consideration in reference to the same conduct, but this is unaccompanied by explanation. A further objection is that even if it can be said with certainty that the employees' conduct did confer a benefit on Dresdner Bank, that conduct cannot technically be called consideration because it was not performed in *exchange* for the promise, but happened as a *consequence* thereof. Given the circumstances, it makes more sense to say that the announcement on 18 August 2008, ie the promise itself, was what provided Dresdner Bank with workforce stability and addressed the FSA's concerns about the lack of a restructuring proposal.

The second observation is as follows. The judges' loose application of consideration strengthens the case for the doctrine's reform;[50] and more pertinently it does so in a manner that parallels my suggestion to abandon the waiver analysis in unilateral contracts. If a legal requirement is being satisfied with great ease, this is good indication that it serves little purpose in the context in which it is being satisfied. This argument applies to the treatment of consideration and acceptance in the *Attrill* cases and in *Brader*. As I have attempted to show, in those cases, consideration was unpersuasively conjured and acceptance, as distinct from notification of it, was said to be waived. All this lends some credence to Atiyah's view that consideration is essentially the reason for enforcing a promise. But this is too vague to be the law. Thus to further our inquiry, we might ask: what kind of reason should the law recognise?[51]

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44 E Peel (n 8) para 3-004; *Currie v Misa* (1875) LR 10 Ex 153, 162 (Lush J).

45 [1991] 1 QB 1.

46 Owen J's findings on consideration were accepted without much elaboration by the Court of Appeal: *Attrill (CA)* (n 1) [95] (Elias LJ).

47 And without the incurrence of a detriment on either party: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ('*Roffey Bros*'), 23D (Purchas LJ); cf *Foakes v Beer* (1884) 9 App Cas 605, 622-3 (Lord Blackburn).

48 See text to n 23-27.

49 *Tweddle v Atkinson* (1861) 1 B&S 393, 398 (Crompton J), 399 (Blackburn J); Peel (n 8) para 3-023.

50 Yee JC expressly acknowledged that serious doubt has been cast on the doctrine of consideration in Singapore jurisprudence: *Brader* (n 3) [69] (Yee JC); *Gay Choon Ing v Loh Sze Ti* [2009] SGCA 3, [2009] 2 SLR(R) 332 ('*Gay v Loh*') [92]-[118] (Phang JA). For the arguments in support of the abolition or reform of consideration, see Lord Wright, 'Ought the doctrine of consideration be abolished from the common law?' (1936) 8 Harvard Law Review 1225; Atiyah, *Essays on Contract* (n 42) 179-243. For a defence of the doctrine, see M Chen-Wishart, 'In Defence of Consideration' [2013] Oxford University Commonwealth Law Journal 209.

51 'Since it is unthinkable that any legal system could enforce *all* promises it has always been necessary for the courts to decide which promises they would enforce': P Atiyah (n 42) 181.

One might approach this question from two (opposite) angles. From one angle, it may be said that the traditional conception of consideration enshrines the notion of bargain or reciprocity.[52] This reason is too narrow, especially for unilateral contracts.[53] In addition, it has been regarded as essentially eroded by the rule that consideration need not be adequate.[54] From another angle, by virtue of basic Kantian principles of trust and respect, it is simply wrong to break promises.[55] This reason by virtue of its moral nature is too broad and in any case does not purport to be a legal reason for keeping promises. We are therefore looking for something in between reciprocity and a moral obligation to keep one's promises that can be applied as law.

I think the answer begins with the recognition that there is no *one* unifying reason.[56] There are *many*. That is why in *Gay Choon Ing v Loh Sze Ti* ('*Gay v Loh*'), Phang JA observed[57] *obiter* that should the doctrine of consideration be abolished, its function will have to fulfilled by alternative *doctrines*, which include promissory estoppel,[58] economic duress,[59] undue influence[60] and others. Although these doctrines are most commonly applied in the context of bilateral undertakings, their existence in case law and expression in promissory language therein[61] suggests a plurality of reasons why a court would not be inclined to enforce a promise. If there is any concern that such an analysis endorses a growing judicial incursion on the freedom of contract,[62] it is abated by the focus of this paper on developing a rational legal framework for when and why a *unilateral* undertaking, *viz* a single promise made by one party, should be enforced.

But before I set out what this framework might be, it is necessary to examine a contender of serious pedigree to the notion that there is no one unifying reason for enforcing promises. That contender is the so-called 'intention to create legal relations'.

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52 *Thomas v Thomas* (1842) 2 QB 851, 859 (Lord Denman CJ); E Peel (n 8) para 3-002.

53 See text to n 94-97.

54 *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87 (HL); *Gay v Loh* (n 49) [100]-[101] (Phang JA); cf M Chen-Wishart, 'Consideration and Serious Intention' (2009) Singapore Journal of Legal Studies 434, 438.

55 C Fried (n 30) 17.

56 Such as bargain, or the protection of induced reliance: Smith (n 29) 185.

57 *Gay v Loh* (n 50) [111]-[112] (Phang JA).

58 '[T]he cases […] afford a sufficient basis for saying that a party would not be allowed in equity to *go back on such a promise*': *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 ('*High Trees*') 134-5 (Denning J); *Roffey Bros* (n 47) 17H-18H (Russell LJ); *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 ('*Collier v Wright*') [37]-[42] (Arden LJ).

59 'There is no finding, and no suggestion, that in this case the *promise was given as a result of fraud or duress*. If it be objected that the propositions above contravene the principle in *Stilk v Myrick* (1809) 2 Camp 317, I answer that in my view they do not; they refine, and limit the application of that principle': *Roffey Bros* (n 47) 16B (Glidewell LJ) (emphasis added); *Pao On v Lau Yiu Yong* [1980] AC 614, 634B-635A (Lord Scarman).

60 'She was not a person who treated her vows lightly; she was deeply religious and *felt bound by her promise*, by her vows, and by the rules of the sisterhood […] The equitable title of the donee is imperfect by reason of the influence inevitably resulting from her position, and which influence experience has taught the Courts to regard as undue': *Allcard v Skinner* (1887) 36 Ch D 145, 184 (Lindley LJ).

61 See n 58-60.

62 This concern, it is conceded, is certainly well founded, even in respect of the nascent doctrine of economic duress which, although ostensibly targets the 'coercion of the will', might be seen as a subset of the rules relating to judicial intervention in contracts formed between parties of unequal bargaining power. See *Alec Lobb (Garages) v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87, 93F-H (Sir Peter Millett QC). But this concern should not come as a surprise, or be overstated: P Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1985) 681-715. For a comparative analysis of Commonwealth jurisdictions on the unconscionable bargain doctrine and its relationship with duress and fraud et al, see D Capper, 'The Unconscionable Bargain in the Common Law World' (2010) 126 LQR 403.

III.3 Intention to create legal relations

This doctrine was the invention of Frederick Pollock.[63] He borrowed the notion of intent from Prussian jurist Friedrich Carl von Savigny to explain why a social engagement is not a binding legal contract.[64] This idea first received judicial support in English law through Atkin LJ's speech in *Balfour v Balfour*,[65] in which it was expressed in the form of a presumption. In the context of unilateral undertakings, the starting point has always been the *Carlill* defendants' (famously) unsuccessful argument that the words in their advertisement were not intended to amount to a binding promise.[66]

The intention to create legal relations occupies a hallowed place in Singapore contract law. It all began in 2004 with Rajah JC's pithy dictum in *Chwee Kin Leong v Digilandmall.com Pte Ltd* ('*Digilandmall (HC)*'): 'The marrow of contractual relationships should be the parties' intention to create a legal relationship.'[67] In 2009, to support his Honour's *obiter* critique of the doctrine of consideration, Phang JA in *Gay v Loh* cited the paragraph in *Digilandmall (HC)* that contained Rajah JC's dictum but did not discuss that dictum specifically.[68] Then in 2014, Yee JC in *Brader* applied Rajah JC's dictum as law and carried it to its next logical conclusion: the doctrine of intention to create legal relations was now thought to be the key element the formation of unilateral contracts.[69] As if the word 'marrow' did not sufficiently carry the meaning, Yee JC coined his own expression: 'an intention to create legal relations is *sine qua non* [sic] for a valid contract to arise'.[70] And as if his Honour was consciously aware of the difficulties with offer, acceptance and consideration, he wrote reassuringly that 'although the other elements of a valid contract are *indicia* of a contractual relationship, the intention to be legally bound is *definitive* of such a relationship.'[71]

The centrality of the doctrine of intention to create legal relations in contract formation affects the question of who bears the burden of proving that relation.[72] Comparing the *Attrill* cases and *Brader* illustrates this point well.[73] Owen J, in addressing the intention to create legal relations, had

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63 P Atiyah (n 62) 690.

64 ibid 690.

65 [1919] 2 KB 517, 577 (Atkin LJ). In the same case Warrington LJ (at 575) adopted a more conventional analysis in preferring to say that the wife 'made no bargain at all'. cf *MacLeod v MacLeod* [2008] UKPC 64, [2010] 1 AC 298 [36] (Baronness Hale of Richmond) and *Granatino v Radmacher* [2010] UKSC 42, [2011] 1 AC 534 ('*Granatino*') [108] (Lord Phillips), [142] (Baroness Hale).

66 *Carlill* (n 16) 266 (Bowen LJ).

67 [2004] SGHC 71, [2004] 2 SLR(R) 594 [139]. In that paragraph, Rajah JC (as his Honour then was) was examining whether the requirement of consideration had been fulfilled in the formation of a bilateral contract, which contract his Honour later deemed to be vitiated by reason of a unilateral mistake. Relying on *Roffey Bros* (n 47), His Honour took opportunity there to commend the doctrine of intention to create legal relations and criticise the doctrine of consideration, arguing that 'the time may have come for the common law to shed the *pretence of searching for consideration to uphold commercial contracts*.' (emphasis added) His Honour's judgment was upheld by the Singapore Court of Appeal in *Chwee Kin Leong v Digilandmall.com Pte Ltd* [2005] SGCA 2, [2005] 1 SLR(R) 502, where consideration and the doctrine of intention to create legal relations received no discussion.

68 *Gay v Loh* (n 50) [96] (Phang JA).

69 *Brader* (n 3) [73] (Yee JC).

70 ibid [74] (Yee JC).

71 ibid [73] (Yee JC) (emphasis original).

72 See also *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 ('*Ermogenous*') [26] (Gaudron, McHugh, Hayne and Callinan JJ).

73 It should be noted that in the *Attrill* cases, the doctrine of intention to create legal relations was discussed in respect of the *Attrill* claimants' *first* ground of argument, *viz* Dresdner Bank had unilaterally varied their pre-existing employment contract. Neither Owen J nor Elias LJ considered the doctrine at all in respect of their alternative argument (which we have hitherto been assessing) that a separate unilateral contract had

recourse to *Edwards v Skyways Ltd* ('*Edwards*') on the issue of burden of proof. In *Edwards*, Megaw J said, '[T]he subject-matter of the agreement [being] business relations, […] I accept the propositions of counsel for the plaintiff that in a case of this nature the onus is on the party who asserts that no legal effect was intended, and the onus is a heavy one.'[74] In the *Attrill* cases, the asserting party was Dresdner Bank, and Owen J accordingly held that it bore the burden of proof.[75] This analysis was affirmed by the Court of Appeal.[76] By contrast, Yee JC read *Edwards* as authority for a lower *standard* of proof in respect of business as compared to domestic contexts.[77] His Honour then held that *burden* of proof was nevertheless on the claimants, who were seeking to establish a contractual relationship with the Bank.[78] This rather flies in the face of Megaw J's actual words in *Edwards*. But the noteworthy point here is that this is a necessary consequence of construing the intention to create legal relations as the 'marrow' or '*sine qua non*' of contract. If such intention is merely *one of several* legally required elements of contract formation, then where those other elements are present, the burden of proof naturally falls on the party seeking to deny the contractual relation. But if such intention is the *key or only* legally required element in contract formation, then the burden must surely fall on the party seeking to establish the contractual relation. Yee JC's judgment is therefore internally consistent in this respect.

However, his Honour's application of the doctrine of intention to create legal relations to unilateral undertakings faces at least three difficulties. First, it is no secret that such intention is often a work of judicial fiction.[79] As regards unilateral undertakings the question is whether the promisor intended to be bound. In *Carlill*, for instance, the 100*l* reward was probably a lie.[80] The influenza was at its height in London in 1892, medical quackery was rife and the judges were well aware of it.[81] Ibbetson observes that too often promisors and parties to agreements have no relevant intention at all; the courts invent intent to impose or deny liability, but such findings easily mask covert value judgments.[82] Now one could argue that the fiction might be rescued by adverting to the objective approach to intent.[83] But is intention still meaningful if the result is exactly the opposite of what the Carbolic Smoke Ball Company intended? Alternatively, the objective approach to intent might lead to absurdity: In the *Attrill* cases and in *Brader*, the judges had to turn a blind-eye to the logical conclusion of the bank's intent as objectively construed, *viz* if all but one of DKIB's employees left, that one employee would receive the full €400m bonus pool.[84] The doctrine of intention to create legal relations

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arisen. This difference does not affect my analysis because we are still ultimately dealing with the binding character of a unilateral undertaking.

74 [1964] 1 WLR 349, 355 (Megaw J). Owen J also referred to *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm), [2003] 1 Lloyd Rep 1 as authority for the same proposition.

75 *Attrill (HC)* (n 2) [130] (Owen J).

76 *Attrill (CA)* (n 1) [63], [80] (Elias LJ).

77 [1964] 1 All ER 494, 500 (Megaw J).

78 *Brader* (n 3) [74] (Yee JC). This is clearly consistent with his Honour's view of the intention to create legal relations as the *sine qua non* of contractual relationships.

79 See B Hepple, 'Intention to Create Legal Relations' [1970] CLJ 122; H Collins, *The Law of Contract* (Weidenfeld and Nicholson 1986) 92.

80 Whether the Carbolic Smoke Ball Company had 1,000*l* deposited with the bank as a sign of sincerity was never established at the trial: Simpson (n 37) 271.

81 A Simpson (n 37) 266-8.

82 D Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 2001) 247.

83 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH* [2010] UKSC 14, [2010] 1 WLR 735 [45] (Lord Clarke JSC).

84 *Attrill (CA)* (n 1) [99]; *Brader* (n 3) [79].

is unclear on how much room the courts have to manoeuvre to arrive at the intent required for liability to be imposed or denied, and disguises the fact they need manoeuvre at all.

Second, viewed against the conventional elements of offer, acceptance and consideration, the doctrine of intention to create legal relations has been criticised as a conceptual redundancy.[85] Lords Moulton's and Atkinson's speeches in *Heilbut, Symons & Co v Buckleton* ('*Heilbut*') demonstrate that the existence of an *animus contrahendi* is no standalone criterion to be sought in addition to offer, acceptance and consideration, but is merely the summing up of those elements.[86] Prioritising the doctrine of intention to create legal relations conflates the analytically distinct elements of agreement (in offer and acceptance) and bargain (in consideration),[87] and effectively allows it to act as a safety net at the dispense of justice. Moreover, since consideration and acceptance in unilateral contracts are likely to stand on flimsy ground, as I have shown through the *Attrill* cases and *Brader*, it is not clear that intention can always be adequately summed up from them. Further, if we accept that the offer and acceptance analysis of unilateral contracts is inapposite,[88] then we are not so much summing up intention on the part of A on the basis of the A's agreement with B as we are on the basis of A's promise itself. In searching for an intention to create legal relations, are we not therefore in a roundabout fashion simply asking the question why A's promise is of a kind that should be enforced?

Third, if the doctrine of intention to create legal relations becomes the key or only applicable test as Yee JC has foreshadowed, contract formation would be reduced to a question of factual inference[89] when it should really be a question of law. The only legal question left would be who bears the burden of proof.[90] Crucially, as Chen-Wishart has argued, this absolutist position cannot be sustained because it deprives contract law of its normative content.[91] The seriousness of a promise as evinced by intent is not the only reason why promises are recognised as contracts because personal autonomy is not the only political value protected by the law, nor is it the only value that a liberal theory of contract encompasses.

Before leaving this issue I should add a few words on a particular conception of the doctrine of intention to create legal relations advanced by Dori Kimel. In Kimel's view, the doctrine is *the* distinguishing factor between a mere promise and contract because it not only refers to a *serious* voluntary assumption of an undertaking but a serious voluntary assumption of a *legally binding* undertaking.[92] The ability to make promises and agreements without being 'captured' by the *state-regulated version* of these practices, for Kimel, exists as a negative freedom that serves to protect the positive freedom of developing and reinforcing personal relationships. [93] In my view this argument is of jurisprudential value, but that is all. It highlights the liberal value of freedom *from* contract, which I fully accept and indeed go on to explore how it might be promoted by the law in the next section. But

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85 I acknowledge that leading textbooks consider it to be a separate requirement as a matter of law, eg E Peel (n 8) para 4-033.

86 [1913] AC 30, 44 (Lord Atkinson), 47 (Lord Moulton); Hepple (n 78) 131-2.

87 See B Hepple (n 79) 128.

88 See text to n 30-35.

89 See *Brader* (n 3) [75] (Yee JC).

90 See text to n 72-78.

91 M Chen-Wishart, 'Consideration and Serious Intention' (n 54) 442.

92 D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing 2005) 138. For Kimel, promise and contract are fundamentally different because the former exists to enhance and reinforce *trust* in the context of personal relationships, whereas the latter envisages the imposition of right and obligations on parties that enjoy personal *detachment*. For a summary of his thesis see C MacMillan, *Review: From Promise to Contract: Towards a Liberal Theory of Contract by Dori Kimel* (2004) 15 Kings College Law Journal 202.

93 D Kimel (n 92) 139.

what is clear is that contemplation of state regulation would be an implausible legal test for intent. The average person who has made a contractually valid promise would I think be hard-pressed to say, or be seen to say, that he was conscious of entering the ambit of state regulation when making that promise.

IV. A New Analysis

A brief summary of my arguments is appropriate at this stage. So far I have used the *Attrill* cases and *Brader* as recurrent examples in my analysis of the various aspects of unilateral contract formation. I first argued that unilateral contracts are not amenable to an offer and acceptance analysis by virtue of their promissory nature. I then argued that serious doubt has been cast on the purpose of consideration, which like the requirement of acceptance, is easily satisfied. Proposing that the courts should squarely consider the variety of reasons why a promise should be enforced, I proceeded to examine the doctrine of intention to create legal relations as a possible candidate for a unifying reason, but found that it obscured value judgments, overemphasised personal autonomy, and was a conceptual redundancy. Accordingly, I will now propose a new framework to analyse unilateral contracts. This framework, it is submitted, will make the law more *transparent* and *coherent*, and more adequately protects the modern *liberal* value of freedom from contract.

I suggest a two-step test. First, one should look to the nature and content of the promise that has been made and decide whether such a promise, on those grounds, should be enforced. If the answer is 'Yes', then secondly, one should ask whether a reasonable person in the position of the promisee would have perceived the promise as legally binding. If the answer is also 'Yes', then we have a unilateral contract. Does this approach give insufficient regard to the parties' actual intentions? As I will explain, it does not.

The first limb has been the courts' approach in disguise. The 'nature' of the promise is discernible from what one might call the key message from the courts in cases concerning unilateral contracts. In *Carlill*, for example, the key message is that a promise made to the public through an advertisement should be legally binding.[94] In *Daulia*, the key message is that an oral promise to exchange contracts for a sale of land[95] should be legally binding even if not specifically enforceable due to not being in writing—a formality requirement that vendors would be tempted to exploit in the face of volatile property values.[96] In the *Attrill* cases and *Brader*, the key message is that a promise to honour a restructuring proposal, specifically involving the paying of bonuses to employees,[97] should be legally binding; extraneous political and financial circumstances are no excuse.

By examining the 'nature' of the promise the courts will ineluctably be transparent about their value judgments. The analytical method could take the following form. The court could ask: what *kind* of promise is it; are promises of that *kind* usually binding; and why? Alternatively, to appropriate a philosophical term, the court could identify the 'central case'[98] of the promise in question in the

94 See H Roberts, 'Smoke Screen' [2011] Legal Executive 30.

95 Not a contract *of* sale but a contract *for* sale, which performance would bring a contract *of* sale into existence: *Daulia* (n 11) 246F (Buckley LJ).

96 If it was not disclosed to the court 'at the last moment' that the defendants' mortgagors had found a purchaser at a higher price and so the defendants felt bound to reject the plaintiffs despite the assurances given, Buckley LJ 'should have regarded this as another *case of a kind* which has become all too common recently, when property values have been very volatile, in which a vendor has taken advantage of section 40 in circumstances in which *justice and probity should have induced the vendors to honour their bargain*.' Goff LJ similarly would have thought that the defendants' conduct was 'unmeritorious'. See *Daulia* (n 11) 244E-F (Goff LJ); 250G-H (Buckley LJ).

97 One commentator put it this way: 'The message of the courts is simple – make sure your mouth isn't bigger than your wallet': P Finding, 'Promises, Promises' (2013) Employers' Law (Jul/Aug) 12, 13.

98 This philosophical device would focus any analysis of the reason to enforce a promise by sensibly turning one's attention first to the paradigmatic version of the potentially enforceable promise in question. John

context of the relationship between the promisor and promisee, decide whether that promise is a 'peripheral case' and explain why it should or should not be binding. But examining the nature of the promise seems to introduce indeterminacy into the law since it entails drawing up a non-exhaustive catalogue of ostensibly disparate circumstances: advertisements, employment relationships, and so on. Will the courts (and litigants) have guidance in identifying the 'central case' of a promise in any given context? Yes they will, and it comprises two interrelated aspects. First, it includes previous decisions, as exemplified above. Second, it involves referencing social norms by looking at the various social contexts in which promises are considered to possess (or be devoid of) legal effect. These norms may or may not also or already be enshrined in previous decisions.

This leads me to the second key word in the first limb: 'content'. Since identified social norms are never absolute, the court should also look at the 'content' of the promise.[99] By this I mean the substance or terms of the promise itself, which, in the final analysis, may indicate either a deviation from or convergence with the central case.[100] And this is where the court may consider as a matter of *fact* any indicia of an intention to be bound on the part of the promisor. *Balfour* is a neat example of the judicial recognition of a social norm that a promise made in the domestic context does not usually give a cause for action on a contract.[101] Accordingly, one example that converges to the central case of promises of this kind would be *Jones v Padavatton*[102] and a case going the other way would be *Errington v Errington and Woods*.[103]

As a whole, the first limb secures the political value of freedom *from* contract[104] by performing a cautionary[105] function. When the law is clear on what kinds of promises are *prima facie* binding, promisors and promisees enjoy a greater negative freedom in being able to better anticipate when they

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Finnis explains, 'So there are central cases, as Aristotle insisted, of friendship, and there are more or less peripheral cases (business friendship of convenience, cupboard love, casual and play relations, and so on)': J Finnis, *Natural Law and Natural Rights* (2nd ed, OUP 2011) 11.

99 In propounding the element of 'content' as a qualifier to 'nature', I am very hesitant to thus characterise the 'nature' criterion as some kind of 'presumption' that can be 'rebutted'. The language of presumption is unhelpful here because first, it would facilitate an unnecessary allocation of the burden of proof (see text to n 90-91; *Ermogenous* (n 72) [26] (Gaudron, McHugh, Hayne and Callinan JJ)) since any genuine inquiry into whether a promise should be enforced must address the fundamental issue of the content of that promise, regardless of which party in fact furnishes that content. Second, 'social norms' are by definition subject to social change, and so the only reasonable implementation of such norms as guidance for the court is that their identification must ultimately be a matter for the court's *discretion*; the existence of a presumption would raise questions on the standard of proof required for rebuttal, but which standard, by virtue of social change, correspondingly varies *over* time and *between* different norms, and is therefore not amenable to particularity. Compare, for instance, *Balfour* (n 65) in 1919 and *Granatino* (n 64) in 2011 with respect to judicial attitudes towards pre-nuptial agreements.

100 J Finnis (n 98) 11.

101 *Balfour* (n 65) 577 (Atkin LJ). See further S Hedley, 'Keeping contract in its place—*Balfour v Balfour* and the enforceability of informal agreements' (1985) 5 Oxford Journal of Legal Studies 391.

102 [1969] 1 WLR 328.

103 *Errington v Errington and Woods* [1952] KB 290 (CA) ('*Errington*').

104 See text to n 92-93; R Barnett, 'Conflicting Visions: A Critique of Macneil's Relational Theory of Contract' (1992) 78 Virginia Law Review 1175, 1196; T Rakoff, 'Is Freedom from Contract Necessarily a Libertarian Freedom' (2004) 2 Wisconsin Law Review 477, 493.

105 The first limb is, of course, not a formality requirement. But its approach is intuitive and parallels the natural thinking process of a reasonable person intending to make a serious promise. Such a person usually considers the purpose of making promise and the social context in which he is about to do so. To that extent, and to the extent that the first limb is clear as a matter of law, it induces in that person the circumspective frame of mind appropriate in his pledging of his future. See L Fuller, 'Consideration and Form' (1941) 41 Columbia Law Review 799, 800.

are entering into an agreement that may be legally enforceable.[106] An unfortunate corollary of shoehorning unilateral undertakings into the bilateral offer and acceptance model is that what appears to be an informal promise could turn out to be legally enforceable.[107] The teleological approach under the first limb also accords with the rise of doctrines like economic duress and unconscionability, which are today being analysed in the context of increasing judicial and statutory controls over contract[108] and commended as viable alternatives to the doctrine of consideration.[109] The decline of freedom of contract[110] and the rise of freedom from contract necessitates a Diceyan aversion to rules of contract formation that are ill-suited and thus likely to be arbitrarily applied,[111] and the honest judicial confrontation of the nature and content of promises exactly fulfils this purpose in the case of unilateral undertakings.

Next, the second limb seeks to enshrine the key contribution of *Carlill* in this area of law. Bowen LJ said of the advertisement in that case, 'It seems to me that in order to arrive at a right conclusion we must read this advertisement in its plain meaning, as the public would understand it. […] How would an ordinary person reading this document construe it?'[112] Thus, having examined the nature and content of the promise, the court should then occupy the shoes of the reasonable person in the promisee's position. The reasonable promisee's perception *alone* is a sufficient counterpart to the first limb because we have, first, discarded the notion of bargain (and thus the promisee's reciprocal conduct) as the only (if at all viable) reason for enforcing promises. Second, we have addressed the strangeness of the requirement that promises must be 'accepted' and the artificiality of the suggestion that communication of it may be 'waived'. The approach under the second limb avoids the further fiction of constructing the promisor's intention and treating it as the be all and end all of unilateral contract formation, and yet maintains the well-established objective principle in *Smith v Hughes*, which expressly considered the viewpoint of the reasonable promisee.[113]

The focus on the reasonable promisee's perception also provides the only rational explanation for the protection of the promisee's expectation interest in respect of remedies for breach.[114] This promotes coherence of the law. In *Carlill*, the company was ordered to pay Mrs Carlill the 100*l*;[115] in

106 An interesting parallel might be drawn with development of the law of express use, which was facilitated by the social recognition of state enforcement of holding arrangements: See S Gardner, 'Reliance-Based Constructive Trusts' in C Mitchell (ed), *Constructive and Resulting Trusts* (1st ed, Hart Publishing 2009) 63, 85. I am grateful to Yu Jie Wu for drawing this to my attention.

107 For example, '[the] decision in *Attrill* is a timely reminder that promises that do not look or feel like contractual terms can be treated as binding and, therefore, enforceable': P Finding (n 97) 13.

108 M Littlewood, 'Freedom from Contract: Economic Duress and Unconscionability' (1984-87) 5 Auckland University Law Review 164, 166, 177.

109 *Gay v Loh* (n 50) [111]-[112] (Phang JA).

110 P Atiyah, *The Rise and Fall of Freedom of Contract* (n 62); G Gilmore, *The Death of Contract* (Ohio State University Press 1974).

111 A Dicey, *Introduction to the Study of the Constitution* (8th ed, Macmillan 1915) 184.

112 *Carlill* (n 16) 266 (Bowen LJ).

113 A person is legally bound if 'a *reasonable* man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him': *Smith v Hughes* (1870-71) LR 6 QB 597, 607 (Cockburn CJ).

114 Where the promisor has failed to honour his promise and therefore failed to make the promisee better off. See *South Australian Asset Management Corp v York Montague Ltd* [1997] AC 191, 216E-F (Lord Hoffmann).

115 *Carlill* (n 16) 272 (Bowen LJ).

Errington, the couple was entitled to have the mortgaged property conveyed to them;[116] and in the *Attrill* cases and in *Brader*, the bank was ordered to pay its employees the bonuses.[117]

Accordingly, the second limb does not seek to identify reliance on the part of promisee.[118] Indeed, it may be argued that if there is reliance at all, it is because the promise is binding, not the other way around.[119] But the distinction between reliance and expectation must be pursued in some detail because there is an apparent overlap between the promissory nature of the unilateral contract and the doctrine of promissory estoppel. One needs only to look at the promissory language used by Denning J in *Central London Property Trust v High Trees House Ltd* ('*High Trees*') to figure the similarity.[120] The most honest way to draw the distinction is to take the promissory estoppel doctrine at its *strongest* and show that even then, it is different from the unilateral contract under my analysis. The strongest application of promissory estoppel can be found in the Australian case of *Walton Stores (Interstate) v Maher* ('*Walton Stores*'),[121] which, it is noted, does not reflect English law. In *Walton Stores*, the majority in the High Court of Australia was willing to use promissory estoppel to prevent the appellant from retreating from its implied promise to complete the contract.[122] The High Court found that it had become unconscionable for the appellant to go back on its word because the respondents had acted to their detriment on the basis of a false assumption that the appellant should have corrected.[123] Promissory estoppel was thus applied not merely as a defensive equity or shield but as a sword. The similarity between *Walton Stores*, or promissory estoppel as a sword, and my analysis of the unilateral contract is that both involve enforcing a promise of contractual performance without recourse to the conventional elements of contract formation. What then is the difference? In doctrinal terms, the difference is that promissory estoppel emphasises the promisor's reasonable expectation that his promise will induce action or forbearance,[124] whereas the unilateral contract, on my analysis, emphasises the promisor's creation of an expectation in the promisee of performance of the promise. In functional terms, the difference is that the former protects the claimant's reliance interest and the latter, his expectation interest. Having considered promissory estoppel in its strongest iteration, the distinction is therefore starker in English law, where the operation of promissory estoppel is generally only suspensory and requires a pre-existing legal relationship.[125]

But is it not fundamentally unfair that in protecting the promisee's expectation interest we do not require him to have acted in any way? On a conventional analysis, this at least appears to be accounted for by acceptance and consideration. But even that, I suggest, is illusory. As regards acceptance, I have already argued that a promisee simply does not 'accept' a promise. As regards consideration, *Roffey Bros* tells us that the incurrence of detriment on the promisee is unnecessary—only the conferral of a practical benefit on the promisor is required.[126] My approach is unfair only if we

116 *Errington* (n 103) 295 (Denning LJ).

117 *Attrill (CA)* (n 1) [100] (Elias LJ); *Brader* (n 3) [126] (Yee JC).

118 cf Smith's view on the underlying principle of unilateral undertakings: see n 56.

119 C Fried (n 30) 19.

120 Describing the previous cases on which authority his Lordship rested the recognition of the estoppel doctrine, Denning J said, 'They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made, and which was in fact so acted on': *High Trees* (n 58) 134.

121 [1988] HCA 7; (1988) 164 CLR 387.

122 ibid [38] (Mason CJ and Wilson J).

123 ibid [38] (Mason CJ and Wilson J).

124 *High Trees* (n 58) 134 (Denning J); ibid [26] (Mason CJ and Wilson J).

125 *Collier v Wright* (n 58) [37] (Arden LJ). See also *Combe v Combe* [1951] 2 KB 215, 218 (Denning LJ).

126 *Roffey Bros* (n 47) 23D (Purchas LJ).

remain attached to the notion of bargain as enshrined in consideration, which entails a tit-for-tat conception of fairness. I have rejected this notion in my earlier argument. True unfairness, it is submitted, arises when the court does not plainly explain why a single promise made to a reasonable person should or should not be enforced.

Finally, I suggest that this two-step test should be implemented by the common law. The recommended discretion inherent in teleological nature of the test, and its focus on the honesty of judicial attitude towards contract formation, makes it most suitable for judicial consideration and implementation. Moreover, both limbs may be derived from a reinterpretation of old cases, as I have attempted to show.

V. Conclusion

Justice Holmes famously said, 'Great cases, like hard cases make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.'[127] *Carlill* is certainly one of the great cases of the common law, and it did raise an issue of overwhelming interest that no doubt appealed to the judges' conscience. I would not venture to say it made bad law because it rightly commended the perspective of the reasonable promisee. But I will say that it has for too long cast a shadow on the true nature of the unilateral contract, a shadow that obscures the reasons for which judges find such contracts, and the values they protect in doing so. A unilateral contract is at its heart a single promise. It must be emphasised that this conceptual analysis does not entail any moral theory of contract as a self-imposed obligation, as Fried would insist.[128] Neither does it mean that contract is ultimately a hybrid of principles of liability founded on torts and restitution, as Atiyah might suggest.[129] The purpose of contract is to enforce promises and to be clear as to why. If for bilateral contracts the best way to do so is by identifying offer and acceptance, accompanied with consideration and intent, then so be it. But there is no need for any of that in unilateral contracts. Given their distinctive nature, unilateral contracts can and should be governed by their own rules. Today, the case for a liberal theory of contract based on positive autonomy in terms of being bound by contract because one has chosen to be is a weak one.[130] The focus is on one's negative freedom not to be contractually bound if one can help it. Accordingly, in my view, plainly addressing the nature and content of promises as they appear to the reasonable man in a variety of social contexts best protects the expectations and, more broadly, the liberty of promisor and promisee.

127 *Northern Securities Co v United States* 193 US 197, 400-1 (1904) (Holmes J).

128 C Fried (n 30) 5.

129 See generally P Atiyah (n 41) 10-56.

130 See generally P Atiyah (n 62) and G Gilmore (n 110); Ibbetson (n 82) 245; cf Fried (n 30) 57.

Incidental Direct Effect: Horizontal Direct Effect by the Back Door?

James Bradford[1]

I. Introduction & Case Law Background

Direct effect is seen as one of the key elements distinguishing the European Union (EU) from other international organisations. Broadly speaking the doctrine refers to the capacity of provisions of EU law (which are clear, precise and unconditional[2]) to be invoked and relied on by individuals of Member States before their national courts. It was first elaborated in the *Van Gend en Loos* case,[3] with the rationale being that the spirit, economic aspect and terms of the EEC Treaty meant that article 12 should have been 'interpreted in such a sense as to produce direct effect and to create individual rights which internal courts should protect'[4] (the key idea underpinning it was the notion that in seeking to establish a Common Market, the Member States must recognise the Community as a new legal order).[5] Following its application to Treaty articles, direct effect has been extended to secondary legislation. Arguably this has been straightforward in relation to regulations and decisions: Treaty of the Functioning of the European Union ('TFEU'), article 288 states that they both shall be 'binding in its entirety' and also says with regards to regulations that they are to have 'general application [… and be] directly applicable in all Member States'. However, more difficulty is to be found with directives which though binding, are addressed to Member States and not the individuals themselves and which might cause more conceptual difficulties.[6]

This notwithstanding the European Court of Justice (ECJ) has applied direct effect to directives on the basis of three main rationales: (1) compatibility with the Treaty text,[7] (2) the diminished utility of the measure if direct effect were not allowed[8] and (3) the estoppel argument.[9] Yet

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1 Jesus College; I am grateful for the comments from Dr Eveline Ramaekers and the reviewers from the Oxford University Undergraduate Law Journal Editorial Board.

2 The conditions for the operation of direct effect as noted in Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 and affirmed in later case law such as Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337.

3 *Van Gend en Loos* (n 2).

4 ibid.

5 '[W]e must conclude from this that the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member-States but also their nationals. Community law, therefore, apart from legislation by the member-States, not only imposes obligations on individuals but also confers on them legal rights'.

6 A directive may well leave some discretion to the Member States and thus the nature of directives might not fulfil the normal criteria for direct effect (precision, unconditionality and the absence of discretion/implementing measures): P Craig & G de Búrca, *EU Law Text, Cases and Materials* (5th ed, OUP 2011).

7 'it would be incompatible with the binding effect attributed to a directive by article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned': *Van Duyn v Home Office* (n 2).

8 'the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of community law': ibid.

in *Marshall v Southampton and SW Hampshire AHA,*[10] the Court qualified this by finding that directives were only capable of *vertical* direct effect and not *horizontal* direct effect, i.e. the direct effect of a directive could be pleaded in an action against the state but not against the private parties. The main rationale in the case was an interpretation of the then EEC Treaty, art 189: the Court found that 'the binding nature of a directive which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual' (other rationales have been advanced also, for instance on the basis of legal certainty, such as in the case of *Wells and Transport Secretary*[11]). Although the Court has been clear in its rejection of horizontal direct effect, one must evaluate the position in light of the number of exceptions which have emerged and in particular that of *incidental direct effect* as outlined in the *CIA Security International*[12] and *Unilever Italia* cases.[13]

II. Aim of Analysis

The main task of this paper will be to examine the case law and to see if it has allowed horizontal direct effect (i.e. the imposition of obligations on private parties) through the *back door*; i.e. indirectly in all but name. To do this, one will need to evaluate the degree to which the factual result is the same under either position and whether the new notion can be reconciled with the initial policy reasons for the rejection of horizontal direct effect. In light of this it will be submitted that although in a broad sense, incidental direct effect is horizontal direct effect by the back door, it would have been better for individuals had it been permitted through the *front door* in the first instance.

III. The Doctrine of Incidental Direct Effect

The first matter to outline is the incidental direct effect doctrine as noted in the case law. Craig highlights the essence of the concept when he says that it refers to when 'an individual can plead a directive in an action against another individual and it can affect the outcome of the case even if it does not directly impose obligations on the private defendant'.[14] The central cases are *CIA Security*[15] and *Unilever Italia*.[16] In the former, CIA Security had argued in its claim against private companies (whose allegation in turn had relied on a piece of Belgian legislation) that Belgian legislation had not been notified to the Commission as required by Directive 83/189, art 8. The ECJ held that the relevant provisions of the Directive laid a clear obligation on Member States to notify draft technical regulations to the Commission before they were adopted. The key point was that CIA Security was able to rely on Belgium's failure to comply with the Directive in its legal action against the private parties (even though there was no strict obligation on the private parties themselves); Craig notes that the effect of this was 'to deprive the defendants of a defence that they would otherwise have had to the claim of unfair trading and thus alter the outcome of the legal proceedings and it was in this sense that the Directive had an incidental, albeit very important, effect in an action between the private parties'.[17] This decision was supported by the ECJ in Unilever where the Court acknowledged again that a

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9 'a member-State which has not adopted the implementing measures required by the directive in the prescribed periods may not rely, as against individuals, on its own failure to perform the obligations which the directive entails': Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629.

10 Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

11 Case C-201/02 *Wells and Secretary of State for Transport, Local Government and the Regions* [2004] ECR I–723.

12 Case C-194-94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I–2201.

13 C-443-98 *Unilever Italia v Central Food* [2000] ECR I-7535.

14 P Craig & G de Búrca, *EU Law Text, Cases and Materials* (n 6).

15 See text to (n 12).

16 See text to (n 13).

17 P Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' [2009] 34 EL Rev 349.

directive could not *itself* impose obligations on individuals but held that the principle was not violated here because the Directive did not define the substantive scope of the legal rule on which the national court would decide the case and it did not create rights or obligations for individuals.

IV. Exclusionary & Substitutionary Effect

It has been noted by commentators such as Craig[18] and Dougan[19] that a key part of the reasoning in these cases is built on the distinction between 'exclusionary effect' and 'substitutionary effect'. The former relates to the idea that the directive can be invoked in cases between individuals in order to have national law disapplied, so long as the directive does not create new law or new rights/obligations to be applied; rather it leaves a 'void' which is filled by other provisions of national law[20] (this is different from *substitutionary effects* where new rights or obligations are created). This distinction seems to fit with Dougan's conception of the 'primacy' model of EU supremacy (which treats EU primacy as a constitutional fundamental of the EU); from this starting point, the model envisages the principle of direct effect as neither necessary nor relevant when dealing with the exclusionary effects produced by the principle of supremacy.[21] This is the principal outline of the case law on incidental effect and its underlying premise.

V. The Potential to Reconcile with Original Prohibition of Horizontal Direct Effect?

To proceed with the main focus of this assessment, it is clear that from one perspective it could be contended that the incidental direct effect notion is not a back door version of horizontal direct effect. Certainly the ECJ at the time sought to maintain that they were not undermining the principle of non-horizontal direct effect in *Marshall* when they said in *Unilever*:

> [I]t is clear from settled case law of the Court that a directive cannot of itself impose obligations on individuals and cannot therefore be relied on as such against them. No derogation from that principle can be based on the judgment in CIA Security. The operative part of that judgment discloses no intention to reverse the principle according to which a directive cannot have direct effect in horizontal relations between individuals.[22]

This reasoning is supported if one follows the approach of the Court and maintains the distinction between *exclusionary* and *substitutionary* effects; Dougan notes that the '*primacy*' model of supremacy noted above which depends on this distinction, would reason that it is the principle of supremacy itself which is capable of obliging the national court to set aside any inconsistent domestic legislation and while this might *incidentally* affect the legal relations between the private parties, it does not actually amount to direct effect in the strict sense.[23] This interpretation would see *Unilever* as a case of the Court merely excluding a national legal rule on labelling that would otherwise have been applicable in this dispute, leaving it to Italian law to rule on the contractual consequences of this exclusion; not in fact then the imposition of direct effect to the private parties.[24] Thus by focusing on

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18 ibid.

19 M Dougan, 'When worlds collide! Competing Visions of the relationship between direct effect and supremacy' (2007) 44 CMLRev 931.

20 P Craig & G de Búrca (n 6).

21 M Dougan (n 16).

22 *Unilever Italia v Central Food* (n 13).

23 M Dougan, 'When worlds collide! Competing Visions of the relationship between direct effect and supremacy' (n 19).

24 This would come as a result of *substitutionary* effects where direct effect as a doctrine would be used to create new rights and obligations.

exclusionary rather than *substitutionary* effects (and by noting that no obligations were imposed on the private parties), one could reconcile these incidental direct effect cases with *Marshall* and the rule against horizontal direct effect (by just arguing that *Unilever* is an example of exclusionary rather than substitutionary effects); in line with the initial scope of the analysis, this would naturally indicate that incidental direct effect was not a *back door* version of horizontal direct effect.

VI. Flaws in the Reconciliation Argument: The Limits of Exclusionary/Substitutionary Effect Reasoning

However it is submitted that the above suggestion – that one can make a satisfactory reconciliation between incidental direct effect and the non-horizontal direct effect rule – is limited for a number of reasons. Firstly the accommodation sought is built on an inadequate premise; namely that the distinction between *exclusionary* and *substitutionary effects* which lies at the heart of the 'primacy' model is flawed. Craig says that in reality these two cases of *CIA Security* and *Unilever* show that 'directives can be enforced horizontally between the parties, provided that this can be rationalised in terms of an exclusionary rather than substitutionary effect'.[25] However Dougan has said that the distinction is arbitrary and formalistic: although the primacy model depends on the assumption of the existence of legal vacuums, he says 'surely every exclusion implies some form of substitution, and vice versa, since there can in fact be no such thing as a legal vacuum'.[26] Furthermore there are other, wider theoretical problems with the logic of this distinction (upon which reconciliation could have been established): it is not clear for instance, as noted by Craig, why an exclusionary effect is more desirable than a substitutionary one.[27] If the reasoning hinged on the underlying assumption that exclusionary effect was less *intrusive* than its counterpart, then this simply does not reflect the reality of the situation as noted above by Dougan.[28] Following this and even more crucially, if the idea was that exclusionary effect conformed with and stemmed from the primacy of European law over the national legal order, 'it is unclear why […] [notions of supremacy and primacy] should not also demand substitution even in horizontal cases'.[29]

Attempts to reconcile this case law with horizontal direct effect not only suffer from these conceptual difficulties, but also from comparing the factual outcomes. Although the individuals did not have any direct obligations imposed on them (theoretically in line with Marshall), 'non-compliance by the Member State nonetheless as in *CIA Security*, had a very marked incidental effect for the private party, since reliance by one party on the Directive led to the disapplication of the pre-existing national law and resulted in the imposition of contractual obligations on the defendant'[30] (which would not have been imposed had the previous national law been applied). Therefore substantively it is clear that obligations were placed on the private party and the degree to which this outcome differs from that which would have occurred had horizontal direct effect been allowed is limited.

Moreover alongside the broad factual similarity, in terms of legal effect and result at least, between the two instances, it has been argued by commentators such as Craig that one cannot accommodate the incidental direct effect doctrine with the policy reasons for denying horizontal direct effect in the first cases,[31] noting the difficulties with the legal certainty and textual rationales which

25 P Craig (n 17).

26 M Dougan (n 19).

27 P Craig (n 17).

28 The practical reality that substitution is taking place, which is evident from the disruption caused to the rule of the national legal system

29 P Craig (n 17).

30 ibid.

31 Noted below.

underpinned the reasoning of *Marshall* and cases which followed. For instance in *Wells,*[32] the ECJ explicitly used the legal certainty rationale to support the rule against horizontal direct effect:

> [T]he principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights. Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party.[33]

However as AG Jacobs noted in *Unilever* (an opinion not heeded by the Court) it would be wrong if courts were obliged to find a breach of contract between individuals, solely because of a failure to notify by the Member State under the directive and said that 'such consequences would be contrary to principles fundamental to our legal systems, and contrary in particular to fundamental requirements of legal certainty'.[34] He noted a number of potential uncertainties involved, from uncertainty as to whether the measure is a technical regulation and whether it required notification to uncertainty as to the appropriate remedies for the breach of contract, in the absence of fault in either party.

With these considerations in mind, it is clear that in practice, the ECJ has allowed a horizontal direct effect of sorts: the premise upon which accommodation between the prohibitive rule and the incidental effect doctrine was based (the distinction between exclusionary and substitutionary effects) is beset with conceptual problems, the factual outcomes in either scenario are similar and it is difficult to reconcile the incidental effect exception with the initial policy reasons for the rule against horizontal effect. This would all go to indicate that the reality of the case law shows that the ECJ has developed a position which virtually allows that which was banned in the first place: a back door horizontal direct effect.

VII. COMPARATIVE POSITIONS OF THE PARTIES IF HORIZONTAL DIRECT EFFECT WAS THROUGH THE *FRONT DOOR*

Despite the above conclusions that the ECJ has effectively allowed a back door horizontal direct effect, it is arguable whether it would not have been better, instead of having horizontal direct effect through the *back door*, to have it through the *front*. It is submitted here that the positions of the parties would have been enhanced had the ECJ simply allowed horizontal direct effect in the first place rather than create this apparent qualification (which more contradicts rather than qualifies the original prohibition). This argument can be demonstrated by comparing the actual positions of the parties in the case law, with the hypothetical results had the rule not existed initially. For instance Craig argues that as a result of *CIA Security* / *Unilever* the burden placed on the private party is greater than it would be had *Marshall* been concluded differently as the private party does not have control over fulfilment of the obligation in the Directive; compliance with the legal directive is not in the hands of the private firm but the Member State (additionally, the private individual may have had no knowledge that the State was in breach). As AG Jacobs says in *Unilever*: 'an individual would lose a case […] not because of his own failure to comply with an obligation deriving from Community law, but because of a Member State's behaviour'.[35] The fundamental problem is the individual's inability to determine whether or not he is liable and the fact that he has 'no control over [… his] own legal destiny.'[36]

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32 Case C-201/02 *Wells and Secretary of State for Transport, Local Government and the Regions* [2004] ECR I–723.

33 ibid para 56.

34 *Unilever Italia v Central Food* (n 13).

35 ibid.

36 P Craig (n 17).

Further this is compounded by the confusion of the fact that it might not be self-evident, prior to a Court ruling, that the Member State was in breach of the directive. The complexity of the technical issues operating in these cases might mean that the private firms are unable to assess whether the Member State law was compatible with the Union measure (the trigger for the incidental imposition of obligation). This ties in to the lack of certainty argument noted by AG Jacobs in *Unilever* above. Private parties are unable to plan their conduct effectively because of the convoluted position of the law in this regard.

Therefore it is clear that by focusing on the incidental effects of the Member State, the private individual is placed in a worse position then if horizontal direct effect had been allowed initially. His position under the rule is uncertain and more burdensome due to the fact that events or legal consequences which may impact him lie outside of his control.

VIII. Wider Limitations of the Prohibition on Horizontal Direct Effect

These comments point to the wider problems with denying horizontal direct effect of directives in the first place: the fact that the parties would have been in a comparatively better position had the rule not existed leads one to question the precise reasons and foundations for the prohibitive rule established in the earlier case law.

Initially it is possible to argue that there are some inconsistencies with the rationale for the rule laid down in *Marshall*. A good example of this is the *textual* reasoning and the notion that the prohibition follows an understanding of the wording of TFEU, art 288:[37] the idea being that since the binding effect of directives only exist in relation to 'each Member State to which it is addressed', a directive cannot of itself impose obligations on the individual. It is clear that the Court's adherence to the wording of the text here seems to conflict with its approach to the direct effectiveness of certain Treaty articles which, like directives, are also explicitly addressed only to the Member State. An example being the approach of the ECJ in *Defrenne v. Sabena*.[38] The Court dismissed the argument that what is now TFEU, art 157 could be relied upon only as against the State; it held that since 'article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals'. Thus using the fact that directives are addressed to Member States as justification for the rule is misleading, given the inconsistent approach of the ECJ in relation to directives and Treaty articles.

Moreover another argument used to support the prohibition is that to allow horizontal direct effect would blur the distinction between directives and regulations established by the Treaty (as noted by AG Slynn in *Marshall*[39]). However, again this argument has been noted to suffer from flaws. The main difference between these two mechanisms is that the Member States have the choice as to the form and methods of implementation for directives; however giving direct effect to directives, whether vertical or horizontal, 'is not intended to undermine this. It is not intended to take away this choice'.[40] The point that this fundamental difference between directives and regulations would not be affected by

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37 The precise wording of the article states: 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

38 Case 43/75 *Defrenne v. Sabena* [1976] ECR 455

39 'to give what is called 'horizontal effect' to directives would totally blur the distinction between regulations and directives which the EEC Treaty establishes in articles 189 and 191': Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.

40 P Craig & G de Búrca (n 6).

the granting of horizontal direct effect was emphasised by AG Lenz in *Faccini Dori v Recreb*[41] who noted:

> [I]n my view, the nature of directives does not preclude their having horizontal effect. Neither would that eliminate the demarcation between regulations and directives, since directives cannot have direct effect until the period for transposition has elapsed and only in the case of clear and unconditional provisions.

The final principal rationale adduced against horizontal effect is that of legal certainty; the inapplicability of this argument has been made clear by looking at the positions of the parties in *incidental direct effect* above. The complexities of the law in this area, due to the qualifications and exceptions which have emerged, have rendered the legal landscape difficult to navigate. This characterisation is even clearer when one acknowledges that presumably horizontal direct effect would only operate where the provisions were sufficiently clear, precise and unconditional. Moreover the criticism of this rationale was made by AG Jacobs in *Nicole Vaneetveld v Le Foyer SA*[42] where he said: 'it might well be conducive to greater legal certainty and to a more coherent system if the provisions of a directive were held in appropriate circumstances to be directly enforceable against individuals'.

It is clear from this that there are considerable limitations in the rationale rejecting horizontal direct effect for directives: justifications based on the wording of the provisions, the nature of directives/regulations and the need for legal certainty are all vulnerable to strong criticism, which in turn leads one to ultimately question the existence of the prohibition in the first place.

IX. Conclusion

It has been argued that broadly, incidental direct effect *is* horizontal direct effect by the *back door*: the legal effect on the individuals is similar in general terms and the argument used to justify the doctrine as a qualification rather than a contradiction to the *Marshall* rule is flawed. The argument suffers from weak conceptual distinctions and conflicting policy grounds. It has been submitted that it would have been better (for the parties involved) had horizontal direct effect been allowed through the *front door* in the first instance; an evaluation of the positions of the parties and the original rationale shows that it might now be time to abandon the prohibition on horizontal direct effect for directives.

41 C-91-92 *Faccini Dori v Recreb* [1994] ECR I-3325.

42 Case C-316/93, *Nicole Vaneetveld v Le Foyer SA* [1994] ECR I-763.

Contractual Privity and Inducing Breach of Contract

Wei Jian Chan[1]

The negative aspect of privity of contract states that duties cannot be imposed on third parties without their consent. This article argues that, while there appears to be two distinct lines of cases, the negative privity doctrine is subject only to one exception – the tort of inducing breach of contract. It further argues that both the general rule and its exception are justified. This analysis will be premised on the notion that contractual benefit can receive limited protection in a manner akin to property.

I. Introduction

The doctrine of privity is traditionally regarded as containing two aspects: only parties to a contract can acquire rights under the contract, and only parties to a contract can be subjected to duties by the existence of this contract.[2] This article concerns the latter aspect ('the negative privity doctrine').

This article will begin by providing an illustration of the negative privity doctrine. It will then explain an exception to the doctrine: the tort of inducing breach of contract. Thereafter, three *apparent* exceptions will be examined. First, the apparent exception whereby a third party who acquires property with notice of a contract affecting it may be bound by the contract. This is not an exception because it emanates from the tort of inducing breach. Second, the apparent exception whereby an undisclosed principal is bound by the contract. This is not an exception since it does not involve a relationship lacking contractual privity. Third, the apparent exception whereby a third party is under a duty established by the tort of causing loss by unlawful means. This duty is not an exception because it does not arise from contract. The tort of inducing breach of contract is therefore the only *de jure* exception to the negative privity doctrine. Finally, it will be argued that this arrangement is both conceptually coherent and desirable in practice.

II. Application of Negative Privity Doctrine

The application of this doctrine can be illustrated in the context of sub-contracting.

In *Hampton v Glamorgan CC*,[3] the defendant county council contracted with Shail, a builder, for the construction of a school for a lump sum of 13,600*l* including 450*l* for the installation of a heating system. Shail sub-contracted with the claimant, Hampton, for the installation of this heating system for 391*l*. Subsequently, Shail defaulted after only having paid 200*l*, and Hampton attempted to claim against the county council.

The House of Lords applied the negative privity doctrine in favour of the defendant. The key issue they considered was whether, on a true construction of the contract, Shail had contracted as a principal, or as Glamorgan CC's agent. This was of significance because Hampton could only impose

1 BA Jurisprudence (second year) at Harris Manchester College, Oxford. The author would like to thank Prof Louise Gullifer, Mr Roderick Bagshaw, Yu Jie Wu, and Nettie Choo for their comments.

2 E Peel, *Treitel: The Law of Contract* (13th ed, Sweet & Maxwell 2011) para 14-015.

3 [1917] AC 13 (HL).

an obligation upon Glamorgan CC to make payment directly for the heating, if and only if there was privity of contract between Glamorgan CC and Hampton.[4] This privity of contract could only be achieved if Shail was Glamorgan CC's agent, since '[Shail] had no authority to pledge the county council's credit' on his own.[5] The Court was unanimous in holding that, on a true construction of the agreement, Shail had contracted as a principal with Hampton, and not as Glamorgan CC's agent. The claim against Glamorgan CC was thus rejected.

Hampton v Glamorgan CC thus establishes that only where there exists privity of contract between parties can one party impose a duty upon another. Since Glamorgan CC was not a party to the contract between Hampton and Shail, Hampton was unable to impose a duty upon Glamorgan CC under that contract.

III. The Tort of Inducing Breach of Contract

There lies an exception to the negative privity doctrine, in the form of the tort of inducing breach of contract. This tort finds its origins in the case of *Lumley v Gye*.[6]

Wagner, a singer, contracted with the proprietor of the Queen's Theatre to provide services for three months. The defendant, with knowledge of this contract, engaged Wagner to sing at his Theatre instead, thereby inducing her to breach her contract with Queens's Theatre. The Court of Queens' Bench held that Gye was liable, stating that:

> [A] person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's, service, or by harbouring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law.[7]

After some confusion,[8] *Lumley v Gye* was held to be representative of a unique tort of inducing breach of contract, distinct from the tort of causing loss by unlawful means, in the current leading case, *OBG v Allan*.[9] Lord Hoffmann stated that the requirements of the tort are:

1. '[Y]ou must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect.'[10]
2. You must 'procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not.'[11]
3. You must have intention to cause the breach of contract: 'if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended.'[12]

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4 'In those circumstances, my Lords, fortunate or unfortunate as it may have turned out for the tradesman that he dealt with the builder, he cannot now, I fear, be permitted to set up a privity of contract with some one else, namely, the owner': ibid 23 (Lord Shaw).

5 ibid 19 (Earl Loreburn).

6 (1853) 118 ER 749 (HL).

7 ibid 752-753 (Wightman J).

8 The tort of inducing breach of contract was conflated with other torts: see *Quinn v Leathem* [1901] AC 495 (HL); *GWK Ltd v Dunlop Rubber Co Ltd* (1926) 42 TLR 376 (CA); *DC Thomson & Co Ltd v Deakin* [1952] Ch 646 (CA).

9 [2008] 1 AC 1.

10 ibid [39].

11 ibid [40].

4. There must be an actual breach of the contract: 'one cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability.'[13]

III.1 Accessorial Liability & Multital Rights

The tort of inducing breach of contract is a form of accessorial liability that is parasitic upon the breach by the contracting party.[14] As suggested by Erle J, 'he who procures the wrong is a *joint wrong-doer*, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of'.[15] Lord Hoffmann later unambiguously stated that '*Lumley v Gye* created accessory liability, dependent upon the primary wrongful act of the contracting party.'[16] Consequently, the third party is held 'liable jointly and severally with the infringer for the damages suffered by the plaintiff as a result of the infringement'.[17]

Such a reading is consistent with the case law. The House of Lords in *OBG v Allan* held that the tortfeasor must indirectly procure the breach of contract *by the contracting party* in order to be liable under the tort in *Lumley v Gye*. If the tortfeasor directly intervenes to cause the breach, he would be liable under the tort of causing loss by unlawful means instead.[18] While it has been acknowledged that this distinction is difficult to draw in practice,[19] the distinction excludes the possibility that the third party is being held directly liable for the breach.

The fact that the tort of inducing breach of contract is a form of accessorial liability should not be taken to mean that an independent duty has not been imposed on a third party. Every legal relation must be between two individuals: a single right must correlate to a single duty.[20] In effect, the existence of the tort of inducing breach of contract imposes upon the rest of the world a large number of individual but coincident duties to refrain from inducing breach of the contract. In Hohfeldian terms, the parties to a contract acquire a multital right against the world that they refrain from inducing breach of that contract.[21]

Therefore, the availability of an action under this tort means that the existence of a contract *ipso facto* imposes duties to refrain from interfering with the contracting parties in performing the contract upon multiple third parties.

III.2 Potential Objections

Two objections may be raised against regarding the tort of inducing breach of contract as an exception to the negative privity doctrine.

First, one might suggest that the contractual parties do not agree to impose a contractual obligation on the third party: the duty imposed is not carefully negotiated between the parties. In order to constitute a true exception to the doctrine, it must be the very subject matter of the contract that imposes the duty on the third party.

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12 ibid [43].

13 ibid [44].

14 See *Sefton v Tophams Ltd* [1965] Ch 1140 (CA); *Allen v Flood* [1898] AC 1 (HL).

15 *Lumley v Gye* (n 6) 755.

16 *OBG v Allan* (n 9) 20.

17 *CBS Songs v Amstad Consumer Electronics* [1988] AC 1013 (HL), 1058 (Lord Templeman).

18 See *J T Stratford & Son Ltd v Lindley* [1965] AC 269, 324 (HL).

19 See A Dugdale and M Jones, *Clerk & Lindsell on Torts* (20th ed, Sweet & Maxwell 2013) para 24-35.

20 W Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (1st ed, Yale University Press 1919).

21 A Campbell, 'Some Footnotes to Salmond's Jurisprudence' (1941) 7 CLJ 206, 211-212.

However, this criticism perhaps misses the point. While contractual parties do not agree between themselves to impose this tort-based duty on the third party, the content of the duty owed by the third party nonetheless turns on the content of the contract. The content of the contract determines the nature of the breach by the contracting party, and the substance of what must be induced by the tortfeasor. If, for instance, the contract is one of employment, then one potential obligation imposed by the tort would be to not to hire the employee for similar services. Thus, it is the subject-matter of the contract that determines the exact scope of the duty imposed on the third party. This criticism is therefore misplaced.

Second, it may be argued that the contractual parties cannot make a third party liable for anything other than procuring breach of contract. This criticism goes only to the scope of the exception and not to its existence. It is clear from the earlier analysis that a duty arising specifically from the *content* of the contract is indeed imposed on third parties between contractual parties.

As such, the tort of inducing breach of contract can be seen as a significant exception to the negative privity doctrine.

IV. Acquisition of Property With Notice

There exists a line of cases which give the appearance of creating a distinct exception to the negative privity doctrine. In these cases, a third party purchases property with notice of the fact that the property is involved in a pre-existing contract. It will be argued that these cases do not constitute a *sui generis* exception to the negative privity rule that is based upon the notion of constructive notice. Rather, this line of cases is merely a result of the application of the aforementioned exception of the tort of inducing breach of contract.

IV.1 De Mattos v Gibson

The case of *De Mattos v Gibson*[22] establishes the rule that where a party acquires property with notice of a pre-existing contract, he may be bound not to use the property inconsistently with it. Knight-Bruce LJ, in an oft-quoted passage, suggested that:

> Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller.[23]

The facts of *De Mattos v Gibson* can be used to illustrate how the requirements of the tort of inducing breach of contract are met. In this case, Curry chartered a ship to De Mattos, before mortgaging the ship to Gibson.[24] Gibson had notice of the charterparty, and received benefit of the money paid for it. Following damage to the ship during a voyage, Gibson threatened to sell the vessel, without binding the subsequent purchaser to the earlier charterparty. De Mattos thus brought an action against Gibson for specific performance of the charterparty and an injunction restraining his use of the ship in a manner inconsistent with charterparty.

Indeed, the Lord Chancellor eventually refused to intervene in favour of De Mattos. However, his judgment was based on the fact that Gibson had not done anything to interfere with the

22 (1858) 45 ER 108 (HL).

23 *De Mattos v Gibson* (n 22) 110.

24 The decision did not turn on any particular provision of the law of mortgages.

charterparty between Curry and De Mattos. While he had threatened to sell the vessel, he had only done so when the charterparty was virtually at an end, after having advanced considerable sums to aid in the repair of the vessel. Therefore, since there had been no interference on Gibson's part, Gibson could not be held liable.

However, the Court acknowledged that Gibson could have been liable to De Mattos. The Lord Chancellor suggested that '[i]f, for instance, when the vessel put into Penzance, and before a reasonable time for Curry's doing the repairs had elapsed (supposing his power of sale to have been then available), [Gibson] had determined to exercise [the power of sale], expressly declaring that he meant to conceal the charter from the purchaser, or much more certainly if he had endeavoured to hinder the voyage by sending the vessel in a different direction, I think that [Gibson] might have been restrained from doing such acts as these by injunction.'[25]

In this counterfactual situation, Gibson's conduct would have met all four requirements of the tort of inducing breach of contract. Gibson knew that his sale could result in a breach of the charterparty. He would have procured breach intentionally, as a means for the furtherance of his private business. The breach would have been a means for him to avoid paying for repairs to the vessel. Therefore, while liability in *De Mattos v Gibson* was not ultimately made out, the case could be consistent with the tort of inducing breach of contract.

The Lord Chancellor suggested that 'a Court of Equity […] will restrain the employment of the vessel in a different manner […] according to the principle so fully expressed in the case of *Lumley v. Wagner*.'[26] As a matter of precedent, one might persuasively argue that the *ratio decidendi* in *De Mattos v Gibson* is premised on the tort of inducing breach of contract. Nonetheless, this analysis is not yet conclusive. In order to fully appreciate the application of the tort of inducing breach of contract in such situations, we must consider subsequent decisions applying the rule in *De Mattos v Gibson*.

IV.2 The Strathcona

In *Lord Strathcona Steamship Co. v Dominion Coal Co, The Strathcona*,[27] a factual scenario similar to that in *De Mattos v Gibson* arose. Lord Strathcona Steamship Co. ('LSSC') had issued a writ claiming specific performance of the obligations under the charterparty by ('DCC'). While the Privy Council denied specific performance, it granted an injunction restraining DCC from acting inconsistently with the charterparty.

The principle stated by Lord Shaw was that the individual might be liable for an injunction under a constructive trust to be imposed by the Court, if he receives property with notice of a prior agreement relating to the property. In his words:

> If a man acquires from another rights in a ship which is already under charter, with notice of rights which required the ship to be used for a particular purpose and not inconsistently with it, then he appears to be plainly in the position of a constructive trustee with obligations which a Court of equity will not permit him to violate.[28]

The doctrine set out by Knight-Bruce LJ in *De Mattos* was explicitly applied in the reasoning of the court.[29] However, the Court took the view that the rule in *De Mattos* fell within the rule in *Tulk*

25 *De Mattos v Gibson* (n 22) 116.

26 ibid.

27 [1926] AC 108 (PC).

28 *The Strathcona* (n 27) 125.

29 ibid 117.

v Moxhay,[30] in which 'the remedy is a remedy in equity by way of injunction against acts inconsistent with the covenant, with notice of which the land was acquired'. As a matter of precedent, this decision appears to be inconsistent with the earlier judgment in *De Mattos v Gibson*.

The Strathcona was decided in the Privy Council. While it is not binding upon subsequent judges, 'being one of a Board which included Lords Haldane, Wrenbury and Blanesburgh, in addition to Lord Shaw, [it] is (so far as it deals with questions of equity) entitled to respect which in a common law lawyer borders upon awe.'[31] If the above analysis is right, then *The Strathcona* could result in a bifurcation of the two lines of cases; cases involving chattels would have a distinct juridical basis from the tort of inducing breach of contract.

IV.3 Port Line v Ben Line Steamers

It was correctly held by Diplock J in *Port Line v Ben Line Steamers*[32] that *The Strathcona* was wrongly decided, to the extent that it suggested the existence of notice gave rise to the equity.[33] He refused to follow *The Strathcona* in making his judgment, providing two arguments suggesting that the conflation of *De Mattos* and *Tulk v Moxhay* was highly incoherent as a matter of law.

First, the *Tulk v Moxhay* rule requires that the person seeking to enforce the restrictive covenant have a *proprietary* interest in the property for the benefit of which the negative covenant was imposed, at the time of the creation of the negative covenant. The general principle was 'if an equity is attached to the *property* by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.'[34] In *The Strathcona*, LSSC only had a gross time charter, a contract for services that accords no proprietary or possessory rights in the ship.[35] If the *De Mattos* doctrine was based on *Tulk v Moxhay*, then the injunction should not have been granted in *The Strathcona*.

The only property interest existing then that could have resulted in the suggested binding nature would be the covenantee's commercial interest in the observance of the covenant. If this were the proprietary right through which third parties are bound, then the Privy Council in *The Strathcona* would have in reality been basing their decision on the tort of inducing breach of contract.

Second, if the juridical basis of intervention in *The Strathcona* was indeed the rule in *Tulk v Moxhay*, the decision in *The Strathcona* would have been inconsistent with *Dunlop Pneumatic Tyre v Selfridge*.[36] Dunlop had a proprietary interest in the tyres before it sold them to D & Co, subject to the price maintenance covenant. Applying the rule in *Tulk v Moxhay,* Selfridge should have been bound to perform the covenant since they had knowledge of its existence. Therefore, the conflation of the *De Mattos* and *Tulk v Moxhay* rules would be contrary to prior authority.

For reasons based on both precedent and the application of law, the implementation of the *De Mattos* rule in *Strathcona* does not involve invoking the law relating to restrictive covenants. It should instead be seen as an application of the tort of inducing breach of contract. Indeed, but for the controversy surrounding the conflation of Knight-Bruce LJ's statements with the rule in *Tulk v*

30 (n 27).

31 *Port Line v Ben Line Steamers* [1958] 2 QB 146 (QB).

32 ibid.

33 Diplock J suggests that the Court in *The Strathcona* followed *De Mattos v Gibson* (n 22) in its entirety: *Port Line v Ben Line* (n 31) 166.

34 *Tulk v Moxhay* (1848) 41 ER 1143 (HL), 1144 (Cottenham LC).

35 *Port Line v Ben Line Steamers* (n 31) 166 (Diplock J).

36 [1905] AC 454 (HL), 461.

Moxhay, *The Strathcona* falls squarely within the scope of the tort of inducing breach of contract,[37] since its facts are so similar to that of *De Mattos*. The main factual difference in *The Strathcona*, which brought the case more squarely within the tort, was that DCC explicitly refused to perform the charterparty, claiming frustration, which would have resulted in a breach, thus permitting the issuance of an injunction against them.

Ultimately, Diplock J distinguished *The Strathcona* on its facts, since in the instant case, Ben Line did not have actual knowledge of the specific content of Port Line's rights under the charterparty. In his view, Port Line could thus not have acquired any rights against Ben Line. Nonetheless, *Port Line v Ben Line Steamers* convincingly establishes the proposition that the tort of inducing breach of contract is the only exception to the negative privity doctrine. The only question remaining is whether courts have deviated from this analysis in subsequent cases.

IV.4 Swiss Bank v Lloyd's Bank

In *Swiss Bank v Lloyd's Bank*,[38] the analysis in *Port Line v Ben Line Steamers* was conclusively affirmed.

Swiss Bank lent money to Israel Financial Trust ('IFT') to acquire shares in First International Bank of Israel ('FIBI'). IFT later purported to give Lloyd's Bank an equitable charge over the shares. At this time, Lloyd's Bank did not have actual notice of the terms of the exchange control consents, but Lloyd's Bank later acquired notice. Subsequently, Lloyd's Bank sold the shares. Swiss Bank brought a claim against Lloyd's Bank for repayment of the loan out of the proceeds of Lloyd's Bank's sale of the FIBI shares. It was held by Browne-Wilkinson J that:

> if at the date of the Lloyds charge, Lloyds had had actual notice of the plaintiff's rights in relation to the FIBI securities and the plaintiff had been informed of IFT's intention to grant the Lloyds charge, the plaintiff could in [his] judgment have obtained an injunction restraining Lloyds from taking the charge since by so doing they would have been committing the tort [in *Lumley v Gye*].[39]

Accordingly, he awarded an injunction.

Browne-Wilkinson J premised his interpretation of the *De Mattos* principle squarely on the tort of inducing breach of contract. He held that '[w]hen [*De Mattos*] was decided, it had already been recognised at common law that it was a legal wrong or tort for someone knowingly to interfere with the contractual rights of others', based on the judgment in *Lumley v Gye*. Based on this analysis, he held that Lloyd's bank could not be liable for the imposition of an injunction because they did not have actual notice of the existence of the contract, which, as considered, is a requirement for the tort of inducing breach of contract. Browne-Wilkinson J's statements constitute *expressis verbis* support for the proposition that the two lines of cases are in reality one.

IV.5 A Broader Trend

In the light of the cases discussed, it seems that the cases relating to rights attaching to property have been decided on the basis of the tort of inducing breach of contract. While earlier cases like *De Mattos* have been somewhat ambiguous and *The Strathcona* was a step in the wrong direction, *Port Line* and *Swiss Bank* confirm that this line of cases is an application of the exception of the tort of inducing breach of contract. Courts have reached this conclusion both as a matter of precedent and as a matter of law.

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37 'If A agrees with B to allow B the use of A's ship, and subsequently A sells to C, who is all the time aware of the agreement between A and B, C, by denying to B the enjoyment of the vessel during the existence of the contract, renders A liable to B in contract.': E C S Wade, 'Notes' (1926) 42 LQR 139, 140.

38 [1979] Ch 548 (Ch D).

39 ibid 57.

In order to establish whether the tort of inducing breach of contract is the only *de jure* exception to the negative privity doctrine, this essay will now proceed to consider the doctrines of undisclosed principal and causing loss by unlawful means.

V. Undisclosed Principal

The doctrine of undisclosed principal provides that '[a]n undisclosed principal is bound by contracts and conveyances made on his account by an agent acting within his authority'.[40] It is not an exception to the negative privity doctrine.

An undisclosed principal may bring an action on or be liable under a contract that his agent had actual authority to enter into. If a third party discovers the existence of the undisclosed principal, he may elect to sue either the undisclosed principal or the agent.[41] The undisclosed principal may not ratify the contract subsequently if his agent did not act within the scope of the mandate at the time of formation.[42] The doctrine thus appears to be premised on the principles of agency, and it seems that in reality, the contract is treated as between the third party and the undisclosed principal.

Judicial opinion supports this view. Scrutton LJ suggests that the third party 'has in fact made a contract with [the undisclosed principal]'.[43] Lord Lindley stated that the contract was 'in truth, although not in form, that of the undisclosed principal himself'.[44] It therefore seems that 'the undisclosed principal is also a party to the contract entered into by the agent on the undisclosed principal's behalf'.[45]

This view is further supported by the rule that there cannot be subsequent ratification of the contract by the undisclosed principal. Where contractual privity has been established by ratification, the courts explained their conclusion on the legal fiction that the agent had authority from the outset.[46] Indeed, 'ratification cannot take place where the agent was unauthorised as it would be inconsistent with the agent being the sole contracting party at the inception of the contract'.[47] The modification of the contract to give rise to privity between the principal and the third party would require fresh consideration.

Since there is privity of contract between the undisclosed principal and the third party, there has been no duty imposed upon an individual who is not a party to the contract. Accordingly, the doctrine of undisclosed principal is not an exception to the negative privity doctrine.

VI. Causing Loss by Unlawful Means

The existence of the tort of causing loss by unlawful means as a distinct entity was confirmed by the House of Lords in *OBG v Allan*.[48] The tort has been said to be based on the principle that 'a man who is carrying on a lawful trade or calling has a right to be protected from any unlawful interference with

40 *Restatement (Second) of Agency* (American Law Institute 1958) at [186].

41 *Priestly v Fernie* (1863) 3 H. & C. 977 (Court of Exchequer)

42 *Keighley, Maxsted & Co. v Durant* [1901] AC 240 (HL).

43 *Gardiner v Heading* [1928] 2 KB 284 (CA), 290.

44 *Keighley, Maxsted & Co. v Durant* (n 42) 261.

45 C Tan, 'Undisclosed Principals and Contract' (2004) LQR 480, 487.

46 See *Bolton Partners v Lambert* (1889) 41 Ch D 295.

47 C Tan (n 45) 505.

48 While there is disagreement as to the label for the tort (cf Lord Nicholls at [141]), this essay will adopt Lord Hoffmann's label: *OBG v Allan* (n 9) at [46]-[64] (Lord Hoffmann), [141]-[167] (Lord Nicholls).

it'.[49] The conduct constituting the tort centres on the interference with the valid business relationship of a third party.[50]

The tort of causing loss by unlawful means is not an exception to the doctrine of privity since liability for the tort does not arise from contract between the claimant and a third party.[51] A contract between the claimant and the third party is not necessary. Liability is imposed because of culpability, not the nature of contract. Any overlap with the protection of contract is coincidental and not an element of the tort. Two factors point to this conclusion.

First, it is necessary to the commission of the tort that unlawful means be used. In the case of *Allen v Flood*,[52] the Law Lords consistently held that the motives of the defendant, no matter how distasteful, were insufficient to found a cause of action where the act itself was not unlawful.[53] In *OBG v Allan*, the majority held that only wrongs actionable in civil law were sufficient. Lord Nicholls, dissenting, suggested that unlawful acts comprised 'all acts a defendant is not permitted to do, whether by the civil law or criminal law'.[54] While there has been disagreement as to the precise scope of 'unlawful means' required, it has been recognised at the very minimum that the tort has a requirement that the defendant's conduct constitute a violation of the law in some form.

Second, intention is an 'essential ingredient' to the tort.[55] Specifically, 'there must be an intention to cause loss'.[56] This is a distinctly higher mental element requirement than the need for intention to *induce breach of contract* found in the *Lumley v Gye* tort. Here, 'intention serves as the factor which *justifies imposing liability* on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant'.[57]

These factors suggest that courts impose liability for inducing breach of contract because of the *culpability* of the defendant, as established by his use of unlawful means and malicious state of mind. Indeed, the tort imposes a duty on the tortfeasor to refrain from interfering with contractual relations, but this duty is an extension of the tortfeasor's ordinary duty not to engage in unlawful conduct, rather than a result of the contractual relations between the claimant and third party. Contractual relations therefore have at best a mere *historical involvement* in the commission of the tort. Accordingly, the tort of inducing breach of contract is not an exception to the negative privity doctrine.

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49 *Ex parte Island Records* [1978] Ch 122 (CA) at 136 (Lord Denning MR).

50 The requirements are: '(1) the existence of a valid business relationship with a third party; (2) that the defendant knew or ought to have known of this relationship; (3) that the defendant's conduct prevented formation of a contract or its performance in circumstances in which there was no breach of an existing contract; (4) the defendant's conduct qualified as unlawful means or warranted exceptional treatment; (5) the unlawful means were not directly actionable by the claimant; (6) the defendant intended to cause the claimant harm; and (7) the defendant's conduct was the proximate cause of the claimant's loss': A Dugdale, M Jones, *Clerk and Lindsell on Torts* (n 19) para 24-70.

51 'This tort is based on the deliberate use of unlawful means; it differs therefore from both inducing breach of contract (where liability stems from a direct invasion of a legal right)': ibid para 24-72.

52 See text to n 14.

53 '[H]is action being lawful, and no unlawful means being used in carrying it out, the motive, even if it be personal ill-will to another, would not, in my opinion create liability to a claim in damages': ibid 166 (Lord Shand); '[I]t humbly appears to me to be against sound principle to hold, that the additional ingredient of malicious motive should give a right of action against an individual for an act which if done without malice would not be wrongful, although it results in damage to a third person': ibid 172 (Lord Davey).

54 *OBG v Allan* (n 9) at [162].

55 ibid (n 9) at [141] (Lord Nicholls).

56 ibid [62] (Lord Hoffmann).

57 ibid (n 9) at [166] (Lord Nicholls) [Emphasis added].

VII. A Justified Arrangement

The proposition that the only exception to the negative privity doctrine is the tort of inducing breach of contract thus appears to be convincingly established. This arrangement is a justified one. This essay will consider the justification for both the exception and the general exclusionary rule as regards the imposition of duties on third parties.

VII.1 Exception to the Rule

The key question here is why the tort of inducing breach of contract is the only exception to the negative privity doctrine. The tort of inducing breach of contract binds third parties, and gives contractual parties a right *in rem*[58] to not have their contractual rights interfered with, because the law regards a contractual party's right to the benefit of a contract as property.[59]

This article will address the question in four steps. First, it will be argued that contractual benefit can be treated as property. Second, contractual benefit should be treated as property. Third, the tort of inducing breach of contract is meant to protect contractual benefit as a proprietary interest. Fourth, the contrary arguments are mistaken.

VII.2 Contractual Benefit as Property

This article does not seek to give a philosophical account of the nature of property. However, Lord Wilberforce's statement in *National Provincial Bank v Ainsworth* is helpful in framing the inquiry into the nature of property: a proprietary interest is 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability'. [60]

At English law, personal property is divided into things in possession and things in action, according to the remedies by which rights to them may be enforced. A thing in action is 'a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession'.[61] Applying Lord Wilberforce's criteria in *Ainsworth*, contractual rights, or the entitlement to the benefit of a contract, can be treated as things in action.[62]

First, this benefit is definable. Following Penner, we must distinguish between the right and its value. The identity of the person against whom the right is held is only relevant to ascertaining the contractual right's value. This permits 'the right itself to appear as if it reaches right through the debtor or the bank or the company to the property it legally holds.'[63]

The value of a contractual right can thus be ascertained by looking past the party on which the duty is incident, to the value of his performance. Upon an objective construction of the contract's

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58 To adopt a Hohfeldian analysis, whether a right is *in rem* or *in personam* turns on the degree of exigibility exhibited by the right. In the instant case, the duty imposed by the tort of inducing breach of contract is universally exigible and thus can be accurately characterised as a right *in rem*.

59 For the sake of clarity, this article takes the view that the characterization of a thing as property that gives rise to the protection, rather than the other way around.

60 *National Provincial Bank v Ainsworth* [1965] AC 1175 (HL) at 1247-1248A.

61 *Torkington v Magee* [1902] 2 KB 427 (KB), 430.

62 See generally M Bridge, L Gullifer, G McMeel, S Worthington, *The Law of Personal Property* (1st ed, Sweet & Maxwell 2013) para 21-007.

63 J Penner, *The Idea of Property in Law* (1st ed, OUP 2000) 130.

terms,[64] the scope of a contractual right can be defined in terms of the value of performance or the damages available to the promisee in the event of breach.

Second, contractual rights are also capable of assumption by third parties. Contractual rights are assignable, subject to certain exceptions.[65] The effect of assignment is a transfer of the Hohfeldian rights under a contract to another party, while the duties are not shifted:[66] if A owes a contractual obligation to B, and B assigns this obligation to C, the effect of assignment is that B's property in A's obligation is transferred to C. There is no new contractual relationship between A and C.

Third, contractual rights have a significant degree of permanence or stability as a result of the protection offered by the law. Upon the formation of a valid contract backed by consideration, parties are only allowed to escape their obligations under very limited circumstances: *viz.* mistake and frustration. In the event of a breach of a primary contractual obligation, a secondary obligation is likely to arise. Actions are available at law to enforce the payment of such damages. Further, actions are available in the event that obligations are breached.

The treatment of contractual benefit as a form of property is perhaps attributable to the intervention of equity: equity permitted the assignment of debts and contractual rights when this was not permitted by the common law, and treated a promise to grant security as tantamount to security.[67] Indeed, it was held by Lord Mance in *Belmont Park Investments v BNY Corporate Trustee Services* that 'a bare contractual claim is also a form of property'.[68]

VII.3 Scope of Property Interest

Lee[69] has argued that the property aspect in contractual rights should be limited to their status as promises: the right to performance cannot in itself be regarded as property. The inducement tort only applies where a third party *causes* the breach of contract, because the 'specific interest that the inducement tort protects is that of the promisee's superior access to the promisor's promise'.[70] Lee argues that if the inducement tort were concerned with protecting performance generally, then a third party should be liable wherever his conduct inhibits performance. Since this is not the case, it is only the interest in the *promise* and not the contractual right generally that constitutes property.

This analysis draws too fine a distinction. The requirement of causation imposed by the law is explicable on the basis that it is unfair to hold an individual liable for harm that he did not cause. It is axiomatic that causation must be established in order for liability to arise. Further, the requirement of *inducement* and not just *causation* can be explained on the basis that the tort is one of accessorial liability. Epstein's view[71] that the promised performance should be regarded as property is preferred. As considered, it would not be conceptually incoherent to treat contractual rights as if they were property, and it is not inconsistent with the requirements of the inducement tort to adopt such a conclusion.

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64 The approach of English law is 'not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention': *Deutsche Genossenschaftbank v Burnhope* [1995] 1 WLR 1580 (HL).

65 There are two mechanisms for the assignment of intangible property – statutory and equitable assignment: See Law of Property Act 1925, Section 136; *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, 461.

66 *Tolhurst v Associated Portland Cement Co* [1902] 2 QB 660, 668.

67 E McKendrick, *Goode on Commercial Law* (4th ed, OUP 2010) 31.

68 [2011] UKSC 37 at [167].

69 P Lee, 'Inducing Breach of Contract, Conversion and Contract as Property' (2009) 29 OJLS 511, 522-525.

70 ibid 524.

71 R Epstein, 'Inducement of Breach of Contract as a Problem of Ostensible Ownership' (1987) 16 Journal of Legal Studies 1.

VII.4 Effect of Treatment as Property

The effect of the aforementioned treatment of contractual rights as property, is that they can, to use Hohfeldian terms, be construed as a multital right that is exigible against all others. In Millett LJ's words, '[t]he essence of a legal estate is that it binds the whole world, not just the parties to the grant and their successors'.[72] Rights are not proprietary *because* they are binding on third parties; rather, they bind *as a result* of being proprietary.[73]

Consequently, the existence of a contract and its contractual benefit, imposes a bundle of coincident duties upon all other individuals. These duties collectively required third parties to refrain from acting inconsistently with the contractual benefit accruing to parties to the contract. It is this effect of the treatment of contractual rights that accounts for the exception to the negative privity doctrine. The tort of inducing breach of contract 'treats contractual rights *as a species of property* which deserve special protection, not only by giving a right of action against the party who breaks his contract but by imposing secondary liability on a person who procures him to do so'.[74] The tort is the mechanism through which the law regulates third party interference with the benefit of contracts.

The tort is the *only* exception, because it applies to the unique scenario in which the aspect of contracts which constitutes property (i.e. the contractual benefit) has been interfered with by a third party. Insofar as the law deems fit to provide protection to private property,[75] this exception to the negative privity doctrine is justified as a matter of the application of law.

VII.5 A Matter of Principle

Further, as a matter of principle, there are strong reasons for making the tort of inducing breach of contract an exception to the negative privity doctrine. Three arguments will be considered.[76]

First, the protection of contracts against third parties increases the security of contracts and makes it easier for a party to rely on his contract, which is desirable as it assists in extending the range of choices. Second, the institution of private property makes certain commodities available for trade and exchange and thus maximises social wealth. If contracts were not protected against third parties, they would not be a secure thing to trade in. Third, private property institutions provide a suitable reward for productive endeavour: engaging in contractual exchange is a form of productive behaviour which should be supported by a grant of an interest which can be protected against strangers.

As such, it seems that the tort of inducing breach of contract should be the only exception to the negative privity doctrine, both as a matter of law and as a matter of principle.

VII.6 Affirming the Sole Exception

The property-based analysis of the *De Mattos v Gibson* exception (premising the *De Mattos* line of cases on the rule in *Tulk v Moxhay*) should be rejected for policy reasons. This exception would apply to a narrow range of cases in which the subject matter of the contract is property: e.g. a bareboat charterparty.

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72 *Bruton v London & Quadrant Housing Trust* [1998] QB 834 (CA) at 845E

73 The effect on third parties is not 'the basis upon which that protection is given' but is simply a term descriptive of the '*effect* of that protection': *Yanner v Eaton* (1999) 201 CLR 351 (QB) at [85] (Gummow J).

74 Emphasis added: *OBG v Allan* [2008] 1 AC 1 at [32]; Epstein concurs that '[t]he tort of inducement of breach of contract is best understood as an unsuspected manifestation of the problem of ostensible ownership.': R Epstein (n 71) 1, 2.

75 A discussion of normative reasons for the protection of property by the law goes beyond the scope of this article.

76 R Bagshaw, 'Inducing Breach of Contract' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence (Fourth Series)* (1st ed, OUP 2000) 131, 133-137.

This range of situations would be equally well covered by the tort of inducing breach of contract. The existence of two overlapping exceptions to the negative privity doctrine would be both pointless and needlessly confusing.

The property-based analysis of the *De Mattos v Gibson* exception should be rejected. The analysis based on the tort of inducing breach of contract is therefore the best justification for the exception to the negative privity doctrine.

VIII. Potential Objections

Two potential objections to the above analysis will now be considered. First, the argument that the strict mental element requirement of the tort of inducing breach of contract is inconsistent with the corpus of property law. Second, that the failure to extend the tort of conversion to contractual rights reflects incoherence in the negative privity doctrine.

VIII.1 The Mental Element

The tort of inducing breach of contract requires the tortfeasor to act with express intent to procure a breach of contract: 'if the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then in my opinion it cannot for this purpose be said to have been intended'.[77]

This is a significantly stricter mental element requirement than ordinarily found in property law related torts. For instance, the tort of conversion requires intention only in relation to the tortfeasor's assertion of his own title.[78] The tortfeasor faces strict liability in relation to denying the claimant's title.[79] Further, while intention is required in relation to the tort of trespass, the threshold is merely that of intent to make contact with the claimant's goods.[80] One might therefore argue that the requirements of the tort of inducing breach of contract are not consistent with the tendencies of property law.

However, this inconsistency does not lead to the conclusion that the tort of inducing breach of contract is doctrinally incoherent. The tort of inducing breach involves a tripartite relationship and potentially two innocent parties. If a third party acts maliciously in inhibiting a contractual party's exercise of his rights, Courts are justified in intervening in favour of the contractual party. Where both parties are innocent, it is a matter of policy: Courts are merely applying a pre-established policy for the incidence of loss on either party. In Epstein's words, '[t]he case for protecting the innocent purchaser of labor against the tort action of the prior contracting party seems to rest on a sense of the *appropriate balance of convenience* in any conflict between two innocent parties.'[81]

Indeed, the strict mental element of the tort of inducing breach of contract arises because of the nature of the conduct that must be intentionally performed. Inducing breach of contract is a form of conduct that must be specifically directed against a contractual party, unlike conduct like mere interference with goods. '[I]f the breach of contract is neither an end in itself nor a means to an end, but merely a foreseeable consequence, then […] it cannot for this purpose be said to have been

77 *OBG v Allan* (n 9) at [43] (Lord Hoffmann).

78 *Fouldes v Willoughby* (1841) 8 M&W 540 (Court of Exchequer).

79 *Lancashire and Yorkshire Railway Co v MacNicholl* (1918) 8 LJKB 601 (CA), 605.

80 *William Leitch & Co v Leydon* [1931] AC 90 (HL), 107; See also M Bridge, L Gullifer, G McMeel, S Worthington (n 62) para 16-006.

81 R Epstein (n 71) 25 (emphasis added).

intended.'[82] The strict mental element requirement is thus both within the discretion of courts, and justified as a matter of principle.

Thus, the strict mental element requirement of the tort of inducing breach of contract should not be considered an inconsistency within the negative privity doctrine.

VIII.2 The Tort of Conversion

One might argue that the tort of conversion should be a further exception to the negative privity doctrine. Actions in conversion are available *vis-à-vis* certain forms of property. It is possible to extend conversion to things in action and contractual rights.[83] Thus the lack of an action in conversion in respect of the contractual benefit[84] might be construed as an inconsistency with the above analysis.

This view should be rejected: the availability of an action in conversion is not a necessary corollary to the classification of a right as proprietary in nature. 'Conversion is historically a tort *against a person's interest in a chattel*, being derived from the action for trover, which included a fictitious allegation that the plaintiff had lost the chattel and that the defendant had found it.'[85]

Its extension to things in action was a relatively recent development, and it is not crucial or necessary to the idea of property that conversion be available as a remedy. The law on conversion was modified in the Torts (Interference with Goods) Act 1977. Conversion was defined as applying to 'goods', which it defines as 'all chattels personal other than things in action and money'.[86] While the 1977 Act was not meant to be a codification or exhaustive restatement of the law, it is trite law that apart from goods, the tort of conversion applies only in limited circumstances to things in action.[87]

Notably, the extension of conversion to contractual rights was rejected by the House of Lords in *OBG v Allan*, on the grounds that it imposes a regime of strict liability, goes against the juridical tendency of limiting liability for pure economic loss, and that there is no authority supporting such an extension.

The strict liability imposed by the tort of conversion is of particular concern. Goymour and Watterson note that the extension of a strict liability wrong to a large category of interests (things in action) is a dramatic step. '[W]ithout case law settling the tort's scope and practical implications in concrete settings, [such an extension] would be likely to generate significant uncertainty in commercial transactions'.[88] The extension of conversion to contractual rights may well be a matter better left to Parliament. The present law on conversion is not an inconsistency with the negative privity doctrine.

VIII.3 Privity as a Whole

The general exclusionary rule of the negative privity doctrine is justifiable because the policy of the law is not to permit individuals to impose forbearances upon others without their consent. Owing to the consensual nature of contracts, duties can only validly be imposed where individuals have given the due consent.

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82 *OBG v Allan* (n 9) at [41] (Lord Hoffmann).

83 A Goymour and S Watterson, 'Testing the boundaries of conversion: account-holders, intangible property and economic harm' [2012] LMCLQ 204, 213.

84 It was expressly held in *OBG v Allan* (n 9) that there an action in conversion is unavailable in relation to contractual rights.

85 ibid [95] (Lord Hoffmann) [Emphasis added].

86 Section 14(1).

87 See M Bridge, L Gullifer, G McMeel, S Worthington (n 62) para 16-034.

88 A Goymour and S Watterson (n 83) 226.

Individuals cannot transfer property that they do not have title to or possession of: *nemo dat quod non habet*. Since rights and duties are correlative, the existence of property in the form of a contractual right is coextensive with the existence of the correlative duty. A party who purports to impose a duty on a third party in favour of the counterparty is attempting to give something he has no right to—the performance of an obligation by that third party. Accordingly, parties to a contract cannot agree to impose duties upon third parties.

This analysis is also consistent with the converse aspect of the privity doctrine. Following the coming into force of the Contracts (Rights of Third Parties) Act 1999, contractual parties can impose the benefit of a contract upon third parties if, on a true construction, the contract indicates such an intention. This is possible since the contractual duties would be imposed on parties to the contract, which would necessarily have given consent. Accordingly, it is possible for this contractual benefit to be assigned to third parties.

IX. Conclusion

To conclude, the tort of inducing breach of contract, being uniquely meant to protect the integrity of property in the form of contractual benefit, is justified as the only exception to the negative privity doctrine both as a matter of law and as a matter of principle. It is crucial to an intellectually sound understanding of the privity doctrine that contractual rights be conceived of as property.

The Potential Danger of Retention of Title Clauses

A Case Note on *Caterpillar (NI) Ltd v John Holt & Company (Liverpool) Ltd* [2013] EWCA Civ 1232

Daniel Webb

I. INTRODUCTION

The main commercial advantage to adding a retention of title clause to a contract is obvious: it allows a seller to keep the legal title to goods when they are sold, so that if a buyer falls insolvent prior to payment, the seller is then able to seize the goods and discharge the debt as legal owner. Such a provision is often added by way of course into modern contracts. However, the judgment handed down on 17 October 2013 in the case of *Caterpillar (NI) Ltd (formerly known as FG Wilson (Engineering) Ltd) v John Holt & Company (Liverpool) Ltd* ('*Caterpillar v John Holt*') reveals an unforeseen consequence of such a clause, namely that it precluded the seller from bringing any action for the price.[1]

II. BACKGROUND

Caterpillar supplied generators and spare parts to Holt Liverpool, which would then export them to its subsidiary, Holt Nigeria. On 7 December 2009, Caterpillar informed Holt Liverpool that invoices were overdue for payment. The parties then agreed a repayment plan that aimed to bring Holt Liverpool back into terms by December 2010. By August 2010, Holt Liverpool was unable to meet the repayment terms and in January of the following year Caterpillar exercised its rights under the retention of title clause in its standard terms and conditions. Holt Liverpool then responded to the effect that Holt Nigeria was now the legal owner of the goods. In a separate Commercial Court dispute, Holt Liverpool sued Caterpillar for damages, alleging breaches of a distributorship agreement and claiming damages in excess of USD 54 million. Instead of countersuing, Caterpillar then brought a claim for the price of USD 12 million, a liquidated sum in respect of generators and spare parts sold and delivered, and purported to be due under the contract.

III. CLAIM FOR THE PRICE

There were two main advantages to bringing such an action, as opposed to any claim in tort. Firstly, speed: actions for the price are a 'quick and easy method of obtaining judgment for a liquidated sum', which can then expedite the winding up of an insolvent defendant.[2] Secondly, there was a clause in Caterpillar's standard terms and conditions preventing 'any set-off to the price of the products'.[3] It was accepted by all parties that Caterpillar had to uphold a claim for the price if it wanted to stop Holt Liverpool's separate breach of contract claim from being set off.

Caterpillar brought its claim under Sale of Goods Act 1979, s49. Pursuant to this Section, an unpaid seller can bring an action for the price of goods if either (1) title to the goods has passed to the buyer or (2) payment of the price is expressed to be payable on a certain day. Originally, Caterpillar's

1 [2013] EWCA Civ 1232; [2014] 1 All ER 785

2 S Cogley & J Richmond, 'Retention of Title' (*The Law Society Gazette*, 11 November 2013) <www.lawgazette.co.uk/law/practice-points/retention-of-title/5038661.article> accessed 5 Jan 2014.

3 This was relevant to a not insubstantial portion of the Court of Appeal decision, yet is beyond the scope of this note.

claim was under both subsections, although its reliance on the latter was soon abandoned. Holt Liverpool's defence was based upon the 'Title and Risk of Loss' clause in the terms and conditions:

> Notwithstanding delivery and the passing of risk in the products, title shall not pass to the buyer until Seller has received payment in full [...] Until such time as title passes, Buyer shall hold the products as Seller's fiduciary agent and shall keep them separate from Buyer's other goods. Prior to title passing Buyer shall be entitled to resell or use the products in the ordinary course of business.

This type of retention of title clause is also known as a *Romalpa* clause.[4] In essence, Holt Liverpool's argument was that it had sold the goods on to its subsidiary before paying for them, therefore it never held legal title and so could not be liable under Section 49(1).

IV. SECTION 49(1) AS THE EXCLUSIVE REMEDY

At first instance, Caterpillar's claim for the price was upheld by Popplewell J. It was argued that the goods in question passed to Holt Liverpool immediately before they then passed to Holt Nigeria. Despite the 'Title and Risk of Loss' clause, Holt Liverpool was thought to have held title for a scintilla of time, which was all that was necessary to trigger Section 49(1). Caterpillar also argued that there was enough case law to support a common law claim for the price. On this point the judge found against the claimant.

In the Court of Appeal, Longmore, Patten and Floyd LJJ reconsidered whether an action for the price could be maintained even if the property in the goods had never passed to Holt Liverpool. Longmore LJ made clear that there were only two situations where an action for the price could be maintained: those which are set out in Sections 49(1) and (2). He suggested that this Section would be 'largely otiose'[5] if a seller could maintain such an action whenever a buyer was obliged to pay. One may therefore infer that Section 49 stipulates the only circumstances permitting an action for the price.

On this basis it seems that Professor Sir Roy Goode's *Commercial Law* may be mistaken to characterize Section 49(1) as a superfluous provision, the result of 'faulty drafting'.[6] Goode argues that it would only be necessary for the price to become due under the terms of a contract for a seller then to sue for the price under Section 49. He suggests that there is no obvious need for property in the goods also to have passed to the buyer. This Court of Appeal decision suggests that Goode's reading is flawed: title must pass in order to bring a claim for the price.

V. SECTION 49 CASE LAW

The court nevertheless considered the cases put forward by Caterpillar as showing exceptions to Section 49 as an exclusive remedy. In the Australian High Court case of *Minister for Supply and Development* v *Servicemen's Co-operative Joinery Manufacturers Ltd*,[7] the Commonwealth of Australia leased a property, along with the wood-working machinery and equipment that was set up there. A contract was drawn up, according to which the tenants would pay for the machinery and equipment; 'net cash before delivery' was a condition precedent to the passing of property in the machinery. Nevertheless, the tenant used the property and the machinery without paying for the machinery and equipment.

It was held that property had in fact never passed from the Commonwealth of Australia to the Servicemen's Co-operative because the machinery had not been paid for and delivery had not

4 *Aluminium Industrie Vaassen BV* v *Romalpa Aluminium* [1976] EWCA Civ, [1976] 1 WLR 676.

5 *Caterpillar* (n 1) [41] (Longmore LJ).

6 E McKendrick (ed), *Goode on Commercial Law* (4th ed, LexisNexis 2009) 428.

7 [1951] CLR 621.

occurred. The day of payment was not fixed, yet a claim for the price was upheld, despite the fact that the Australian equivalent of Section 49 is written in identical terms to that of English law. Whilst section 49(2) does apply irrespective of delivery, it applies only when payment of the price is expressed to be payable on a certain day. This case was therefore argued to be precedent for such a claim being maintained outside of Section 49.

An English Court of Appeal judgment was also cited. In *Harry & Garry Ltd* v *Jariwalla and others,*[8] it was remarked *obiter* that a claim for the price could be maintained outside the statutory code as the claimant might otherwise be left without a remedy. However, this particular case has been described as 'somewhat obscure',[9] and the relevant remark was made *obiter*.

In strong opposition to this and the Australian authority was the more recent Court of Appeal case of *Otis Vehicle Rentals Ltd* v *Cicely Commercials Ltd,*[10] where judgment was given for the price pursuant to Section 49(2). The claimants had agreed to hire-purchase tractors, contracting with the defendants such that the latter would repurchase the tractors at the claimants' option, two or three years later. In the event, the defendants refused to repurchase and the claimants claimed for the price or damages in the alternative. The court held that, since the price was not payable irrespective of delivery as required by Section 49(2), this subsection could not apply. The claimants could only claim damages.

It was *Otis* that meant Popplewell J felt bound at first instance to deem Section 49 as the exclusive remedy for claims for the price. Ultimately, an Australian case concerning an equivalent of Section 49(2) and an *obiter* comment in the Court of Appeal could not be followed in favour of a more recent *ratio* on this issue from the Court of Appeal. Having considered the foregoing, Longmore LJ agreed with the reasoning of *Otis* and Popplewell J. *Otis* was that latest case judged by the Court of Appeal on this issue and was not obviously wrong. It must surely be seen as entirely reasonable for all three of the judges sitting in the Court of Appeal to agree that a claim for the price must fall within Sale of Goods Act 1979, s49. Longmore LJ stated that Caterpillar could not claim for the price or damages unless property had passed to Holt Liverpool. 'That is just an inherent result of a retention of title clause and shows that it has dangers as well as benefits.'[11]

VI. APPROACHES TO RETENTION OF TITLE

In the light of such a conclusion, had property passed to Holt Liverpool for a scintilla of time before it then passed to Holt Nigeria, as Popplewell J had also held? The judges of Commercial Court and Chancery Court background, as has been pointed out, differed in respect of their commercial and literal approaches to this question.[12]

To take Longmore LJ first, he was the only judge in this decision to have been elevated from the Commercial Court and equally the only judge in this case to agree with Popplewell J on the retention of title point. It has been argued that Longmore LJ 'reverse-engineered the necessary exercise'.[13] If so, this was since he found it commercially counterintuitive for the seller to have intended Holt Liverpool to sell the goods on. Caterpillar would otherwise have been exposed to liability under contracts with the sub-purchaser.

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8 (CA, 16 June 1988) [1988] WL 1608652.

9 S Cogley & J Richmond (n 2).

10 [2002] EWCA Civ 1064.

11 *Caterpillar*, (n 1) [56] (Longmore LJ)

12 S Cogley & J Richmond (n 2).

13 ibid.

Central to Longmore LJ's reasoning was the existence of a 'Relationship of the Parties' clause in Caterpillar's terms and conditions. This stated that 'Nothing herein contained shall be deemed to create an agency, joint venture, partnership or fiduciary relationship between the parties hereto'. It is this, the judge argued, that distinguishes the instant case from *Romalpa* and its paradigm retention of title provision; *Romalpa* did not have such a provision precluding agency and fiduciary relationships. Longmore LJ further distinguished on the basis that the *Romalpa* clause was considerably more detailed than the one at issue. Unlike *Romalpa*, he viewed the purpose of the retention of title clause here as a kind of security so that any sums raised from the buyer selling the property on would then be owed to the seller. It was a way of ensuring the original buyer would not be able to keep any potential profits from the sub-sale and not a way of creating an agency relationship. Indeed, Longmore LJ felt that to view Holt Liverpool as an agent rather than buyer was to mischaracterise their whole commercial relationship and would not have been what the parties had intended.

Patten and Floyd LJJ disagreed. The former responded to the commerciality argument by pointing out that requiring a buyer to account for the proceeds of its further sale as an agent is the hallmark of a fiduciary relationship.[14] Characterising the provision in Caterpillar's terms and conditions as a retention of title clause may indeed expose Caterpillar to liability under contracts with the sub-purchasers, yet this is far from uncommercial. On the contrary, the seller was similarly exposed in *Romalpa* and in that case it was accepted that as between the defendants and the sub-purchasers the defendants sold as principals. Patten LJ writes in strong terms that 'This reasoning has never been held to be bad in law and I see no reason to assume that the draftsman of the claimant's standard conditions thought otherwise'.[15] In short, it was perfectly reasonable for title not to pass on to Holt Liverpool and for Holt Liverpool then to act as agent, selling on the generators and spare parts to Holt Nigeria.

It is from the drafting of the retention of title provision itself that Patten LJ's position gains the most credence. He draws attention to the emphasis placed on the location of title in each successive sentence:

> Until such time as title passes, Buyer shall hold the products as Seller's fiduciary agent [...] Prior to title passing Buyer shall be entitled to resell or use the products in the ordinary course of business and shall account to the Seller for the proceeds of sale.[16]

The plain language approach is most instructive here, as it reveals the limitations of attempting almost to impute a certain commercial intention. If, as espoused by Longmore LJ, this provision was intended to create a charge over the proceeds of sale, Patten LJ opined that 'it could not have been more badly or absurdly drafted'.[17] Rather, this was an effective retention of title clause.

Furthermore, the 'Relationship of the Parties' clause was 'obviously' not intended to negative the 'express imposition of agency'.[18] Whilst it is not especially clear why this is so 'obvious', perhaps one should view this internal contradiction within the contract as another unintended result of an accumulation of 'boiler-plate' clauses, which when read together create a certain confusion. Interestingly, Floyd LJ seemed to attach a certain weight to the fact that this 'Relationship of the Parties' clause was to be found later in the contract. It must therefore 'be read as subject to those earlier terms which expressly create an agency'.[19] This is doubtless a weaker argument than the plain language

14 *Caterpillar* (n 1) [66] (Patten LJ).

15 ibid [68].

16 Emphasis added.

17 ibid [61].

18 ibid [63].

19 ibid [78] (Floyd LJ).

construction of the retention of title clause, yet it was on the retention of title point that the case hinged.

In agreeing with his fellow judge of Chancery background, Floyd LJ added that Holt Liverpool was not only not precluded from selling the goods before it paid for them, but it was expressly permitted to do so by the contract. In return, it accounts for the proceeds of sale to the seller. This entitlement to resell is expressly described as being the period 'prior to title passing', and (addressing a point made by Longmore LJ) the contract did not need to explicate that Holt Liverpool would be selling on as an agent for the original seller. Holt Liverpool sold as fiduciary agent and this was 'inescapable'.[20]

As such, it seems that Patten and Floyd LJJ demonstrated more of a 'black-letter' law approach than their colleague.[21] These judges of a Chancery background construed the retention of title clause in accordance with its plain language. This is surely the best way to proceed when confronted with contracts that bear contradictory clauses, and where the commercial intention is less than clear or arguable at best. On its true construction, therefore, Holt was empowered to pass property directly from Caterpillar to Holt Nigeria but never had title to the goods. Given that a claim for the price had to fall under Sale of Goods Act 1979, s49, and subsection 1 required title to the goods to have passed to the buyer, Caterpillar's action failed.

Caterpillar has been granted leave to appeal to the Supreme Court. Be that as it may, it is not yet clear whether Caterpillar will use this permission. Holt's original breach of contract claim is likely to be heard before any Supreme Court appeal. A decision against Holt for this substantially larger sum may render any further action against them commercially pointless.

VII. Implications of *Caterpillar*

In the wake of this decision, the use of retention of title clauses must now be seen as a balancing act. A seller's understandable desire to protect itself in the event of a buyer's insolvency must be weighed against any potential ability to bring an action for the price. As we have seen, 'boiler-plate' clauses in commercial contracts can conflict with each other such that more provisions do not necessarily guarantee more protection. In order to ensure the application of Section 49 as well as providing against an insolvent buyer, one would expect retention of title clauses to now be drafted in light of this Court of Appeal decision. Contracting parties should take care to include express provisions that price is payable, firstly even though title has not passed (to make allowance for Section 49(1)), and secondly on a day certain, irrespective of delivery (to bring the contract into line with Section 49(2)). In this way, the potential danger of retention of title clauses may well be averted.

20 ibid [75].

21 S Cogley & J Richmond (n 2).

Pure Economic Loss: Out of Negligence and into the Unknown

Joshua Griffin

I. Introduction

The law has taken the correct approach by generally not allowing recovery of pure economic loss in negligence. In the first part of this article, I will justify the exclusionary rule. After briefly stating the general rule for non-recovery of pure economic loss, I will critically assess the different basis and normative justifications for the exclusionary rule in order to show that the exclusionary rule is based on fundamental and orthodox principles of the tort of negligence. I will submit that the exclusionary rule is an expression of the rule that one can only claim for damage to property in which one has sufficient interest.

In the second part of this article, I will consider the main exception in which recovery of pure economic loss can be recovered, namely assumption of responsibility. I will submit that, since the exclusionary rule is an inherent part of the tort of negligence, the exceptions to it are not merely exceptions to the exclusionary rule but are entirely inconsistent with the tort of negligence as a whole. I will submit that main exception to the exclusionary rule, assumption of responsibility, should be separated from the tort of negligence to form an independent head of liability. I will finally submit that it should be grouped with promissory estoppel due to mutual similarities and suggest possible bases for the independent head of liability.

The general rule (known as the exclusionary rule), as laid down in *Spartan Steel and Alloys Ltd v Martin & Co Ltd*[1] is that pure economic loss cannot be recovered. In contrast economic loss that is consequential on physical damage to person or property is generally recoverable. If property is physically damaged, then the claimant must have legal ownership, possessory rights[2] or beneficial interest[3] concerning the property in order to claim.

II. A Normative Justification for the Exclusionary Rule

In order to show that the law has taken the correct approach concerning pure economic loss, it is necessary to show that the exclusionary rule has sound normative justification. I will critically assess four normative justifications for the rule, namely i) policy reasons given by courts ii) distinctiveness of property iii) absence of rights with respect to the loss, and iv) Benson's nonfeasance.[4] I will submit that the only normative justification that satisfactorily supports the exclusionary rule is the general rule that one must have rights with respect of the loss.

I.1 Policy Justifications

The rationalisations given by the judiciary for the exclusionary rule are unconvincing. The rule against recovery for pure economic loss is usually styled by judges as due to 'policy'[5] (ie consideration the wider impact of imposing liability). In other words, the loss is *prima facie* recoverable, and would be actually

1 [1973] 1 QB 27 (CA).

2 *Leigh and Sillivan Ltd v Aliakmon Shipping Co* [1986] AC 785 (HL) ('*The Aliakmon*').

3 *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86 ('*Shell v Total*').

4 P Benson, 'The Basis for Excluding Liability for Economic Loss in Tort Law' in D G Owen (ed), *The Philosophical Foundations of Tort Law* (1st ed, OUP 1997) 201-28.

5 *Spartan Steel* (n 1) 36 (Lord Denning MR).

recoverable, but for these policy reasons. This assumption is based on the Atkinian Neighbourhood principle in *Donoghue v Stevenson*[6] that you should be responsible for the reasonably foreseeable harm negligently caused to your neighbour.[7] The reasons for not imposing liability are ones of policy, primarily the floodgates argument: it would lead to unlimited and indeterminate liability for the defendant. Weir[8] states that the generalisation of negligence has led to principled exceptions to be seen as anomalies for being out of line with the general principle, obscuring the reasons for the exceptions. Generalisation puts the exceptions 'on the defensive' to deny liability. General policy reasons (e.g. the floodgates argument), which apply to other exceptions such as nervous shock and omissions, are often used instead of direct specific reasons why pure economic loss is treated differently. While these policy reasons appear to explain the exclusion of recovery for pure economic loss, they do not explain a general rule barring its recovery. For example, indeterminate liability will not arise in all cases or even all types of cases: e.g. in defective premises cases the number of people liable could be large, but nonetheless determinable. If this were the case, there would be no need for a general rule; the duty question could be applied with these considerations in mind. It would not be necessary to decide on a case-by-case basis, which could risk making liability more uncertain and harder to insure against. Instead, a particular framework of rules could exist (similar to the ones for nervous shock)[9] to filter out types of cases which do risk indeterminate liability.

Another policy justification that is occasionally given is the primacy of contract. The idea is that contract exists to protect expectation. If one wishes to protect their expectation interest, then one should make a contract. Lord Goff stated in *White v Jones*[10] that 'no claim will lie in tort for damages in respect of a mere loss of an expectation, as opposed to damages in respect of damage to an existing right or interest of the plaintiff. Such a claim falls within the exclusive zone of contractual liability; and it is contrary to principle that the law of tort should be allowed to invade that zone.' However, such a principle, in itself, does not exclude pure economic loss. To start with, cases of pure economic loss do not necessarily involve protecting the expectation interest (e.g. wasted expenditure). Furthermore, the line between expectation and reliance interest may be difficult to draw. Additionally, the distinction made by Lord Goff is a false one because of the different roles played by damage in contract and in negligence. In negligence, there must be proof of actionable damage. In contrast, there is no such requirement in contract and recovery for economic loss is a question of quantifying damages. Economic loss is equally taken into account when quantifying damages in negligence (i.e. consequential economic loss). Ultimately, the assertion that contract exists to protect expectation interest for pure economic loss fails to explain *why* expectation interest should *only* be protected by contract. Perhaps it is true that contract is more suitable at protecting the expectation interest and pure economic loss because the parties can negotiate which risks they will take on and the terms can be easily identified. It does not follow from the fact that contract is more suitable, that there should be a general rule against recovery of such loss in negligence.

I.2 Distinctiveness of property compared to wealth

The normative justification given by Weir[11] and Witting[12] are essentially based on a distinction between the right to property and the right to wealth in respect to the former's relationship with

6 [1932] AC 562 (HL).

7 ibid 580 (Lord Atkin).

8 T Weir, 'Abstraction in the Law of Torts – Economic Loss' [1974] City of London Law Review 15, 17.

9 *McLoughlin v O'Brian* [1983] 1 AC 410, 422 (Lord Wilberforce).

10 [1995] 2 AC 207, 257 (Lord Goff of Chieveley).

11 T Weir (n 8).

12 C Witting, 'Distinguishing Between Pure Economic Loss and Property Damage in Negligence: A Personality Thesis' (2001) 21 Legal Studies 481

individuals and individuality. According to them, the basis of the exclusionary rule is that interests in wealth as less importance than interests in property.

Weir's approach is based on a 'hierarchy of interests'. Interests in bodily integrity are more important than interests in property. Similarly, interests in property are more important than interests in wealth. He justifies the distinction between wealth and property on the basis that the latter allows 'gratification of the senses' (i.e. it can be touched) and therefore one can establish a relationship with it.[13]

There are two problems with this approach. Firstly, it does not follow from a presence of a hierarchy of interests that interests in wealth should be *prima facie* excluded. It follows from a hierarchy of interests that less important interests should be given less protection, but not that less important interests should be given no protection at all. While it is true that economic interests are protected in some cases as exceptions to the general rule, Weir's approach gives no indication as to when economic interests will be protected nor does it provide a basis for the existing exceptions.

Secondly, 'gratification of senses' will not always be significant or even present. Various mundane items of property (e.g. paper, wires, clingfilm) will barely gratify one's senses; it would be artificial to talk about such gratification 'establishing a relationship' between the owner and the property. While it is true the owner will interact with such objects, it can't be said that they establish a relationship with them. Furthermore, gratification of senses is not linked the proprietary interest required for recovery in negligence. One can purchase property on the other side of the world without it ever actually gratifying one's senses. Similarly, one can establish a relationship by gratification of senses with property in which one lacks any interests. Additionally, legal persons can own property but have no 'senses' that can be gratified. It could be argued that the fact that property is *capable* of gratifying one's senses is sufficient. However, this stretches 'gratification of senses' so thinly that it loses any significance.

On a similar note, Witting distinguishes property and wealth on the basis of individual personality.[14] He argues that individuals define and constitute themselves by reference to property (and activities). Therefore, property is essential to individual personality. In contrast, wealth is merely a means to acquisition of personality-defining property; the fact that it is yet to be transposed into something that defines personality means that it is less important. Witting's approach faces the same problem as Weir's; it justifies favouring interests in property over interests in wealth, but does not justify the exclusionary rule, nor does it provide an explanation for the exceptions to the exclusionary rule. On top of this, Witting's approach faces four further problems.

The link with personality is tenuous – it is clear that not all property 'defines' our personality. Mundane items do not define or constitute my personality. It could be submitted that the mere fact that property is *capable* of defining or constituting personality is sufficient. However, this ultimately weakens the proposition as the majority of property that one owns does not in fact constitute their personality. Many people are constituted by their wealth or lack of thereof; at least as much as their possessions. Wealth is equally capable of constituting one's personality. For example, people are capable of being defined as 'rich' or 'poor'. Wealth defines the personality of the 'richest person in the world' as much as his possessions. Similarly, someone lacking in wealth could be defined as 'poor'. The mere fact that property is 'capable' of defining personality cannot be enough distinguish property from wealth.

Secondly, Witting's approach, like Weir's, does not satisfactorily deal with legal persons. Witting states that legal persons are equally defined by their possessions - an airline will be defined by

13 T Weir (n 8) 20.

14 C Witting (n 12) 505.

the aeroplanes it owns.[15] However, this undermines the basis of linking rights to *individual* personality. If a legal person has a 'personality' that is defined by its possessions, then its personality is nothing more than a description of its possessions. Personality in individuals is more than a description of one's possessions.

Thirdly, the law does not regard property as an extension of a person's individuality. Damages awarded for property damage are not assessed by reference to 'damage to individual personality', but are based purely on the economic value of that property. There is no scope for sentimental value or damage to personality in the awarding of damages. Furthermore, it is no defence to a claim of property damage that the property in question did not define the claimant's personality.

Furthermore, the idea that money has not yet been transposed into property and is therefore not as important as property itself is contentious. The entire point of money is to facilitate exchange. The reason people earn money is so that they can buy things. Not many people will have money for the sake of having money. People save money for an emergency, for their children, to buy a specific thing, and so on. Undermining money because it is a *means* of obtaining property ignores the entire object of money is to obtain property. It *will* be used to obtain property or a service at some point.

I.3 Absence of rights with respect to the loss

The exclusionary rule is consistent with the treatment of property within the law of negligence. The tort of negligence gives the claimant a right not to have negligent damage done to him or his property. As stated above, the claimant is unable to claim for physical damage to property unless he has legal ownership, possessory rights[16] or beneficial interest[17] concerning the property. I submit that the 'exclusionary rule' is merely an expression of this rule in its application to economic loss.

Consider a simple case where the claimant buys defective premises without knowing of the defect. Where the defect has not caused damage, the claimant's complaint is that he paid too much, ie more than the property was worth. The claimant has no legal ownership, possessory right or equitable interest with respect to the difference in value between what he paid and what it was in fact worth. Even where the defect has caused damage (to the premises itself) and the claimant spends his own money on repairs, the claimant's complaint is still that he paid too much. The cost of repair is the quantification of the difference of value of which the claimant lacks legal ownership, possessory right or equitable interest. The mere fact that you have an interest in wealth of the same value as the loss does not mean you have an interest in the wealth lost. Furthermore, if the claimant could repair for the cost of repair, there would be an arbitrary distinction between claimants who could, and could not, afford the cost of repairs even though the lost suffered (the difference in value) is the same.

The result is because the claimant does not have a sufficient interest in the loss, not because the loss is economic. We can take an example of barter, where property is exchanged instead of money. The claimant trades in two cars for a new car. It turns out the new car has a latent defect, and was worth only one car. The claimant no longer has a proprietary, possessory or equitable right to the additional car that he traded and hence cannot claim with respect to it. It is possible, depending on the terms of the contract, that he would have a claim for breach of contract (e.g. if it stipulated that the new car had no defect). The claimant would still have no interest in the additional car he traded. The loss the claimant has suffered is the difference in value between what he paid and how much the new car is worth. The mere fact that the difference in value between is equivalent to part of the price he paid is the same does not mean he has an interest in the additional car itself.

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15 C Witting (n 12) 513.

16 *The Aliakmon* (n 2).

17 *Shell v Total* (n 3).

The Aliakmon[18] is an informative example: the claimant's property was negligently damaged when being transported, but under the terms of the contract the risk had passed to the claimant, who only had contractual rights concerning the property. Ignoring potential profits, the claimant's economic loss is the same as the physical damage. The claimant did not have sufficient rights to the property, nor in the difference in value. It is no different with pure economic loss than with property.

Finally, we can take an example where the defendant negligently sets fire to the claimant's wallet, burning the £50 note inside. The claimant owned that money so surely he would have a right to claim against the defendant, notwithstanding the fact that the loss is economic. One cannot really say that a £50 note 'gratifies one's senses' or defines one's personality; its value is purely economic.

The truth is that money is no different to property – it is a type of property. However, in typical cases of pure economic loss, the claimant is not claiming for money that is actually his – he is not claiming for damage to his specific property. He is claiming for loss of money that he potentially could have had, rather than money in which he has legal ownership or possessory rights. Viewed in this light, the exclusionary rule follows logically from the rule that one can only claim for damage to property in which one has sufficient interest.

I.4 Benson's requirement of misfeasance

The above analysis holds some similarities to that of Benson.[19] Benson submits that the general rule is part of the broader rule of no liability for nonfeasance. He states that misfeasance is an essential condition for something to be actionable damage. He uses an unorthodox definition of 'misfeasance', meaning that the claimant's loss must be a subtraction or injury to something that the claimant as an exclusive right over against the defendant. For example, the claimant can sue if he has a proprietary or possessory right with respect to the damaged property. In other words, the claimant must have a right with respect to the thing that suffers loss. Pure economic loss cannot be recovered because in such cases, the claimant lacks an interest in the loss.

I agree with Benson to a certain extent: a claimant cannot sue for economic loss that he has suffered because he has no rights in respect to the loss. Nevertheless, I have several difficulties with Benson's analysis, namely that it uses obscure language and is expressed too generally to avoid circularity and to accurately explain the current law.

Firstly, the unconventional use of the terms nonfeasance and misfeasance is so unusual that it undermines his argument. Legal dictionaries define misfeasance[20] as the improper performance of a lawful act, and nonfeasance[21] as the failure to do something that ought to be done. Benson's definition is too far from the conventional meaning to be useful. Misfeasance is not language used by the court and not something that a claimant needs to prove in establishing liability. Furthermore, the terms are not clearly defined by Benson himself, and his unconventional definition must be drawn out from the article as a whole. Instead of using these terms, it is simpler to say that the claimant must have legal ownership, possessory rights or beneficial interest with respect to the loss he suffers.

Secondly, Benson's proposition of 'no liability for nonfeasance' is circular. Benson submits that a claim in negligence must be rooted in an exclusive right. A person has an exclusive right against someone if they are able to sue for interference of that right. A person's legal right to sue cannot be determined by whether or not they have that right. The right to sue under the tort of negligence is the

18 *The Aliakmon* (n 2) 809 (Lord Brandon).

19 P Benson (n 4).

20 D Greenberg (ed), *Jowitt's Dictionary of English Law* (3rd ed, Sweet & Maxwell 2010) 1476; M Woodley, J Bainbridge (eds.), *Osborn's Concise Law Dictionary* (12th ed, Sweet & Maxwell 2013) 280.

21 D Greenberg (ed) (n 20) at 1558; M Woodley, J Bainbridge (eds) (n 20) 294

exclusive right against someone. On the other hand, it is not circular to say one must have legal ownership, possessory rights or beneficial interest over property damage. This statement is one of reference rather than of liability; the right derived from the tort of negligence is informed by other areas of law (e.g. property law, trusts law). In contrast, Benson's proposition is that to have a right to sue in negligence, you must have a right to sue in negligence.

The reason for circularity in Benson's submission is that he expresses the 'sufficient interest' damaged too vaguely and generally. The result is that it includes rights that are not sufficient interests and it can be twisted to justify liability using circular logic. It is true that legal ownership, possessory rights and beneficial interest are 'exclusive rights' against the defendant. However, contractual rights to property would be an 'exclusive right' against the defendant but it is nonetheless insufficient for liability.[22]

Because 'exclusive right' is too general, it ceases to be a statement of reference but merely refers to the right to not suffer negligent damage. Benson himself justifies liability for 'assumption of responsibility' using circular logic to fit the general expression of 'exclusive right'. He submits that, where a defendant assumes responsibility and a claimant relies on it to his detriment, the claimant alters his position and loses out on 'an advantage' he otherwise could have taken. While the claimant does not have an exclusive right to this 'advantage', the defendant's assumption of responsibility estops him from denying that the claimant has the exclusive right to that advantage. The 'advantage' is treated as a kind of 'quasi-property' and the requirement of misfeasance is met. The estoppel analysis, while ingenious, is a rather artificial way of creating an 'exclusive right' where there is in fact no such right. The concept of 'exclusive right' is not one of reference to another area of law, but the right to sue in negligence itself. In a case of property damage, the right to sue in negligence is protecting a right in another area of law (e.g. conversion, tracing). In contrast, the estoppel justification essentially creates an exclusive right out of nowhere; the right exists only in the tort of negligence rather another area of law.

Furthermore, Benson's estoppel analysis does not normatively justify why assumption of responsibility should meet the requirement of misfeasance, but merely provides a mechanism by which assumption of responsibility could be treated as misfeasance. It states that the defendant is estopped from denying that the claimant has an exclusive right, but fails to explain *why* this is the case. The mechanism itself is questionable because it is based too heavily on detrimental reliance and the advantage the claimant misses out on as a result. Stevens[23] and Nolan[24] argue that liability for assumption of responsibility can arise in the absence of reliance, for example where a doctor aids an unconscious person on the street.

II. Exception to the exclusionary rule

The main exception to this general rule is where there is an 'assumption of responsibility' by the defendant, following *Hedley Byrne*.[25] The other exception to this rule is *White v Jones*, which is distinct from (despite characterised by the House of Lords as) assumption of responsibility because there was no direct relationship between the parties at all, let alone an assumption of responsibility.

I shall focus my analysis on assumption on responsibility by excluding *White v Jones*. It is a narrow and particular heading of liability concerning the duties a solicitor owes to intended beneficiaries in drawing up a will rather than a principled exception. The decision itself has influenced

22 *The Aliakmon* (n 2).

23 R Stevens, *Torts and Rights* (OUP 2007) 14.

24 D Nolan, 'The Liability of Public Authorities for Failing to Confer Benefits' (2011) 127 LQR 260.

25 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) ('*Hedley Byrne*').

by the need to do practical justice in the case[26] and has not been influential, but treated as exceptional, in later decisions.[27]

Hedley Byrne held that assumption of responsibility imposes liability for pure economic loss. Assumption of responsibility arises where the defendant assumes responsibility for a task for the claimant, who relies upon the defendant's exercise of due care and skill. While the courts have stated that reliance is required, Stevens[28] and Nolan[29] argue that liability for assumption of responsibility can arise in the absence of reliance, for example where a doctor helps an unconscious stranger. It is submitted that this is the correct view (or at least that reliance is presumed) as it the requirement would arbitrarily exclude cases that involved assisting an unconscious person. Reference in cases to reliance is merely emphasising the requirement that the defendant's negligence caused damage to the claimant.

There are two ways in which the economic loss can be caused: i) The claimant relies on the defendant and subsequently makes a bad bargain; ii) due to the defendant's negligence the claimant loses an expected gain.

'Bad bargain' cases occur when the claimant pays too much for something or makes a bad investment based on the defendant's negligence information. It includes cases such as *Hedley Byrne*, *Smith v Eric S Bush*[30] and *Candler v Crane*.[31] The claimant has not suffered damage to himself or to property that he has legal ownership, possessory rights or beneficial interest. For example, the claimant buys a car, based on the defendant's negligent valuation, for £1000. It is in fact worth £600; the claimant does not have a relevant legal interest in the £400. He has essentially bought a defective product and has not suffered damage. However, the defendant is held responsible for the claimant's bad bargain. While the claimant's decision to make the bad bargain was his own, he relied on the defendant's valuation on the quality of the bargain. Therefore, the defendant is responsible for the claimant entering the bad bargain and liable for the economic loss. This analysis is very detached from the tort of negligence. The claimant is not recovering for damage caused to him or his property. The claimant is recovering for making a bad decision.

'Loss of expectation' is clearly more detached. It occurs where the claimant does not get economic value he expected. Unlike a 'bad bargain' case, he has not invested anything into the situation and is no worse off than before, except for not getting something he expected. The claimant has missed out on what he expected, but the expectation interest is not typically protected in tort. Loss of expectation cases include *Spring v Guardian Assurance Plc*[32] and *Customs and Excise Commissioners v Barclays Bank plc*.[33] In these cases, the claimant has not lost anything but an expectation. The claimant has no legal ownership, possessory right or beneficial interest in the expected financial gain. The claimant may have a contractual interest such as in *Barclays Bank*, but as with property, a contractual interest is not sufficient.[34] As above, an analysis based on assumption of responsibility takes us outside of the tort of negligence, particularly when the head of damages is something that is not typically recoverable in tort ie expectation interest. Where does this leave us?

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26 *White v Jones* (n 10) 258-9 (Lord Goff of Chieveley).

27 *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, 837 (Lord Steyn).

28 R Stevens (n 23) 14.

29 D Nolan (n 24).

30 [1990] 1 AC 831 (HL).

31 [1951] 2 KB 164 (CA).

32 [1995] 2 AC 296 (HL).

33 [2006] UKHL 28, [2006] 4 All ER 256.

34 *The Aliakmon* (n 2).

II.1 Analysis of Exceptions

The cases where recovery is allowed for pure economic loss do not fit in with the tort of negligence. The exclusionary rule is not merely a policy-based rule to which there can be exceptions; it is an expression of the basic principles of the tort of negligence. Assumption of responsibility is hence an exception to the tort of negligence as a whole, rather than just an exception to the exclusionary rule. The assumption of responsibility cases do not require that the claimant to have legal ownership, possessory right or beneficial interest concerning the property. Furthermore, the way in which the responsibility arises is different from the usual duty of care test.[35] If assumption of responsibility is an exception to the tort of negligence (rather than just the exclusionary rule), it follows that liability under assumption of responsibility should be separated from the tort of negligence.

The question remains that, if assumption of responsibility is separated from the tort of negligence, then where should it go? There is already debate as to whether assumption of responsibility belongs in tort or contract. The voluntariness of assumption is not a bar for it being a tort, although Lord Devlin treats it as a relationship that would be contract if there were consideration in *Hedley Byrne*.[36] In contrast, the fault element and the requirement that damage has been suffered are generally not consistent with contract. Assumption of responsibility does not appear to comfortably fit in within traditional conceptions of tort or contract. There is a possible 'third way' of a treating assumption of responsibility as a new type of obligation for which the causative event is neither consent nor wrongs, but reliance.

Before we continue in determining where assumption of responsibility should belong, it is important to consider the development of promissory estoppel as an informative example. In England, promissory estoppel is in a very early stage of development; it still suffers the limitations that there must be a pre-contractual relationship and it cannot be a cause of action.[37] There is no clear indication as to how it will develop. Its development in the US and Australia is informative. The varied development of estoppel in other jurisdictions reflects its difficulty of categorisation.

In Australia, following *Walton Stores (Interstate) Ltd v Maher*,[38] promissory estoppel is used to compensate reliance on a promise where it was unconscionable for the defendant to go back on his promise. It has developed in to a tort-like action, protecting reliance interest where it is 'unconscionable'.

In the US, it was used to enforce promises where there was a defect in the contract,[39] such as an absence of consideration. It has developed into an independent cause of action for enforcing promises. It is more contract-like because the causative event is consent and it protects the expectation interest. It has developed as its own head of liability for enforcing promises distinct from bargain theory. Similarly, proprietary estoppel (essentially promissory estoppel where the promise in question concerns transfer of an interest in land) can be a cause of action that protects expectation interest.[40] The contract basis can be compared to Lord Devlin's justification for assumption of responsibility in *Hedley Byrne*, who refers to the problem in the case as a 'by-product of the doctrine of consideration'.

The reason for considering promissory estoppel is because it shares many similarities with assumption of responsibility and its development should follow that of assumption of responsibility (and vice-versa). Promissory estoppel and assumption of responsibility are both voluntarily assumed

35 *Barclays Bank v Fairclough Building Ltd* (1995) 76 BLR 1.

36 *Hedley Byrne* (n 25) 529 (Lord Devlin).

37 *Combe v Combe* [1951] 2 KB 215 (CA).

38 (1988) 164 CLR 387

39 *Red Owl Stores v Hoffman* 133 NW2d 267 (1965).

40 *Crabb v Arun District Council* [1976] 1 Ch 170 (CA) ('*Crabb v Arun*').

obligations. Most tortious duties apply generally (ie everyone is under a duty not to commit battery), but duties owed due to promissory estoppel and assumption of responsibility arise from voluntary conduct by the defendant. Nonetheless, the obligations are not strictly contractual due to the absence of consideration. Reliance on performance (of a promise / a task with due care) features strongly in both, even if not strictly necessary for assumption of responsibility. They both involve conduct reliance upon which is considered justified by the law, even if reliance is not necessary for a cause of action. They are both unique in that they face difficulty of categorisation as tort or contract. The measure of damages for both can be reliance based or expectation based (proprietary estoppel). While promissory estoppel is currently discretionary and not a cause of action, development in other jurisdictions and of proprietary estoppels shows that these are not inherent features of estoppel.

Their development should, at least, be co-related. Divergent development could create arbitrary differences between the two. For example, why would reliance be presumed in one and not needed in the other? Why would the damages be expectation-based in one and reliance-based in the other? These questions arise now – why does relied on performance of a task give rise to liability, but not reliance on performance on a promise? Unless the content of assumption of responsibility and estoppel start, to some degree, to converge, then it will become harder and harder to justify the distinctions between the two.

The problem justifying the differences between the two can be seen in the US. Gergen[41] in the US has submitted that negligent misstatements (which come under *Hedley Byrne* in English Law) should be treated as a contractual (rather than tortious) claim. What is significant about his analysis is the fact that promissory estoppel is contractual (in the US) is used to justify treating negligent misrepresentations as contractual. The development of promissory estoppel is tied to the development of assumption of responsibility, and vice-versa. As Gergen's submission shows, it would be inconsistent for a legal system to have contractual-based promissory estoppel and tort-based assumption of responsibility.

II.2 Proposed Reform

I would submit that, once assumption of responsibility is separated from the tort of negligence, promissory and proprietary estoppel should be grouped with it. They have more in common with each other than with tort or contract respectively and unless their development converges, there would be inconsistency within the law. Analogous factual situations would arbitrarily be treated differently in the eyes of the law. For example, the rules on what constituted reliance could become arbitrarily different for each of them. Reliance on voluntary conduct should give rise to the same legal liability, whether the conduct be performance of a task, an assurance, or a promise. An independent cause of action would allow the focus to be directly on the nature of the voluntary conduct and reliance etc. without distraction from principles in negligence or evidential types of estoppel (estoppel by representation). Therefore, assumption of responsibility should be a cause of action independent from the tort of negligence, as discussed above. It is wholly inconsistent with the tort, and it would be better if it were no longer influenced by the principles of the tort of negligence and could develop on its own. Similarly, this discussion will assume that promissory estoppel develops into a non-discretionary cause of action much like proprietary estoppel in English law as well as promissory estoppel in the US and Australia. Grouping assumption of responsibility and promissory estoppel together will allow coherent, consistent and converged development on a principled basis. There are, broadly speaking, three possible bases for liability of grouped assumption of responsibility and promissory estoppel: i) contractual ii) tortious iii) reliance-based.

Assumption of responsibility and estoppel could be treated as contractual obligations. This appears to be how Lord Devlin viewed assumption of responsibility in *Hedley Byrne*, saying that it is a

41 M Gergen, 'Negligent Misrepresentation as Contract' (2013) 101 California Law Review 953.

relationship that would be contractual if there were consideration. Gergen[42] has made a similar submission, saying that negligent misrepresentations should be treated as a contractual rather than a tortious obligation. He submits that classical contract theories only focused on the core of contract while ignoring the periphery. What is significant about his analysis is that part of his justification for treating negligent misrepresentation as contractual is that 'requires invited reliance, much like promissory estoppel.' Treating them as contractual would involve allowing contracts in the absence of consideration. The broad definition of contract in the US facilitates this approach, although it would be a more radical step in English law.

Assumption of responsibility and promissory estoppel could be treated as a distinct tort. It could perhaps be based on reliance (either detrimental reliance of justified reliance). However, the doubt cast by Stevens[43] and Nolan[44] on the need for reliance for assumption of responsibility would mean that a tort based on reliance could be substantially different to assumption of responsibility as it is now. The creation of a tort based on justified or detrimental reliance may result in the gap in the law for the cases of assumption of responsibility in which there is no reliance. The tort could perhaps instead be based on conduct that 'invites reasonable/justified reliance', similarly to how Gergen[45] describes negligent misstatements and promissory estoppel. While Gergen uses it to justify a contractual basis, this is because in the US conduct that invites reliance ie promissory estoppel leads to contractual liability. This illustrates the linked development of promissory estoppel and assumption of responsibility. In English law, there is no reason why a tort of 'invited justified reliance' could not exist. While this is easier to envisage for assumption of responsibility, it is harder to do so for promissory estoppel which, at present, lacks a fault element. While there are strict liability torts, promissory estoppels would likely have to be given a fault element in order to be consistent with assumption of responsibility as a separate tort. The requirement in Australia that it is unconscionable for the defendant to go back on his promise, or some variation thereon, could be regarded as a suitable fault element. Treating them as a tort would also preclude the recovery of the expectation interest which occurs in some cases of assumption of responsibility[46] and in proprietary estoppel.[47]

Justified or invited reliance could be treated as a separate category of obligation. The causative event is the reliance itself (or invitation thereof). While the 'reliance interest' is often said to be protected in tort, it is not true to say that someone generally 'relies' on not being battered or defamed in the same way that a person relies on a specific task or promise. Justified reliance as a causative event faces the same problem as a tort of justified reliance, in that it may result in the gap in the law in respect to the cases of assumption of responsibility in which there is no reliance. The creation of a new category of obligation could reflect the fact that liability under assumption of responsibility is not contractual, but is nonetheless voluntarily assumed. It would recognise that assumption of responsibility and promissory estoppel have elements of both tort and contract, which stretching the concepts of tort and contract. However, it could be doubted whether creating a new category obligation is necessary except for from a point of conceptual clarity. Furthermore, the creation of a new category of obligation would also be a very radical move.

The way in which promissory estoppel and assumption of responsibility is less important than grouping them together as an independent head of liability. They have more in common with each other than contract or tort respectively, and the law should treat like cases like. Treating them as the

42 M Gergen (n 41) 957.

43 Stevens (n 23) 14.

44 D Nolan (n 24).

45 M Gergen (n 41) 957.

46 *White v Jones* (n 10); *Spring v Guardian Assurance* (n 34); *Barclays Bank* (n 35).

47 *Crabb v Arun* (n 40).

same kind of thing, whatever that may be, will lead to coherent and consistent development of the law. However they are grouped will involve many changes to the existing law by extending the traditional concepts of tort or contract, or even by creating a new category of obligation. I have proposed three possible directions in which they could develop together. Detailed discussion of which direction would be best is beyond the scope of this article. I would nonetheless submit, as a preliminary view, that the best way for them develop would to be as contractual obligations, as submitted by Gergen, because this would result in the least changes for assumption of responsibility and promissory estoppel themselves, notwithstanding the radical changes to contract law.

III. Conclusion

The law is correct to have a general rule that economic loss is not recoverable. Pure economic loss is not within the scope of the right arising from the tort of negligence. The best justification for this rule is that it is simply an expression of the broader principle in the tort of negligence that a claimant can only recover for loss in which they have a sufficient interest. The exceptions to this rule are inconsistent with the rest of the tort of negligence and in fact constitute exceptions to the tort of negligence itself. These exceptions would be more coherent if separated from the tort of negligence to form an independent head of liability and instead grouped with promissory estoppel. This would allow the similar doctrines of assumption of responsibility and promissory estoppel do develop consistently, coherently and in convergence either as contractual obligations, tortious obligations or as a new, distinct category of obligation.

Making Law far away from Kitchen Tables: Imposing Trusts Regardless of Formalities

Michal Hain[1]

I. INTRODUCTION

A formality is a formal – as opposed to substantive – prerequisite of legal validity. The difference between form and substance can be illustrated as follows: writing signed in the presence of two witnesses is a *formal* precondition of a valid will,[2] whilst an agreement is a *substantive* requirement of a valid contract. Likewise, the so-called three certainties of intention, subject matter and object are part and parcel of what an express trust is; just as there can be no contract without an agreement, there can be no trust without property. On the other hand, the requirement of writing imposed by Law of Property Act 1925, s53(1)(b) with respect to a declaration of trust of land or any interest therein is formal: crucially, it goes beyond the substance of the declaration of trust and imposes a requirement of form. Nevertheless, it must be remembered that legal validity is *contingent* on both form and substance and often, substantive ends can only be achieved through certain formal means.

Albeit in a perhaps superficial way, formalities are comparable to contractual terms implied by law: they are requirements imposed by law, which parties are unable to contract out of. However, they differ in so far as formalities are conditions *precedent* upon which legal validity depends whereas implied terms are substantive requirements that flow from validity – ie are *subsequent* to and consequential on it.

This area of law has been described by Hackney as 'very much practitioners' law in the sense that much of the material comes from operations in which lawyers have had a formative hand and which have not been produced on kitchen tables'.[3] He therefore argued that it is redolent with the values of administrative effectiveness and consistency as certainty keeps costs at a minimum for lawyers who must be able to advise clients.[4] But it is too readily forgotten that even though formalities may be the product of lawyers' hands, it was the laymen's interests that the lawyers had in their minds. Hackney himself said that a deed might be described as the most perfect formality because it is 'easy to make intentionally, and virtually impossible to make by accident'.[5] The law aims to protect the layman who may be largely ignorant of the law from accidentally entering a legally binding transaction.

Formalities are perhaps one of the earliest attempts to protect vulnerable consumers: as early as 1677, Parliament passed the Statute of Frauds to prevent fraud by imposing wide ranging formal requirements on a variety of legal transactions. But the focus of this article will be Law of Property Act 1925, s53:

> (1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol—

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1 St. Anne's College.

2 Wills Act 1837, s9.

3 J Hackney, *Understanding Equity and Trusts* (1st ed, Fontana Press 1987) 83.

4 ibid.

5 ibid.

> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;
> (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
> (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.
>
> (2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

At least three aspects of this Section are of great importance. First, with regards to its scope, it only concerns trusts that are not resulting, implied or constructive. Second, paragraph (c) applies to equitable interests that already exist at the time of the disposition whereas paragraphs (a) and (b) are also concerned with the creation of legal and equitable interests respectively. Third, whilst a failure to comply with paragraph (a) results in no interest being created or disposed of, *Gardner v Rowe*[6] provides that a failure to comply with (b) only renders the trust unenforceable. Since the formal defect can be cured retrospectively, legal validity and enforceability are not coextensive.

Of course, these requirements have the potential to cause great injustice in individual cases. This led judges in pursuit of the undoubtedly laudable goal of doing justice to the parties before them to go to great lengths to avoid Section 53 where formalities stood in the way of achieving this goal. The easiest way of doing so was labelling a trust 'resulting', 'implied' or 'constructive'. The consequential problems are at least twofold. It makes devising a working taxonomy of trusts impossible and entails a certain level of disingenuity as the resulting tension between the values of formalities and doing justice to the individual parties is shrugged under the carpet. Dixon has asked in the context of proprietary estoppel:

> If statute requires the claimant's alleged property right to have been created with a certain type of formality, why, in the absence of such formality, can the claimant run to the back door, break in using estoppel as a jemmy, and run off with some or all of the landowner's proprietary valuables?[7]

Often there are good reasons to allow claimants to break in using not only estoppel but also various trusts as a form of jemmy. Regrettably, this issue is just rarely confronted head-on as the question is avoided completely by an instrumental classification of a trust.

In order to be able to weigh up these competing interests, it is first necessary to consider what functions formalities serve. This enables us to assess the tension between these values and the considerations that warrant the imposition of trusts in various circumstances. The three trusts this article will discuss are resulting trusts, the trust imposed in *Rochefoucauld v Boustead*[8] and the so-called common intention constructive trust. The analysis will lead to the conclusion that the present classification of these trusts is unsatisfactory and unnecessary as the harshness of Section 53 can be avoided on orthodox principles of Equity identified in 1615 in *The Earl of Oxford's Case*: Equity does

6 (1828) 5 Russell 258; 38 ER 1024.

7 M Dixon, 'Confining and Defining Proprietary Estoppels: The Role of Unconscionability' (2010) LS 408, 409.

8 [1897] 1 Ch 196 (HL).

not allow defendants to insist on their strict legal rights where it would be unconscionable for them to do so.[9]

II. The Functions of Formalities

In his article on 'Consideration and Form', Fuller identified three purposes of legal form: (i) the evidential, (ii) cautionary and (iii) channelling function. Even though Fuller is right to point out that 'there is an intimate connection'[10] between them, it is helpful to consider them separately. This will show that legal formalities pursue two sets of values: certainty and protection. Where in a given case requirements of form would result in an individual's protection being sacrificed at the altar of legal certainty, judges are faced with the decision as to which set of values is to prevail.

II.1 Evidential Function

A situation where it is the claimant's word against the defendant's and neither side is able to adduce any evidence to substantiate their claim is a judge's nightmare. With a formality, this can easily be avoided. An agreement put down in writing or certified by a notary is naturally easier to prove. The requirement of witnesses in Wills Act, s9, for instance, clearly serves this evidential function.

II.2 Cautionary Function

However, formalities do not only serve as evidence. They also perform what Fuller called a cautionary function 'by acting as a check against inconsiderate action'.[11] This is why Hackney considered it to be important that a deed is difficult to make by accident. Even though Hackney made those remarks before the Law of Property (Miscellaneous Provisions) Act 1989 abolished the requirement of a seal for the execution of a deed, it is clear that the current requirement that the instrument 'makes it clear on its face that it is intended to be a deed'[12] warns those executing it of the legal consequences of their actions. This is distinct from any evidentiary purpose of the formality requirement.

II.3 Channelling Function

On the other hand, when an instrument makes clear that it is a deed, this also serves the (arguably evidential) function of proving that the parties signed a deed and not a contract. In so far as legal consequences follow from this fact, this is clearly significant. Fuller therefore argues that 'form offers a legal framework into which the party may fit his actions, or, to change the figure, it offers channels for the legally effective expression of intention' and this is what he calls the channelling function of formalities.[13]

Jhering used the following analogy to illustrate what he called the 'facilitation of judicial diagnosis':

> Form is for a legal transaction what the stamp is for a coin. Just as the stamp of the coin relieves us from the necessity of testing the metallic content and weight - in short, the value of the coin (a test which we could not avoid if uncoined metal were offered to us in payment), in the same way legal formalities relieve the judge of an inquiry whether a legal transaction was intended, and - in case different forms are fixed for different legal transactions - which was intended.[14]

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9 (1615) 21 ER 485.

10 L Fuller, ' Consideration and Form' (1941) 41 Columbia Law Review 799, 803.

11 Fuller (n 10) 800.

12 Law of Property (Miscellaneous Provisions) Act 1989, s1(2)(a).

13 L Fuller (n 10) 801.

14 R Jhering, *Geist des Römischen Reichts* (8th ed, 1923) 494.

Even though Fuller objects that 'Jhering has placed an undue emphasis on the utility of form for the judge, to the neglect of its significance for those transacting business out of court',[15] it is important to appreciate the point Jhering makes: *different* formalities may be used to distinguish *different* legal instruments. This is particularly important where the *substance* of two transactions is identical such as in the case of deeds and contracts.

Where the difference is only formal and not substantive, it is the *form* that can bring about a legal consequence: for instance, compliance with the formality requirements of a deed relieves the parties of the need to provide consideration to render their agreement enforceable. So although form and substance were initially presented as two distinct facets of a legal transaction, this analysis shows how form may alter substance to the extent that the former delineates different legal transactions where their substance is identical.

II.4 Value of Formalities

This illustrates that formalities are much more than a convenient tool at the lawyer's hand. They also help those who are uninitiated in the law to be able to prove that a certain transaction happened, to avoid legal transactions they may be reluctant to enter and to structure their affairs by fitting them into the framework of the law structured by various formalities. The aims they pursue are therefore at least twofold: making the law more certain and protecting the layman. However, these values may conflict and the strict insistence on formalities may result on great hardship on an individual. Nevertheless, Hackney warned that:

> The judge may do 'justice' to the individual before him, and injustice to large numbers outside the court whose settled planning and legitimate expectations are thrown into question by the introduction of discretionary justice, or even simple change.

It follows that where courts choose to avoid formalities, they must do so with great caution and tackle these issues transparently. Regrettably, the courts have not always done so.

III. IMPOSING TRUSTS REGARDLESS OF FORMALITIES

Since Section 53(1) does not apply to resulting, implied or constructive trusts, classifying a trust as falling into one of those categories allows for the avoidance of formal requirements altogether. However, it is first necessary to tackle the issue of classifying trusts.

III.1 Classifying Trusts

Most commonly, trusts are classified as express, resulting or constructive. Express trusts are said to arise in response to the parties' intentions whereas constructive trusts are imposed by law. A resulting trust, however, is one where the settlor becomes the beneficiary: the beneficial interest is said to spring back[16] to the settlor.

The problem with this classificatory scheme is that the labels 'express', 'constructive' and 'resulting' answer different questions: whilst 'express' and 'constructive' refer to the causative event that brings the trust into existence, 'resulting' describes the trust's structure. It follows that an express trust can be resulting where the settlor transfers an interest on trust for himself. Similarly, where a transferee is holding property on trust in favour of a transferor not due to the transferor's intention but by operation of law, this can only be sensibly described as a constructive resulting trust.

Swadling has therefore criticised this classification of trust as unsatisfactory. It resembles a taxonomy of animals into carnivores, herbivores, omnivores and furry animals. All types of animals –

15 L Fuller (n 10) 801.

16 The term 'resulting' originates from the Latin word *resalire* which means to spring back.

regardless of what they eat – can have a fur and the different labels answer different questions: whether an animal is a carnivore, herbivore or omnivore tells us what the animal eats whereas the label 'furry' informs us of whether the animal has fur. Unfortunately, such an obviously unsatisfactory taxonomy has plagued the law of trusts for centuries and is reflected in Law of Property Act 1925, s53.

It follows that it would be a mistake to discard an exercise in taxonomy as purely academic devoid of practical significance since the classification of a trust has an impact on whether it must comply with the necessary formalities.

The courts have however not applied Section 53(2) to include an express resulting trust; otherwise, a declaration of trust by A that B is hold land on trust for A would not need to comply with the formality requirements of section 53(1)(b). This raises the question of what type of resulting trust does fall under Section 53(2).

Megarry J in *Vandervell (No 2)* identified two kinds of resulting trusts: presumed and automatic.[17] As Section 53(1) does not apply to either, both of these categories can be discussed in turn before turning to what may be called the exception articulated in *Rochefoucauld v Boustead* and lastly, the common intention constructive trust.

III.2 Presumed Resulting Trusts

Where one transfers property to another *inter vivos*, the law presumes that the latter is to hold the property on trust for the former unless the transferor is the transferee's husband, parent or *in loco parentis*. Although this qualification is expressed as a presumption of advancement, this is an unfortunate misnomer.

Presumptions reverse the burden of proof from one party to another in cases where a party can establish a primary fact and the law presumes a secondary fact. Upon proof of the primary fact, the court *must* find the existence of the secondary fact unless the other party can disprove it. The presumption of advancement, however, merely puts the parties in the position they were all along: the party asserting the existence of a trust must adduce evidence to this effect. The 'presumption' of advancement is therefore not really a presumption at all. It only reverses the burden of proof in a highly artificial sense: a gratuitous *inter vivos* transfer shifts the burden on the second party and proof that the transferor was the transferee's husband, parent or *in loco parentis* reverses the burden of proof back However, the better view, put forward by Swadling, is that 'it is more accurate to describe this only as a situation where the resulting trust presumption does not apply'.[18]

Therefore, the rule merely delineates the instances giving rise to the presumption of resulting trust. The obvious problem – that this draws an unwarranted distinction between men and women – has been resolved by s199 of the Equality Act 2010 that abolished it. Once the Section comes into force, the law will thus presume that any gratuitous *inter vivos* transfer of property is to give rise to a resulting trust.

However, in order to understand both how the presumption can be rebutted it is crucial to identify what the secondary fact is that is *presumed* from the primary fact that must be *proved*. The answer cannot be 'a resulting trust' because that is a legal *consequence* of finding a certain fact, but not a fact in and of itself.

17 [1973] 3 WLR 744 (Ch) 762-3.

18 W Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72, 73.

Davies and Virgo must be right when they say that '[w]hat is presumed is an intention of the settlor. It is this intention that then leads to the conclusion that there is a resulting trust'.[19] Lord Browne-Wilkinson in *Westdeutsche* therefore recognised that 'the presumption of resulting trust is rebutted by evidence of any intention inconsistent with such a trust'.[20] The presumption can therefore be rebutted by proof that the property was given in exchange for consideration, to be received on gift,[21] in pursuance of a contract,[22] or by way of loan.[23]

The difference distinguishing express trusts and presumed resulting trusts is that the intention need not be proved on the balance of probabilities by the party seeking to establish the trust's existence. However, both the object and subject matter of the trust are certain. The law is therefore simply giving effect to the settlor's intention albeit that intention need not be proved by the person wishing to establish the trust but has to be disproved by the other party once the gratuitous *inter vivos* transfer is proved.

Three scenarios can be distinguished to illustrate the importance of this rule in practice:

(1) A orally declares B trustee in favour of A of land owned by A.
(2) A gratuitously transfers land to B on the oral understanding that B is to hold the land on trust for A.
(3) A transfers land to B for value on the oral understanding that B is to hold the land on trust for A.

The first case obviously does not comply with Section 53(1)(b), but the formal defect can be cured. In the second case, the land is held on trust for A unless B could adduce evidence that A did not intend a trust. The third case, on the other hand, is covered by the rule in *Rochefoucauld v Boustead*.[24]

The question raised by the operation of presumed resulting trusts is why the law makes it easy for the gratuitous transferee to establish a trust in his favour without the need to either prove the requisite intention or comply with the relevant formalities. Murphy J in *Calveley v Green* explained that presumptions are a 'process of standardised inference':

> If common experience is that when one fact exists, another fact also exists, the law sensibly operates on the basis that if the first is proved, the second is presumed.[25]

Lord Diplock in *Pettitt v Pettitt* similarly held that a presumption is no more than a consensus of judicial opinion as to the most likely inference of fact in the absence of evidence to the contrary.[26] It may therefore be objected that the law is taking a very cynical view as it presumes that transferors wish to retain a beneficial interest in the property they transfer gratuitously.

However, this does not change the fact that the courts are really giving effect to the settlor's intentions because it is the intention that is presumed and must be disproved. If the intention can be proved by positive evidence, the presumption is insignificant. It is only relevant where the intention cannot be proved. A presumed resulting trust is therefore really an express trust albeit the *expression* of the requisite intention need not be proved.

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19 P Davies and G Virgo, *Maudsley and Burn's Equity & Trusts: Text, Cases and Materials* (7th ed, OUP 2013) 392.

20 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 708.

21 *Fowkes v Pascoe* (1875] 10 Ch App 343 (CA).

22 *Westdeutsche* (n 20).

23 *In re Sharpe (a bankrupt)* [1980] 1 WLR 219 (Ch) 223.

24 See below.

25 (1984) 155 CLR 242 (HCA) 264.

26 [1970] AC 777 (HL) 823.

Equity does not allow the transferee to insist on his strict legal rights, as it would be unconscionable for him to do so. After all, it would be unconscionable for a trustee to deny the existence of a trust if property was transferred on trust to him. On the other hand, this does not explain why in these circumstances formalities need not be complied with. In effect, this leads to a situation where A can gratuitously transfer land to B and a trust in favour of A will be presumed even though A has not complied with the formalities imposed by Section 53(1)(b). As long as B cannot adduce positive evidence that A did not intend a trust, the land will be held on trust. A settlor who wants to create a trust in favour of oneself is therefore effectively exempt from the formality requirements whilst A must comply with those formalities in cases of both self-declarations of trust and conveyances subject to trusts for third parties.

To the extent that the courts are doing no more than giving effect to the intent of the legislature, these decisions are well within the proper ambit of judicial authority. Nevertheless, this does not relieve us of identifying an intelligible purpose for such an exception. It is probable that the institution of the presumed resulting trust is meant to protect the transferor against fraudulent transferees. Section 53(1)(b) similarly seeks to prevent landowners from being deprived of the beneficial interest in the property. Thus, the aims of Section 53(1)(b) and presumed resulting trusts are not opposed to each other; rather, they are parallel. Indeed, the imposition of the formality requirement would thwart the purpose of the legislation: protecting the landowner.

III.3 Automatic Resulting Trusts

Where an express trust fails because, for example, the objects are uncertain, the trustee holds the property on resulting trust for the settlor. In these cases, there is no *presumption* of resulting trust. This is most clearly illustrated by the decision of the House of Lords in *Vandervell v IRC* where the last thing the settlor wanted was for the equitable interest to rest with him and Lord Wilberforce concluded that there is 'no need, or room [...] to invoke a presumption'.[27]

Nevertheless, Lord Browne-Wilkinson in *Westdeutsche* was 'not convinced' that it arises automatically and does not depend on intention.[28] His Lordship argued that where the settlor expressly or by necessary implication abandons any beneficial interest, the undisposed-of equitable interest would vest in the Crown as *bona vacantia*. Undoubtedly, settlors may provide for the consequences of the potential failure of their trusts; a settlor's intention displaces the general rule. However, Lord Browne-Wilkinson's *obiter* remarks only tell us that the property will be held for the Crown where the settlor declares that (1) a trustee is to hold property on trust for X and (2) if the trust fails, the property is *not* to be held on trust for himself.

With respect, the problem with this view is that it is irreconcilable with the facts of *Vandervell* and even if the facts of the case could be said not to have amounted to an 'expressed intention' or giving rise to a 'necessary implication', the very narrow point that where the settlor only expresses his wish not to hold the beneficial interest it is to pass to the Crown still seems doubtful.

Whilst there is no authority on this point, is seems more sensible in the current political context to assume that where the settlor abandons his beneficial interest in default of the trust, the trustee – not the Crown – should be taking the property outright. Every donor abandons his beneficial interest in favour of the donee. Therefore, when a transferor abandons his beneficial interest in the property, the title to the property passes absolutely – ie *without* a trust – and the transferee takes outright.

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27 [1967] 2 AC 291 (HL) 329.

28 *Westdeutsche* (n 20) 708.

Lord Millett in *Air Jamaica Ltd v Charlton* held that the resulting trust responds to the 'absence of any intention on [the settlor's] part to pass a beneficial interest to the recipient'.[29] Respectfully, this answer begs the question. Where A transfers property to B, he *either* intends to pass absolute ownership to B as a gift, pursuant to a contract or by way of loan *or* intends B to hold the property on trust for either C or A. All express trusts respond to A's intention that B is to retain merely the legal title and not benefit from the property. It is thus no answer to the question of why B should hold on trust for A where the trust for C fails that A did not intend B to take the property outright. Intention in both the negative sense – of not intending to benefit B – and the positive sense – of intending to benefit someone else – gives rise to *express trusts*.

In light of *Vandervell v IRC* and the preceding analysis, it is clear that it is not the settlor's intention that gives rise to the automatic resulting trust. However, this does not mean that the settlor's intention cannot override the general rule. It plainly does. This means that courts will respect a settlor's intention as to what is to happen if the trust fails.

What is then the rationale for the general rule? There are at least two approaches. First, the trustee would be unjustly enriched if he could take the property beneficially. The problem with this approach is relatively simple: it does not explain why the settlor has a proprietary as opposed to personal remedy. Swadling even suggested that in this context a personal claim might be preferable 'because it ensures equality of treatment between creditors in the event of the transferee's insolvency'.[30] An alternative approach is perhaps devoid of jurisprudential appeal but disarmingly simple. Davies and Virgo's introduction to automatic resulting trusts is telling. They ask 'who else should have the beneficial interest in the property?' and answer, '[n]ot the trustees [...] [n]or the intended beneficiaries'.[31] The 'sensible outcome' and 'best solution,' they argue 'is that the beneficial interest belongs to the settlor'.[32] Arguably, they are right. The rationale is pure pragmatism. A contract entered under a common mistake is void *ab initio*, money paid under mistake must be returned, property intended to be held on trust for a failed express trust is to be held on resulting trust for the settlor unless the settlor makes provision for what is to happen to the property in default. These are rules of law. They are open to change, but there seems to be no need to repair what is not broken.

Automatic resulting trusts arise by operation of law; their rationale is pragmatism. They are therefore constructive trusts and truly fall outside the ambit of Section 53(1). Indeed, it would be absurd if they did not. The result would be that land that was to be held on a failed trust is to be held outright by the trustee whereas chattels would be held on a resulting trust for the settlor.

III.4 *Rochefoucauld v Boustead*

The Court of Appeal in *Rochefoucauld v Boustead* has established 'that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself'.[33] Since the courts refuse to allow a defendant to rely on a statute to enable fraud, such a trust will be given effect to notwithstanding non-compliance with Section 53.

However, *Bannister v Bannister*[34] and *Rochefoucauld* give different answers to whether the trust so constituted is express or constructive. This is problematic at least in so far as the Court of Appeal is bound by its own decisions and the Court of Appeal in *Bannister* was thus bound by *Rochefoucauld*. But

29 [1999] 1 WLR 1399 (PC) 1412.

30 W Swadling (n 18) 101.

31 P Davies & G Virgo (n 19) 376.

32 ibid.

33 [1987] 1 Ch 196 (CA) 206 (Lindley LJ).

34 [1948] 2 All ER 133 (CA).

regardless of the law of precedent, Swadling argues that such a trust is express as a matter of principle.[35] He asks the following question:

> 'Assume the legislature repealed section 7 [of the Statute of Frauds] / section 53(1)(b) [of the Law of Property Act 1925]. Were the facts of *Rochefoucauld* to recur, there could be no argument that the trust was express.'[36]

It follows that the trust so recognised is not one of those exempted from the operation of Section 53(1). So why did the court – as Swadling put it – 'effectively repeal the statute, at least so far as the claimant was concerned'?[37] Even though the maxim that equity will not allow a statute to be used as a tool for fraud is often invoked to justify the result, this explanation is plainly inconsistent with *Hodgson v Marks.*[38]

A transferred her house to B who orally agreed that he would hold it on trust for A. B then sold the house to C who mortgaged it to a building society. The Court of Appeal held that C and the building society were bound by the trust in favour of A even though neither the building society nor C can sensibly be described as being fraudulent. The reason the formality requirement of Section 53(1)(b) was disapplied is therefore that it would have been unconscionable for the defendants to rely on their strict legal rights; not that the defendants were guilty of any wrongful conduct.

III.5 Common Intention Constructive Trusts

The leading case on the common intention constructive trust is *Jones v Kernott*.[39] The Supreme Court was unanimous on the result and all Lordships agreed that the trust imposed was a common intention constructive trust.

Where majority and minority differed significantly was the characterisation of the *intention* this constructive trust was based on. Whilst Lady Hale, Lords Walker and Clarke purported to *infer* an intention, the minority of Lords Kerr and Wilson was upfront about the fact that no such intention could be inferred and had to be *imputed*. As Lord Neuberger put it in *Stack v Dowden*, '[i]mputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend'.[40] The distinction is thus between the objective deduction of an intention from evidence on the one hand and the attribution of an intention to parties who – on the facts – had no such intention on the other.

Regrettably, Lady Hale and Lord Walker who delivered the leading judgment illustrated the point that 'while the conceptual difference between inferring and imputing is clear, the difference in practice may not be so great' themselves.[41] The closest their Lordships came to justifying what they called the 'logical inference' from the facts was that 'it is clearly the intention which reasonable people would have had had they thought about it at the time'.[42] With respect, this reasoning is flawed. The justification for i*nferring x* cannot possibly be that *x* is what the court would *impute.*

Lords Kerr and Wilson recognised that on the facts it was impossible to infer any intention and the court must impute an intention that reflects what is fair and just. It is Lord Wilson's remark

35 W Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in Mitchell (ed) *Constructive and Resulting trusts* (1st ed, Hart 2010) 113.

36 W Swadling (n 18) 113.

37 ibid.

38 [1971] Ch 892.

39 [2011] UKSC 53 , [2011] 3 WLR 1121.

40 [2007] UKHL 17; [2007] 2 AC 432 [126].

41 *Jones v Kernott* (n 39) [34].

42 ibid [48].

about the 'continued failure of Parliament to confer upon the courts limited redistributive powers in relation to the property of each party upon the breakdown of a non-marital relationship' that most accurately captures the judges' sentiment of frustration about their lack of authority.[43]

Whilst going into the justification for such wide-ranging distributive powers with respect to property outwith any legislative authority is beyond the subject of this article, what must be appreciated is the extent to which the courts simply ignore formality provisions in imposing what they believe to be just.

If Mrs Jones and Mr Kernott had wanted to settle their beneficial interest in the house, they would have had to comply with Section 53(1)(b). If they had done so at the time they bought their house, the outcome would have been very different. What the Supreme Court relied on was that the parties' intentions had *changed* and the beneficial interest was therefore split according to those changed intentions. Where the interests had been put down in writing by the parties, the disposition of their already existing beneficial interest would have had to be in writing by virtue of paragraph (c). In such a case, it would not even have been sufficient for the parties to agree expressly and orally on a change in beneficial interest.

The court's jurisdiction in redistributing property therefore seems to invite cohabiting couples not to settle their affairs in order for them to remain as flexible as possible. Even though as a matter of statutory interpretation, this seems justified as the trust imposed in *Jones v Kernott* was constructive – and indeed wholly constructed by the court – as a matter of principle, it may seem doubtful whether this uncertainty is desirable.

Nevertheless, what emerges is that the proprietary arrangement imposed reflects what the court believed to be fair and just – ie conscionable – and formalities were held to be irrelevant.

V. Conclusion

What emerges is that even though *The Earl of Oxford's Case* was decided nearly 400 years ago, the principle articulated in it is still very topical. Equity will not allow defendants to rely on their strict legal rights where it would be unconscionable for them to do so and goes as far as to simply ignore statutorily imposed formalities in order to achieve this end.

Whilst this may not be problematic and can in many cases – as seen from the preceding analysis – be justified, these issues should not be shrugged under the carpet under the smokescreen of dubious equitable maxims but tackled transparently.

[43] ibid [78]

Two Questions of Maritime Jurisdiction

Yu Jie Wu[1]

On 15 February 2012, two Italian marines on board an Italian-flagged vessel, the *MV Enrica Lexie*, allegedly shot and killed two persons on board a fishing vessel, the *St Antony*. They had mistaken them for pirates. These two marines were subsequently arrested. The case made its way to the Supreme Court of India on the primary question of whether the Union of India had sufficient jurisdiction to try them.

Amidst the human and diplomatic drama of subsequent events, the decision of the Supreme Court offers a platform for an inquiry into the international law of the sea. The key task of this paper is the clarification, though not necessarily simplification, of such issues raised by the Supreme Court of India's decision in *Republic of Italy v Union of India*.[2] It will not address the question of immunity,[3] but will instead concentrate on two questions of maritime jurisdiction, (1) the use of the *Lotus* case[4] and the nature of exclusive flag State jurisdiction[5] and (2) India's jurisdiction over its contiguous zone and its understanding thereof.[6] As to the first question, the following seeks to provide a clearer understanding of the *Lotus* case and the concept of exclusive flag State jurisdiction, and as to the second, it will be argued that the Supreme Court of India misconstrued the nature of jurisdiction available in the contiguous zone, demonstrating the difficult relationship between that zone and the Exclusive Economic Zone ('EEZ'). This paper will address matters on two levels: firstly regarding the decision itself[7] and secondly regarding the two issues it raises.[8]

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1 Magdalen College, Oxford. I would like to thank Valentin Jeutner and the editors of the Journal for their comments. Over the past year, I have benefitted greatly from conversations and work with Weijian Chan, Torsten Cheong, Nettie Choo and Sophie Scholl on these and similar issues.

2 *Republic of Italy v Union of India* (2013) 4 SCC 721 (Supreme Court of India).

3 In any case, this issue did not concern the Court greatly in the judgment.

4 *Case of the SS Lotus (France v Turkey)* (Merits) PCIJ Rep Series A No 10.

5 United Nations Convention on the Law of the Sea (adopted 10 December 1982, opened for signature 10 December 1982) 1833 UNTS 3 (UNCLOS) art 92.

6 Concerning the validity of India's maritime claims with reference to UNCLOS art 33. This issue is now more important given that prosecution under the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act 2002 (India) has been halted: TNN, 'SUA charge against Marines nixed, Italy wants case closed' *The Times of India* (25 February 2014) <http://timesofindia.indiatimes.com/india/SUA-charge-against-Marines-nixed-Italy-wants-case-closed/articleshow/30967137.cms> accessed 6 March 2014.

7 The following analysis will address the domestic law of the Union of India only insofar as it reveals the nature of jurisdiction it sought to exercise in this case. Any criticism here directed towards that exercise is not directed against the Court itself, as within the domestic system, domestic laws take precedence: *Republic of Italy v Union of India* (n 2) [111] (Kabir CJ). However, the validity of such claims will be assessed against international law, especially where the Court has made statements about the compliance with international law: e.g. ibid [100], [110] (Kabir CJ).

8 This paper seeks to analyse in more depth the actual decision of the Court, building on existing analysis on other points concerning immunities and the SUA Convention: see e.g. V Eboli & J Pierini, 'Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: The *Enrica Lexie* Case' (2012) 51 Mil L & L War Rev 117.

I. THE DECISION OF THE SUPREME COURT OF INDIA

Two questions were before the Supreme Court. First, did the State of Kerala have jurisdiction? Second, did the Union of India have jurisdiction?

The Supreme Court made two factual assumptions which drove the decision to base jurisdiction on India's claims in its contiguous zone. The first assumption was that the incident occurred approximately 20.5 nautical miles ('nm') from India, and, as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976 ('Maritime Zones Act 1976') within India's Exclusive Economic Zone[9] and contiguous zone.[10] The second was that the *St Antony* was not flying an Indian flag at the time of the incident.[11] This was despite submissions on the registration of a fishing vessel under Part XV-A of India's Merchant Shipping Act 1958,[12] and the decision of the High Court of Kerala assuming that the *St Antony* was registered.[13]

Kabir CJ, delivering the leading judgment, first had to resolve the preliminary issue of whether the State of Kerala had jurisdiction to investigate and prosecute. It was held that it did not, as a state within the Union only had jurisdiction with respect to the territorial sea.[14] In relation to the Union's jurisdiction, Kabir CJ first considered the maritime zones claimed by India, recognising that because the contiguous zone formed part of the EEZ, the laws governing the EEZ would govern incidents in the contiguous zone. In this respect, he considered that the Maritime Zones Act 1976 was in compliance with the United Nations Convention on the Law of the Sea ('UNCLOS').[15] Article 97 of UNCLOS was then considered and rejected as a basis for giving Italy the exclusive right to bring penal proceedings against the marines.[16] There was then an extended reference to the *Lotus* case,[17] then to exclusive flag State jurisdiction,[18] and then to the sovereignty that India may exercise in its maritime zones.[19]

The crux of the decision was then addressed, namely, the application of the Indian Penal Code ('IPC') by way of Section 2, dealing with offences committed in India, through the application of Notification SO 671(E) of 27 August 1981.[20] Section 4 of the IPC, dealing with extraterritorial offences, was not relied on due to a concession by the State of Kerala in the Kerala High Court.

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9 Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act 1976 (India) (MZA 1976) s 7(1).

10 MZA 1976 s 5(1).

11 *Republic of Italy v Union of India* (n 2) [101] (Kabir CJ).

12 ibid [67], [90].

13 Although ultimately relying on another basis of jurisdiction: *Massimilano Latorre v Union of India* (2012) 252 Kerala LR 794 (High Court of Kerala) [1] (Gopinathan J).

14 *Republic of Italy v Union of India* (n 2) [93].

15 ibid [100].

16 ibid [102]-[103].

17 ibid [104].

18 ibid [105].

19 ibid [106].

20 Although not addressed directly in the reasoning, this approach was cited as proposed by counsel: ibid [90]. It was also addressed by Chelameswar J: ibid [127]-[128]. The more explicit reasoning can be understood from the judgment in the High Court of Kerala, *Massimilano Latorre v Union of India* (n 13) [21] (Gopinathan J): 'In the light of the above notification, I find that IPC and CrPC have been made applicable to the EEZ. And, by reading Section 2 of the IPC, along with Sections 3 and 7 of the Territorial Waters Act, and the above notification, I find that the provisions of IPC are extended to the CZ/EEZ of India. In other words, Section 2 of the IPC is extended by the above notification to the CZ/EEZ.'

Recognising that under international law a State did not have sovereignty in the *EEZ*, Kabir CJ finally concluded that:

> 'India is entitled both under its domestic law and the public international law to exercise rights of sovereignty up to 24 nautical miles from the baseline on the basis of which the width of the territorial waters is measured […]. The incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the contiguous zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country.'[21]

Thus, the Union of India had jurisdiction over the marines, and the Supreme Court directed that a Special Court be established to try the case according to the 'Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS, 1982, where there is no conflict between the domestic law and UNCLOS, 1982.'[22]

Chelameswar J delivered a concurring judgment,[23] which set out in detail the constitutional provisions relating to the exercise of jurisdiction by the Union, the nature of India's territory and the bases of extraterritorial jurisdiction. The basis of the application of the IPC was explicitly termed a 'legal fiction' under the Maritime Zones Act 1976, that the enactment would operate *as if* the contiguous zone and EEZ were part of India's territory.[24]

From this brief summary of the reasoning of the Supreme Court, it is clear that there is a complex circulation of concepts and doctrines that needs to be systematized. It is hoped that by clarifying concepts and doctrines, a more coherent system of jurisdiction can be constructed arising from the framework provided by UNCLOS.

II. THE *LOTUS* CASE AND EXCLUSIVE FLAG STATE JURISDICTION

The *Lotus* case is a foundational case in international law.[25] But its scope is problematic, and the validity of its legal propositions is unclear.[26] I will first consider the references to *Lotus* in *Italy v India* by both counsel and the Court and whether they provide indications of State attitudes towards the *Lotus* case today, then turn to the actual decision by the Permanent Court of International Justice ('PCIJ'), and finally conclude regarding the status of the *Lotus* case today. I then turn my attention to the nature of exclusive flag State jurisdiction.

II.1 References to Lotus in Italy v India

Mr Salve, on behalf of the Republic of Italy, 'urged that the judgment of the Permanent Court of International Justice in *S.S. Lotus* […] continued to be good law, save and except to the extent it had been overridden, but only in relation to collisions under Article 97 of UNCLOS.'[27] Mr Banjeri, the

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21 *Republic of Italy v Union of India* (n 2) [110].

22 ibid [111].

23 Regarding the application of article 97 of UNCLOS, his Honour concluded that 'irrespective of the meaning of the expression 'incident of navigation', Article 97 has no application to the exclusive economic zone': ibid [149]. The reasoning is obscure. This might be a flaw in the legal reasoning, but has no impact on the following discussion.

24 ibid [127].

25 L Henkin, 'International Law: Politics, Values and Functions' (1989) 216 Recueil des Cours de l'Académie de Droit International 9, 278; H Handeyside, 'The *Lotus* Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?' (2007-8) 29 Mich J Intl L 71, 71-2.

26 A Lowe and C Staker, 'Jurisdiction' in M Evans (ed) *International Law* (3rd ed, OUP 2010) 313, 317.

27 *Republic of Italy v Union of India* (n 2) [36] (Kabir CJ).

Additional Solicitor General, made reference to *Lotus* as 'good law' where article 97 of UNCLOS would not apply.[28] At present, it is sufficient to note that counsel to the dispute did make reference to *Lotus* where the rule under article 97 was in question, but not in relation to any assertion of India's flag State jurisdiction over the *St Antony*.[29]

Kabir CJ recognised that the applicability of *Lotus* turned on the applicability of article 97 of UNCLOS.[30] The facts and holding of the PCIJ in that case were set out,[31] and exclusive flag State jurisdiction was considered.[32] But neither of these paragraphs seemed to play material roles in the reasoning. More discussion was given to this point in the High Court of Kerala, in relation to the objective territorial principle,[33] recognising that India would enjoy flag State jurisdiction if article 97 did not apply.[34]

However, because the basis of jurisdiction eventually asserted was *not* flag State jurisdiction, *Lotus* served only a secondary purpose of identifying the relationship between Italy's flag State jurisdiction and India's jurisdiction over its contiguous zone.[35] It is also clear that the parties did not cite the case for the broader principle, that in the absence of a restrictive rule, a State may exercise jurisdiction however it wished. The references to *Lotus* are thus not useful indicators of a State organ's understanding of that case.

II.2 The PCIJ's decision in Lotus

The decision in *Lotus* stands for a number of propositions of international law. I am concerned here with those that relate to the issue of jurisdiction.[36]

The first proposition, a principle of 'international legal positivism,'[37]was that '[r]estrictions upon the independence of States cannot […] be presumed.'[38] The second proposition follows from the first, and provides that prescriptive jurisdiction is broad:

> 'Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts

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28 ibid [72].

29 See text to n 12-13.

30 *Republic of Italy v Union of India* (n 2) [103].

31 ibid [104].

32 ibid [105].

33 M Shaw, *International Law* (6th ed, CUP 2008) 656-7. In India's domestic system, such a principle operates from s 179 of the Code of Criminal Procedure.

34 *Massimilano Latorre v Union of India* (n 13) [34]-[35] (Gopinathan J).

35 Contrast the reading of that case in N Black, 'Criminal Jurisdiction over Maritime Security in the Indian Ocean' (2013) 1 Cornell Intl LJ Online 77.

36 Here, the view is taken that the PCIJ in *Lotus* was in fact enunciating a rule of jurisdiction. A contrary suggestion has been raised that the decision 'does not set a judicial principle by establishing a rule for the exercise of jurisdiction based on the so-called 'protection principle', or on the relevance of the effects of the crime and the place where such effects take place': Eboli & Pierini (n 8) 127. But this view is not convincing, given the explicit statements about the nature of flag State jurisdiction. Further, the fact that the PCIJ did not inquire into the actual decision of the Turkish Courts is neither here nor there. 'The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as treaty provision enters into account, or the possibility of a denial of justice arises': *Case Concerning the SS Lotus* (n 4) 24.

37 H Handeyside (n 25) 75.

38 *Case Concerning the SS Lotus* (n 4) 18.

> outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.'[39]

The final proposition, on flag State jurisdiction, was that where a constituent element of an offence occurs on board a vessel, the flag State of that vessel shall have jurisdiction to try for that offence.[40]

The PCIJ's reasoning can be formulated in the following manner:

> *Major premise*: A State in its own territory may exercise jurisdiction in the absence of a restrictive rule of international law.[41]
> *Minor premise 1*: A vessel is assimilated to the territory of the flag State, 'for, just as in its own territory, that State exercises its authority upon it, and no other State may do so.'[42]
> *Minor premise 2*: There is no restrictive rule of international law prohibiting the exercise of jurisdiction where an element of the crime occurs in the territory of a State.[43]
> *Conclusion*: A State may exercise jurisdiction over offences effects of which occur on board a vessel flying its flag as there is no rule prohibiting such exercise of jurisdiction.

Under the present international law, this reasoning may not be satisfactory. In the first place, the major premise is not generally accepted in its entirety, if at all. As Judges Higgins, Kooijmans and Buergenthal recognised, '[T]he dictum [44] represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies.'[45] It is indeed arguable that a restrictive approach, the need to show some facilitative basis of jurisdiction, has now been adopted.[46] In some respect, it may simply be a question of the burden of proof that arises only 'in specialized or unusual situations where the authorities are few and/or contradictory'.[47]

In the second place, the first minor premise obfuscates the issue: what does it actually mean for a vessel to be assimilated to the flag State's territory? This statement seems to join two aspects of jurisdiction—the 'exclusive' right to enforce laws on board the vessel[48] and the right to prescribe or regulate for conduct and events on board that vessel. The reasoning of the PCIJ is unclear, as these two aspects of jurisdiction are not necessarily co-extensive.[49] A clearer statement of law was perhaps given by Judge Moore: '[A] ship on the high seas is, *for jurisdictional purposes*, to be considered as a part of

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39 ibid 19.

40 R Churchill and A Lowe, *The Law of the Sea* (3rd ed, Manchester University Press 1999) 208.

41 *Case Concerning the SS Lotus* (n 4) 19.

42 ibid 25.

43 ibid 27.

44 See text to n 39.

45 *Arrest Warrant of 11 April 2000 (Congo v Belgium)* (Merits) [2002] ICJ Rep 63 [51] (Joint Sep. Op. of Judges Higgins, Kooijmans and Buergenthal).

46 C Ryngaert, *Jurisdiction in International Law* (OUP 2008) 21.

47 M Akehurst, 'Jurisdiction in International Law' (1972-3) 46 BYIL 145, 167.

48 *Case Concerning the SS Lotus* (n 4) 25.

49 R Jennings & A Watts (eds) *Oppenheim's International Law* (9th ed, Longman 1996) § 137.

the territory of the country to which it belongs'.[50] But it might be questioned whether the major premise can or should apply with respect to flag State jurisdiction if this is the case.

The reasoning of the PCIJ in this respect is in need of re-evaluation. Such a re-evaluation can only be undertaken by reference to the doctrine of exclusive flag State jurisdiction. This is a question of legal doctrine underlying a legal rule. Before turning to that re-evaluation, however, it is worth setting out the status of the legal rule today.

II.3 The Lotus case today

What is the status of the jurisdiction recognised by the PCIJ in that case today?

The PCIJ's decision was met with immediate disapproval. Representations made by the International Association for Mercantile Marine Officers, considered by the League of Nations Advisory and Technical Committee for Communications and Transit, subsequently referred to the International Labour Office, and finally addressed by conferences under the purview of the International Maritime Committee, sought to establish an agreement on the exclusivity of jurisdiction by the flag State or the State of which responsible persons were nationals.[51]

Eventually, treaty provisions reversed the state of law after the *Lotus* case. This series of provisions began with article 1 of the 1952 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation,[52] which was then re-codified by the 1958 Convention on the High Seas, article 11,[53] and then article 97 of UNCLOS.[54] Article 6 of the Convention on the High Seas and article 92 of UNCLOS are not the relevant provisions in this respect.[55] Thus, where article 97 of UNCLOS or article 11 of the HSC have no application, the jurisdiction under *Lotus* continues to exist.

There are two key means of disapplication, either by showing that there was no collision or incident or navigation,[56] or by showing that the person whose responsibility is engaged is not the master or any other person in the service of the ship.[57] Statements (or indeed assumptions) to the

50 *Case Concerning the SS Lotus* (n 4) 69 (Diss. Op. of Judge Moore) (emphasis added).

51 P Jessup, 'The Growth of the Law' (1935) 29 AJIL 495, 496ff.

52 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation (adopted 10 May 1952, entered into force 20 November 1955) 439 UNTS 235 (Brussels Convention on Collisions) art 1.

53 Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 (HSC) art 11.

54 UNCLOS art 97.

55 Not only because the PCIJ in *Lotus* clearly operated on the basis of such flag State jurisdiction (what exactly that entails remains to be seen—see below), but the 1952 Convention did *not* include a provision like HSC art 6 or UNCLOS art 92—the relevant operative 'reversal' was brought about by the specific provisions above. Admittedly, this view is contrary to the assertions of some commentators: see J Bellish, 'Revisiting Jurisdiction over the *Enrica Lexie* Incident' (*The View from Above: Denver Journal of International Law and Policy*, 2 March 2012) <http://djilp.org/1816/revisiting-jurisdiction-over-the-enrica-lexie-incident/> accessed 12 March 2014.

56 The approach taken by the Supreme Court of India. This Note will not consider the details of the reasoning in that respect.

57 The application of UNCLOS art 97 with respect to stolen vessels is an open question. A further difficult question that will not be addressed here is the relationship between UNCLOS art 97 and art 105, which raises problems of interpreting treaties like the HSC and UNCLOS.

contrary, that article 97 is absolute and incapable of disapplication,[58] should be avoided. It serves as a barrier to otherwise lawful exercise of jurisdiction, and is justifiable only because of the countervailing arguments operationalised in those two conditions.[59]

II.4 Exclusive flag State jurisdiction

A re-evaluation of the *Lotus* jurisdiction involves an examination of the very concept of exclusive flag State jurisdiction on the high seas.[60] Article 92(1) of UNCLOS provides, *inter alia*, 'Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.' A number of descriptions of exclusive flag State jurisdiction, specifically, prescriptive jurisdiction, can be provided. To be sound, a description needs to account for (A) the jurisdiction recognised in the *Lotus* case, and (B) the existence of concurrent jurisdiction that may occur on board one vessel.[61] I intend to take the label of 'exclusive' jurisdiction seriously.

What is meant by jurisdiction? In essence, it is 'the extent of each state's right to regulate conduct or the consequences of events'.[62] I am here particularly concerned with the right to prescribe by the application of laws by legislation. The issue is the extent of permissible jurisdiction, and the *bases* on which application may be permissible. *Exclusive* jurisdiction is the right of one State to prescribe *to the exclusion* of all other States. The problem with a simple application of such exclusivity is that it cannot account for the two particular characteristics identified above.[63]

Three possible explanations of such exclusive jurisdiction arise from the distinctions between exclusive jurisdictions attaching to the identity of the person, the location, and the subject-matter of the law.

The first sense of jurisdiction, exclusive jurisdiction on the basis of the identity of the person over which jurisdiction is asserted, does not *prima facie* offer a sound explanation - the *Lotus* case could not have been decided the way it was if so. If this were the basis of exclusive jurisdiction, why was there a need for the subsequent reversal provided by treaties on the *basis* of such exclusive jurisdiction over the master or other person in the service of the ship? But on a second look, the reasoning provided below regarding practicality[64] may have applied when the PCIJ decided the case. The subsequent treaty rules can then be seen as *clarifying* the scope of exclusive jurisdiction. Further, the practice of

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58 As implicit in A Jennings & R Watts (n 49) § 291; I Bantekas, 'Criminal Jurisdiction of States under International Law', *Max Planck Encyclopaedia of International Law* (2011) <http://opil.ouplaw.com/home/epil> accessed 29 January 2014 [7]: 'On the high seas, the general rule is that only the flag State has jurisdiction over crimes occurring on vessels flying its flag' citing UNCLOS art 97.

59 For the underlying policy: International Law Commission, 'Report of the International Law Commission Covering the Work of its Eighth Session' (23 April-4 July 1956) UN Doc A/3159 [1956] II YILC 256, 281.

60 'In general, the flag State […] has the exclusive right to exercise legislative and enforcement jurisdiction over its ships on the high seas': R Churchill & A Lowe (n 40) 208. cf M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007) 158. A point worth considering is whether the following discussion would have implications for how we might conceptualise exclusive jurisdiction under UNCLOS art 60.

61 Recognised as part of UNCLOS art 97. This was also conceded by the dissenting judges in *Lotus*: e.g. *Case Concerning the SS Lotus* (n 4) 38 (Diss. Op. of Judge Loder), 53 (Diss. Op. of Lord Finlay).

62 R Jennings & A Watts (n 49) § 136. cf M Shaw (n 33) 645.

63 Therefore the formulation of such jurisdiction by H Myers, *The Nationality of Ships* (Martinus Nijhoff Publishers 1967) 56 cannot be accepted at the outset.

64 See text to n 76-77.

certain States in the exercise of extraterritorial criminal jurisdiction whereby members of the crew of a vessel are excluded from the remit of the legislation supports this explanation.[65] Therefore, there is an arguable case that exclusive flag State jurisdiction may be on the basis of exclusive jurisdiction *for members of the crew.*

The second sense of exclusive jurisdiction, based on the location of conduct, was asserted by France in the *Lotus* case: 'International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.'[66] The PCIJ appeared to agree,[67] but as analysed above, the reasoning is obscure. The stronger argument against this form of jurisdiction is that this assertion is contrary to the recognition even by some of the dissenting judges that the State of which the guilty party is national may exercise concurrent jurisdiction.[68]

The final sense of jurisdiction, based on distinctions over subject-matter, considers that a flag State ought to have exclusive jurisdiction over *particular matters* that pertain to the vessel. This seems to be viable. The fundamental problem with characterising exclusive flag State jurisdiction in such a way is the absence of a guiding rule for *which* subject matters fall outside of the flag State's exclusive jurisdiction. While this is not the place to exhaustively define such exclusive jurisdiction,[69] some provisions in UNCLOS provide indications. Article 94(1) of UNCLOS provides a broad direction by imposing the obligation of flag States to 'effectively exercise its jurisdiction and control in administrative, technical and social matters'.[70] One might also consider as indicative a provision such as article 211(5) of UNCLOS, limiting the laws and regulations of a coastal State on 'prevention, reduction and control of pollution from vessels' to those that conform to and give effect to 'generally accepted international rules and standards.'[71] This can be read as providing that while the enforcing State could be a State other than the flag State, the subject-matter of the prescription must be those accepted standards to which the flag State, presumably, has had regard to, given international acceptance. Such an approach is reflected also in article 211(6)(c) of UNCLOS pertaining to designated 'special areas', whereby coastal States in those areas cannot 'require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted by international rules and standards'.[72] *A fortiori*, such matters should be within the exclusive competence of the flag State on the high seas.

As between the first and third senses of exclusive jurisdiction, the latter offers the better foundation. This is so because the arguments underlying the *matters* reserved to exclusive jurisdiction are the policy factors that justify such exclusivity, while the questions of identity are less able to serve as such drivers. For example, the concern with not exercising jurisdiction over nationals who are part of the crew is in fact informed by the perception of certain matters falling within the flag State's competence. Furthermore, there is a difficulty in identifying what particular *identities* are bases for

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65 It derives support from a case like *R v Kelly* [1981] QB 174 (CA), interpreting s 686(1) of the Merchant Shipping Act 1894 that gave jurisdiction, 'Where any person, being a British subject, is charged with having committed any offence […] on board any foreign ship *to which he does not belong*.' (emphasis added). The case turned on whether the person was sufficiently attached to the foreign ship, indicating potentially an understanding of exclusive flag State jurisdiction on the basis of whether the matter or person pertained to the operation of the vessel itself. See also New Zealand's Crimes Act 1961 s 8(1)(d).

66 *Case Concerning the SS Lotus* (n 4) 22.

67 ibid 25.

68 See n 61.

69 How different interests and priorities are resolved is beyond the scope of this essay. For one theory of how to do so, see M McDougal & W Burke, *The Public Order of the Oceans* (1st ed, Yale University Press 1962) ixff.

70 UNCLOS art 94(1).

71 ibid art 211(5).

72 ibid art 211(6)(c).

exclusive jurisdiction—article 92(1) refers to '[s]hips', and not to persons. Presumably the crew of the ship will be subject to that exclusive jurisdiction, but the question is how far this extends. Would it extend to the security or service personnel on board a cruise liner?[73] Would it extend to engineers or just the navigational crew? The many meanings the term 'ship' can take can only be determined in each case by reference to the purpose of invoking the term.[74] If this is so, then we are faced again with the question of subject-matter.

There is therefore no exclusive flag State jurisdiction on the basis of subject-matters that do not fall within this category of matters. On this approach, there is no *necessary* link between exclusive jurisdiction and exceptions to that jurisdiction. The basis of active nationality jurisdiction could simply be the desire of States to exercise jurisdiction for certain matters over their nationals.[75]

Where does *Lotus* fit? This statement by the PCIJ explains the basis for finding jurisdiction in that case:

> These two elements [of the offence, the conduct and the results,] are, legally, entirely inseparable, so much so that their separation renders the offence non-existence. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction.[76]

An absurd situation would arise if exclusive jurisdiction was taken to the extremes: if the flag State of the vessel on which the results of the offence occurred sought to exclude the jurisdiction over that matter, and the flag State of the vessel on which the criminal conduct occurred sought to do the same, there would be a deadlock.[77]

But would this apply to all forms of criminal conduct? Suppose the issue of an engine's operation is within the flag State's exclusive jurisdiction. If fumes from the engine travel across to another vessel and cause injury, and if such a series of events is criminal under the laws of the second flag State, would that State enjoy jurisdiction on the basis of *Lotus*? It is unclear if the law at present provides any answer. It might be suggested provisionally that the first flag State enjoys exclusive jurisdiction in this regard. The role of the passage above from *Lotus* is limited—it is not a trump. It only provides an *argument* for recognising that a particular subject matter is *not* within the exclusive jurisdiction of the first flag State. It will have to be weighed against other considerations. Thus, the jurisdictional principle in *Lotus* is not a conclusive basis for the non-exclusivity of flag State jurisdiction, but merely one driver among many for recognising that non-exclusivity.

As a general scheme, we therefore have (A) exclusive flag State jurisdiction over particular matters; (B) other matters that do not fall within the scope of (A), with the principle in *Lotus* acting as one consideration for deciding what these matters are; and (C) exceptions on the basis of treaty law.

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73 Of concern regarding jurisdiction for crimes committed on board such vessels: 'Crimes against Americans on Cruise Ships: Hearing Before the Committee on Transportation and Infrastructure', 110th Congress (2007) 32.

74 D O'Connell, *The International Law of the Sea*, vol 2 (IA Shearer ed, OUP 1984) 747-9.

75 E.g. Crimes at Sea Act 2000 (Australia) s6(2). Thus while these examples of State practice are restricted to non-crew, it is not necessarily the case that the flag State *always* has jurisdiction over the crew members. It would depend on the nature of the matter involved.

76 *Case Concerning the SS Lotus* (n 4) 30-1.

77 cf W Berge, 'Conflicts in Respect to Criminal Jurisdiction' (1930) 24 ASIL Proceedings 34, 36.

But there are dangers to such an approach. Category (B) does not arise from treaty law.[78] This is in contrast to the exceptions to flag State jurisdiction that may arise from treaties, the only source of exceptions, strictly speaking, under UNCLOS, article 92. If article 92 provides the relevant rule, where do the exceptions in (B) come from? They seem to be inherent limits to exclusive flag State jurisdiction, but how are we to rationalize them? As yet, the law does not offer the tools needed to address this question.

This warning is not intended to cast doubt on the basic analysis that there is no magic attaching to 'exclusive flag State jurisdiction'. What this caveat turns our attention to is the need to ensure some degree of an agreed understanding of flag State jurisdiction that does *not* turn on *a priori* logical deductions from principles of jurisdiction, but does turn on an answer to a basic question, 'What is the desirable scope of matters for which the flag State ought to be exclusively competent?' Of particular concern will be issue of flags of convenience,[79] passenger transportation on the sea,[80] and environmental control.[81] Such an understanding should then be implemented in a way that ensures certainty. Certainty is valuable when considering issues of criminal jurisdiction, in order to ensure effective law enforcement and to ensure that legitimate uses of the seas are not hampered. What is now implicit in the opaque phrase, 'exclusive jurisdiction', should be outlined in clear terms, stating the *exact scope* of exclusive jurisdiction and *exceptions* from that scope.[82]

III. JURISDICTION OVER THE CONTIGUOUS ZONE

I now turn to consider the actual basis of jurisdiction asserted by the Union of India in *Italy v India*—jurisdiction over the contiguous zone.

The contiguous zone under the 1982 UNCLOS is defined by article 33. As relevant, it provides:

> (1) In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
>
> (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

The fundamental question is whether the application of the Indian Penal Code to the contiguous zone is lawful under international law. Kabir CJ considered that it was.[83] The following will

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78 Other than the exception for active personality jurisdiction for collisions and other incidents of navigation, which is now stated explicitly in treaty provisions: HSC art 11, UNCLOS art 97.

79 G Manchuk, 'The Law of the Flag and Maritime Criminal Jurisdiction: A New Rule to Replace an Outdated, Inconvenient Doctrine' (2007-8) 32 Tulane Maritime LJ 221.

80 A Wright, 'High Seas Ship Crimes' (2009) 7 Loyola Maritime LJ 1, 15ff.

81 E Molenaar & A Oude Elferink, 'Marine Protected Areas in Areas Beyond National Jurisdiction' (2009) 5 Utrecht Law Review 5.

82 Perhaps this doctrine has been a victim of its historical pedigree. Contrast the detailed, *de novo* approach taken to jurisdiction on board aircraft by the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 220.

The following remark is particularly revealing. 'In this sense the principle of the "exclusive jurisdiction" on the flag State can mislead those unfamiliar with the law of the sea. It is not an absolute prohibition on concurrent jurisdiction': D Guilfoyle, 'Shooting Fishermen Mistaken for Pirates' (*EJIL: Talk!*, 2 March 2012) <http://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility/> accessed 7 March 2014.

83 *Republic of Italy v Union of India* (n 2) [110].

consider the general doctrine of the contiguous zone, and then the particular use of that doctrine in the *Italy v India* case.

III.1 The contiguous zone in international law

The contiguous zone is a doctrine in international law whose scope and detail are difficult to ascertain. It suffers from the unfortunate combination of an unclear pre-codification status, a messy negotiation history,[84] complex drafting and inconsistent state practice.[85] Ascertaining the true scope of the contiguous zone requires one to take positions on a number of key issues in treaty interpretation and the relationship between treaty and custom.[86] It will not be the aim of the following analysis to come to a certain conclusion on the scope of a coastal State's powers in the zone. Rather, the key debates will be highlighted, with a view towards placing India's State practice in context and towards evaluating whether the claim to jurisdiction *can* be justified.

The critical question that needs to be addressed is whether a coastal State has *prescriptive* jurisdiction in its contiguous zone. Article 33 of UNCLOS refers only to 'control necessary' to either prevent or punish infringements of regulations in the territorial sea or territory. This is vague. The form of control is left undefined—control can either be by certain measures like visit or search,[87] or by the application of certain rules which must be followed.

Judge Laing in his Separate Opinion to the *M/V Saiga (No 2)* case provided a rare judicial pronouncement on an analysis of article 33. Beginning with an interpretation of the word 'control', it was noted, 'Control evidently is not coincident with generalized and plenary sovereign activity.'[88] A contextual interpretation was offered with respect to other provisions in UNCLOS that do refer to jurisdiction.[89] Given continued ambiguity, recourse was had to supplementary means of interpretation, that is, the preparatory works[90] and laws that applied with respect to contiguous zones prior to the 1958 Convention.[91] Judge Laing arrived at the conclusion, '[W]hat we now call control in the contiguous zone is permitted to the extent that the coastal State acts reasonably and necessarily and the control is exercised in those four circumstances in order to benefit the State territory.'[92] Thus, 'Article 33 does not authorize the prescription of customs and the specified other types of laws and regulations

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84 S Oda, 'The Concept of the Contiguous Zone' (1962) 11 ICLQ 131.

85 A Lowe, 'The Development of the Concept of the Contiguous Zone' (1981) 52 BYIL 109, 168.

86 And, potentially, on certain doctrinal issues arising from hot pursuit—the debate over the nature of hot pursuit that can be undertaken *from* the contiguous zone is difficult one, suffering from the same difficulties identified above: see e.g. C Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20 ODIL 309.

87 And even if it is restricted to control (assuming that no laws of the coastal State can validly apply in the contiguous zone), there is no clear indication of the extent of control allowed. As an indication of the debates: a narrow view is supported by IA Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 25 ICLQ 320, 330, especially for incoming vessels—where the aim is prevention, control 'must be limited to such measures as inspections and warnings, and cannot include arrest or forcible taking into port.' This narrow view is deprecated by M McDougal & W Burke (n 69) 630: 'It does not seem probable that state will suddenly convince themselves that a suspected vessel's crossing of an imaginary line in the ocean delimiting the territorial sea is necessary before an exercise of protective authority can be considered reasonable.' See also T Treves, 'Navigation' in J Dupuy and D Vignes (eds), *A Handbook on the New Law of the Sea*, vol 2 (Martinus Nijhoff Publishers 1991) 835, 857.

88 *M/V Saiga (No. 2) (St Vincent and the Grenadines v Guinea)* (Merits) (1999) 120 ILR 143, 269 [9] (Sep. Op. of Judge Laing).

89 ibid [10]-[11].

90 ibid [12].

91 ibid [13].

92 ibid.

for conduct occurring inside the contiguous zone itself and not due or intended to occur in the aforementioned territorial areas.'[93] It thereby seems as if there is a degree of prescriptive jurisdiction where there is an act within the contiguous zone *and* due or intended to occur in the territorial sea and territory. This view was one supported, to an extent, by Professor O'Connell.[94]

It is this form of prescriptive jurisdiction that does not fall foul of the argument from absurdity, that given article 27(5) of UNCLOS, which forbids the arrest of ships in the territorial sea for offences committed prior to entry, '[i]f legislative jurisdiction were to exist in the contiguous zone so that ships could commit offences there, they would be able to achieve a greater degree of immunity from coastal State jurisdiction by fleeing into the territorial sea than by fleeing to the high seas or economic zone'.[95] If the prescriptive jurisdiction only serves to make unlawful those acts which, if consummated in the territorial sea, would also be illegal, then there is no issue.

But despite this convincing argument,[96] there are indications that a broader prescriptive jurisdiction is possible. This turns largely on three arguments. The first is an argument from the practice of States prior to the 1958 Convention. On a review of practice of States generally from 1930-1958, Professor Lowe concluded that 'there is every indication that States thought themselves entitled to extend legislative and enforcement jurisdiction alike, for limited purposes, into the contiguous zone.'[97] This was the first basis on which Judge Oda had argued that in the contiguous zone, 'the coastal State would be entitled to exercise, even though for limited purposes only, its power, which would not differ from the power exercisable in the territorial sea.'[98] The second argument is from the course of negotiations and drafting at the 1958 Conference. In the First Committee, the final provision arrived at was:

> In a zone of the high seas contiguous to its territorial sea, the coastal State may take the measures necessary to prevent and punish infringements of its customs, fiscal, immigration or sanitary regulations, and violations of its security.[99]

Judge Oda has argued that in the Plenary Meeting, a reversion to the draft article put forward at the outset of the Conference by the International Law Commission[100] was motivated by a desire to exclude the reference to security interests, but was not meant to alter the substance of the powers a

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93 ibid [14].

94 D O'Connell (n 74) 1060: prescription is possible but will be 'limited in scope […] to prevent the evasion of other laws, such as laws respecting customs duties, passports or health control, which are intrinsically laws to be administered at the frontier.'

95 R Churchill & A Lowe (n 40) 137; A Lowe (n 85) 167.

96 However, concerning such arguments relating to the coherence of various provisions in such a multilateral treaty (especially now the UNCLOS), a warning should be sounded, 'In point of fact, all the efforts deployed in the great workshop of UNCLOS III have been directed towards constructing an imposing edifice representing a régime of the ocean likely to be voted into existence irrespective of what it may bode for the future. Unable to cling to the aim of true world harmony, the delegates have felt compelled to content themselves with cobbling together a patchwork of ideas which are not necessarily harmonious': *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Merits)* [1985] ICJ Rep 157 [24] (Diss. Op. of Judge Oda).

97 A Lowe (n 85) 157.

98 S Oda (n 84) 187.

99 Report of the First Committee' United Nations Conference on the Law of the Sea (Geneva 24 February-27 April 1958) UN Doc A/CONF.13/L.28/Rev.1.

100 With the addition of 'immigration': ILC, Articles Concerning the Law of the Sea, 'Report of the International Law Commission covering the work of its eighth session' (23 April-4 July 1956) UN Doc A/3159; [1956] II YILC 256 art 66.

coastal State would enjoy.[101] The final argument is from subsequent State practice showing more extensive claims.[102]

III.2 The contiguous zone in Italy v India

The above debate has been set out in detail to indicate where the key issues lie, but also to highlight in contrast the paucity of discussion by the Supreme Court of India. Kabir CJ had concluded that under international law, India was entitled 'to exercise rights of sovereignty up to 24 nautical miles from the baseline on the basis of which the width of the territorial waters is measured'.[103] What are these 'rights of sovereignty'? They are referred to in distinction to 'sovereign rights […] for certain purposes'.[104] These 'sovereign rights' are referred to as stopping short of sovereignty.[105] Rights of sovereignty are therefore, on the *internal vocabulary* of the judgment, particular rights that the sovereign has, 'of which the exercise of penal jurisdiction under the criminal law is an important part.'[106]

But such reasoning is conclusory and obscure. It is further complicated by the particular mechanism by which the Indian Penal Code was deemed applicable to the contiguous zone. The relevant instrument, Notification SO 671(E) of 27 August 1981, was in fact promulgated under the powers in respect to the EEZ, that is, s 7(7) of the Maritime Zones Act 1976. Given that the contiguous zone is *within* the EEZ, it was taken in the High Court of Kerala[107] and in the Supreme Court that the laws so extended would apply in the contiguous zone.[108] Section 2 of the Indian Penal Code, dealing with territorial offences, was applicable because it was found that the Notification was intended to apply such laws to the contiguous zone and EEZ,[109] and so the contiguous zone was to be treated as part of the territory of India. Insofar as this is purely a matter of domestic law, there is no trouble. The issue arises in relation to the Court's *approval* of such a mechanism as compliant with international law. It is on this matter that one gets little argument.

Above, it was recognised that there was a debate over the extent of a coastal State's jurisdiction in the contiguous zone. But the debate was framed in such a way that it was assumed that there would be limits on the purposes for which jurisdiction could be exercised. The approach of the

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101 S Oda (n 84) 152-3: 'an examination of the drafting process at the Geneva Conference has indicated that the terms of Article 24 did not truly represent the opinion of the majority of the States at the Conference.'

102 But contrast Lowe (n 85) 168: 'Unfortunately, it is impossible to resolve any remaining doubts on this point by reference to the subsequent practice of States. That practice is divergent, and its analysis is complicated by the emergence of claims to pollution, defence and economic zones going beyond the scope of the 1958 contiguous zone article, as well as by the uncertainty of the rules of treaty law concerning the legal effect of divergent practice of parties upon treaty interpretation.' Further, it is unclear to what extent subsequent practice can be relevant for treaty interpretation where they do not establish an agreement: Vienna Convention on the Law of Treaties (adopted 23 May 1969, opened for signature 23 May 1969) 1155 UNTS 331 (VCLT) art 31(3)(b). Perhaps consider: *Kasikili/Sedudu Island (Botswana v Namibia)* (Merits) [1999] ICJ Rep 1045 [80] (emphasis added): 'The factual findings made on these occasions were not, as such, disputed at the time. The Court finds that these facts, *while not constituting subsequent practice by the parties in the interpretation of the 1890 Treaty*, nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms.'

103 *Republic of Italy v Union of India* (n 2) [110].

104 ibid.

105 ibid [106] (Kabir CJ).

106 ibid.

107 See n 20.

108 ibid [100] (Kabir CJ).

109 *Massimilano Latorre v Union of India* (n 13) [21] (Gopinathan J).

Indian Supreme Court here has bypassed this debate entirely. The only recognition of a purpose limitation was in relation to the EEZ, but such limitations are equally present for the contiguous zone. While the wording of s 5(4) of the 1976 Act does indicate a broad scope of powers in the contiguous zone,[110] it is still clear even in the domestic Statute that the powers are exercisable only for particular matters.

No reference was made to perhaps the most controversial aspect[111] of India's contiguous zone claimed under the 1976 Act, that is, the reference under s 5(4)(a) to the 'security of India'.[112] This is surprising, given that it is under this interest that the application of the Indian Penal Code with respect to the incident here is most justifiable. It is unfortunate that the decision in *Italy v India* has effectively bypassed the relevant debates, instead relying on assertions of sovereignty that have little basis in international law. If this was due to an implicit assumption that such matters would fall under 'security', the fears which motivated the exclusion of security interests during drafting are vindicated.[113]

What this does reveal is the problematic relationship between the contiguous zone and the EEZ. In spatial terms, the extension of coastal State competence to a zone up to 200 nm from the baseline clearly overshadows the 24 nm contiguous zone, a fact with some legal significance in the present case given the application of the Notification for the EEZ to the contiguous zone. In jurisdictional terms, the more restricted nature of the EEZ gives rise to the possibility of over-simplifying the specific character of the contiguous zone. The easy question to pose is, 'Why should there be functional limits on jurisdiction in the contiguous zone if it is a zone closer to the territory than the EEZ?' In structural terms, the application of high seas norms in the contiguous zone is mediated by the existence of the EEZ. Thus, in the EEZ, article 58(2) of UNCLOS provides for articles 88 to 115 to apply 'in so far as they are not incompatible with this Part' on the EEZ. But pursuant to article 55, the EEZ begins immediately after the territorial sea. This is recognised in the Court as the basis for *applying* the Notification to the contiguous zone, but the *limits* of such a definition are not recognised. Thus, the statement that 'the exclusive economic zone continues to be part of the high seas over which sovereignty cannot be exercised by any nation'[114] is correct, but does not go far enough in the Court's reasoning—it applies equally to the contiguous zone.

IV. Conclusion

I have thus considered in detail the nature of flag State jurisdiction (and the *Lotus* decision), and the contiguous zone, both as bases of prescriptive jurisdiction in the seas. The decision in *Italy v India* has served as the foil for our discussion, and it is unfortunate, but perhaps excusable, that key issues of international law were not aired out and considered properly. These rules on jurisdiction are only part of the saga concerning the *Enrica Lexie* incident, and it is as yet unclear what will happen to the two Italian marines.

What is clear is that the jurisdiction in the law of the sea continues to operate as a particularly knotty area. The doctrines of exclusive flag State jurisdiction and of the contiguous zone were explicitly stated in the 1958 Conventions, but key issues have not yet been resolved. As stated above, to resolve

110 'The Central Government may exercise such powers and take such measures in or in relation to the contiguous zone as it may consider necessary […]': Maritime Zones Act 1976, s 5(4).

111 O Sharma, *The International Law of the Sea: India and the UN Convention of 1982* (OUP 2010) 124-5.

112 J Roach & R Smith, *Excessive Maritime Claims* (3rd ed, Martinus Nijhoff Publishers 2012) 156, citing OP Sharma, 'India and the United Nations Convention on the Law of the Sea' (1995) 26 ODIL 391, 403-4.

113 ILC, Commentary to the Articles Concerning the Law of the Sea, 'Report of the International Law Commission covering the work of its eighth session' (23 April-4 July 1956) UN Doc A/3159 [1956] II YILC 265, 295 para 4.

114 *Republic of Italy v Union of India* (n 2) [106] (Kabir CJ).

these issues requires taking a stance on a wide range of problems in international law, and this paper has not sought to provide *solutions* for these issues. Rather, the more modest aim was to identify difficult issues in these doctrines, to offer guidance for a possible solution or to indicate particular worries about the specific case under discussion. It is hoped that, in the midst of the hustle and bustle of diplomacy, political movement and academic commentary, fundamental issues of doctrinal clarity and coherence are not quietly lost at sea.

Utterly at Odds: Criminal Intention, Motive, and the Rule of Law

Benjamin Xie

The concept of intention in the English criminal law is commendable in that it is flexible enough for judges (or juries) to do justice in any given case. This Article however will explore ways in which the concept is incompatible with the rule of law. This Article will argue that motive is at times considered under the guise of intention and the concept is manipulated to reach the desired result. This Article will conclude with a proposed modification to the current concept to allow for the explicit consideration of motive; which would better satisfy the rule of law without compromising the competing requirement of justice.

I. INTRODUCTION

'Everyone who watches *Law & Order* knows (or thinks they know) that motive is very important in criminal justice. However, as any first year law student will tell you, motive is irrelevant in determining criminal liability.'[1] This contradiction between common sense and legal wisdom is played out in cases where a defendant intentionally commits a crime but does so with a good motive. The following two cases are good examples.

I.1 R v Steane

During the Second World War, Steane helped Joseph Goebbels broadcast and produce propaganda films.[2] He thereby assisted the Nazi cause. After the War, he was charged with doing acts likely to assist the enemy with intent to assist the enemy.[3] He swore he had never the slightest intention of assisting the enemy. Rather, he was in continual fear for his wife and children. His defence was that his acts were done with the intention that his wife and children would not be sent to a concentration camp. That was indeed what the Gestapo threatened him with. He was convicted at trial, but his conviction was quashed upon appeal. Lord Goddard CJ found that the jury was not entitled to presume a guilty intent where the circumstances showed that the act was consistent with an innocent intent, in this case, 'the innocent intent of a desire to save his wife and children from a concentration camp'.[4]

I.2 R v Smith

The second case is a corruption case.[5] Smith was convinced that the members of Castleford Borough Council were corrupt. He thus offered the mayor £500, intending to induce the mayor to agree – in principle – to sell a piece of council land to him. His motive was to expose the mayor's corruption.

1 C Hessick, 'Motive's Role in Criminal Punishment' (2007) 80 Southern California Law Review 89.

2 *R v Steane* [1947] KB 997 (CA).

3 'If with intent to assist the enemy, any person does any act which is likely to assist the enemy [...] then, without prejudice to the law relating to treason, he shall be guilty of an offence against this regulation and shall, on conviction on indictment, be liable to penal servitude for life.': Defence (General) Regulations 1939, Regulation 2A (since repealed):

4 *Steane* (n 2) 1006 (Lord Goddard CJ).

5 *R v Smith* [1960] 2 QB 423 (CA).

However, the mayor did not accept his £500, and Smith was charged with corruption.[6] His lawyers argued that his motive was to expose corruption, to which Hilbery J replied that 'motive only goes to mitigation'.[7] He was thus convicted, Lord Parker CJ finding that 'the appellant even on his own case was here purposely doing an act which the law forbids'.[8]

I.3 Toying with the Concept of Intention

In both these cases the defendant committed a crime with a good motive. Steane intentionally assisted the enemy with the motive of saving his wife and children; Smith intentionally offered the mayor a bribe with the motive of exposing corruption. Moreover, both Lord Goddard CJ and Lord Parker CJ consistently held that motive and intention are two different things. Why then did Steane and Smith face different fates?

In *R v Steane*, Lord Goddard CJ held that, 'no doubt the motive of a man's act and his intention in doing the act are, in law, different things';[9] before going on to seemingly imply that the 'desire to save his wife and children' was Steane's intent rather than motive.[10] Although his official *ratio decidendi* was not that Steane had an innocent intent, but rather that the trial judge's summing-up was erroneous, he seemed to have manipulated the concept of intention in order to quash Steane's conviction.

This article seeks to consider these cases, and other similar cases where defendants intentionally commit offences without malicious motives, at times even the 'best of motives',[11] and how courts occasionally seem to toy with the concept of intention to let deserving defendants off the hook. It seeks to show that in those circumstances, although justice might be upheld, the rule of law is compromised. A modification to the concept of intention will be proposed, such that the requirements of the rule of law can be better met, while still allowing for justice to be done.

II. Intention in the English Criminal Law

The legal definition of intention in the English criminal law is not found in legislation,[12] but in the case law. There are two distinct tests within the legal definition of intention, which will be referred to as 'direct intent' and 'oblique intent'.

II.1 Direct Intent

In *R v Moloney,* Lord Bridge held that:

> The golden rule should be that, when directing a jury on the mental element necessary in a crime of specific intent, the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent, unless the judge is convinced that, on the facts and having regard to the way the case has been presented to the

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6 'Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor.': Public Bodies Corrupt Practices Act 1889, Section 1(2).

7 *Smith* (n 5) 424.

8 ibid 430 (Lord Parker CJ).

9 *Steane* (n 2) 1005 (Lord Goddard CJ).

10 'In this situation, the Court of Appeal admitted motive by the "back door" method…': A Norrie, *Crime, Reason and History* (2nd ed, CUP 2001) 40; 'It seems that in [*R v Steane*] the courts do attach significance to the defendant's motives.': J Herring, *Criminal Law Text, Cases, and Materials* (5th ed, OUP 2012) 202.

11 *Yip Chiu-Cheung v The Queen* [1995] 1 AC 111 (PC) 118 (Lord Griffiths).

12 A Ashworth & J Horder, *Principles of Criminal Law* (7th ed, OUP 2013) 172.

> jury in evidence and argument, some further explanation or elaboration is strictly necessary to avoid misunderstanding.[13]

This 'golden rule' defines intention to be decided by the 'jury's good sense'.[14] Lord Bridge however qualifies the 'golden rule', stating that it is frequently necessary to explain to a jury that 'intention is something quite distinct from motive or desire'.[15] 'Direct intent' is thus defined as the jury's interpretation of intention, except that it is not motive nor desire. And it seems that juries are not confused by this definition, evidenced by the lack of clarification notes from juries to judges.[16]

II.2 Oblique Intent

The cases that Lord Bridge envisioned as requiring further explanation or elaboration, thereby departing from the 'golden rule', are cases concerned with 'oblique intent'.

'Oblique intent' is defined by the *Woollin* test, first formulated in *R v Nedrick*[17] and later modified in *R v Woollin*.[18] In *R v Nedrick*, Lord Lane CJ held that:

> [T]he jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.[19]

In *R v Woollin*, the House of Lords approved of Lord Lane CJ's direction, except for one modification – substituting the word 'infer' with 'find'.[20]

The *Woollin* test can thus be stated as such: courts are entitled to find intention where the result was (objectively) a virtual certainty, barring unforeseen circumstances, as a result of the defendant's actions, and the defendant (subjectively) appreciated that the result was a virtual certainty, barring unforeseen circumstances, as a result of his actions. Courts are not required, merely entitled, to find intention, and may decide not to find intention despite the test being fulfilled.[21]

III. The Rule of Law

The rule of law is a difficult concept to define, mainly because there is no consensus as to its requirements. It is generally accepted however that there are the following two principal conceptions.

III.1 Formal Conception

The formal conception does not require that the law itself be good, merely that the law adheres to certain procedural attributes. The purpose of the rule of law then is purely to ensure that the law is capable of guiding the behaviour of its subjects. Prominent examples of the formal conception include the ones articulated by Fuller[22] and by Raz.[23]

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13 *R v Moloney* [1985] AC 905 (HL) 926 (Lord Bridge).

14 It might be argued that a jury merely finds, rather than defines, intention. In finding intention however, should the jury deliberate on what intention means, the answer would be for the judge to leave it to the 'jury's good sense'; it seems then that the jury inevitably defines intention as well.

15 *Moloney* (n 13) 926 (Lord Bridge).

16 Law Commission, *Murder, Manslaughter, and Homicide* (Law Com No 304, 2006) para 3.23.

17 *R v Nedrick* [1986] 1 WLR 1025.

18 *R v Woollin* [1999] 1 AC 82.

19 *Nedrick* (n 17) 1028 (Lord Lane CJ).

20 *Woollin* (n 18) 96 (Lord Steyn).

21 A Ashworth & J Horder (n 12) 172.

22 L Fuller, *The Morality of Law (The Storrs Lectures)* (rev ed, Yale University Press 1977).

23 J Raz, *The Authority of Law* (1st ed, OUP 1979).

III.2 Substantive Conception

The substantive conception requires that the law itself be just, and consequently that it protects fundamental rights. It also includes the requirements of the formal conception. The rule of law then becomes a comprehensive ideal rather than merely one amongst others. Prominent examples of the substantive conception include the ones articulated by Bingham[24] and by Dworkin.[25]

IV. INCOMPATIBILITY BETWEEN INTENTION AND THE RULE OF LAW

The flexibility inherent in the concept of intention theoretically allows for it to be used to sidestep the rule that motive is irrelevant to intention. Moreover, there is some evidence of this being done in practice. It is this toying with the concept of intention that is incompatible with the rule of law.[26]

IV.1 Flexibility Inherent in the Concept of Intention

'Direct intent' is defined by the jury's good sense – *viz.* the 'golden rule' – with the restriction that intention may not be equated to motive or desire. It seems however that, given the 'golden rule', juries are free to violate even that very caveat by interpreting one's intention to be one's motive, or desire.

The flexibility with respect to 'oblique intent' is analytically more obvious. Juries are entitled to find intention where certain conditions are met. They can choose to, and not to, find intention as they please.

This flexibility is sometimes called the 'moral elbow room',[27] which allows the courts to manipulate[28] the concept of intention where there is a strong moral pull to do so. Norrie describes this as 'a kind of moral shadow-boxing or ventriloquism which deals with moral issues, but at one remove'.[29] Ashworth describes this as 'leaving the door ajar', which 'judges believe to be essential to doing justice'.[30]

In general then, courts are more or less unfettered in their decision as to the intention of a defendant. Consequently, they have found this a convenient technique to use when the law does not allow them to come to their desired verdict. The cases illustrating this phenomenon are few, partly because such situations are often dealt with extra-judicially. There are however a sufficient number of cases that display this worrying trend.

IV.2 Flexibility in the Case Law

Aside from *R v Steane* and *R v Smith*, there are a handful of other cases that may be considered in the same vein. In *Gillick,*[31] a doctor who intentionally gave contraceptive advice and pills to a girl under 16 years old, with the motive of protecting her from exposure to pregnancy and sexually-transmitted diseases, was held not to have the intention to aid and abet underage sexual intercourse. In *Re A,*[32] doctors who intentionally separated two conjoined twins, Jodie and Mary, knowing that Mary would inevitably die, but with the motive of giving Jodie a reasonably good prospect of a reasonably normal

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24 T Bingham, *The Rule of Law* (1st ed, Penguin 2011).

25 R Dworkin, 'Political Judges and the Rule of Law' in Aileen Kavanagh and John Oberdiek (eds), *Arguing About Law* (Routledge 2008).

26 This is not the argument that the current concept of intention is in flagrant violation of the rule of law. Merely that insofar as conformity to the rule of law is a matter of degree, the efficacy of the concept of intention in guiding conduct can be improved upon.

27 A Norrie (n 10) 58.

28 A Ashworth & J Horder (n 12) 175.

29 A Norrie, 'After Woollin' [1999] Crim LR 532, 543.

30 A Ashworth & J Horder (n 12) 174-5.

31 *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 (HL).

32 *Re A (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 (CA).

life, were held not to have the intention to kill Mary.[33] In *Adams,*[34] a doctor who intentionally gave drugs to patients, knowing that the drugs would hasten their deaths, but with the motive of lessening their pain, was held not to have the intention to kill the patients. On the other hand, in *Yip Chiu-Cheung v The Queen,*[35] an undercover drug enforcement agent who intentionally trafficked heroin from Hong Kong to Australia, with the motive of infiltrating and bringing to justice a gang of criminal drug dealers, was held to have the intention to traffic the drugs. In *Chandler v DPP,*[36] a group of protestors who intentionally occupied an airfield, knowing that it would immobilise the airfield, but with the motive of promoting peace and the safety and interests of the State, were held to have the intention to prejudice the safety and interests of the State.

These cases poignantly illustrate the inconsistency in the case law with respect to the concept of intention. It seems that this inconsistency stems from the rule that motive is irrelevant to intention. Thus at times, when judges are more minded of their duty to administer justice *according to law*, they might convict a defendant who was 'acting courageously and with the best of motives',[37] as they did in *Yip Chiu-Cheung v The Queen*. At other times, when judges are more minded of their duty to *administer justice* according to law, they might find that a deserving defendant did not possess the necessary intention. The following two court martial cases are further evidence that it is the consideration of motives that is responsible for this inconsistency.

IV.3 A Tale of Two Soldiers

In 2008, Captain Semrau[38] intentionally shot an unarmed, wounded[39] insurgent in Helmand province in Afghanistan. He was charged with second degree murder, of attempt to commit murder using a firearm, of negligent performance of a military duty, and of disgraceful conduct. There was public support for Semrau's actions during the trial,[40] and he was eventually acquitted of the first three charges. He was convicted of disgraceful conduct,[41] and was reduced in rank and dismissed from the Armed Forces.

In 2011, Sergeant Blackman[42] intentionally shot an unarmed, wounded[43] insurgent in Helmand province in Afghanistan. He was charged with murder. There was similar public support for

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33 This was the *dicta* of Walker LJ. It is not clear what the official *ratio decidendi* was as the other two judges in the Court of Appeal came to the same result via different routes. Ward LJ based his judgment on notions of self-defence, while Brooke LJ relied on arguments of necessity.

34 *Bodkin Adams* [1957] Crim LR 365.

35 *Yip Chiu-Cheung* (n 11).

36 *Chandler v DPP* [1964] AC 763 (CA).

37 *Yip Chiu-Cheung* (n 11) 118 (Lord Griffiths).

38 *R v Semrau* [2010] CM 4010.

39 'An Apache helicopter… blasted off [the] insurgent's leg, almost severed his other one and severely wounded him in the abdomen': R J Brennan and B Campion-Smith, 'Capt. Robert Semrau found not guilty of murder' *The Star* (Ottawa, 17 July 2010); '[I]n the words of one eyewitness, [the insurgent] was "98 per cent" dead': M Friscolanti, 'Capt. Robert Semrau dismissed from the Forces' in *Maclean's* (Toronto, 5 October 2010); '[T]he panel was satisfied beyond a reasonable doubt that the insurgent was still alive at the time [Semrau] shot him': *R v Semrau* (n 38) at [7].

40 'Here we were thinking killing the Taliban was the purpose of having our brave young soldiers in the murderous death-invested hellhole that is Afghanistan in the first place.': J Warmington, 'Canadian soldier kills Taliban???' *Toronto Sun* (Toronto, 3 January 2009).

41 The conduct that was disgraceful was 'shooting an unarmed and wounded person': *Semrau* (n 38) para [10]. *Quaere* having been found to have shot an unarmed and wounded person, whether his acquittals under the first three charges were compatible with the rule of law.

42 *R v Blackman (Alexander Wayne)* [2014] EWCA Crim 1029.

43 '[T]he insurgent may have died from his wounds': ibid [32].

Blackman's actions,[44] but he was convicted of murder. He was sentenced to imprisonment for life, with a minimum term of 8 years before the Parole Board could consider whether to release him on license. He was also reduced to the ranks and dismissed from the Armed Forces.

The facts of these two cases are strikingly similar. Not only were both Semrau and Blackman deployed in Helmand province in Afghanistan, but the incidents also both occurred on the outskirts of Lashkar Gah. The wounded insurgents whom they encountered were both hit by Apache helicopter gunships. The two soldiers both disarmed the wounded insurgent. They were both obliged under international law[45] to offer First Aid to the wounded insurgent, but they believed[46] that the insurgent was beyond medical treatment. They both discussed how to deal with the insurgent with the other members of their patrol, before shooting the insurgent in the chest. Putting aside the motives of the two soldiers, the factual scenarios are very nearly identical.

What then could account for the different outcomes in these two cases? It does not seem to be that Semrau was charged under Canadian law and that Blackman was charged under English law – intention is defined under both jurisdictions as distinct from motive.[47] It seems that it was the motives of the soldiers that led to the different outcomes.

Semrau argued that his shooting was a 'mercy kill'.[48] He allegedly said that 'anyone would do the same for any other human being in that situation. He is still a human being and should not suffer like that.'[49] Conversely, Blackman argued that he thought the insurgent was already dead when he discharged the firearm.[50] Blackman seems to have shot the insurgent in much colder blood; the Judge Advocate General HHJ Blackett commented that the tone and calmness of Blackman's voice after he shot the insurgent was chilling.[51] It was suggested that Blackman might have been particularly hard hit when two well-liked and respected marines, including a young officer[52] whom Blackman mentored, were killed in a roadside bomb a few months before.[53] It seems then that the motives of Semrau and Blackman were diametrically opposed, Semrau's motive being to lessen the insurgent's suffering, whereas Blackman's motive might have been revenge.

IV.4 Two Grounds of Incompatibility

This consideration of motives and subsequent manipulation of the concept of intention is incompatible with the formal conception of the rule of law in two respects. First, the law is applied differently from

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44 'More people in Britain believe that [Blackman] should be shown leniency when he is sentenced for murdering a Taliban fighter than want him to receive a full life sentence.': R Sanchez, 'I stood in the shoes of Marine A' *The Telegraph* (Washington, 1 December 2013).

45 'The wounded and sick shall be collected and cared for.': Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, Article 3(2).

46 Capt Semrau is quoted as saying: 'Until you've seen what an Apache can do to a human being, you haven't seen anything. It's like the hand of God comes down from the sky and rips off limbs.': R Sanchez (n 44).

47 'Motive is no part of the crime and is legally irrelevant to criminal responsibility.': *Lewis v The Queen* [1979] 2 SCR 821 (SCC) 833 (Dickson J).

48 '[Semrau] later confessed that it was a "mercy kill".': M Friscolanti, 'Capt. Robert Semrau dismissed from the Forces' *Maclean's* (Toronto, 5 October 2010).

49 'Semrau is alleged to have told the private under his command "that he couldn't live with himself if he had left a wounded human being and nobody should be made to suffer like that." Later that day, Semrau was overheard saying that he fired the shots that killed the insurgent and that "anyone would do the same for any other human being in that situation. He is still a human being and should not suffer like that."': M Comte, 'Trial begins for Canadian soldier in killing of unarmed Taliban' *AFP* (Gatineau, 24 March 2010).

50 This was rejected by the Court Martial which found that the defence 'lacks any credibility and was clearly made up after [Blackman] had been charged with murder in an effort to concoct a defence'.

51 *Blackman* (n 42) [32].

52 Lieutenant Oliver Richard Augustin.

53 S Morris and R Norton-Taylor, 'Marine Who Murdered Taliban Prisoner Loses Fight to Remain Anonymous' *The Guardian* (London, 5 December 2013).

how it is declared. Second, the law is applied differently to different cases. As a result, the law is less able to guide conduct.

On the first ground, orthodox legal doctrine declares that motive is irrelevant to intention. The law is neither unclear nor obscure, but it is hypocritical. It is not followed. Insofar as there is incongruence between the law as declared and as administered,[54] it is incompatible with the formal conception. The declared law is unable to guide conduct since it is not even adhered to.

On the second ground, the concept of intention itself is being applied differently in different cases. In some cases motive is irrelevant to intention, in other cases it is relevant. Insofar as the law is lacking in generality,[55] it is incompatible[56] with the formal conception. Since the law is applied differently to different people, one would not be able to predict how the law would apply to any given person, and in that manner the law would be unable to guide conduct. Both these grounds impair the law's ability to guide conduct and are thus incompatible with the formal conception of the rule of law.

The second ground of criticism goes beyond the formal requirement of generality[57] to the substantive requirement of legal equality. The idea that every person should be equal before the law is the 'cornerstone of our society'[58] and goes back to Dicey's formulation of the rule of law.[59] To understand this criticism, one need only to put oneself in Blackman's shoes; to feel the sense of inequality he might feel as he sits out his life sentence while Semrau walks free in the streets. This is notwithstanding the fact that the law explicitly tells Blackman that motive is irrelevant to intention, and that all are equal before the law.

It might be argued that the concept of intention, while incompatible with the formal conception, adheres to the requirements of the substantive conception. Under the substantive conception, not only must the law be able to guide conduct, it must also be just. If it is conceded that a just result was reached in all the aforementioned cases, then it follows that the rule of law was still complied with; the formal requirements were merely balanced against the substantive ones. A similar view can also be taken if one adopts a formal conception; namely that the incompatibility with the rule of law is justified by competing claims of justice and fairness, and thus the overall legal position is satisfactory. After all, as Raz argued: '[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty.'[60] Both these points are sound; the current state of the law is not too bad, but it can be better. It can better adhere to the rule of law while still complying with the claims of justice. To do so, we need to look at motives.

V. Motive in the English Criminal Law

Motive is not completely irrelevant in the English criminal law; indeed, it may be misleading[61] to describe it as such. There are five important areas,[62] both judicially and extra-judicially, where motive plays a key role in the criminal law.

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54 See Fuller's eighth desiderata, 'Congruence between Official Action and Declared Rule': L Fuller (n 22) 81ff.

55 See Fuller's first desiderata, 'The Generality of Law': L Fuller (n 22) 46ff.

56 It might be argued that the same arbitrary, ambiguous law applies generally to everyone. Even if the argument is pursued in this manner, it still follows that the arbitrary law is unable to guide conduct and is therefore incompatible with the rule of law.

57 Both Fuller and Raz distinguish their requirements of generality from equality or fairness. They seem to take the view that (for example, racial) discrimination is compatible, indeed *per* Raz institutionalised, by general rules.

58 T Bingham (n 24) 55.

59 A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan 1959) 193.

60 J Raz (n 23) 229.

61 J Herring (n 10) 202.

62 This is not intended to be an exhaustive list.

V.1 Limited Evidentiary Role

Prosecutors often provide juries with a motive to convince them of the defendant's guilt;[63] because it is easier for juries to believe that a crime is committed where they can appreciate the defendant's motive, than where no motive is apparent.[64] It is in this sense that motive plays an evidentiary role, as Gross puts it:

> In general, motives may play a role in deciding whether a particular person committed a crime but not in deciding whether a particular crime was committed.[65]

V.2 Sentencing

Motive often affects the sentence a defendant receives, aggravating motives increasing the sentence and mitigating motives lessening the sentence. This goes back to the point made in *R v Smith* by Hilbery J that 'motive only goes to mitigation'.[66] Smith and Hogan explain the point this way:

> Motive is important again when the question of punishment is in issue. When the law allows the judge a discretion in sentencing, he will obviously be more leniently disposed towards the convicted person who acted with a good motive. When the judge has no discretion (as in murder) a good motive may similarly be a factor in inducing the Home Secretary to grant an early release on license.[67]

V.3 Jury Nullification

Herring describes this phenomenon succinctly:

> There have been cases[68] where it is widely thought that the jury has acquitted the defendant because they have believed he acted from the best of motives, despite a clear direction from the judge that he is guilty in the eyes of the law.[69]

V.4 Executive Clemency

The royal prerogative of mercy allows the British monarch to grant royal pardons to convicted persons. An example of its exercise would be in the famous case of *R v Dudley and Stephens,*[70] where stranded sailors who were convicted for the murder of a cabin boy, their motive having been to consume him to preserve their own lives, were sentenced to the mandatory death penalty with a recommendation for mercy. A few days after the sentencing, Queen Victoria exercised the royal prerogative of mercy, commuting their sentence to six months' imprisonment.

V.5 Prosecutorial Discretion

Prosecutors can choose to exercise their discretion by not prosecuting a person who commits an offence. For example, Lord Griffiths conceded that the undercover agent in *Yip Chiu-Cheung v The*

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63 C Hessick (n 1) 94.

64 'As an evidential fact motive is always relevant, but never essential. When a motive of the accused for the commission of a crime is discovered, it is easier to believe that he committed it than when no motive is apparent. For this reason it is always relevant to prove the existence of a motive. But though the discovery of a motive helps to prove the guilt of the accused, there may be ample proof, independent of motive, of his guilt. It is not necessary therefore for the state to prove the motive as an evidential fact.': W H Hitchler, 'Motive as an Essential Element of Crime' (1931) 35 Dick LR 105, 112.

65 H Gross, *A Theory of Criminal Justice* (1st ed, OUP 1979) 103.

66 *Smith* (n 5) 424 (Hilbery J).

67 J C Smith and B Hogan, *Criminal Law* (9th ed, Butterworths 1999) 79.

68 Herring gives the example of *Ponting* (Central Criminal Court, 11 February 1985). *R v Semrau* (n 38) can also be considered under this heading.

69 J Herring (n 10) 203.

70 *R v Dudley and Stephens* (1884) 14 QBD 273 DC.

Queen would not have been prosecuted if the plan (to traffic heroin from Hong Kong to Australia) had been carried out as intended.[71] Hall attributes 'very laudable motives' to many exercises of this discretion:

> [T]here must be a large number of cases where State's attorneys, regardless of what substantive law was involved, deliberately forego prosecution because the harms committed were actually minor ones and the motives were very laudable.[72]

V.6 What Role Should Motive Play?

It might be argued that motive should be relegated to playing only the circumscribed roles in the periphery of the criminal law, and should not have any influence on the very concept of intention, lest courts start to propound their own moral philosophy. Two minor technical points and one main principled point can be made against the limited role that motive currently plays.

The role that motive plays in sentencing is marginal where mandatory sentences are at play: an example would be when a defendant is charged with murder where, if convicted, he is facing a mandatory life sentence. Also, the role that motive plays in prosecutorial discretion is unable to function as a proper safety net, as prosecutors may choose to prosecute a defendant even where his alleged motives are laudable, merely because the prosecutors doubt the authenticity of the defendant's claims (rather than the praiseworthiness of his motives).

The principled point is well put by Fuller in *The Case of the Speluncean Explorers,*[73] where he creates a fictional case with facts similar to *R v Dudley and Stephens*. The fictional Chief Justice convicts the fictional defendant, with a recommendation for executive clemency, and the point is made in the fictional judgment of Foster J:

> Truepenny, CJ. In a case like this the principle of executive clemency seems admirably suited to mitigate the rigors of the law, and I propose to my colleagues that we follow the example of the jury and the trial judge by joining in the communications they have addressed to the Chief Executive. There is every reason to believe that these requests for clemency will be heeded, coming as they do from those who have studied the case and had an opportunity to become thoroughly acquainted with all its circumstances. […] I think we may therefore assume that some form of clemency will be extended to these defendants. If this is done, then justice will be accomplished without impairing either the letter or spirit of our statutes and without offering any encouragement for the disregard of law.
>
> Foster, J. I am shocked that the Chief Justice, in an effort to escape the embarrassments of this tragic case, should have adopted, and should have proposed to his colleagues, an expedient at once so sordid and so obvious. I believe something more is on trial in this case than the fate of these unfortunate explorers; that is the law of our Commonwealth. If this Court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved in this petition of error. For us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of this Commonwealth no longer pretends to incorporate justice.[74]

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71 *Yip Chiu-Cheung* (n 11) 118 (Lord Griffiths).

72 J Hall, *General Principles of Criminal Law* (2nd ed, Bobbs-Merrill 2005) 102.

73 L Fuller, 'The Case of the Speluncean Explorers' [1949] 62(4) Harvard Law Review 616.

74 ibid 619-20.

The point Fuller makes is that it is unsatisfactory for the courts to be unable to bring about a just result without resorting to extra-judicial measures. To say that Justices are unable to uphold justice within the judicial system, and have to resort to extra-judicial means, would be 'an admission that the law… no longer pretends to incorporate justice'.

VI. UTTERLY AT ODDS

Having set out why the flexibility in the concept of intention is incompatible with the rule of law, how the consideration of motives play a key role in the incompatibility, and why motives should be considered by courts in the judicial process, this article will propose the following modification[75] to the current law.

First, intention should be tightly defined in law, thereby removing the 'moral elbow room'. For instance, a person acts intentionally with respect to a result when (i) he acts in order to bring about that immediate[76] result, or (ii) the immediate result will be virtually certain to occur, and he acts knowing that that is so. The second part is essentially the *Woollin* test without the 'entitled to find' elbow room.

Second, the following test should be introduced: if, exceptionally, a defendant's intention is utterly at odds with his motive, he will be deemed not to have the relevant intention. This 'utterly at odds' test thus allows courts to deem, in law, that an intention is not present where it in fact is. The test is not meant to be a verbal formula for mechanical application; rather, that a motive is utterly at odds should be asserted in a conclusory fashion indicating underlying concerns of justice which warrant a general rule of acquittal in the situation. The test is merely a convenient label to attach considerations of motive to the outcome, and courts should here have regard to whether a defendant committing a particular crime, with a particular motive, is deserving of punishment.

Courts could gradually develop the law under the 'utterly at odds' test, deciding case-by-case whether certain intentions and motives are utterly at odds or whether they are not. The test is intended to apply only in exceptional cases, particularly cases which are traditionally dealt with by extra-judicial means. The test is not intended to be a green light to allow courts the discretion to acquit seemingly deserving defendants, but rather a body of case law will make it relatively certain whether defendants with a particular motive will be able to seek recourse under this test.

The argument to tighten the definition of intention is not new. Ashworth argues that courts should adopt a tighter definition of intention and place greater emphasis on appropriate defences instead, so as to ensure that important moral distinctions are marked appropriately.[77] Similarly, the First Model contained in the Law Commission's proposal tightens the definition of intention, before adding a proviso: 'a person is not to be deemed to have intended any result which it was his or her specific purpose to avoid.'[78] It is clear that with the tightening of the definition of intention, certain

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75 It is envisioned that this modification can be formulated by the judiciary in a manner similar to the *Woollin* test.

76 'Immediate' here is used as opposed to 'subsequent'. For example, if Jean Valjean steals a loaf of bread and feeds his starving nephew with it, the immediate result is that the bread is stolen and the subsequent result is that the nephew is fed. As long as Valjean intended that the loaf of bread be stolen, the law must find that he had the necessary intent.

77 A Ashworth & J Horder (n 12) 175.

78 Law Commission, *A New Homicide Act for England and Wales?* (Law Com CP No 177, 2005) para 4.3: 'Subject to the proviso set out below:

a person acts "intentionally" with respect to a result when he or she acts either:

(1) in order to bring it about, or

(2) knowing that it will be virtually certain to occur; or

(3) knowing that it would be virtually certain to occur if he or she were to succeed in his or her purpose of causing some other result.

defences, provisos, or exceptions, would need to be put in place to protect morally deserving defendants from the full rigour of the law. The 'utterly at odds' test allows courts to explicitly consider the defendant's motives in every case, as opposed to developing new defences (say for medical professionals) which may not be sufficiently attractive to remove the temptation in the courts to manipulate the concept of intention. The 'utterly at odds' test is also preferable to the Law Commission's First Model proviso, since a motive could be utterly at odds with an intention even though the motive is not to avoid that very intention. For example, in *R v Steane*, Steane's motive was not to avoid assisting the enemy, he probably could not care less about whether the enemy was assisted at that point in time. Steane merely desired to save his wife and children from a concentration camp, and that motive was utterly at odds with his intention to assist the enemy.

VI.1 Application of the 'Utterly at Odds' Test

The test is intended to apply as follows. In *R v Steane*, Lord Goddard CJ would not be able to assert that Steane might have 'the innocent intent of a desire to save his wife and children from a concentration camp'. He would be obliged to hold that Steane had the intent to produce those propaganda films. He would however be able to rely on the test to hold that that intent was utterly at odds with Steane's motive to save his wife and children, thereby deeming, in law, that Steane did not have the necessary intent to be convicted. In *R v Smith*, Lord Parker CJ would be able to hold that Smith's motive to expose corruption was not utterly at odds with his intention to bribe the mayor. In both cases, the courts can be intellectually honest and still come to the same result.

If a case identical to *R v Semrau* comes before the English courts, the court can then decide whether the intention to shoot an unarmed, fatally wounded, enemy combatant on the battlefield is utterly at odds with the motive of lessening the combatant's inevitable suffering. Whichever way the court decides would at least make it certain for future cases.

VII. Potential Pitfalls

VII.1 Precision Creates Uncertainty

It might be argued that the vagueness of the 'utterly at odds' test creates uncertainty in the law which is incompatible with the rule of law. It is conceded that the 'utterly at odds' test is more vague than Lord Bridge's definition of intention in *R v Moloney*, it is far more vague than the rule that motive is irrelevant to intention, and it is only slightly less vague than the 'entitled to find' direction in the *Woollin* test. However, vagueness does not necessarily increase uncertainty. On the contrary, too much precision can create uncertainty. Endicott makes this point with reference to the Statute of Frauds:

> [T]he history of the English Statute of Frauds shows that precise laws stimulate the interpretative ingenuity of lawyers and judges. Whether a judge will apply the effects of a precise rule may be as uncertain as whether a judge will apply a vague rule.[79]

Thus, the precise rule that motive is irrelevant to intention is not necessarily less uncertain than the comparatively vaguer 'utterly at odds' test. Instead, given how the precise rule has been applied, it seems likely that the 'utterly at odds' test would reduce the uncertainty in the law.

VII.2 The Devil Himself

It might be argued that the consideration of motive creates evidentiary difficulties which then create uncertainty in the law and is thus incompatible with the rule of law. After all, Brian CJ held in the 15th century that: 'the devil himself knoweth not the mind of men'.[80] Courts however have to, and inevitably

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Proviso: a person is not to be deemed to have intended any result which it was his or her specific purpose to avoid.'

79 T Endicott, 'The Impossibility of the Rule of Law' (1999) 19 OJLS 1, 7.

80 17 Edw IV, T Pasch case, 2.

do,[81] make findings of motive. It seems that this issue can be dealt with by placing the burden of proof on the defendant: the prosecution would have to show, beyond a reasonable doubt, that he had the intention, and he would have to show, on a balance of probabilities, that he had the motive which might exceptionally operate to deem the intention void.

VII.3 Defence of Necessity

It might be argued that such cases can be (or are already being) dealt with by the defence of necessity. It suffices for the purposes of this article, without going into the merits, or ability, of the defence of necessity to deal with these cases, to mention that this defence had been proposed, considered, and rejected judicially by Lord Denning MR in *Buckoke v GLC*:

> During the argument I raised the question: Might not the driver of a fire engine be able to raise the defence of necessity? I put this illustration: A driver of a fire escape with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds, or more, for the lights to turn green? If the driver waits for that time, the man's life will be lost. I suggested to both counsel that the driver might be excused in crossing the lights to save the man. He might have the defence of necessity. Both counsel denied it. They would not allow him any defence in law. The circumstances went to mitigation, they said, and did not take away his guilt. If counsel are correct - and I accept that they are - nevertheless such a man should not be prosecuted. He should be congratulated.[82]

VIII. Conclusion

In the 13th century, the medieval Chancellor received petitions seeking relief where the mechanism of the law appeared to work unfairly.[83] When the letter of the law was applied to its fullest rigour it was unable to do justice, and so the Chancellor supplemented it by providing remedies which have become what we today know to be Equity. The Chancellor initially gave relief not according to precedent, but according to his individual sense of right and wrong. This led to Selden's famous criticism that Equity varied like the Chancellor's foot.[84] By the 19th century however, through the efforts of Lord Eldon[85] and others before him, Equity was consolidated into a settled body of legal principles, with solid rules and sharper edges.

The concept of intention in the English criminal law similarly allows for relief to be given where the fullest rigour of the law might be unable to do justice – by virtue of the 'moral elbow room'. The flexibility accorded under the 'moral elbow room' similarly has the potential to, and at times does, vary like the Chancellor's foot. It thus seems to be high time to follow the example of Lord Eldon. The concept of intention should be solidified into concrete rules, and the 'moral elbow room' in the

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81 For example, in most of the above mentioned cases, the courts made a finding of motive.

82 *Buckoke and Others v Greater London Council* [1971] Ch 655 (CA) 668 (Lord Denning MR).

83 J Martin, *Hanbury & Martin: Modern Equity* (19th ed, Sweet & Maxwell 2012) 7.

84 'Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a 'foot' a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.': F Pollock, *Table Talk of John Selden* (1927) 43.

85 'Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot.': *Gee v Pritchard* (1818) 2 Swans 402, 414 (Eldon LC); 'Since the time of Lord Eldon, the system of equity for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles.': *Campbell Discount Co Ltd v Bridge* [1961] 1 QB 445, 459 (Harman LJ).

conception should be similarly codified into certain tests; so that the law in this field can be clearly articulated and explicitly developed, but mainly so that the rule of law can be upheld.