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Introduction

Christy Rush, Editor-in-Chief

It is with great pleasure that I introduce the second issue of the Oxford University Undergraduate Law Journal.

The BA in Jurisprudence here at Oxford promotes astonishing academic depth, but inevitably there is only so much that can be incorporated into a course that also prides itself on its breadth. Thus there is often a desire to explore a particular aspect of the course in greater detail, even if it is just a minutia, a particular slant or a judgment. The Journal fills this lacuna by offering students a platform for further engagement with the challenging issues that can, fortunately or unfortunately, be found throughout English law.

But the Journal is not simply concerned with giving students an opportunity to reflect on these academic issues for themselves: it is part of the fertile ground of academic literature that inspires, provokes, and challenges minds across the country, and even the world. Law is no stranger to a surfeit of academic commentary, and it is important that the Journal makes its own mark. To this end, we have selected a small number of high quality articles with which we aim to contribute to the jurisprudential debate. We hope we have succeeded: last year we received many comments from legal professionals who came across the Journal and were impressed with what they read. The Journal is also featured in many libraries worldwide and the first issue was downloaded by thousands from our website.

It is naturally no easy task to compile a journal with stringent requirements of quality. Recognition must go first and foremost to the writers. For the large majority of them, this represents their first foray into academic writing. Our team of editors have also worked tirelessly with the writers to maximise the potential of each article. Thanks must also go to the Law Faculty, who have supported the endeavour, as well as Linklaters LLP, our generous sponsors. Finally, we are pleased to continue to have our Honorary Board, comprising eminent figures from across the legal sphere, involved with the Journal.

It is easy to forget when reading the Journal that all the contributors are undergraduates: some were still at school only last year. So it is with excitement that we witness the first step in what is hopefully an extensive chain of contribution to the legal arena, whether it will be through academia or legal practice. On behalf of the entire team that helped to shape this work, I hope that you find it both educational and entertaining, and would welcome any comments that you may have at ouulj@law.ox.ac.uk.

Christy Rush
Editor-in-Chief
Oxford University Undergraduate Law Journal

Developments in the Roman law of sale: Taking another look at *arra* and the warranty against eviction

Michal Hain¹

1 Introduction

We study history to learn from our mistakes. While some may perceive the latter as less interesting than the former, no principled distinction can be drawn between human and legal history; refusing to look back at either of them would be both arrogant and ignorant. The common law of England has prevailed over centuries; it has withstood civil unrest, revolutions, constitutional change, and two World Wars. English law is nevertheless in its adolescence compared to Roman law, which survived for more than two millennia, from 450 BC to the 19th century in the European *ius commune*. Regulating arguably the most important commercial transaction, the law of sale is undoubtedly of high significance in any given society. Various influences shaped the Roman law of sale over the centuries. Exposed not only to Hellenistic influence but also intervention by the *curule aediles*, the contract evolved. This evolution is one of the aspects that make the law of sale – in Zulueta’s words – the ‘most fruitful subject in Roman law for the English law-student’.²

We often use specific examples of legal concepts to show the ways in which Roman law matured. The *lex Aquilia*, for instance, evolved from a narrow statute to a wide-reaching body of rules regarding damage unlawfully caused. Its development is illustrative of the influence of both juristic interpretation and Praetorian intervention. Similarly, the development of *stipulatio* – the paradigm Roman institution – exemplifies how Greek practice shaped and eventually transformed Roman theory.

Any attempt to give a thorough account of the whole body of Roman law of sale, about which many books have been written, would be futile in a single article. Nevertheless, using two aspects of the Roman law of sale, developments can be illustrated. Therefore, after a brief summary of the formation of the contract and its main effects, the focus will be two features of the contract: *arra*³ – a token of a bargain well struck – and the warranty against eviction. Three developments will be shown:

1. *Arra* in Justinian’s law was the result of a fusion of Greek penal and Roman evidential *arra*. The outcome was penitential *arra* – something previously unknown to both Greek and Roman law.
2. The warranty against eviction, ‘as we find in the law of Justinian and as it has become part and parcel of the *ius commune*, was the result of a long and interesting his-

1 St Anne’s College. I owe my thanks to Jeffrey Hackney whose insightful comments both challenged and inspired my views. Furthermore, I am grateful to the team of OUULJ editors for their contributions. All mistakes remain my own.

2 Francis de Zulueta, *The Roman Law of Sale* (OUP, 1945) iii.

3 This will be the spelling used throughout this article.

torical development, in the course of which several legal institutions, supplementing each other, eventually grew together.⁴ An implied term of a conveyance and an express guarantee complemented each other to give rise to an implied warranty against eviction in the whole body of sale.

3. Sale exists at the crossroads of real and personal rights. As any contract, its effect was *in personam*. Its real effect in Rome was at most indirect. Ultimately, the rigid dichotomy between conveyances transferring real rights and contracts creating personal rights nevertheless broke down.

1 (a) Formation of the contract

Emptio venditio was a consensual, bilateral and *bonae fidei* contract. Its formation was simple:

The contract of sale is complete when the price is agreed upon, although the money may not yet have been paid, nor even any earnest [*arra*] given, for what is given by way of earnest, is evidence that a contract of sale has been formed.⁵

Undoubtedly, there must be consent not only as to the price, but also as to the thing sold. Zulueta speaks of ‘three essentials’: the thing, the price, and the consent of the parties.⁶ However, ‘there is no form of words or of writing required, but it is sufficient that those who are transacting the business have come to an agreement’.⁷

1 (b) Effects of the contract

The primary duty of the seller was to deliver the thing sold. While executing ‘an *effective* conveyance is the main obligation of a vendor of land’⁸ in English law, the duty of the Roman vendor was merely to ‘execute the legal act required for transferring ownership and to render the buyer *possessor*’;⁹ the conveyance need not transfer ownership. As *emptio venditio* never had any effect *in rem*,¹⁰ the buyer needed conveyances to discharge his primary duty of delivery. *Res mancipi*¹¹ – the goods most significant to an agricultural society such as Early Rome – had to be transferred by a formal conveyance. One such formal conveyance was the *mancipatio*:

In the presence of the transferor, of five witnesses, and a balance holder (*libripens*) the transferee had to pronounce the following formula: ‘I declare that this slave is

4 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP, 1990) 294.

5 G.3.139 in T Lambert Mears, *The Institutes of Gaius and Justinian, the Twelve Tables, and the CXVIIIth and CXXVIIth Novels, with Introduction and Translation* (Stevens and Sons, 1882).

6 Zulueta (n 2) 10.

7 G.3.136 (n 5).

8 Zulueta (n 2) 35f (emphasis added).

9 Fritz Schulz, *Classical Roman Law* (OUP, 1951) 531.

10 WW Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline* (rev edn, Cambridge University Press, 1965) 280.

11 These were: land, slaves, and beasts of draught and burden.

mine by Quiritary right, and let him by bought by me with this [piece of copper and copper scale].¹²

It was a cash sale in appearance ‘which derive[d] from a period before the existence of coined money’.¹³ In its primitive form, *mancipatio* was ‘sale and a conveyance in one’.¹⁴ Ownership passed in Republican and Classical times whether or not any price had been paid.¹⁵ This derives from a time when the weight of bronze would represent the price. With the rise of coined as opposed to weighed money, *mancipatio* became abstract.

The other formal conveyance was *in iure cessio*, which took the form of legal proceedings before a magistrate. However, it does not seem to have been a common practice:

Commonly, however, indeed almost always, we proceed to effect the transfer by formal conveyance, because we can do this ourselves in the presence of friends, as it is not proper or necessary to make any application (involving considerable difficulty) to perform it in the presence of a praetor or a governor of a province.¹⁶

All other things – *res nec Mancipi* – could be transferred informally by *traditio* – mere delivery.

Furthermore, the vendor was under an obligation to take care of the thing before delivering it. By the time of Justinian, he was also was liable for eviction and latent defects.

The duty to deliver was concurrent with the buyer’s duty to pay the price ‘in the sense that if one party sought to enforce the other’s duty he must either have performed or be ready to perform his own’.¹⁷ Where a vendor sued the buyer after having delivered the thing, he could claim merely the purchase price, but was unable to reclaim the thing. This was an ‘iron rule of Roman law which the classical lawyers unflinchingly observed, never yielding to Greek ideas, which advocated an action for the restoration of the thing’.¹⁸ Furthermore, the buyer carried the risk of loss or damage to the goods. Lastly, the purchaser also bore any costs the vendor incurred taking care of the thing between the conclusion of the contract and delivery; for example, the expense of repairing buildings and of taxes or medical, funeral, and even educational expenses of a slave.¹⁹

2 *Arra*

‘Roman *arra* has been, and still is, susceptible of great controversy.’²⁰ Three key stages in the development of *arra* must be distinguished: Greek, Classical and Justinianic law. At the different stages, *arra* played different roles. However, pinning its function down at the vari-

12 Schulz (n 9) 345 (the translation of the words spoken was altered to represent a wider consensus about its meaning).

13 Barry Nicholas, *An Introduction to Roman Law* (OUP, 1962) 63.

14 HF Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge University Press, 1932) 144.

15 Schulz (n 9) 374.

16 G.1.25 (n 5).

17 Nicholas (n 13) 182.

18 Schulz (n 9) 532.

19 Zulueta (n 2) 36.

20 Michael McAuley, ‘One Thousand Years of *Arra*’ (1977) 23 McGill LJ 693, 693.

ous times is what sparks controversy among academics. Again, three distinct roles can be identified:

1. *arra confirmatoria*: The confirmatory or evidential function of *arra* is illustrated by the practical and evidential difficulties of purely consensual agreements.
2. *arra poenalis*: Penal *arra* seeks to penalise the party who breaks the agreement.
3. *arra poenitentialis*: It has a penitential function when it allows one or both parties to withdraw from the contract.

Ultimately, the practical outcome was dependent less on its legal function than the amount of *arra* actually handed over. It is nevertheless incoherent to claim that large *arra* was penal while small *arra* penitential. A large sum paid over in order to withdraw may have vastly surpassed the damages incurred by the other party while a small sum paid as a penalty may not have covered the damages at all. Similarly, if the same sum were paid over – whether its legal function was to give a right to withdraw or penalise the withdrawing party – the practical outcome would have been the same. Making the function of *arra* dependent on whether it failed to cover or exceeded the other party’s losses would enable the buyer, in choosing to hand over a certain amount, determine the legal function of the institution; the tail would wag the dog.

2 (a) Greek law

In Greek law, mere promises or consensual agreements were not actionable. Nonetheless, handing over *arra* – a certain sum of money – after two persons agreed on a sale could secure the obligation. ‘[A]lthough there was no possibility of action to enforce fulfilment, the party who failed to fulfil lost the amount of the earnest.’²¹ The buyer would forfeit it if he failed to pay the price. The seller ‘not only had to return the buyer’s *arra*, but he also had to pay him *alterum tantum*, i.e. as much in addition’²² if he defaulted. Obviously, its effectiveness would depend on the *arra* being of more than negligible value.²³ While the penalty was the same for both parties in theory, the Greek rule put the vendor in an advantageous position in practice. He would simply keep the *arra* if the buyer defaulted, while the buyer would have had to seek legal action to make the vendor pay. Furthermore, once the vendor was bankrupt, the seller would have only been one of many creditors.

Jolowicz claims that Greek *arra* had a “penitential” function, i.e. either party could withdraw from the bargain, provided he was willing to lose the amount of the *arra*.²⁴ Cornil, however, disagrees; the parties could withdraw from the bargain because of the nonbinding character of the agreement. *Arra* was the penalty they incurred for withdrawing.²⁵ Zulueta similarly believes the function was penal.²⁶ It may be superficial to separate the underlying agreement and the handing over of *arra*, as the former was the reason for the latter. Furthermore, this

21 Jolowicz (n 14) 300.

22 Zimmermann (n 4) 231.

23 Zulueta (n 2) 23.

24 Jolowicz (n 14) 522.

25 Georges Cornil, ‘Die Arrha im Justininischen Recht’ (1928) 48 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 51, 72.

26 Zulueta (n 2) 22.

would attribute *arra* a function in the *handing over of arra* while it would have no function in the *agreement to sell*, which was separate. Moreover, there is no substantial difference in outcomes whether it is labelled penitential or penal – the withdrawing parties forfeits a sum of money or pays it respectively.

Clearly, it would be ironic to claim that the aim of *arra* was giving the parties a *ius poenitendi* – a right to withdraw. *Arra* in Greek law was strengthening as opposed to weakening a non-binding agreement to sell goods. The parties had a right to withdraw to begin with. *Arra* imbued this with an important qualification; it became a right of withdrawal *incurring a penalty*. There can be no doubt that its aim was to discourage withdrawal through penalising it. *Arra* ‘operated not to permit but to limit the repudiation of the sale agreement’;²⁷ its function in Greek law was penal.

2 (b) Classical law

As ‘the advent of consensualism is generally considered to be the dividing point between the early law and the classical law’,²⁸ it is certain that in Classical times a purely consensual agreement lacking any formalities was actionable. As Nicholas put it, consent ‘involves the meeting of two minds, the concurrence of two intents’.²⁹ Therefore, it need not manifest itself physically. This raises not only a practical, but also an evidential problem. First, one party cannot read the mind of the other. Contractual obligations arise only once there is consent; determining when negotiations end and agreement begins is thus highly relevant. Inferences about the state of mind can only be drawn from its physical manifestations – a handshake, for instance. Nevertheless, this cannot solve the second, evidential problem. Proving two parties shook hands may be easier to prove than a meeting of minds, but is anything but easy. However, *arra* could tackle both of these issues serving as evidence of the concluded contract of sale. Commonly, it was a ring, but it could have been money or any other thing. Once the obligation was discharged, the ring could be claimed back; if it was money, it was set off against the purchase price:

If a ring was given as an earnest and the ring is not returned after the sale was carried out, the price having been paid and the object delivered, under what action may suit be brought? Should a *condictio* be brought on the theory that it was given for a reason which has now lapsed, or should there be a suit on the purchase? Julian would (...) say there can be an action on the purchase; but a *condictio* will also be possible since the ring is in the seller’s hands without a reason.³⁰

While Ulpian treats the keeping of the ring as unjust enrichment, Julian would proceed with an *actio empti*. The remedies may differ, but the reasoning is roughly comparable. Clearly, the seller should not keep *arra* without any good reason. The *condictio* would accordingly be available. However, Julian subsumes this under the notion of good faith, which widened; the *actio*, by its nature, could thus be used to remedy something done contrary to *bona fides*.

For Zulueta it is

27 JAC Thomas’ ‘*Arra* in Sale in Justinian’s law’ (1956) 24 *Tijdschrift voor Rechtsgeschiedenis* 25, 258.

28 McAuley (n 20) 693f.

29 Nicholas (n 13) 175.

30 Ulpian D.19.1.11.6 in Alan Watson, *The Digest of Justinian* (University of Pennsylvania Press, 1985).

‘inconceivable that *arra* in the classical period provided a *locus poenitentiae* in the sense that its forfeiture superseded the *actiones empti* and *venditi* in law. On the other hand, it may be presumed that the value forfeited counted towards damages; if so, it might in some cases supersede the *actiones* in fact, there being no damages left to recover.’³¹

Where *arra* was money, it was set off against the purchase price.³² This was in accordance with good faith. Similarly, any action on sale claiming damages would be *ex bona fides*. Zulueta’s presumption thus must be correct, as *arra* would accordingly be set off against the claim of damages.

Furthermore, he interprets

‘the silence of the metropolitan jurists [as] a clear indication that in the commercial practice with which they were concerned substantial *arra* hardly ever occurred. This contrasts with the evidence of the Egyptian papyri, where *arra* runs high, usually to half as much as the price.’³³

While in Greece penal *arra* was money, in Rome its function shaped the form of *arra*. Its aim was to adduce evidence of a contract. Money – or any other fungible for that matter – would be poor evidence. On the other hand, a ring could be presumed to be distinctive; it was hence perfect evidence. Gaius as well as Ulpian thus speak of a ring. ‘Elsewhere in the Roman law, the giving of a ring in promise of marriage, the *arra sponsalicia*, was indicative of this very personal pledge’.³⁴ Binding the parties rather on a moral and spiritual level than legally, it embodied a promise. The buyer could easily be held to account, as the seller would be in possession of buyer’s ring. How a buyer could hold a seller to account is left open. It is possible that the purchaser would have to prove that the vendor was in possession of the ring of the purchaser’s ring or seek to prove consent in another way.

Nevertheless, in G.3.139 Gaius seems to warn his students against the supposition that *arra* was essential to creating an obligation. It may therefore be presumed that in pre-consensual times, *arra* in Rome served a function similar to Greek practice. In Classical Rome, substantial *arra* in the form of money would make sense in high-profile commercial transactions, where it was important for the parties to secure the obligation as a large amount of money was at stake. However, traders would not walk around Roman markets with dozens of rings in their pockets. Moreover, they would use *arra* not as proof, but as a form of security to avoid the need to seek redress in time-consuming legal proceedings. However, stipulations based on strict law were more straightforward than a *bonae fidei* contract. Lastly, any sort of penalty could be easily incorporated and the stipulation’s written form – the *cautio* – was evidence enough rendering evidential *arra* in the form of a ring redundant.

31 Zulueta (n 2) 23.

32 Zimmermann (n 4) 231.

33 Zulueta (n 2) 23.

34 McAuley (n 20) 694.

In conclusion, there is no doubt that in Classical law, *arra* was ‘suppletive, a security device additional to the action on the sale’³⁵ playing a ‘confirmatory role’.³⁶ Its function was evidential. Money handed over in high profile transactions, it is likely that it may have appeared to be *arra*, but in fact it was part of an agreement secured by two stipulations and thus not part of the contract of sale. Nevertheless, where *arra* was money as part of *emptio venditio*, good faith applied and it was thus deducted from the price or damages.

2 (c) Justinian’s law

Justinian’s codification, illustrative of the mature Roman law, has given rise to disputes both textual and substantive in nature.³⁷ In typical Justinianic manner, the passage begins with a verbatim quotation of Gaius. Subsequently, a change introduced in the Codex 4,21,17 is explained. However, eventually Justinian seems to introduce a radical change:

The contract of sale is complete as soon as the price is agreed upon, although the money has not yet been paid, nor even any earnest [*arra*] given, for what is given by way of earnest is only evidence that a contract of sale has been formed. But this is the case with sales made without writing; for *no alteration has been made by us in such sales*. But, in respect of those which are committed to writing, we have enacted that a sale is not to be complete unless an instrument of sale has been drawn up, being either written by the contracting parties, or at least signed by them, if written by another hand; or, if drawn up by a notary, it must be accepted by the parties as completely setting out the contract in all its parts; for, as long as any of these points are wanting, there is opportunity to retract, and *either vendor or purchaser may withdraw from the contract without incurring any penalty*. We, however, have only allowed the contracting parties thus to withdraw without loss, if nothing has already passed by way of earnest; for, if earnest has been given, *whether the contract of sale has been created with or without writing*, he who declines to complete the contract, if he is the purchaser, is to forfeit the earnest; but, if he is the vendor, he must hand over double the amount, although nothing has been agreed upon about the earnest.³⁸

Before a contract of sale was reduced to writing, ‘there was still room for reconsideration and either vendor or purchaser could withdraw from the contract with impunity. Hence the need for [*arra*].’³⁹ An agreement to write a sale agreement down is neither a contract nor binding; *arra* was used a penalty to discourage withdrawal in a manner reminiscent of Greek practice. Its function was penal in this instance.

However, much to the puzzlement of the reader, the compilers of the Institutes subsequently seem to import the Greek rule into any contract of sale whether it ‘has been created with or without writing’ after having declared ‘no alteration’ had been made. Giving rise to controversy and confusion alike, there have been many attempts to translate the passage differently. These are all strained. The natural translation seems clear; the meaning of ‘*sive in scriptis sive*

35 *ibid* 698.

36 Zimmermann (n 4) 231.

37 McAuley (n 20) 701.

38 J.3.23.pr (n 5).

39 Zimmermann (n 4) 232.

sine scriptis venditio celebrata est is 'whether the contract has been created in writing or without writing'.⁴⁰ This translation will be used for the purposes of the subsequent argument.

Arra thus conceived acquires a penitential function. Seemingly, a party, which previously would have been bound to perform a duty enforceable by the *actio empti* or *actio venditi* respectively, could forfeit the *arra* to withdraw from the contract. It gave a right to withdraw where previously there was none. Justinian's *arra* clearly weakened the contract of sale, if not diminishing it completely. Buckland also believes that it is

perhaps the best view is that [Justinian] did in fact give the right of withdrawal in all cases. (...) The change, great in law, would be small in practice, partly because practice already followed Eastern lines, and partly because, *arra* being normally more than half the price, it would rarely be worth either party's while to enforce the contract.⁴¹

The amount handed over as *arra* may have been dependent on the parties' origins. Byzantine was however clearly influenced strongly by the Greek tradition – in this case, the handing over substantial sums as *arra*; it is thus likely that by Justinian's time, Eastern practice was followed.

Since '*de facto* damages, achieved by the giving of *arra*, would have been determined by the parties at a preliminary stage'⁴² there may not have been a need for the parties to seek damages judicially; hence reducing the amount of litigation. However, if the seller withdrew and refused to pay the *arra*, the buyer would have to resort to a lawsuit nonetheless. It put him in a very unfavourable position. It could have happened that the buyer lost both the *arra* and the prospective trade with the seller running off. It is conceivable that the forfeiture of *arra* would be counted towards damages as the action was *ex bona fide* and thus compatible with a regular action on sale. This would mean that a party whose damages were greater than the earnest would seek redress before the court, while party whose damages were equal to *arra* would not. However, what if the damages were smaller than the *arra* kept? Did this 'unjust enrichment' give grounds for a legal claim? Arguably not – the party forsook the amount of *arra* voluntarily deciding to withdraw. He could thus not seek compensation for the *arra* that exceeded the damages of the other party, as it was his own will giving rise to these circumstances.

The result is that in Justinian's law the institution of *arra* lost its evidential function. Any money or any other fungible of which double the amount could be handed over would be poor evidence while handing over double the amount would be bizarre if the *arra* was a ring. Writing had long replaced *arra* as evidence. Nevertheless, it played a penal role regarding incomplete written sales, as the underlying agreement was non-binding. In the case of both written and unwritten legally binding contracts of sale, *arra* gave a right to withdraw – it acquired a penitential function as Justinian combined Greek and Roman practice.

40 Similarly to Mears, Zulueta translates the passage as 'whether the sale has been conducted with or without writing': Zulueta (n 2) 81.

41 WW Buckland, *A Textbook of Roman Law* (3rd edn, Cambridge University Press, 1963) 481f.

42 McAuley (n 20) 705.

3 Warranty against eviction

A vendor was not obliged to transfer ownership. A guarantee of undisturbed possession developed alongside, supplementing this peculiar rule. The Roman law was a law of actions or remedies. There was a right where there was a remedy – the maxim of ‘*ubi remedium, ibi ius*’ applied. Thus, by explaining how the warranty against eviction developed, the individual actions that could be used to enforce it can be analysed individually.

3 (a) *Actio auctoritatis*

Mancipatio is the conveyance by which the obligation to convey arising from sale was fulfilled. It implied a warranty against eviction, which was in use by the time of the Twelve Tables. This institution was called *auctoritas*, and the action arising from it *actio auctoritatis*.⁴³ The transferee could bring it against the transferor for double the purchase price after he was evicted from the thing transferred for a substantially defective title. According to Zulueta, it could be brought, should the ‘buyer be evicted within the period of *usucapio* by action brought by a third-party, provided that the buyer had given the seller notice (*denuntiatio*) of the action, so that he could defend it’.⁴⁴

The first of these requirements seems dubious. *Usucapio* required a *iusta causa*, which was undoubtedly present due to the preceding sale; good faith, which was rebuttable but was presumed; and the lapse of the required time, which was one year for movables and two years for immovables in Classical Rome. Nevertheless, stolen things and things taken by force were excluded by the Twelve Tables and the *lex Plautia et Julia* respectively. While theft of land was impossible, the definition of *furtum* was so broad that usucapion of movables was very rarely possible. It would seem odd to limit the warranty against eviction to a time period, after which the evicted buyer would have no redress. Another argument against this is that the *stipulatio duplae* complementing the *actio auctoritatis* included no such temporary constraint.

There is however no doubt that when threatened with eviction, the transferee had to ‘inform the transferor and call upon him to support the title he had transferred, and if the transferor failed to defend the action so that eviction followed’⁴⁵ he could bring an action.

However, Roman law did not put the seller under a contractual, but ‘semi-delictual liability arising from receipt of the price’.⁴⁶ This suggests the warranty arose from delict, or what Zulueta seems to call half a delict, which is a notion examined below. The reason was that, when selling property, if the vendor accepted payment for a thing he did not own, he put the purchaser in danger of being evicted. ‘This was not unlike *furtum nec manifestum*, a non-manifest theft of the money: hence the sanction of *duplum*.’⁴⁷ Delicts were civil wrongs by definition; this suggests that a ‘wrong’ had been deliberately committed. However, knowing and unknowing transferors were treated equally. This is arguably unjust; even an innocent heir, who had alienated property he and all the family thought he had inherited and whose older and presumed lost brother later reappeared, would be held liable although had done no

43 Schulz (n 9) 533.

44 Zulueta (n 2) 43.

45 Jolowicz (n 14) 149.

46 Zulueta (n 2) 42.

47 Zimmermann (n 4) 295.

wrong. Furthermore, it should be remembered that the *auctoritas* is old enough to have been in use when *mancipatio* was not merely a conveyance but conveyance and contract in one. This would suggest it arose half from the (unjustified) conveyance and half from contract making it semi-delictual and equally semi-contractual. The penalty it imposes by requiring paying twice the price, however, points into the direction of delict at a time when only theft and intentional bodily harm were punished and the delictual remedies were clearly penal. The most appropriate parallel can be drawn between the *actio auctoritatis* and the *condictio* remedying unjust enrichment. They neither arise from contract nor delict and both actions could lie without any fault at all. What Gaius says about unjust enrichment applies equally to the *auctoritas*:

But this kind of obligation does not seem to arise out of contract, since he who gives with the intention of paying, is rather desirous of dissolving than of forming an obligation.⁴⁸

The transferor manciping property was dissolving the contractual obligation of delivery while becoming liable at the same time. One essential difference lies in the fact that the *actio auctoritatis* gave rise to double the purchase price while the *condictio* could only recover the amount given by mistake. Nevertheless, it seems sensible to attribute a delictual or semi-delictual origin to the *auctoritas*. It punished those who had the audacity to transfer property that did not belong to them before witnesses. It applied to innocents, but this may have been merely necessary collateral damage in the eyes of early Roman law.

Whatever this liability should be called, it ‘did not lie in a failure to transfer ownership to the transferee (...) It lay in the transferor’s failure to support the transferee against the true owner’.⁴⁹ This analysis explains the need to inform the transferor about the impending eviction. If the buyer had not given the seller the chance to defend the title, he could not be held liable. However, it did not prevent liability where the transferor failed to defend the title he conferred.

There were nonetheless limits to the operation of this warranty. It ‘did not cover the sale of *res nec Mancipi*; nor did it apply where *res Mancipi* had been sold and were merely handed over by way of *traditio* (or transferred by way of *in iure cessio*)’.⁵⁰ The fact that the *actio auctoritatis* was unavailable for property transferred by way of *in iure cessio* adds another advantage, besides what Gaius portrays as ‘considerable difficulty’⁵¹ in applying to the magistrate, of *mancipatio* over *in iure cessio*.

Furthermore, the *actio* may have been confined to sales. It might seem bizarre to hold someone liable for eviction from a thing he transferred by way of gift. Nevertheless, the penalty was double the purchase price. In a donation, there was no purchase price, hence the liability was de facto non-existent. Moreover, confining the *actio auctoritatis* to sales would make it indirectly contractual as opposed to delictual. As the nature of the action would not entail any practical difficulties, it is improbable that it was confined to sales.

48 G.3.91 (n 5).

49 Raphael Powell, ‘Eviction in Roman Law and English Law’ in David Daube (ed.), *Studies in the Roman Law of Sale: Dedicated to the Memory of Francis de Zulueta* (OUP, 1959) 84.

50 Zimmermann (n 4) 295.

51 G.2.25 (n 5).

While admittedly primitive, the *actio auctoritatis* ‘was still in use, unaltered in essentials, at the end of the classical period, but is not mentioned in the Digest, because in the interval it had disappeared along with *mancipatio*’.⁵²

3 (b) *Stipulatio duplae*

Where the *actio auctoritatis* did not apply, it became customary ‘to provide for the seller’s liability by exacting from him a promise by stipulation that in the event of eviction, he would pay double the purchase price (*stipulatio duplae*)’ – in other words an express warranty.⁵³ This could also be simply for the purchase price (*simpliciter*), ‘this being apparently common where the article sold was of no great value’.⁵⁴ A stipulation thus supplemented the *actio auctoritatis* in this manner. However, the ‘protection of the purchaser still contained one grave weakness: the remedies against eviction were not inherent in sale, but required an additional act by the parties’.⁵⁵ Where the parties omitted the stipulation, the buyer had no remedy in the event of eviction in republican and early classical law.⁵⁶

3 (c) *Actio empti*

Nevertheless, ‘such *stipulationes*, being felt to be just, became customary’.⁵⁷ Slave dealers were even forced by the *curule aediles*, who regulated markets, to give them.⁵⁸ With the ‘growth of the conception of *bona fides*, it came to be regarded as inconsistent with good faith not to make the promises which were usual’.⁵⁹ The buyer could accordingly compel the seller to give a stipulation by the *actio empti*. This stage had been reached by the time of Neratius⁶⁰ (late first century and early second century AD). The warranty against eviction became inherent in contracts of sale at this point – though only indirectly through the *auctoritas* on the one hand and the *stipulatio duplae* on the other.

Eventually, the *actio empti* could be brought directly in case of eviction. ‘Julian was the first to take this step, thereby endowing the consensual contract of sale with an *implied* warranty for eviction.’⁶¹ Similarly to the example about *arra* above, Julian seemingly understood good faith in a rich sense and thus allowed actions on sale for matters that were initially outside its scope. However, the fundamental rule still applied: It could only be brought after the buyer was evicted; not simply because the buyer found out he was lacking legal title.

4 Conclusion

It has been shown that *arra* acquired a dual function in Justinian’s era by the fusion of Greek penal and Classical evidential *arra*. In the case of non-binding agreements to put a sale into writing, it played a penal role where it allowed withdrawal from all complete sales. Jolowicz

52 Zulueta (n 2) 43.
 53 Jolowicz (n 14) 302.
 54 *ibid.*
 55 Zimmermann (n 4) 296.
 56 Schulz (n 9) 534.
 57 Zulueta (n 2) 42.
 58 D.21.2.37.1.
 59 Jolowicz (n 14) 302.
 60 D.19.1.11.8.
 61 Schulz (n 9) 534 (emphasis added).

perceived it as an attempt to ‘fuse [the Greek penitential function] with the Roman evidentiary function’;⁶² instead Justinian had done away with the latter entirely. *Arra* given after a contract of sale had been completed was penitential.

Furthermore, an implied warranty against eviction inherent in the contract of sale developed. It was the result of implied (semi-)delictual liability of *auctoritas* and an express truly contractual liability, which ‘first arose not out of any development of the theory of sale, but from a special contract voluntarily added to sale by the parties (...)’.⁶³ They supplemented each other. Eventually, the warranty against eviction was consumed by the idea of *bona fides*. Liability became contractual and enforceable by an *actio empti*.

Besides building the cornerstone of the future implied warranty against eviction, the *actio auctoritatis* rattled a conceptual divide perceived by some as fundamental. Nicholas distinguishes conveyances from contracts to explain the differences between rights *in rem* and *in personam*:

The ways in which they come into existence are kept distinct: the act which creates a right *in personam* does not create a right *in rem*, and vice versa. The most important application of this principle is in the distinction between contract and conveyance. A contract creates rights *in personam* but cannot create or transfer rights *in rem*. For this a conveyance is necessary, i.e. an act recognised by law as appropriate for the purpose. (...) This separation of contract and conveyance is rooted in the sound though inarticulate principle that rights *in rem*, since they potentially affect everyone, should not be secretly created or transferred whereas there is no such objection to the secret creation of rights *in personam*.⁶⁴

Similarly, Buckland and McNair claim that the distinction between rights *in rem* and *in personam* ‘was much more clearly felt than it has been with us. A conveyance was one thing: a contract was another. The typical conveyance was *mancipatio*, a formal act, admitting of no express conditions, and transferring property but doing nothing more.’⁶⁵ Indeed, *emptio venditio* ‘never had any “real” effect’.⁶⁶ Nevertheless, servitudes, or *iura in re aliena* as they were called by medieval jurists, were created by pact and stipulation. Thus there were clearly contracts that did have an effect *in rem*. Similarly, *mancipatio*, which Buckland and McNair describe as a typical conveyance, had an effect *in personam* giving rise not only to the *actio auctoritatis*, but also the *actio de modo agri*.⁶⁷ The dichotomy was not as clear-cut as some might wish. *Mancipatio* in particular blurred the line between the concepts of contracts and conveyances. Ironically, or perhaps appropriately, the conveyance that at some point ‘had not been a symbolical sale but a real one’⁶⁸ ended up influencing the real contract of sale. This was the

62 Jolowicz (n 14) 522.

63 Zulueta (n 2) 42.

64 Nicholas (n 13) 103.

65 Buckland and McNair (n 10) 116.

66 *ibid* 280.

67 ‘Where land was mancipated and the vendor had by way of a *lex mancipatio dicta* (a formal declaration made in the course of *mancipatio*) that it was of a particular size, he was liable for the proportionate amount of the price if the actual acreage turned out to be less than asserted’: Zimmermann (n 4) 308.

68 Jolowicz (n 14) 144.

beginning of the end of a purely personal contract of sale paving the way for a world where contracts could transfer real and create personal rights.

We have explored the development of two institutions of the commercially highly relevant contract of sale over a number of centuries. Understanding how sale evolved deepens our knowledge of the contract today. More importantly, it shows how two devices – *arra* on the one hand and the warranty against eviction on the other – secured two very different kinds of promises. The former strengthened a promise to buy and sell while the latter guarded the buyer against being evicted from property which he bought. There is thus an obvious symmetry between them. Because an agreement to sell was at least morally perceived as binding and a right to peaceful possession of purchased property was recognised, *arra* and the warranty against eviction served those purposes respectively. Laws can be used to enforce a society's beliefs in what is right and wrong and as attitudes about justice have changed, so did sale; these two devices are instances of this development, which spans across all areas of law.

Interpretative processes under the Scotland Act 1998 Case Note: *Imperial Tobacco Ltd v The Lord Advocate*

Yu Jie Wu

This Note concerns the decision of the Supreme Court in the case of *Imperial Tobacco Ltd v The Lord Advocate*.¹ The question before the Supreme Court was whether or not sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 were ‘not law’² for being outside the Scottish Parliament’s legislative competence as defined by section 29 of the Scotland Act 1998. This case is significant for two key reasons.³ First, delivering the sole speech in the Supreme Court, Lord Hope of Craighead enumerated three principles of statutory interpretation in relation to the Scotland Act 1998. These principles deserve close examination as judicial statements from the highest court on a key matter in devolution. Secondly, this was the first challenge under section 29(2)(b) read with Schedule 5 of the 1998 Act to reach the Supreme Court. In these two ways, the present case supplements the current understanding of the 1998 Act and the devolution settlement. It is the purpose of this Note to consider how the Act has been read in the Supreme Court and the Inner House of the Court of Sessions, in order to piece together the interpretative processes required by the Scotland Act 1998 and to highlight approaches indigenous to the Act.⁴ Where a body of jurisprudence is in its infancy,⁵ a thorough understanding of existing judicial approaches is crucial for the development of the law. This Note hopes to contribute to that understanding.

1 Three principles of interpretation

Under the heading of ‘The interpretation issue’, treated in paragraphs 10 to 18 of his speech, Lord Hope of Craighead responds to the discussion in the Court of Session⁶ and submissions made by the Lord Advocate and Advocate General⁷ as to the proper approach to the construction of the Scotland Act 1998 in relation to legislative competence. His Lordship’s response is embodied in three principles.

1 [2012] UKSC 61.

2 Scotland Act 1998, s 29(1).

3 This note will not consider the effect of the approach of the Supreme Court in *Martin v Most* [2010] UKSC 10, [2010] SC 40, in relation to a challenge to competence under s 29(2)(c) read with para 2 of Sch 4. This challenge was dismissed by Lord Hope of Craighead at [44]–[45] of the present case, [2012] UKSC 61, but did not involve close examination of the para 2 provisions at [38]. It is very close to a non-question, given the conclusion, at [45], ‘I can see no connection between [the challenged provisions’] purpose and effect and the law on reserved matters.’

4 To an extent, the present note builds on the analysis undertaken in M Walters and P Craig, ‘The Courts, Devolution and Judicial Review’ [1999] PL 274, 289 ff. by examining judicial attitudes towards the interpretative problems raised there.

5 Especially in a settlement where there are mechanisms that attempt to avoid litigation in courts. R Rawlings, ‘Concordats of the Constitution’ (2000) 116 LQR 257, 270–1.

6 [2012] UKSC 61 [10].

7 *ibid* [11].

The first is that ‘the question of competence must be determined in each case according to the particular rules that have been set out in section 29 of and Schedules 4 and 5 to the 1998 Act’.⁸ The courts cannot determine ‘whether legislation on any particular issue is better made by the Scottish Parliament or by the Parliament of the United Kingdom at Westminster’,⁹ but can only apply rules set out by the Westminster Parliament.

The second principle states unequivocally that ‘those rules [in the Scotland Act] must be interpreted in the same way as any other rules that are found in a UK statute’.¹⁰ This is justified in terms of the need for a ‘coherent, stable and workable’ settlement.¹¹

The final principle is that ‘the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation’.¹² While the system of devolution ‘was intended, within carefully defined limits, to be a generous settlement of legislative authority’¹³ by defining competence negatively, this could not be a presumption in favour of competence in each case that would arise.

How far do these principles extend? Prima facie, these principles seem to be in contrast to the approach taken to the Northern Ireland Act 1998 in *Robinson v Secretary of State for Northern Ireland*.¹⁴ On a closer look, this is not so. *Robinson* was not a case regarding legislative competence. Instead, the House of Lords there had to consider the election of the First Minister and Deputy First Minister and the appointment of a date for an extraordinary election as mechanisms of Northern Irish devolution.¹⁵ Such issues arising from the machinery of devolution differ from questions of legislative competence. Lord Hope’s principles are explicitly directed towards the latter and the rules set out in the Scotland Act.¹⁶ It is not difficult to imagine a situation where the *mechanisms* of devolution created by the Scotland Act 1998 may need to be interpreted without reference to legislative competence – the varieties of executive roles in the 1998 Act may give rise to judicial review proceedings without touching upon the matter of legislation.¹⁷ Furthermore, *dicta* in *AXA General Insurance Ltd v HM Advocate*¹⁸ suggest that, apart from challenges to competence, Acts of Scottish Parliament that derogate from fundamental rights and the rule of law might not be recognised by the courts.¹⁹ In such a situation, whether or not ‘the provisions should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional

8 *ibid* [13].

9 *ibid*.

10 *ibid* [14].

11 *ibid*.

12 *ibid* [15].

13 *ibid* [15].

14 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390 [11] (Lord Bingham of Cornhill).

15 *ibid* [3]–[6], [9].

16 *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61 [12].

17 Consider, for example, a potential challenge to the use of s 104 Scotland Act 1998 that has to make reference to the fundamental political and constitutional reality underlying the devolution settlement. See *Martin v Most* [2010] UKSC 10, [2010] SC 40 [80] (Lord Rodger of Earlsferry).

18 *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [51]–[52] (Lord Hope of Craighead), [136] (Lord Reed).

19 *ibid* [136]: ‘The language of section 29 does not imply that the matters listed there are necessarily exhaustive of the grounds on which Acts of the Scottish Parliament may be challenged’ (Lord Reed).

provisions are intended to embody'²⁰ in contrast to Lord Hope's articulated approach above is an open question that should be determined on the basis of constitutional²¹ and political arguments.²² Lord Hope's principles must be seen in their context as being directed towards questions of legislative competence. An overextension of these principles would obscure important constitutional and political issues pertaining to these other aspects of Scottish devolution, and leave these issues unscrutinised.

2 Schedule 5 and legislative competence

Having addressed the interpretative principles, this Note now turns to consider the substantive analysis of the Scotland Act 1998. Most relevant are the following two grounds of challenge,

1. that, on a proper construction of section 29(2)(b) and 29(3) read together with Section C7(a) of Head C in Schedule 5, sections 1 and 9 of the 2010 Act relate to 'the sale and supply of goods to consumers', which is a reserved matter;
2. that, on a proper construction of those subsections read together with Section C8 of Head C, sections 1 and 9 relate to 'product safety', which is a reserved matter (...).²³

Lord Hope's interpretative approach reveals that the matter is more complex than the simple application of legislation. The interpretative process is the determination of whether section 29(2)(b) applies so that the challenged provisions are not law, per section 29(1). This requires three interpretative sub-processes,²⁴ (1) determining the rules and purposes of the challenged provisions per section 29(3), (2) interpreting the 'reserved matters' referenced by section 29(2)(b) in Schedule 5, and (3) considering whether the rules in (1) 'relate to' the

20 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390 [11] (Lord Bingham of Cornhill).

21 Perhaps the Supreme Court may be more reticent given the 'reaction' to *Robinson* in the St. Andrew's Agreement, adding s 4(5A) to prevent the manoeuvrings of the Secretary of State in 2001 from occurring again.

22 See in relation to the Northern Ireland Act 1998, B Hadfield, 'Does the devolved Northern Ireland need an independent judicial arbiter?' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003) 132. Such arguments would need to consider the role of the Supreme Court and the appeals structure in place. See N Walker, 'Final appellate jurisdiction in the Scottish Legal System' (Scottish Government, 2010) 25–6, 31.

23 *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61 [25].

24 *ibid* [18].

reserved matters in (2) in the manner required.²⁵ Here, this Note aims to establish the principles of construction relating to these three sub-processes.

2.1 *The challenged provisions: section 1 and section 9 of the 2010 Act*

The present case does not break new ground on this front, but reinforces the approach taken by Lord Hope on this matter in *Martin v Most*, with which their Lordships had unanimously agreed.²⁶

Lord Hope begins at paragraph 22 of his speech, where his Lordship affirms Lord Reed's interpretation of the relevant provisions. The reasoning, however, is sparse, and it is therefore necessary to turn to Lord Reed's judgment in the Inner House.

Lord Reed's reasoning²⁷ begins with a discussion of the content of section 1. The 'legal effect' of the provision, in this case, the legal powers conferred by the statute, is then established. What the 'legal effect' is will differ from statute to statute, but seems to refer to the legal scheme for duties or powers created by each piece of legislation. Following that, the short-term and long-term consequences are considered, with Lord Reed concluding that the former depends on how the Scottish Ministers exercise the powers pursuant to section 1(2) and (4), and that the courts are not able to predict the latter. It is then stated that the long-term consequences do not bear on the question of the purpose of the provision. Reference is made to extrinsic material, and the purpose is checked against its legal effect. The reasoning in relation to section 9 is similar.

Where the courts rely on extra-statutory materials, especially Parliamentary statements, as part of their interpretation of statutes potential problems arise. Does the approach taken here side-step such problems in giving effect to the Act? A key issue is that of judicial independence, especially relevant here due to the court's role as, to borrow a phrase, the 'non-partisan guardian of this constitutional settlement'.²⁸ Kavanagh has criticised the rule in *Pepper v Hart*²⁹ on this point, arguing that it collapses interpretation and legislation and makes the courts delegates of Parliament and the executive.³⁰ In relation to devolution, this concern could materialise if the legislative material is designed to convince the courts that a provision is within competence. However, such a concern can be overstated. Section 29(3) of the 1998 Act requires the courts to consider the *effect* of the provisions. By placing consideration of effect on par with interpretation of purpose, section 29(3) gives effect to what Lord Atkin had stated in *Gallagher v Lynn*, 'An Act may have a perfectly lawful object (...) but may seek to achieve that object by invalid methods (...)'.³¹ It highlights the fact that the means of implementing a purpose is a legal instrument that is to be reviewed against legal standards set out

25 (1) and (2) need not be in that order. However, whether or not this may have an impact on the substance of determinations may be a question worth pursuing. And this is not to say that further processes are not involved within each sub-process.

26 It is to be recalled that the contentious issue was the interpretation of para 2 of Sch 4 to the 1998 Act.

27 *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9, [2012] SC 297 [133].

28 *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] NI 390 [14] (Lord Bingham of Cornhill).

29 *Pepper v Hart* [1993] AC 593 (HL).

30 A Kavanagh, 'Pepper v Hart and Matters of Constitutional Principle' (2005) 121 LQR 98, 102–3.

31 *Gallagher v Lynn* [1937] AC 863 (PC) 870, qtd. *Martin v Most* [2010] UKSC 10, [2010] SC 40 [13] (Lord Hope of Craighead).

in the devolution statute. The purpose is the first step in the construction of the challenged provision, but s 29(3) also reintroduces an element of independence when the courts consider the effect of the relevant legislation.

2.1.1 The use of jurisprudence from federalist jurisdictions and from the Privy Council

The approach described above must be considered in the context of a dearth of statements in Lord Hope's speech on the 'respectation' doctrine³², the principles used to determine if a particular statute contravenes rules of competencies. Instead of relying on these other methods and tests, Lord Hope has approached the problem on the basis of the Scotland Act 1998. This is in stark contrast to the detailed examination of Canadian and Australian jurisprudence in the Inner House of the Court of Sessions, and highlights the need to develop further understanding of the current approach to the devolution statute, which is beginning to develop its own jurisprudence.

It is submitted that by relying strictly on the provisions of the Scotland Act 1998 and the method of construction above, Lord Hope has achieved to a greater extent the aims of consistency and stability set out previously. An indigenous doctrine developed with close reference to the nature of the specific Act in question can be considered on its own footing, without having to be submitted to the historical desiderata of federalism in other jurisdictions. Development with regards to the specific nature of the 1998 Act would discipline subsequent case law in a manner that transposition would not, by ensuring that there is a clear, ultimate point of reference. In *Martin v Most* Lord Hope had stated: 'The rule that was evolved and applied in these cases [the "pith and substance" doctrine], among others, provides the background to the scheme that is now to be found in the Scotland Act.'³³ This cannot be contested. But Lord Hope then goes on to state that, as to the meanings of the rules of the Act, 'the Scotland Act provides its own dictionary'.³⁴ In keeping with the first principle as described at paragraph 13, construction of the Scotland Act 1998 must be internally coherent and be derived from itself.

2.2 Schedule 5 of the Scotland Act 1998

The following attempts to identify certain interpretative approaches that can be taken, the factors that need to be taken into account, and notes how relying on a set of tools allows the courts to tackle the specific styles of the lists in Schedule 5.

It first addresses Section C7(a) and sets out the structure of reasoning in the Supreme Court, then supplements this with reference to judgments in the Inner House. This reasoning will then be evaluated in relation to the principles identified by Lord Hope. Section C8 is then considered: the contrast between the characters of Sections C7(a) and C8 show that conclusions as to each Section in Schedule 5 are not easily universalised.

32 *Martin v Most* [2010] UKSC 10, [2010] SC 40 [11] (Lord Hope of Craighead).

33 *ibid* [14].

34 *ibid* [15].

2.2.1 Section C7(a)

On the construction of Section C7(a), which sets out the reserved matter as ‘the sale and supply of goods to consumers’, Lord Hope agrees with Lord Reed.³⁵ His Lordship addresses the structure of Schedule 5, the relevant portion of which is Part II, and the headings from A to J: ‘There is no common characteristic, but there is a common theme. It is that matters in which the United Kingdom as a whole has an interest should continue to be the responsibility of the United Kingdom Parliament at Westminster.’³⁶ Moving then to Section C7 under Head C, Lord Hope describes the structure in three parts. This process of reasoning is one of narrowing down, going from the general to the particular. Each stage requires reference to relevant provisions, the state of the law prior to devolution, and the vagaries of legislative drafting. Throughout, the elements are examined for their potential impact on the meaning of Section C7(a).³⁷ Remarking that the Notes that had accompanied the Bill stated ‘that the titles of heads, sections, etc are merely signposts and that they do not form part of the definitions of the reserved matters’, his Lordship was convinced by the overall effect of the section that the relevant context was that described in the heading, ‘consumer protection’.³⁸ Lord Hope then interpreted the term, ‘consumer protection’, concluding against the wide interpretation advanced by counsel for the appellant.³⁹

What is of further interest here are statements made by Lord Reed in the Inner House on the nature of Schedule 5, which Lord Hope in the Supreme Court did not explicitly affirm.⁴⁰ They are therefore only of persuasive force.

At paragraph 85, Lord Reed describes the difficulties involved in defining ‘watertight compartments’, leading to a particular approach to drafting: ‘There are a number of examples of a reserved matter described at a high level of generality being followed by other, more specific, matters which might be thought to fall within, or overlap with, the scope of the first matter.’⁴¹ His Lordship continues by analysing the structure of some other lists in Part II, Schedule 5. Of particular note is his Lordship’s statement, ‘[G]iven the idiosyncratic style in which schedule 5 has been drafted, I would be cautious in applying conventional canons of statutory construction.’⁴² It seems that Lord Reed is referring in part to how the elements of the lists in Schedule 5 relate to each other: no universal rule can be identified, and it is best therefore to approach each list on its own terms.

In concluding this part of his analysis, Lord Reed considers the relative competencies of the bodies in relation to the UK single market.⁴³ This reliance reveals one more interpretative approach to the question of what constitutes a reserved matter.

35 *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61 [34].

36 *ibid* [29].

37 *ibid* [30].

38 *ibid* [31].

39 *ibid* [34].

40 *ibid* [34], where Lord Hope only affirms Lord Reed’s conclusion: ‘The better view is that given by Lord Reed’.

41 *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9, [2012] SC 297 [85].

42 *ibid*.

43 *ibid* [95].

However, issues arise in relation to two of the principles stated by Lord Hope.⁴⁴ In justifying the first principle, that ‘the question of competence must be determined in each case according to the particular rules that have been set out in section 29 of and Schedules 4 and 5 to the 1998 Act’,⁴⁵ his Lordship expressly states that the courts cannot decide matters on the basis of their perception of relative competence. And yet, at paragraph 29, Lord Hope identifies what the items in Schedule 5 share in common as ‘matters in which the United Kingdom as a whole has an interest [and] should continue to be the responsibility of the United Kingdom Parliament at Westminster’.⁴⁶ There seems to be a contradiction between the stated principle and the practice of interpretation carried out. Furthermore, Lord Reed’s approach makes explicit the possible impact of such a view on interpreting Schedule 5.⁴⁷

It is submitted that the first principle should not be read as excluding reliance on the concept of relative competence. That concept is useful as a guide towards giving effect to the devolution settlement. Lord Hope’s statement should be read as stating simply that the statute is the ultimate source of the relevant rule, that the applicable Schedules were drafted by the competent legislature, and that the courts are in no position to usurp these determinations. It would not, on this reading, exclude the possibility that in interpreting the substantive terms in Schedule 5 the courts may have regard to the relative competencies of the devolved and central bodies, for the purpose of the Union and to give effect to the rules set out in the statute.

There is also a potential conflict between Lord Reed’s explicit statement that Schedule 5 cannot always be read with the same rules of construction as applicable to regular statutes⁴⁸ and the second principle, requiring that the Scotland Act be interpreted like other statutes of the Westminster Parliament. Two approaches are possible. The first approach interprets the second principle as applying only to the ‘rules’, and that the Schedule, as information relevant to the application of the rules, need not be construed in the same manner. If one follows this argument, it seems that the second principle applies only to the provisions in the body of the 1998 Act or perhaps the provisions of the Schedules in so far as they can be described as ‘rules’.⁴⁹ The second approach to reconciliation could be to avoid the question entirely by noting that Lord Hope does not at any point make the same statements regarding the drafting of Schedule 5, and the principle set out by the Supreme Court is the rule to follow.

On balance, the first approach is preferred. Lord Reed’s observations of the structure of certain lists in Schedule 5 are empirical observations informed by legal analysis of the significance of the lists’ characteristics. To properly determine the scope of the reserved matters, that Schedule must be understood in all its nuances.⁵⁰ The second approach would be a thoroughly unsophisticated analysis. While this may add a level of uncertainty, as will be seen in relation to Section C8, the nature of Schedule 5 requires such an approach.

44 *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61 [13], [14]. Text to n 8.

45 *ibid* [13].

46 *ibid* [29].

47 *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9, [2012] SC 297 [95].

48 *ibid* [87].

49 Contrast the statute-like rules in Scotland Act 1998 para 2, Sch 4 and the lists of Sch 5.

50 See also M Walters and P Craig, ‘The Courts, Devolution and Judicial Review’ [1999] PL 274, 283.

2.2.2 Section C8

The differences between Section C7(a) and C8 affirm Lord Reed's statements as to the particular drafting styles and structures of each section. Section C8 opens with 'Technical standards and requirements in relation to products in pursuance of an obligation under EU law'; the list ends with 'Product safety and liability' and 'Product labelling' before turning to exceptions. It does not have the same logical progression between elements as in Section C7(a). However, when determining the scope of 'Product safety and liability', the approach that takes into account context, competencies and the structural nuances of each section is equally useful. Further, another approach can be identified: the reference to section 11 of the 1987 Act acts as a focusing tool, allowing the courts to consider concretely the potential width of the reserved matter in Section C8. It was argued that if the challenged provisions lay within the scope of section 11, they would then relate to the reserved matter under Section C8, 'product safety'.

Lord Hope discusses the technical aspects of the section 11 provision.⁵¹ His Lordship then recounts and affirms Lord Reed's judgment in the Inner House. That reasoning, involving consideration of (1) the significance of the legislation in relation to the single market and (2) the division of responsibility prior to devolution, leads to the conclusion that matters falling under section 11 of the 1987 Act fall under Section C8 as reserved matters.⁵²

This means of reasoning through statute is available only in such a case where the statute is directly relevant to the reserved matter. As the core of a regulatory structure, the 1987 Act was, as the Lord President described, useful 'to understand how, pre-devolution, matters in relation to consumer protection were legislatively organised'.⁵³ It must be noted, however, that this is not as simple as Lord Hope makes it out to be. In the Inner House, counsel for the appellants had argued that the 1987 Act was relevant as to Section C7 of Schedule 5. Upon reflection, it was decided that it was better related to Section C8, given the ordinary meaning of the term 'product safety' in Section C8. This involved interpretation of the statute, and interpretation of the relevant sections in the Schedule. If, as Lord Reed describes⁵⁴, the sections are not 'pigeon-holes', it seems as if the test of whether or not a statute is relevant to a particular reserved matter or other is one of correspondence between the ordinary meaning of the terms in the Sections and the nature of the Act relied upon.

What the above analysis has revealed is that, in relation to Schedule 5, their Lordships have equipped themselves with various tools for assessing the individual lists. Due to their nature, the lists are not susceptible to the application of universal rules, but require close attention to the particular characteristics of each Section. While this may affect the degree of certainty

51 *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61 [35].

52 *Imperial Tobacco Ltd v Lord Advocate* [2012] CSIH 9, [2012] SC 297 (n 9) [100].

53 *ibid* [10].

54 *ibid* [87].

for claims in relation to Schedule 5, it is necessary to achieve an intellectually rigorous and coherent understanding of each Section.

2.3 Conclusions as to competence

After a summary of the interpretation of the challenged provisions and the reserved matters in Schedule 5, it was enough for Lord Hope to conclude that these two elements did not match.⁵⁵ The challenged provisions do not have the purpose of intruding on the concerns in Section C7(a) or 8; therefore, they do not relate to those reserved matters.

3 Summarising the interpretative processes

The nature of interpretation under the Scotland Act 1998 is complex because the Act provides for a variety of legal processes relating to the competence of the Scottish Parliament. It is possible first to consider the three potential legal challenges under the 1998 Act: (1) challenges to legislative competence, (2) challenges to the functioning of the mechanisms of devolution, and (3) challenges to the constitutionality of Acts passed. It has been shown first that the principles set out by Lord Hope in the present case go towards (1), and that the other potential challenges *may* operate with different principles. Under (1), three forms of challenge can be identified: (a) reserved matter challenges; (b) content challenges; and (c) obligation challenges, corresponding to section 29(2)(b) and (c); section 29(2)(a) and (e); and section 29(2)(d) respectively. Under (a), this Note has considered challenges under section 29(2)(b), relating to Part II of Schedule 5, the list of reserved matters. This process requires three interpretative sub-processes, noting that the first two need not take place in any particular order: (1) determining the purpose and effect of the challenged provisions, (2) determining the extent of the reserved matters, and (3) considering if the purpose and effect of the provisions relates to the reserved matters as construed.

It is clear that (3) is the least burdensome step. (1) also proves relatively easy as the present case settles that this question is to be determined with reference to the Scotland Act 1998 as an independent statute, relying on previous jurisprudence only as background. Sub-process (2) is the most complex due to the nature of the lists in Schedule 5. The present case has demonstrated what approaches to identifying the reserved matters may look like. Attention must be paid to the specific nature of each section: consideration must be given to (1) the headings, (2) extrinsic materials relevant to said headings, (3) the relationship among elements of a list, (4) the relationship between parts of a list, (5) the relationship between the sets of lists, (6) the existence of ‘illustrations, exceptions or interpretation provisions’,⁵⁶ (7) considerations of efficiency, and (8) existing statutes used to focus the court’s attention. This is to be contrasted with an analogy-based and incremental method that gains weight on the basis of precedence – the differences between Sections C7(a) and C8 warn against such a temptation.

4 Conclusion

In so far as the goal of devolution jurisprudence is to develop a ‘coherent, stable and workable’ settlement,⁵⁷ it is necessary for the courts, and especially the Supreme Court, to be aware of

55 *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61 [40], [42].

56 Scotland Act 1998, Sch 5, Part II, para 3.

57 *Imperial Tobacco Ltd v The Lord Advocate* [2012] UKSC 61 [14]

how they approach questions of competence. The identification of the three principles, the decreased reliance on pre-1998 jurisprudence and the approaches to Schedule 5 evidence keen understanding of the unique aspects of the 1998 Act. Internal inconsistencies, where they do arise, are reconcilable. If the present case is a sign of how the jurisprudence will develop, there is much to be content with.

Towards an *actio popularis*? Standing and constitutional values: A comparative analysis

Roxane Reiser

Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power.

Sedley J in *R v Somerset CC, ex parte Dixon* (1998)¹

Sedley J's statement in *Dixon* lies at the heart of the current liberalisation of the requirement of standing for citizens seeking to challenge government action through judicial review. Section 31(3) of the Senior Courts Act 1981 provides that the applicant needs to show a 'sufficient interest in the matter to which the application relates'. In order to understand the recent liberalisation of the doctrine of standing and envisage its future development one needs to decipher the principles that lie behind this formula. Many different interpretations have been propounded, some liberal, and others less so; some, like Sedley J's above, seem destructive of any barriers to the so-called *actio popularis*, which enables any citizen to challenge administrative action solely by virtue of his supposed interest in the vindication of the rule of law.

The result is a confused and complex body of law. This confusion seems to stem from two related factors: first, differences in judicial opinion as to the proper role of the citizen and of the courts in public law; secondly, a failure to explicitly address the question of whether any citizen, whatever his or her particular stake in the issue in question, should indeed be able to challenge the actions of the executive and, if so, what the constitutional consequences of allowing such an *actio popularis* might be. Unlike England and Wales, other legal systems have confronted this question more directly. They have provided reasoned answers outlining concrete and coherent rationales, thereby delineating the proper ambit and function of the doctrine of standing within the constitutional framework in place. The aim of this paper is to assess what English law can learn from these jurisdictions and to consider where the doctrine of standing should go in the future. The first part will focus on the recent liberalisation of the doctrine of standing in English law and seek to evaluate the arguments advanced in its support. In the second part, comparisons with the German, American, and Indian approaches to standing will be made, concentrating on their rejection or approval of the arguments prevailing in English law and on the other considerations that have shaped their respective standing requirements. The final section will draw lessons from these differing approaches and consider how they may inform the future development of the doctrine of standing in English law.

¹ *R v Somerset CC, ex parte Dixon* [1998] EnvLR 111, [1998] 75 P & CR 175, 121.

English law and sufficiency of interest

The doctrine of standing seeks to resolve the conflict between ‘the desirability of encouraging people to participate actively in the enforcement of the law, and the undesirability of encouraging meddlesome interlopers invoking the jurisdiction of the courts in matters in which they are not concerned’.² Standing is only concerned with whether a particular claimant is entitled to invoke the jurisdiction of the court,³ a question that is left to the discretion of judges. Standing operates both at the leave stage and the substantive hearing. At the leave stage standing is merely concerned with the screening out of ‘busybodies with misguided or trivial complaints of administrative error’,⁴ thereby preventing the overburdening of the courts and unnecessary impediments on administrative efficiency. At the substantive hearing the issue of standing is however ‘fused’ with the merits of the case itself, i.e. the substance of the claimant’s allegations.⁵ This so-called ‘fusion technique’ has the consequence that the outcome of each case will depend on a wide variety of considerations, ranging from the strength of the applicant’s interest, the nature of the statutory power or duty at issue, the perceived importance of the subject matter of the claim, and the gravity of illegality asserted.⁶ The courts have to undertake a balancing exercise between rather malleable considerations. The result is a body of law whose shape, or rather lack of shape, has been heavily influenced by judges’ individual conceptions of the proper role of individuals and of the courts vis-à-vis the government. It is in this light that the requirement of ‘sufficient interest’ found in section 31(3) of the Senior Courts Act must be considered.⁷ The interpretation given to the requirement has evolved through new sets of facts, new social circumstances, and separate judicial opinions as to the proper purpose of the doctrine of standing. This evolution has not however been backed by any unified attempt to define clearly the role that the citizen should play in public law. The recent liberalisation of the standing doctrine thus lacks a firm principled basis and, further, fails to account for other conflicting authorities.

An important case, which seems to have been largely disregarded by the new liberalising current, is the *Rose Theatre* case.⁸ This case displays a very restrictive conception of the doctrine of standing by insisting that the applicant’s interest must be capable of individualisation, above and beyond that of the general public. The applicant, a company set up by a group of people for the sole purpose of preserving the remains of an Elizabethan theatre threatened by a building development, applied for judicial review of the Secretary of State’s decision not to list the remains under the Ancient Monuments and Archaeological Areas Act 1979. Schiemann J found not only that the Secretary of State had not been acting illegally but also that, even if he had, the company had no standing to challenge his decision. The 1979 Act conferred on them no right or interest above the general public that the decision be taken lawfully. Schiemann J did not explicitly define sufficiency of interest although he did recognise that the interest did not need to be a direct financial or legal one. His Lordship’s ap-

2 Lord Woolf, Jeffrey Jowell, Andrew Le Sueur, *De Smith’s Judicial Review* (6th edn, 2007) para 2–002.

3 Paul Craig, *Administrative Law* (7th edn, 2012) 25–001.

4 *R v IRC, ex parte National Federation of Self-Employed* [1981] 2 WLR 722, [1982] AC 617, per Lord Diplock, 643.

5 *ibid.*

6 *ibid.* See also Craig (n 3) 25–015.

7 It is now generally accepted that sufficiency of interest constitutes a unified test of standing regardless of the remedy sought by the applicant. See *R v IRC* (Lord Diplock) and *O’Reilly v Mackman* [1982] 3 WLR 1096, [1983] 2 AC 237 (Lord Denning MR).

8 *R v Environment Secretary, ex parte Rose Theatre Trust* [1990] 2 WLR 186, [1990] 1 All ER 754.

proach was however radically opposed to that of Sedley J. To the applicant's objection that, if his Lordship were wrong on the legality issue, his Lordship's decision on standing 'may well leave an unlawful act by a minister unrebuked and indeed unrevealed', Schiemann J replied that 'the law does not see it as the function of the courts to be there for every individual who is interested in having the legality of an administrative action litigated'.⁹

Judges in later cases have departed from the restrictive approach of the *Rose Theatre* case without providing wholly convincing reasons for doing so. The current liberalisation of standing seems to stem foremost from a desire to allow the vindication by citizens, through the courts, not only of their immediate and individualised rights or interests but also of shared public grievances, potentially affecting everyone. Judges supporting this development, unlike Schiemann J, have failed to back it with reflection on the proper function of the courts in public law. This lacuna is most discernible in the *Greenpeace* case.¹⁰ Greenpeace, an international environmental NGO, challenged the Pollution Inspectorate and the Minister for Agriculture's decision to allow British Nuclear Fuels Ltd to discharge nuclear waste at the Sellafield nuclear site. Greenpeace was accorded standing to initiate judicial review. However Otton J, conscious of the highly political aspect of the decision and likely wary of depriving the standing requirement of any substance, emphasised that standing would not automatically be granted to interest groups on the basis that their members are concerned with a particular matter and feel like they should have a say. His reasons for according Greenpeace standing were, first, that Greenpeace enjoyed an important international reputation and was particularly suited to argue this 'serious and complex' issue; and, secondly, that a large proportion of its members lived in the Cumbria region and that if Greenpeace did not have standing they would be unable to challenge the decision of Inspectorate, so that unlawful action might be left without redress.

Otton J's reasoning largely evades the crucial legal debate at issue here. What seems to emerge from his judgment is an attempt to combine largely unrelated factors to give effect to his own view of the desired result. His Lordship's approach to the requirement of sufficiency of interest is thus a confused one. Three types of interests are emphasised: Greenpeace's general interest in the decision, *qua* interest group, by virtue of the values it defends; the particular interest of the inhabitants of the Cumbria region who might be directly affected by the decision; and the implicit general public interest of all in having unlawful administrative action redressed. This begs the question, if there is such an overarching generalised interest shared by all in enforcing the rule of law, why should any other type of interest be required in addition to it? Otton J's judgment also begs another question: should the financial resources, the expertise or the efficiency of the applicant influence his ability to invoke the jurisdiction of the court? These latter considerations seem to be primarily concerned with procedural efficiency and hardly reconcilable with the type of general interest outlined above. Thus Otton J's judgment leaves several questions open whose resolution is essential in order to provide a firm and coherent basis to the doctrine of standing: what sort of procedural filter, if any, should the doctrine of standing provide? And, most importantly, should the court depart from their traditional role of adjudicating concrete disputes and protecting private interests to embrace a much broader function of addressing general public grievances in purported maladministration?

⁹ *ibid* 522.

¹⁰ *R v Inspectorate of Pollution, ex parte Greenpeace (No 2)* [1994] 2 CMLR 548, [1994] 4 All ER 329.

These questions did not find any answer in the *World Development Movement* case.¹¹ Rose LJ granted standing to the organisation to challenge the Foreign Secretary's decision to grant aid for the construction of the Pergau Dam in Malaysia, which the WDM alleged to be outside the relevant statutory powers. His Lordship again emphasised three similar types of interests without, however, deciding whether the third more general one in having the rule of law enforced was determinative. The following passage of his judgment evinces his view: '(...) the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved'.¹² His Lordship did not however address the implications of an *actio popularis* in English law. *R v Somerset CC, ex parte Dixon*¹³ might be one of the only cases where the possibility of introducing such an action is openly acknowledged and favoured. Sedley LJ held that the applicant was 'perfectly entitled *as a citizen* (emphasis added) to be concerned about, and to draw the attention of the court to, what he contends is an illegality in the grant of a planning consent which is bound to have an impact on our natural environment'.¹⁴ His Lordship added that '[p]ublic law is not at base about rights (...) it is about wrongs' and that 'a person or organisation with no particular stake in the issue or the outcome' could be granted standing 'without in any sense being a mere meddler'.¹⁵

Thus the story of standing is one of conflicting conceptions and outcomes. The requirement of sufficiency of interest has come to encompass a very wide range of considerations that often have little to do with the applicant's particular 'interest' per se. These various considerations reveal that the doctrine of standing is seeking to perform three functions at the same time. First, it seeks to impose a procedural filter, which prevents the overburdening of the court and promotes (as far as is possible) procedural effectiveness. Secondly, it seeks to ensure that individual rights or interests that have been infringed or affected by administrative action can effectively be vindicated through the courts. Thirdly, and most problematically, it seeks to ensure that illegal administrative action does not go without redress when needed. It is this third function which has been at the fore of the recent developments in the doctrine of standing and which has given rise to the present confusion and complexity in the law. The rule of law argument is being increasingly championed without any clear appraisal of the constitutional significance of Sedley J's view. The question is: why has the English judiciary not embarked upon such an appraisal and derived from it a general and firm principle that might support a more coherent development of the law in the future, be it liberal or restrictive? Other jurisdictions have taken this important step. Germany, the United States and India are telling examples. These countries' approaches to standing disclose a more thorough reflection on the role of the citizen within their respective constitutional arrangements. Their rules of standing range from the extremely restrictive to the extremely liberal. In the second part of this paper, the approach of these three legal systems to standing is examined and how their respective experiences can inform the English debate is considered.

11 *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* [1995] 1 WLR 386, [1995] 1 All ER 611.

12 *ibid* quoting Professor Wade in *Administrative Law* (7th edn, 1994) 712, 395.

13 *R v Somerset CC, ex parte Dixon* [1998] EnvLR 111, (1998) 75 P & CR 175.

14 *ibid* 117.

15 *ibid* 121.

The role of standing in comparative perspective

1. German law: Injury of legal rights and judicial prudence

In German law, the right to challenge administrative action through judicial review is enshrined in three main statutory provisions. The common feature of these actions is the emphasis on the infringement of the claimant's legal rights by the administrative act, i.e. personal rights protected by law as opposed to moral or factual interests. The German approach is thus one of judicial prudence where the judge's power to extend the area of possible claimants is strictly limited by the wording of the relevant statutes.

Article 19(4) of the German Constitution (*Grundgesetz*)¹⁶ provides that: 'Should *any person's rights* (emphasis added) be violated by public authority, recourse to the courts shall be open to him (...).'¹⁷ Similarly paragraph 42(1) and (2)¹⁸ of the *Verwaltungsgerichtsordnung* enable a claimant to seek the annulment of an administrative decision or to demand its performance only if he can plausibly assert that his legal rights have been infringed (unless otherwise provided by law). The same goes for constitutional challenges of administrative actions where the claimant must show that one of his constitutional rights has been infringed.¹⁹ It is generally agreed that the relevant right must be a '*subjektives öffentliches Recht*' (a subjective public right). What this exactly means is a matter of debate.²⁰ One general trend can however be discerned as to how this requirement operates. Judicial review of administrative action in German law being, as in English law, a control of legality only, a claim must be based on the breach of a *Rechtsnorm*, a legal rule, by the administration. Then for a subjective public right to be recognised, the *Rechtsnorm* in question must also be intended to protect the applicant's subjective interests as opposed to the 'objective' interests of the public and, further, the norm must confer on the applicant the right to vindicate those interests against the administration. As a result, legal protection will generally not be accorded to factual interests since the necessary link to the breach of the relevant *Rechtsnorm* does not exist.²¹ Similarly an organisation will generally only have standing if it can assert that one of its own 'subjective rights' has been infringed. It will not have standing to vindicate the rights of its members, let alone its own moral or political values.²²

16 Grundgesetz, Art 19(4) reads as follows: 'Wird jemand durch die öffentliche Gewalt *in seinen Rechten verletzt* (emphasis added), so steht ihm der Rechtsweg offen. Soweit eine andere Zuständigkeit nicht begründet ist, ist der ordentliche Rechtsweg gegeben.'

17 Pieter Van Dijk, *Judicial Review of Governmental Action and the Requirement of an Interest to Sue* (1980) 155.

18 §42(2) VwGO: 'Soweit gesetzlich nichts anderes bestimmt ist, ist die Klage nur zulässig wenn der Kläger geltend macht durch den Verwaltungsakt oder seine Ablehnung oder Unterlassung in seinen Rechten verletzt zu sein.' NB: §43 VwGO provides that where the claimant is seeking a declaration as to legality of a particular administrative decision he needs only to show a 'legitimate interest' in the declaration. However given the subsidiary nature of this remedy, it will not be discussed here.

19 §90(1) of the Bundesverfassungsgerichtsgesetz: 'Jedermann kann mit der Behauptung durch die öffentliche Gewalt in einem seiner Grundrechte oder in einen seiner in Art. 33, 38, 101, 103 und 104 des Grundgesetzes enthaltenen Rechte verletzt zu sein, die Verfassungsbeschwerde zum Bundesverfassungsgericht erheben.'

20 For the generally accepted interpretation see Eyermann and Fröhler, *Verwaltungsgerichtsordnung: Kommentar* (1998) 267: 'Subjektives Recht ist die einem Subjekt durch eine Rechtsnorm, einen vertrag, Zusicherung oder durch einen früheren Verwaltungsakt zuerkannte Rechtsmacht von einem anderen ein bestimmtes Tun, Dulden oder Unterlassen zu fordern.'

21 Pieter Van Dijk (n 17) 183–184.

22 Eyermann and Fröhler (n 20) 293; Pieter Van Dijk (n 17) 193–194.

The German requirement of a 'subjective legal right' differs fundamentally from the very flexible English test of 'sufficient interest'. German judges have very little leeway to advance policy arguments in order to allow claims in the public interest as has been done in England. They have sometimes been able to enlarge minimally the range of recognised legal rights through interpretation, by reading into a *Rechtsnorm* a subjective right or by extending the ambit of constitutional rights (most notably the very malleable rights to freedom and equality – GG Art 2(1) and Art 3). Nevertheless no constitutional right has yet been stretched so far as to encompass a general public right of vindicating the rule of law. Nor has the 'rule of law' argument ever prevailed in German courts. The possibility of an *actio popularis* is flatly rejected. The function of standing in German law is thus foremost the protection of individual rights from infringement by administrative action. Beyond that, rather than seeking to ensure that any citizen is always able to challenge any type of administrative wrongdoing through the courts, the German doctrine of standing goes the opposite way and seeks to remove from the reach of the courts actions relating to collective interests having a strongly political character.²³ It is interesting to note that the political aspect of the claims made by the World Development Movement and Greenpeace did not seem to make English judges particularly cautious in their decisions. Quite the contrary, their Lordships saw it as an occasion to address a general public concern in what they thought to be the interest of the public as a whole. By contrast German law adopts a much more limited conception of the role the judiciary. The German judge is no more than '*la bouche de la loi*' as Montesquieu would say.²⁴ The German judge merely states the law and does not make it. By strictly confining the role of the courts to the adjudication of concrete disputes involving individual rights and by leaving the vindication of collective interest in the political sphere, German law overtly acknowledges that citizens do not have any general interest in having the rule of law enforced. The German approach has the merit of clarity and consistency. However, it presupposes the existence of strong and open democratic mechanisms, which ensure that what cannot or should not be vindicated through the courts can be effectively vindicated through the political forum. Many might deny that the political mechanisms in place in England and Wales are sufficient to ensure that the government performs its actions according to law. These mechanisms could however potentially be strengthened or re-arranged. Recourse to the courts is not the only option.

2. American Federal law: injury in fact and separation of powers

As regards American law, the discussion will focus on judicial review of administrative action for its conformity with federal law, especially the Constitution – a process that takes place in the federal courts. The American approach is of great interest for the present discussion as its doctrine of standing is 'strongly influenced by constitutional conceptions as to the inherent limitations of judicial power in American federal law'.²⁵ The standing doctrine is shaped by prudential and constitutional principles – notably the separation of powers doctrine, an essential tenet of the US constitutional culture.

In American federal law the doctrine of standing must be seen in light of Article III(2) of the Constitution, which limits the exercise of federal judicial power to 'cases' and 'contro-

23 Pieter Van Dijk (n 17).

24 Montesquieu, *De l'esprit des lois* (first published 1758).

25 Schwartz and Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (1972) 271.

versies'. The words have been interpreted to mean that judicial review by the federal courts should be limited to 'questions presented in an adversary context',²⁶ as opposed to 'abstract, hypothetical or contingent questions'.²⁷ Standing is also shaped by Title 5, §702 of the United States Code which provides that '[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute is entitled to judicial review thereof'.²⁸ This provision has been generally interpreted as requiring a mere 'injury in fact',²⁹ as opposed to a strict legal right. Yet whether this suffices in practice is a matter of controversy. Indeed the Supreme Court has held that standing may be qualified by prudential principles where: (1) the applicant's claim is based on 'abstract questions of wide public significance' that amount to 'generalised grievances' pervasively shared and most appropriately addressed in the representative branches;³⁰ (2) the applicant seeks to vindicate the legal rights of interests of third parties;³¹ or (3) where his claim does not arguably fall within the 'zone of interests'³² to be protected or regulated by the relevant law. How these principles operate in practice is beyond the scope of this article. Suffice to say that in American federal law a citizen's 'interest to have the Government act in accordance with law'³³ will not give him standing, such an interest being too 'abstract' to give rise to a 'concrete injury' constituting an injury in fact, even if this means that unlawful administrative action might never be reviewed.³⁴ Beyond that, what these principles disclose is an emphasis on the proper role of the courts rather than the administration's wrongdoing.

What emerges is that the US doctrine of standing serves a much broader function than that of protecting individual interests. It falls somewhere between the German and the English approach. Unlike the English approach, the doctrine is increasingly seen as essential in preserving the separation of powers between the three branches of the State and in defining 'the proper – and properly limited – role of the courts in a democratic society'.³⁵ Justice Scalia, the main proponent of this rationale, wrote:

'(...) the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.'³⁶

The American approach to standing thus requires judges to assess not only the proper ambit of their functions but also whether each claim is best addressed by the courts or through the

26 *Flast v Cohen*, US 83, 94–5 [1968] quoted in Laurence Henry Tribe, *American Constitutional Law* (3rd edn, 2000) 311, [3–7].

27 *Alabama State Federation of Labor v McAdory*, 325 US 540, 461 [1945] quoted in LH Tribe (n 26) [3–9].

28 5 USC §702, formerly §10(a) of the Administrative Procedure Act 1946.

29 *Lujan v Defenders of Wildlife*, 504 US 555, 560–1 [1992]; *Valley Forge Christian College v Americans United for Separation of Church and State, Inc*, 454 US 464 [1982] 471–2. See also LH Tribe (n 26) [3–14].

30 *Valley Forge Christian College v Americans United for Separation of Church and State* 454 US 464 [1982] 475. *ibid* 474.

32 *Association of Data Processing Service Organization v Camp*, 397 US 150 [1970], 152–3; see also *Dismas Charities, Inc v United States DOJ*, [2005] 401 F3d 666 (6th Cir Ky 2005).

33 *Schlesinger v Reservists Committee to Stop the War*, 418 US 208 [1974] 217.

34 *ibid* 227.

35 *Allen v Wright*, 468 US 737, 752 [1984] 752.

36 Antonin Scalia, 'The Doctrine of Standing as an Essential Element of the Separation of Powers' (1983) 17 Suffolk ULR 881, 894.

democratic process. This two-fold inquiry may provide an attractive alternative to the German and English approaches. In cases where the applicant's claim relates to a general public interest in having the alleged illegality redressed, the court could ask itself first whether the issue at stake is of such a broad reach and public significance that it should be resolved through the public debate rather than a judicial decision; and secondly whether there are satisfactory political mechanisms in place that ensure that such a debate can take place. If both of these questions are answered in the affirmative, standing should not be granted.

3. Indian law: public interest litigation and the rule of men

Indian law displays the paramount liberalisation of the doctrine of standing in recognising public interest litigation. This approach is instructive in so far as, unlike the English approach and its 'confused' liberalisation, it is strongly rooted in principles of social justice inherent in India's constitutional culture. As Cassels puts it: 'Under the banner of Public interest (or Social Action) Litigation and the enforcement of fundamental rights under the Constitution, the courts have sought to rebalance the distribution of legal resources, increase access to justice for the disadvantaged and imbue formal legal guarantees with substantive and positive content.'³⁷ This is judicial activism at its highest.

Public interest litigation in India can be initiated either through article 226 of the Constitution where the applicant asserts that he suffered a 'legal wrong' caused by the administrative action or through article 32 of the Constitution where he asserts that one of his 'fundamental rights' has been violated (the latter proceedings taking place in the Supreme Court). These provisions have been interpreted in an extremely wide way. Standing is thus concerned with much more than the protection of individual interests. In *Bandhua Mukti v Union of India*,³⁸ Chief Justice P.N. Bhagwati stated: 'Public interest litigation is not in the nature of adversity litigation but it is a challenge and opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of our Constitution.'³⁹ Consequently, as Bhagwati CJ made it clear in *S.P. Gupta v Union of India*,⁴⁰ any member of the public may initiate proceedings for the benefit of a third party or group of people who are 'by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief'. Moreover, even where the administrative action in question does not affect a person or a determinate class of persons but the public at large, any member of the public can sue provided that he is acting *bona fide* and having a 'sufficient interest'. This last requirement however seems to be a given, since '[t]he Courts cannot countenance such a situation where the observance of the law is left to the sweet will of the authority bound by it, without any redress if the law is contravened'.⁴¹

The Indian approach could well be the future of English law if the rule of law argument were to be extended fully. The very liberal stance taken in India is, however, justified not

37 Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989) 37(3) *Am Comp L* 495, 497.

38 *Bandhua Mukti v Union of India* AIR 1984 SC 802, quoted in Ronojoy Sen, 'Walking a Tightrope: Judicial Activism and Indian Democracy' (2009) *Ind Rev* vol 8, no 1, 72.

39 *ibid.*

40 *SP Gupta v President Of India* AIR 1982 SC 149, [17].

41 *ibid* [18].

just by the rule of law argument, but more primarily by the perceived role of the judiciary in advancing social justice and by a general distrust in the executive and legislative branches of the State, which are often seen as ‘ineffectual, unstable and corrupt’.⁴² These latter considerations do not apply with equal force to England and Wales where social conditions do not seem to cry out for the same level of judicial intervention. It is true however that distrust in the executive and lack of confidence in the political system are recurring themes in modern Britain. Yet again, this might be a strong signal that a strengthening of the non-judicial accountability mechanism is needed rather than an appeal to resort to the courts. A far-reaching liberalisation, or indeed the complete abolition, of the requirement of standing may result in a dramatic shift in the balance of power towards the courts, transforming them into a surrogate legislature⁴³ in which, however, the voice of the individual rather than that of the majority is sufficient to prevail. Moreover, although it might be thought that having recourse to the judicial process is a much more efficient and expedient way of challenging government action, this very feature might be completely extinguished if the courts become overburdened with claims, resulting in extensive delays. Meanwhile the cost of litigation is ultimately borne by the public purse.

The risk of the judiciary overstepping its defined limits as a result of an excessive broadening of the doctrine of standing is all the more potent in countries such as India or the United States where the courts are empowered to strike down legislation deemed incompatible with the Constitution. In this context, as Pratab Bhanu Mehta powerfully argued, the rule of law argument purportedly legitimising the activism of the constitutional courts can become empty rhetoric: ‘The Supreme Court of India is given to pronouncements that all the branches of the government are “under the Constitution” suggesting that all legitimate power has its source in a legal or constitutional order (...) But who decides what this legal or constitutional order requires in any given case? (...) Some group of men! (...) If this is the case, then the separation-of-powers doctrine implodes (...) it will be subject to the vagaries of the contending wills of men, or in short, politics.’⁴⁴ This dramatic outcome may be an inherent risk in any written constitution. Indeed in England Griffiths⁴⁵ and Waldron⁴⁶ have warned against such dangers. But with or without any written constitution, if English law were to follow the Indian approach – as the increasing championing of the rule of law argument seems to suggest – it would risk diverting the political debate from the public sphere to the courtroom, with the consequences described above. Such a result may be neither needed nor desirable. In any case, as the analysis of three jurisdictions has shown, a coherent approach to standing necessitates an important reflection on the respective appropriateness and efficiency of judicial and non-judicial mechanisms for challenging administrative action, taking due account of the constitutional functions of the different elements of the State.

42 Lloyd and Susanne Rudolph, ‘Redoing the Constitutional Design: From an Interventionist to a Regulatory State’ in *The Success of India’s Democracy* (2001) 131–2.

43 David Feldman, ‘Public Interest Litigation and Constitutional Theory in Comparative Perspective’ (1992) 55 MLR 44.

44 Pratab Bhanu Mehta, ‘The Rise of Judicial Sovereignty’ (2007) Vol 18(2) J Democr 78–9.

45 JAD Griffiths, ‘The Political Constitution’ (1979) 42 MLR 1.

46 J Waldron, ‘A Right-Based Critique of Constitutional Rights’ (1993) 13 OJLS 18.

English law – the way forward

What can English law learn from the foregoing discussion? The first lesson that can be drawn from these comparative observations is that it is by no means self-evident that every citizen should have an enforceable right in ensuring that the government performs its activities according to law. German and American federal law have adopted a more measured approach, not because of a general belief that illegality should go unchallenged whenever the applicant cannot show a sufficient interest in the matter in question, but rather because it is considered that general, shared grievances of maladministration ought to be addressed through other representative mechanisms. The second lesson that can be drawn is, as stated above, that much coherence and consistency can be brought to the doctrine of standing by looking beyond the particular interest of the applicant, his suitability for bringing the claim or any of the other arguments prevailing in English law, and instead focusing on the appropriateness and efficiency of judicial and non-judicial mechanisms for dealing with the claim. In extreme cases where political mechanisms are absent, corrupt or inefficient, rendering citizens highly vulnerable to potential abuses of executive power – and when these abuses are a regular occurrence within society – liberalising or indeed abolishing the requirement of standing might be justified in order to protect citizens and instigate better standards of administration. Thus the Indian approach is justified, in its own social context. In England and Wales, as we have already acknowledged, the social situation does not necessitate the same level of intervention. However, judges in this country should also be alert to deficient representative mechanisms.

This proposition is not novel. English judges have acknowledged and readily endorsed it when needed. Thus Lord Mustill in *R v Home Secretary, ex parte Fire Brigades*, after recognising the failure of Parliament to provide effective checks on the exercise of executive powers, stated:

‘to avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground in a manner, and in areas of public life, which could not have been foreseen 30 years ago (...) this unprecedented judicial role has been greatly to the public benefit.’⁴⁷

Lord Diplock in the *NFSE* case put the matter slightly differently but to the same effect:

‘[it] is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.’⁴⁸

The distinction between efficiency and policy and lawfulness may be more subtle than Lord Diplock suggests. However his Lordship’s *dictum* also discloses what Harlow and Rawlings⁴⁹

47 *R v Secretary of State for the Home Department, ex parte Fire Brigades* [1995] 2 WLR 464, [1995] 2 AC 513, 567.

48 *R v IRC, ex parte National Federation of Self-Employed* [1981] 2 WLR 722, [1982] AC 617, 619.

49 Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, 2009) chapter 1.

have called the ‘red light theory’ of administrative law, which defines its primary functions as the control of the excesses of the State and foremost the protection private individuals.

We should however be careful not to carry these arguments too far. Recourse to the courts may be legitimate when no other mechanisms can ensure the efficient vindication of the mal-administration in question. This does not however amount to saying that any citizen, whatever his or her stake in the matter to which the application relates, has an overarching right in vindicating the rule of law through the courts. This argument should at last be discarded as over-simplistic and unsatisfactory. As we have seen, appeals to ‘the rule of law’ are often no more than rhetorical and rarely backed by any consideration of the true implications of this argument. Moreover when one considers that ‘illegality’ in administrative law ranges from blatant abuses of power to ‘asking oneself the wrong question’⁵⁰ or preferring one interpretation of a statute for another,⁵¹ one realises that nothing is black or white. Grandiloquent invocations of the rule of law should not distract us from the fact that the decisions challenged are often in the grey area and that their lawfulness or otherwise may be a matter of political opinion. We should also remember that section 31(3) of the Senior Courts Act provides an explicit requirement of sufficiency of interest, which, although undefined, must have been intended as a threshold. The rule of law argument renders this threshold meaningless and indeed seems to make the presence of claimants and of disputes generally wholly unnecessary. Beyond that, as the analysis of Indian law has shown, an excessive liberalisation of the doctrine of standing could have far-reaching consequences on England and Wales’ constitutional framework and on the way individuals advance ideological or political aims. We might reach a state where ‘scarcely any political question arises (...) that is not resolved, sooner or later, into a judicial question’.⁵²

English law should thus adopt a different, more measured approach, which takes into account the same type of considerations characterising the German and the American jurisdictions. For instance, when the application does not relate to any individualised interest but rather to a general public concern, the courts could first assess the public significance of the matter of the application and the potential reach of their decision, so as to determine whether the issue is best dealt with by the judicial branch. Based on this assessment, the courts could then consider whether the matter of the application can be effectively challenged through the political forum. Having answered these two questions, the courts could then decide whether the applicant should be granted standing. Such an approach might provide a useful framework for the future development of the doctrine of standing. By focusing on the public character of the application and on the role of courts within the British Constitution, one might be able to define the boundaries of the doctrine of standing more clearly. Most importantly such an approach would ensure that issues of wide public significance are addressed in a forum where everyone can participate. As citizens we should indeed be sceptical of appeals to the ‘public interest’ in advancing ideological and political aims through the courts. These should not lure us into believing that we always aspire to the same ends or adhere to the same values. Our society is foremost a pluralist one where opinions as to what amounts to good administration (and a good judiciary) diverge. Disagreement is of course to be praised; however the

50 *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208.

51 For instance: *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23, [1993] 1 All ER 289; *R v Hillingdon LBC, ex parte Puhlhofer* [1986] 2 WLR 259, [1986] AC 484.

52 A De Tocqueville, *Democracy in America* (1945) 280.

appropriate place for it to evolve should, as far as possible, be the political arena rather than the courtroom.

Conclusion

The aim of this paper was to show that the current liberalising trend of doctrine of standing lacked a crucial reflection on the constitutional implications of introducing an *actio popularis* in English law, and on the proper role of the courts and of the citizen in public law. It then considered other jurisdictions that have confronted these issues and shaped their respective doctrines of standing accordingly. This analysis has shown that much coherence and consistency could be brought to the doctrine of standing by focusing on the appropriateness and the efficiency of the judicial and non-judicial mechanisms in place for challenging administrative action and on the political character and the public significance of the application. It has been argued that such an approach is more measured and indeed more satisfactory than the ‘rule of law’ argument, which, on a closer analysis, merely evades rigorous reasoning. Finally it has been suggested that the English law doctrine of standing could gain clarity and coherence if the considerations outlined above were taken into account. Whether this will ever be the case, only the future will tell.

Terra firma: An analysis of *John Grimes Partnership Ltd v Gubbins*

Daryl Ho

On 5 February, the Court of Appeal handed down its judgment in *John Grimes Partnership Ltd v Gubbins*,¹ a case concerning remoteness of damage in contract which, like several before it, bubbled up in the wake of *The Achilles*.² Its gist – though occulted by infelicitous language – is that the contemplation by contracting parties of a loss as resulting from breach gives rise to a presumption that the contract-breaker assumed responsibility for that loss. The judgment thus has the potential to clarify considerably the relationship between *Hadley v Baxendale*³ and *The Achilles*. The salient facts are as follows.

Mr Gubbins, the respondent, had planned to transform a field that he owned into a site for open-market and ‘affordable’ dwellings, and in August 2006 obtained planning permission to do so. These dwellings were to be served by a road within the site. If he could get that road adopted by the Cornwall County Council, it would thenceforth be maintained at public expense.⁴ But the Council would not adopt an estate road whose design did not pass muster. So Mr Gubbins engaged the appellant, John Grimes Partnership Ltd, to design the road and drainage for the site by March 2007. This the appellant failed to do: even in February 2008, the agreed work had not been completed. Having received nearly £20,000 in fees from Mr Gubbins, the appellant invoiced him for a further £2,893. Mr Gubbins refused to pay and the appellant commenced proceedings. Mr Gubbins counterclaimed for £398,000 in damages, representing a decline in market values to which the appellant’s failure timeously to complete the agreed work had exposed him.

The trial judge held that Mr Gubbins’ loss of market was not too remote. An appeal from this judgment was unanimously dismissed, Sir David Keene giving the reasons of the Court of Appeal.

Sir David interprets the decision of the House of Lords in *The Heron II*⁵ as being concerned with ‘what the defendant at the time of making the contract ought reasonably to have contemplated would result from the breach of the contract’.⁶ But this sounds curiously like the exposition of a fault standard. One is liable in negligence for, among other things, having failed to act as a reasonable person would have done. But is a contract-breaker liable for a loss in part *because* a reasonable person in his shoes would, unlike him, have had that loss in his contemplation? An affirmative answer to this question would be far removed from the conventional understanding of the causative wrong as consisting in a failure, for whatever reason,

1 [2013] EWCA Civ 37.

2 [2008] UKHL 48, [2009] 1 AC 61.

3 (1854) 9 Ex 341.

4 Highways Act 1980, s 38.

5 [1969] 1 AC 350.

6 *John Grimes Partnership Ltd v Gubbins* [17].

to make the world conform with a contractual term.⁷ Further, it is by no means obvious that the *law* should ever impose a duty to think reasonable thoughts – a duty that is, in any case, bound to be unworkable.⁸

These objections are perhaps not insuperable. After all, the mere fact of breach is enough to entitle the innocent party to *nominal* damages; and there is no absurdity in requiring a claimant to prove more in order to obtain more. But we must also consider whether Sir David paints an accurate picture of what the judges in *The Heron II* were concerned to do. The question in that case was how the rule in *Hadley v Baxendale* should be understood and applied. This rule is that, in order to be recoverable, damages ‘should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it’.⁹ It is now well established that this quotation describes a single principle,¹⁰ namely that contemplation (imputed or actual) is the measure. But it should also be evident that it is not the *contract-breaker* who has to be reasonable in *contemplating* but the *court* that must be so in *imputing or finding* contemplation. The rule in *The Heron II* (which has to do with *imputed* contemplation) can thus be simplified as follows. ‘Where the loss in question was not unlikely to result from the breach, sc. was a serious possibility or real danger, the court will deem the parties to have had that loss in their contemplation when they made the contract.’¹¹ On this view, there is no room for fault.

It should be noted that, since the rule in *The Heron II* only falls to be applied where the evidence is silent as to the parties’ knowledge,¹² the likelihood (at the time of contract) of a loss is logically to be assessed on the basis of the court’s rather than the parties’ knowledge.

Sir David also speaks of losses being reasonably foreseeable (by which, for the above reasons, he probably means ‘contemplated’) *as not unlikely to result*.¹³ In so doing, his Lordship replicates the form of the rule in *Hadley v Baxendale*. What function, it might be wondered, does the emphasised text perform? A coherent answer to this question would illumine much authority. Two interpretations suggest themselves. On the first, the text adds nothing but

7 It should be noted that, though the words ‘should reasonably have contemplated’ appear in the headnote of *The Heron II*, they were adopted by none of the judges in that case. Similar words were, it is true, employed by Lord Porter and Lord Uthwatt in *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196, but in *The Heron II* Lord Morris, after citing their speeches, speaks (at 399E) in terms rather of *deeming* contracting parties to be reasonable persons.

8 By contrast, the standard of care applied in cases of negligence is concerned not with thoughts but with behaviour. Thus, a learner driver, who *ex hypothesi* cannot know as much as the reasonable driver would, discharges his duty of care by inadvertently failing to injure anyone.

9 *Hadley v Baxendale* 354 (Alderson B).

10 See eg *The Heron II* 385A (Lord Reid) 421D (Lord Upjohn); *The Pegase* [1981] 1 Lloyd’s Rep 175 (QBD) 182 (Robert Goff J); *The Achilles* [66]–[68] (Lord Walker).

11 This formulation assumes of course that the court will only impute contemplation to the parties where it is reasonable to do so. Indeed, in so far as it is for the court to determine what is or is not reasonable, its imputations *must* (subject to some right to appeal) be reasonable: see eg *Re Racal Communications Ltd* [1981] AC 374 (HL) 383F–G (Lord Diplock); *R v Gough* [1993] AC 646 (HL) 670D (Lord Goff).

12 As was the case in *Hadley v Baxendale* itself. Only special knowledge need be *evidenced*: the contemplation of serious possibilities or real dangers can be *proved* by means of the rule in *The Heron II*.

13 *John Grimes Partnership Ltd v Gubbins* [17], [20].

merely restates the test to be applied, pursuant to *The Heron II*, in arriving at a finding of contemplation. On the second view, the clause describes what the parties must have contemplated at the relevant time. It will appear from the foregoing that the first interpretation is the more consistent with *The Heron II*. But we shall still have to consider the second on its own terms.

It would seem that the second interpretation presupposes two reasonably discrete stages of the inquiry. The parties must first have contemplated the loss in question; they must then have recognised that loss as being a serious possibility or real danger. It must as such be possible for contracting parties simultaneously to contemplate a loss and to believe it to be unlikely to result. As we have seen, however, contemplation can be founded on the likelihood of a loss. It follows that a loss would be too remote where the court finds that it was not unlikely to result but the parties did not think the same. Conversely, a loss is only recoverable if both the court and the parties come to the conclusion (albeit at different times) that it was a serious possibility or real danger. This complication seems to be unnecessary. Can it really be a ‘defence’, after all, for a contract-breaker to say that he did not think a loss was sufficiently likely when the court has found that in fact it was? There is at least a superficial analogy here with the principle behind the maxim *ignorantia juris neminem excusat*. Nor does there seem to be any reason why an innocent party should not (to some extent) be insulated from the contract-breaker’s (subjective) impression of their agreement – about which impression, moreover, the latter can easily and often incontrovertibly prevaricate. One therefore leans to the view that it is irrelevant what the parties thought of what they (in fact or law) contemplated.

It remains to observe that *Heron II* imputation is the product of policy. Why else would the likelihood of a loss entail as a matter of law its being contemplated? There might often be no positive evidence of what the parties actually had in mind when they made the contract.¹⁴ The law’s response to this perceived problem is apparently to make the wrongdoer suffer from any evidential difficulty in this regard, or at the very least to prevent him from benefiting from it.

We are now in a position to consider what Sir David has to say about the principle recognised by the majority¹⁵ in *The Achilles*. Sir David rightly points out¹⁶ that Lord Hoffmann agreed¹⁷ that the losses contemplated by contracting parties would normally be the same as those for which they assumed responsibility. Sir David then follows *Siemens Building Technologies FE Ltd v Supershield Ltd*¹⁸ in recognising a presumption of assumption of responsibility where contemplation has been proved.¹⁹

It is interesting that Sir David chose to differ from the above authorities in postulating²⁰ an implied term to reflect the contract-breaker’s assumption of secondary responsibility for

14 *John Grimes Partnership Ltd v Gubbins* might be exceptional in that the appellant was found actually to have contemplated the losses in question: [10], [25].

15 Comprising Lord Hoffmann, Lord Hope and Lord Walker.

16 *John Grimes Partnership Ltd v Gubbins* [20].

17 *The Achilles* [11].

18 [2010] EWCA Civ 7, [2010] 2 All ER (Comm) 1185 [43].

19 *John Grimes Partnership Ltd v Gubbins* [24]. See also *Pindell Ltd v AirAsia Bhd* [2010] EWHC 2516 (Comm), [2011] 2 All ER (Comm) 396 [84].

20 *John Grimes Partnership Ltd v Gubbins* [24].

losses consequent on breach. This approach is not unlike that taken by Diplock LJ in *Robophone Facilities Ltd v Blank*,²¹ where his Lordship opined²² that knowledge of special circumstances renders one liable for losses, which would not be regarded as arising in the normal course of things, by making it appropriate for the court to imply a term to that effect. But this goes further than Lord Hoffmann went in *The Achilles*, where he merely observed²³ that ‘the interpretation of the contract as a whole, construed in its commercial setting’ was common to both remoteness of damage and the implication of terms without equating these two offshoots.

This is significant because there is no magic in the fact that an assumption of secondary responsibility is embodied in a contractual term. There is some suggestion in the judgment that their Lordships perceive this, if only darkly. For instance, Sir David sees *The Achilles* as being concerned primarily with ‘the *presumed* intention of the parties at the time of contract’.²⁴ The courts have indeed been less than monomaniacal in giving effect to what contracting parties intend their secondary obligations to be. This is plainly the case in respect of liquidated damages clauses. Contracting parties might expressly agree that a certain sum should be payable to the innocent party in the event of breach, yet the court will not give effect to this part of the agreement unless that sum represents a ‘genuine pre-estimate of the anticipated loss’.²⁵ It might be said that the parties are ‘presumed’ to have intended that the contract-breaker should not be penalised, but surely such an intention is ‘presumed’ principally because the law requires it to be? Whatever the case, this policy of the law simply cannot be implemented by means of an implied term, for this would serve only to render incoherent the contract at hand: any such term would be implied for the sole purpose of contradicting an express provision for a penalty.

It must also be said that *John Grimes Partnership Ltd v Gubbins* does not make any clearer the *conceptual* relationship between contemplation and assumption of responsibility. On the analogy of *R v Woollin*,²⁶ one might expect contemplation of a loss (sc. as not unlikely to result) to suggest, if anything, an intention that it be suffered. But this would surely be incompatible with a contemporaneous undertaking to prevent the cause of the contemplated loss (i.e. breach) from occurring. There might be some specious comfort in the belief that where contracting parties contemplate a loss but say nothing about it they intend the general law of damages to apply. But contracts are easily entered into by unadvised laymen ignorant of the content of this general law; and it is by no means necessary that they so intend. The point is not, however, that the general equation of contemplation with an assumption of responsibility *contradicts* parties’ intentions so much as that it cannot (entirely) be *explained* in terms of the latter. As above, one suspects that some policy is tacitly at work. It is ostensibly better that some wrongdoers should be liable for losses that were not unlikely but for which they assumed no responsibility than that some innocent parties should bear losses arising in the normal course of things.

21 [1966] 1 WLR 1428.

22 *Robophone Facilities Ltd v Blank* 1448.

23 *The Achilles* [11].

24 *John Grimes Partnership Ltd v Gubbins* [19] (emphasis added). See also *The Achilles* [36] (Lord Hope); *Siemens Building Technologies FE Ltd v Supershield Ltd* [42] (Toulson LJ).

25 *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41 (PC).

26 [1999] 1 AC 82.

If this is right, then the question arises how *The Heron II* is to be squared with *The Achilles*. If liability for damages is indeed ‘voluntarily undertaken’,²⁷ is it legitimate to infer the intention of the parties from contemplation that is in turn founded on a certain degree of likelihood? Imputation of contemplation is, to reiterate, two policy decisions removed from intention. It seems unlikely that this state of affairs will change: the policy reasons for both the minimum of contemplation and the presumption of assumption of responsibility, as outlined above, are not without some intuitive attraction. Nonetheless, the judgment in *John Grimes Partnership Ltd v Gubbins* is to be welcomed in as much as it enables us, once properly understood, to take stock of the law and pose such question as the above.

There is much else that is good about the judgment. Sir David makes short work²⁸ of a contention by the appellant²⁹ to the effect that the decision of the House of Lords in *South Australia Asset Management Corp v York Montague Ltd*³⁰ overruled *Hadley v Baxendale*. That decision was concerned with causation rather than remoteness per se, as Lord Hoffmann’s mountaineer scenario³¹ makes plain. This scenario involves a mountaineer who goes on an expedition because his doctor told him, negligently, that his knee was fit. In the course of the expedition, he suffers an injury which has nothing to do with the unfit knee. His injury is caused by the fact that he was given advice rather than that the advice was bad; the doctor’s wrong consists in the fact that his advice was bad rather than that he gave advice.³² There is thus no causal link. But it is only because causation of damage is an element of the tort of negligence that we can at all say that uncaused injuries are *eo ipso* too remote (though this form of words is apt to confuse).³³ And, even within the law of negligence, it is trite that causation, while necessary, is not sufficient.³⁴

Finally, Tomlinson LJ observes obiter³⁵ that market volatility can in some circumstances have been within the contemplation of contracting parties when they made the contract.³⁶ This is a welcome supplement, not only to his judgment in *Pindell Ltd v AirAsia Bhd*, but also to *The Achilles*, where Lord Rodger, applying the reasoning in *Victoria Laundry (Windsor) v Newman Industries*,³⁷ held that the loss of a more favourable rate under the follow-on charter was a different type of loss from that contemplated by the parties because that loss was exacerbated by ‘extremely volatile market conditions’.³⁸ The gist of the dictum in the present case is that it is not possible to identify the point at which a fall in the market becomes so drastic that it cannot have been contemplated in any circumstances. The magnitude of such a fall is, in other words, conceptually distinct from its likelihood, though no doubt the two are often

27 *The Achilles* [12] (Lord Hoffmann).

28 *John Grimes Partnership Ltd v Gubbins* [28].

29 Recorded in [13].

30 [1997] AC 191.

31 *South Australia Asset Management Corp v York Montague Ltd* 213D–E.

32 See also *Rubenstein v HSBC Bank Plc* [2012] EWCA Civ 1184, [2013] PNLR 9 [102] (Rix LJ). Cf. *Siemens Building Technologies FE Ltd v Supershield Ltd* [41] (Toulson LJ).

33 By way of contrast, the fact that one did not cause an injury does not in any way preclude one’s vicarious liability for it. See also the tort of conversion: *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883.

34 See *The Wagon Mound* [1961] AC 388 (PC).

35 *John Grimes Partnership Ltd v Gubbins* [34].

36 Cf. *The Achilles* [78] (Lord Walker).

37 [1949] 2 KB 528.

38 *The Achilles* [53], [60].

associated. This seems sensible and ties in neatly with Lord Hoffmann's explication in *The Achilles* of what it means for a loss to be of a different type from those for which a contracting party assumed responsibility: a loss is so if it 'would reasonably have been regarded by the contracting party as significant for the purposes of the risk he was undertaking'.³⁹ Risks themselves are typically assessed along the two dimensions of the gravity and the probability of the unwanted outcome.

The heart of *John Grimes Partnership Ltd v Gubbins* is, in the last analysis, probably in the right place. It exemplifies how one should understand the effect of *The Achilles* on the earlier jurisprudence, though not perhaps how one should describe it. If I have been pedantic in places, it is because students of law are obliged to swim in the sea of semantic exercises.

39 *The Achilles* [22].

Effectiveness of post-legislative and pre-legislative controls over powers of entry and associated coercive powers

Robert Wyllie

Introduction

Powers of entry and associated coercive powers are some of the most extraordinary that can be given to public officials. It is therefore essential that appropriate pre-legislative scrutiny and post-legislative interpretation takes place. This article tries to assess post-legislative judicial interpretation of powers of entry and associated coercive powers. I conclude by expressing concerns about the desirability of recent developments tending to suggest a wide interpretation will be given to such powers. I challenge the need for such wide interpretations given the situation pertaining in Scotland. In the second part of my article, I examine one new area of pre-legislative scrutiny, called the powers of entry gateway, which was introduced by the present UK government following disquiet about the proliferation of powers of entry. While noting its relative youth, by close examination of the statutes that have passed through the gateway thus far I find some significant shortcomings in how it provides safeguards and coherence to the statutes examined by it thus far.

Searching for interpretative and drafting problems: The *Hoverspeed* case

The Court of Appeal's decision in *Anton Piller KG v Manufacturing Processes and others*¹ broke new ground in providing authority for what have come to be known² as search orders. These orders have acquired a reputation for being draconian,³ but close study of the judgment paints a different picture. The case involved an 'extremely strong *prima facie* case'⁴ of organised intellectual property crime. The defendants had secretly amassed copyright documents and other confidential information outlining the claimant's plans for a new computer, and now planned to start making and selling the computer themselves.

The scheme having been exposed, the court was confronted with a 'real possibility'⁵ that the defendants would start destroying evidence in their possession if they knew of the case being amassed against them. Confronted with such a blatant case of lawbreaking, and given the strong public interest in investigating such serious breaches of the law, it would have quite understandable had the court developed the common law in such a way to provide for a formidable armoury of entry, search and seizure powers to ensure the claimant had access to all relevant evidence on which to build their case. But instead, the court carefully limited

1 [1976] QB 55 (CA).

2 CPR 25.1(1)(h) states 'the court may grant the following interim remedies (...) an order (referred to as a "search order") under section 7 of the Civil Procedure Act 1997 (order requiring a party to admit another party to premises for the purpose of preserving evidence etc.)'.

3 eg Kern Alexander, 'The *Mareva* Injunction and *Anton Piller* Order: The Nuclear Weapons of English Commercial Litigation' 11 Fla J Int'l L 487.

4 *Anton Piller* (n 1) 62 (Ormerod LJ).

5 *ibid.*

the scope of any order to the minimum reasonably imaginable. Exactly what was allowed by the order was made plain:

(...) the Order sought in this case is not a search warrant. It does not authorise the Plaintiffs' Solicitors or anyone else to enter the Defendant's premises against his will. It does not authorise the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the Defendants. The Plaintiff must get the Defendant's permission. But it does do this: it brings pressure on the Defendants to give permission. It does more. It actually orders him to give permission – with, I suppose, the result that if he does not give permission, he is guilty of contempt of Court (...). If the defendant refuses permission to enter or to inspect, they must not force their way in. They must accept his refusal, and bring it to the notice of the Court afterwards, if need be on an application to commit.⁶

From this extract, it is clear that the court took great pains to distinguish between powers of entry, inspection, and search. Of course, the collection of evidence would be effective in more cases had the court provided a power to enter forcibly in spite of a refusal at the door. Failure to provide such a power could mean defendants have time in which to destroy vital evidence while the claimants return to the court empty handed. But the court balanced considerations of effectiveness with the desideratum of ensuring circumscription of coercive powers that they realised had the potential to greatly interfere with the legitimate interests of individuals and organisations. It is reasonable to suppose such a canon should have application not just in civil proceedings but the whole spectrum of circumstances in which similarly coercive powers are used.

Since *Anton Piller*, the courts have not been so adept at recognising such distinctions. The 2003 case of *R (Hoverspeed) v Commissioners of HM Customs and Excise*⁷ provides a good example. There the Court of Appeal was confronted with a challenge to the powers of customs officers to stop and search vehicles to see whether goods properly subject to excise duties were secreted inside. The court needed to examine the scope of powers granted under sections 163 and 163A of the Customs and Excise Management Act 1979. Section 163 says:

(1) Without prejudice to any other power conferred by the Customs and Excise Acts 1979, where there are reasonable grounds to suspect that any vehicle or vessel is or may be carrying any goods which are—

- (a) chargeable with any duty which has not been paid or secured; or
- (b) in the course of being unlawfully removed from or to any place; or
- (c) otherwise liable to forfeiture under the customs and excise Acts,

any officer or constable or member of Her Majesty's armed forces or coastguard may stop and search that vehicle or vessel.

6 *Anton Piller* (n 4) 60 (Lord Denning MR).

7 [2002] EWCA Civ 1804, [2003] QB 1041.

Section 26 of the Finance Act 2000 introduced the new section 163A. This provides a broader power to customs officers, stating:

(1) Without prejudice to any other power conferred by the Customs and Excise Acts 1979, where there are reasonable grounds to suspect that a person in the United Kingdom (referred to in this section as ‘the suspect’) has with him, or at the place where he is, any goods to which this section applies, an officer may—

(a) require the suspect to permit a search of any article that he has with him or at that place, and

(b) if the suspect is not under arrest, detain him (and any such article) for so long as may be necessary to carry out the search (...).

The court summarised what it considered to be the powers granted by these two provisions thus:

iii) Where there are reasonable grounds to suspect that a person has with him, or at the place where he is, goods which are liable to forfeiture, a customs officer may search any article that the person has with him (s.163 of CEMA) (...).

iv) Where there are reasonable grounds to suspect that any vehicle or vessel is or may be carrying any such goods, a customs officer may stop *and search* that vehicle or vessel (s.163A of CEMA) (...).⁸ (emphasis added)

Aside from partially confusing the powers granted by the respective sections of the 1979 Act in its discussion, the court breaks down the distinctions so carefully formulated in *Anton Piller* by eliding the distinction between requiring a suspect to allow a search of his vehicle or vessel, and executing a search in spite of permission not having been granted to do so. Analysis of the legislation shows the provision of such a power of search is completely unnecessary to enable a customs officer to search vehicles in circumstances where permission is refused.⁹ Assuming the court did not intend to challenge the value of circumspection of coercive powers as stated in *Anton Piller*, quite why the court took this step is unclear.

One reason may be a poor quality judicial interpretation of statutory provisions conferring coercive powers, which would be concerning. A second might begin to emerge from an analysis of section 163A(1)(b) which muddies the waters by providing a power for customs officers to detain persons once a search requirement is issued; if the person is not sacrosanct in the eyes of the law, the goods he is carrying can hardly be sacrosanct.¹⁰ Notably, this power

⁸ *ibid* [16] (Mance LJ).

⁹ Anyone who does anything which impedes or is calculated to impede the carrying out of any search for anything liable to forfeiture under the Customs and Excise Acts or the detention, seizure or removal of any such thing commits an offence under s 16 of the 1979 Act. The offence of fraudulent evasion of duties is an indictable offence by virtue of s 170 of the 1979 Act, therefore triggering the provisions in s 16 of the Police and Criminal Evidence Act 1984 enabling a constable to search premises for evidence collection. The 1984 Act applies to customs officers by virtue of the Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007, SI 2007/3175.

¹⁰ *Chic Fashions (West Wales) v Jones* [1968] 2 QB 299 (CA), 319 (Salmon LJ).

is granted to the customs officers despite a drafting convention evident from other statutes showing such powers being conferred on a constable only when an explicit power of search is granted.¹¹ This muddle gives rise to another cause for concern: uncoordinated and unclear drafting, potentially leading to confusion among those tasked with implementing the statute. Both drafting and interpretation ought to be important methods of controlling the impact of such legislative provisions, and I shall now explore each issue in turn to see whether concern is justified.

Strict interpretation of coercive powers

This first part of this article will study judicial control of the scope of statutory entitlements to enter private premises (and associated coercive powers) by looking at cases decided from the 1950s onwards. This is an historically convenient point at which to begin as it represents the beginning of what Moran describes¹² as the rise of ‘the regulatory state’, being a transformation in the functions of government resulting from the proliferation of state supervision of previously unregulated activities. I shall begin by examining cases tending to suggest the courts have previously adopted a stricter interpretation of coercive powers; the next section shall show what I believe to be a more recent and troubling erosion of this firm stance.

In *Grove v Eastern Gas Board*¹³ the Court of Appeal had to examine certain sections of the Gas Act 1948 and decide what rights they gave the Gas Board to access and work in a private dwelling. Somervell LJ, with whom the other members of the court agreed, said:

[Counsel for the claimant] rightly submitted that a right of entry on to premises is, if it is conferred, a right which requires to be expressed in plain terms: I agree with that. On the other hand, I think it is right to bear in mind, in any case where the question arises, the subject-matter with which the Act of Parliament which has to be construed is concerned (...) there would, I think, be no cause for any surprise if one found that those who supply the gas were given necessary powers to inspect the meters and to collect the money which is owed to them for gas which has been already supplied.¹⁴

Two rules of interpretation are implicit in this passage: first, any entitlement to enter premises has to be expressed clearly. Secondly, any interpretive process undertaken must carefully scrutinise claims the statute enabled officials to do things that appeared unnecessary given the subject matter of the legislation. His Lordship went on to say *obiter* that a statutory power of entry might inherently involve a power to use force to gain entry when needed:

In the context of this paragraph of the Schedule [to the Gas Act 1948], and, perhaps, broadly speaking, a power of entry conferred by a statute is, prima facie, at any rate, a power of forcible entry if necessary. There would be no need for statutory authorization if all that the representatives of the gas board were allowed to do was to enter and read the meter if the consumer was willing to admit them (...) so that they could read it.

11 eg Police and Criminal Evidence Act 1984, s 1 (2) or Terrorism Act 2000, s 45 (4).

12 Michael Moran, ‘The Rise of the Regulatory State in Britain’ (2001) Parl Aff 51, 19–34.

13 [1952] 1 KB 77 (CA).

14 *ibid* 82.

Perhaps in light of this statement, Jenkins LJ went out of his way in his judgment to distinguish a right of access from a power of entry. Only the latter could enable officials to use force:

I think there is some force in the argument based on the contrast between [the] expression, ‘shall have access’, and the expressions ‘may enter’ or ‘it shall be lawful to enter’ (...) The contrast seems to me to suggest that whereas (...) [when the former words are used in the statute] a right of access is conferred on the board, [when the latter expressions are used in the statute] what is being dealt with is something more than that; it is a power of entry which might (...) be described as a power ancillary to the right of access; a power which, in that particular case, would make the right of access effective against the will of the occupier of the house.¹⁵

A third interpretative rule can be identified from this passage; close attention would be paid by the court to the exact species of statutory entitlement to enter premises, as only certain kinds are construed as conferring coercive powers. To these rules of interpretation we can add an overarching principle enunciated by Lord Wilberforce in *R v Commissioners of Inland Revenue, ex parte Rossminster*:¹⁶

the courts may look critically at legislation which impairs the rights of citizens and should resolve any doubt in interpretation in their favour [but] it is no part of their duty, or power, to restrict or impede the working of legislation, even of unpopular legislation; to do so would be to weaken rather than to advance the democratic process.¹⁷

In the same case Viscount Dilhorne made clear that a warrant to enter and search premises only conferred those powers and no more:

The issue of a warrant [under this subsection]¹⁸ only authorises entry and search. It does not authorise seizure and removal of anything (...) Strictly I see no need for the warrant to refer at all to the power to seize and remove but if it is thought desirable to do so, then it should be stated that the power of seizure and removal is exercisable by virtue of [the relevant] subsection [where the power is given expressly].¹⁹

Some elements of the later case law reflect Viscount Dilhorne’s strict interpretation of legislation granting coercive powers, and can present an impressive basis in authority for their decision. For example, in *Gilles v Procurator Fiscal, Elgin*²⁰ the High Court of Justiciary in Scotland was concerned with the police power to detain a suspect under section 14 of the Criminal Procedure (Scotland) Act 1995. It reads:

15 *Grove* (n 13) 82.

16 [1980] AC 952 (HL).

17 [1980] AC 952 (HL) 997.

18 The section at issue was s 20C of the Taxes Management Act 1970, subs (1) of which allowed a warrant to be issued authorising an officer of the Board of Inland Revenue to ‘enter [specified] premises, if necessary by force, at any time within 14 days from the time of issue of the warrant, and search them.’ Subs (3) allowed seizure and removal of items an officer has reasonable cause to believe may be required as evidence.

19 *Rossminster* (n 16) 1003.

20 [2008] HCJAC 55, 2009 JC 25.

(1) Where a constable has reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment, the constable may, for the purpose of facilitating the carrying out of investigations—

(a) into the offence; and

(b) as to whether criminal proceedings should be instigated against the person,

detain that person and take him as quickly as is reasonably practicable to a police station or other premises and may thereafter for that purpose take him to any other place and, subject to the following provisions of this section, the detention may continue at the police station or, as the case may be, the other premises or place (...)

(7) Where a person is detained under subsection (1) above, a constable may—

(a) without prejudice to any relevant rule of law as regards the admissibility in evidence of any answer given, put questions to him in relation to the suspected offence;

(b) exercise the same powers of search as are available following an arrest.

(8) A constable may use reasonable force in exercising any power conferred by subsection (1), or by paragraph (b) of subsection (7), above.

In *Gilles*, two police officers forced their way into the appellant's home in order to detain a suspect they believed was living there. But the court decided they had no power to enter the house. The court recalled the high principle enunciated in *Entick v Carrington*²¹ and the requirement under Article 8(2) of the European Convention on Human Rights for an interference with the home to be 'in accordance with the law', in particular 'that the law meets the tests of accessibility and foreseeability, and determines with sufficient clarity the scope of any discretionary authority conferred'.²² The court, seeing there was no express power of entry in section 14, was loath to find any implicit power:

As we have mentioned, Parliament has in other contexts authorised entry by police officers upon private property for purposes intended to assist in the investigation or suppression of crime. Parliament's omission of [a power of entry] from section 14 is unlikely to have been unintended, particularly in the context of the elaborate provision made in respect of the procedure to be followed on detention, and the conferral of an express power to use reasonable force in exercising the power to detain.²³

21 (1765) 19 St Tr 1029.

22 *Gilles* (n 20) [8].

23 *ibid* [10].

The court felt the speech of Lord Scarman in *Morris v Beardmore*²⁴ supported their view in stating:

A constable, who in purported execution of his duty has infringed rights which Parliament has not expressly curtailed, will not, therefore, be able to show that he has acted in execution of his duty, unless (and this will be rare) it can be shown by necessary implication that Parliament must have intended to authorise such infringement (...) [I]t is not the task of judges, exercising their ingenuity in the field of implication, to go further in the invasion of fundamental private rights and liberties than Parliament has expressly authorised.

The court found that common law did not provide a power of entry in Gilles' case, and then posed the question of whether the common law ought to be developed so as to confer such authority. But they decided this was not appropriate, because it was not for the courts to alter the balance between individual rights and the powers of public officials. In making that decision, they followed Lord Bingham of Cornhill's observations in *R (Laporte) v Chief Constable of Gloucestershire*²⁵ about the proper limits of judicial power:

if (...) the public interest requires that the power of the police to control demonstrations of this kind should be extended, any such extension should in my opinion be effected by legislative enactment and not judicial decision (...) The Convention test of necessity does not require that a restriction be indispensable, but nor is it enough that it be useful, reasonable or desirable: *Handyside v United Kingdom* (1976) 1 EHRR 737, para 48; *Silver v United Kingdom* (1983) 5 EHRR 347, para 97. Assessment of whether a new restriction meets the exacting Convention test of necessity calls in the first instance for the wide consultation and inquiry and democratic consideration which should characterise the legislative process, not the more narrowly focused process of judicial decision. This is not a field in which judicial development of the law is at all appropriate.

Current approaches to interpretation of coercive powers

Recent English cases have shown a worryingly mixed, and at times recalcitrant, approach to this line of authority. Courts have seemed more willing to imply the conferral of coercive powers not provided for expressly in the statute. Two of the most striking cases were decided only last year.

In *R (Dulai and Others) v Chelmsford Magistrates' Court and another*²⁶ the claimants contested the lawfulness of a search by the Essex County Council of its business premises. The county's trading standards department suspected large-scale adulteration of food to be taking place at these business premises, and was concerned by the claimants' uncooperative stance. So they applied for a warrant to continue their investigations unhindered. The visit was fruitful, as boxes of the company's records were seized. At paragraph 19, Stanley Burton LJ says that not simply an entry, but a search could be lawfully executed under the relevant statutory power:

24 [1981] AC 446 (HL), 463.

25 [2007] 2 AC 105 (HL), [52].

26 [2012] EWHC 1055 (Admin), [2012] 3 All ER 764.

During the course of the *search carried out pursuant to the warrant* the Council's officers decided to exercise the power conferred by section 50 of the Criminal Justice and Police Act 2001 in order to remove large quantities of documents and records relating to rice in order to decide whether they were required as evidence in proceedings (...) (emphasis added)

This 'search warrant' was issued under section 32 of the Food Safety Act 1990. That section allowed the trading standards officer to exercise the following powers:

- (5) An authorised officer entering premises by virtue of this section, or of a warrant issued under it, may inspect any records (in whatever form they are held) relating to a food business and, where any such records are stored in any electronic form—
- (a) may have access to, and inspect and check the operation of, any computer and any associated apparatus or material which is or has been in use in connection with the records; and
 - (b) may require any person having charge of, or otherwise concerned with the operation of, the computer, apparatus or material to afford him such assistance as he may reasonably require.
- (6) Any officer exercising any power conferred by subsection (5) above may—
- (a) seize and detain any records which he has reason to believe may be required as evidence in proceedings under any of the provisions of this Act or of regulations or orders made under it; and
 - (b) where the records are stored in any electronic form, may require the records to be produced in a form in which they may be taken away (...)

It is clear from reading this section that it does *not* provide a power of search: the term used is inspection. There is a significant distinction between a search power, allowing a public official to rifle through a subject's private papers and goods at will, and an inspection power based on the subject presenting the papers or goods to the official for his assessment following a sufficiently precise description of what is being sought. The latter clearly provides more safeguards than the former. The statutory scheme makes clear Parliament had the latter scenario in mind when it provided for an offence of obstruction to include when a subject, without reasonable cause, fails to give to any person acting in the execution of this Act any assistance or information that may reasonably be required. There is no pressing need for a search power to be conferred upon the trading standards officers: should it be required, an application could have been made by a constable under section 8 of the Police and Criminal Evidence Act 1984, for the offences alleged to have been committed were indictable offences of food fraud.

The court's interpretation elided the qualitative difference in intrusiveness between a search and an inspection, to the detriment of privacy rights and for no more than a marginal benefit to regulatory outcomes. That it took this step in the space of one paragraph is particularly concerning.

Lest this be considered an isolated incident of unprincipled and slipshod interpretation, we should examine the case of *Helidon Vuciterni Alsat UK Ltd v. Brent Magistrates' Court and another*,²⁷ which was heard in the Divisional Court. In this case the legislation involved was regulation 22 of the Consumer Protection from Unfair Trading Regulations 2008,²⁸ which provided for the issue of warrants to trading standards officers. Regulation 22 reads, so far as relevant:

(1) If a justice of the peace by any written information on oath is satisfied—

(a) that there are reasonable grounds for believing that Condition A or B is met, and

(b) that Condition C, D or E is met,

the justice may by warrant under his hand authorise an officer of an enforcement authority to enter the premises at all reasonable times, if necessary by force (...)

These provisions are coupled with those in regulation 21, which grant powers of inspection, seizure and detention once the officer has got on the premises. As a further pointer (if one were needed) to the distinction between the various species of rights conferred by the legislation on authorised officers, regulation 21(9)(a) makes clear that a person cannot be required to produce certain documents for inspection. But David LJ says at paragraph 53 that he rejects the argument:

(...) that the warrants (headed 'Warrant to Enter') had not in terms conferred power to search. Read as a whole (and given also the express reference on their face to Regulation 22), in my view they were sufficiently worded. Further, the accompanying PACE Code B Notices by reference to s.50 of the 2001 Act²⁹ had – as will be gathered, correctly in my view – designated the seizures as being under a 'search' warrant. To the extent that (...) seizure of decoder cards or of the decoder boxes (...) was not authorised, the wide wording of the warrants in my view covered that seizure.

It is unclear quite how PACE Code B Notices can influence statutory interpretation to any great extent. Assuming they were not altogether decisive, the only way in which this statement becomes explicable, given the plain wording of the statute showing that search powers were not granted, is to use a rationale from *Rossminster* that to fail to imply search powers into regulation 22 warrants granted thereunder would 'restrict' or 'impede' the working of legislation. But not only does this appear to be a grossly misconceived attempt to use such reasoning – for again, there is nothing predictable or necessary in this extension of powers – to do so presents a direct challenge to the intention of the drafters of the legislation and results in an unnecessary reduction in the rights of the individual to no advantage whatsoever.

Moreover, quite how this extension of powers fits in with the Convention requirements for necessity or clarity of the scope of any discretion conferred on the competent authorities and the manner of its exercise is unclear. Nor is it clear what account has been taken of the

27 [2012] EWHC 2140 (Admin).

28 SI 2008/1277.

29 Criminal Justice and Police Act 2001.

domestic law principles enunciated in *Grove* and *Rossminster*, for no reference is made to these cases (or any others) in the court's decision on this point. This is hardly surprising given the extent of the court's reasoning on this matter extends to one paragraph.

It may be argued these judgments are aberrations, but this is no answer to the concerns about the interpretative approach these cases reveal. For the higher courts to even begin to adopt such approaches illustrates how far we have come from the heady days of *Grove* and *Rossminster* and should cause real concern. It is now no longer a fanciful prospect that powers of entry should themselves become viewed as mere incidental provisions to be implied when thought fit.³⁰

Even if for argument's sake one conceded these cases were aberrations, the damage that will be caused is potentially significant. The interpretation of coercive powers used by the police is judicially examined regularly, as the triumvirate of cases³¹ in short succession on implied powers to detain persons in a sterile room while searching a building goes to show. Not only that, effective control (being one of the key objectives of interpreting such powers) can be exercised over the use of policing powers in a variety of other ways, for example by the use of well-developed and independent complaints processes. The development of controls over search powers used in other contexts by the regulatory state is not so well advanced, hence the importance of firm judicial control that is so starkly absent from case law now.

Controls provided by legislative drafting

Of course, there would be far fewer disputes over interpretation if the drafting and pre-legislative scrutiny of instruments conferring powers of entry and similar powers were truly effective. There are a number of mechanisms one can suggest for such scrutiny but, up to now, they appear to not have commanded confidence. Powers of entry have been the subject of continued criticism and pressure for change from parliamentarians, political parties and others.³² In response, the Home Office decided in 2011 to establish a 'powers of entry gateway' to assuage these concerns as part of a package of measures to support civil liberties. This was to be a new scrutiny mechanism dealing with three situations: where a power of entry is to be created, where it was being repealed and re-enacted, or where it was being substantively amended. UK government departments³³ are required to ask the permission of ministers in the Home Office before proposing primary legislation or making secondary legislation that would have any of these effects. Approval would only be given if: 'the proposed powers are

30 An example of how this may not be as ridiculous as it first appears can be taken from s 66 of the Education (Scotland) Act 1980, which provides a power to the Secretary of State to cause inspections to be made of schools. Subsection (3) makes it an offence for a person to obstruct an inspector acting in the execution of their duty. The 'missing link' in this statute seems to be an express power of entry. The gradual development of purposive interpretation we have seen may yet come to deal with statutory provisions of this sort as a first step towards effectiveness.

31 Cf. *Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841, [2002] Po LR 388 (where an implied power was not found) with the later cases of *DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 1 WLR 945 and *Connor v Chief Constable of Merseyside* [2006] EWCA Civ 1549, [2007] HRLR 6 (where implied powers were found either in the statute or at common law). The cases show a careful analysis of the appropriateness of the dicta in *Hepburn* and a steady move away from its terms.

32 Sally Almandras *et al*, 'Protection of Freedoms Bill: Research Paper 11/20' (Parliament, 23 February 2011) < <http://www.parliament.uk/briefing-papers/RP11-20> > accessed 14 May 2013.

33 None of the devolved administrations have chosen to follow suit with such a gateway.

necessary and sufficiently uphold the rights and protection of citizens while preserving the need for effective enforcement'.³⁴

The first applications to the gateway were presented in March 2011, while a guidance document explaining how the gateway would work was published in August 2011. A written parliamentary question asked in April 2012³⁵ uncovered something of the gateway's work: it listed eight pieces of legislation that received ministerial approval and became law. From a careful examination of the instruments listed in the question, we can gain an understanding of the effectiveness of the gateway in ensuring the adequacy and effectiveness of safeguards and overall coherence of the powers.

The weight the gateway attaches to safeguards: policy

The European Court of Human Rights' judgment in *Gillan*³⁶ makes it clear that safeguards on powers engaging Article 8 rights must constitute a 'real curb (...) so as to offer the individual adequate protection against arbitrary interference'. It is therefore unsurprising when guidance issued by the Home Office on how the gateway will engage in scrutiny says:

The need for entry powers will be assessed on the principles of necessity, proportionality and whether sufficient safeguards are in place to minimise intrusion to businesses and occupiers of domestic premises.³⁷

The guidance goes on³⁸ to list a number of common safeguards that government departments are expected to consider, and which the Home Office will consider when the instrument reaches the gateway. Government policy is stated to be that 'a power of entry and associated power should include as many relevant safeguards for the occupier of premises as are compatible with effective enforcement'.

The weight the gateway attaches to safeguards: practice

While the gateway has ensured much progress has been made in removing dwellings from the scope of powers of entry, and introducing a requirement for a warrant to use powers of entry, analysis of the instruments indicates some safeguards are placed in particular instruments while being left out from others, with no easily discernible explanation of why.

By way of example, the new powers of entry provided in the Energy Information Regulations 2011³⁹ require⁴⁰ an inspector to leave a notice explaining in plain terms the legislation under which the powers were obtained. No other instruments provide for this safeguard, despite most involving routine and targeted inspections of business undertakings to ensure compliance with safety and similar regulations. None of the regulations appear to present problems that would mean this safeguard could not be implemented.

34 Home Office, 'Powers of Entry Gateway Guidance Version 1.0' (August 2011) 3.

35 HL Deb 23 April 2012, cWA364.

36 *Gillan v United Kingdom* (2010) 50 EHRR 45, [79].

37 Home Office, 'Powers of Entry Gateway Guidance Version 1.0' (August 2011) 3.

38 *ibid* 9.

39 SI 2011/1524.

40 Paragraph 2(3), new Sch 2.

While one regulation⁴¹ imposes a reasonableness requirement on an inspector proposing to use powers of entry, in none of the other instruments that have passed through the gateway is this the case. This is especially concerning given the judicial interpretation of conditions required to be satisfied before entry or use of similar powers has been much stricter than interpretation of scope of powers once conditions are met.⁴²

Respecting differences between different species of coercive powers: policy

An example where we can be sure the gateway does not work as it should concerns the difference between powers of search and inspection. The guidance document takes pains to point out that there is a qualitative difference between a power to inspect and a power to search. It makes clear that:

It does not follow that a routine power of entry and inspection should necessarily include a power of search and seizure. Such powers (assuming of course that they are necessary at all) should at least depend upon their being reasonable suspicion of a contravention and preferably upon a justice's warrant as well. A power of search and seizure clearly bears more heavily on the occupier of premises than a simple power of entry and there should therefore be greater safeguards.⁴³

Respecting differences between different species of coercive powers: practice

Regulation 35(1) of the Veterinary Medicines Regulations 2011⁴⁴ empowers an inspector to inspect and search relevant premises. Regulation 15(8) of the Non-Commercial Movement of Pet Animals Order 2011⁴⁵ gives similar powers to an inspector to inspect and search premises. None of the extra safeguards that the Government believes should be attached to search powers have been applied in these cases.

It may be an unfortunate by-product of the gateway that bolder steps do not appear to have been taken to ensure the distinctions between different powers are properly respected and safeguards proportionate to the intrusiveness of the powers are applied. For example, there

41 Schedule to the Storage of Carbon Dioxide (Inspections etc.) Regulations 2012, SI 2012/461.

42 See for example, *Syed v Director of Public Prosecutions* [2010] EWHC 81 (Admin) where the condition that a power of entry be used only for the purpose of 'saving life or limb' was very strictly interpreted. One can see the court's general approach to such conditionality issues in *R (Redknapp) v Commissioner of City of London Police and another* [2008] EWHC 1177 (Admin), [2009] 1 WLR 2091.

43 n 36, 5.

44 SI 2011/2159.

45 SI 2011/2883.

is a strong case for a template statute, providing a number of carefully-drafted safeguards and conditions that could then form the building blocks for future powers of entry.⁴⁶

Instruments passing through the gateway are differently drafted for no obvious reason, to the point of confusion

By way of example of this point, regulation 23(1)(i) of the Animal By-Products (Enforcement) (England) Regulations 2011 provides that an authorised officer can mark an animal or an animal by-product while they conduct their inspection. Regulation 12(4) of the Wine Regulations 2011 provides for a similar power to mark condemned wine products. While the wine instrument specifies⁴⁷ that the offence of obstruction includes alteration or removal of an inspector's mark, the By-Products Regulation provides no such elaboration. This is not to say the Wine Regulations were beyond criticism: so incompetent was the drafting of the power of entry in those regulations that the Joint Committee on Statutory Instruments brought it to the special attention of both Houses of Parliament.⁴⁸

Two instruments⁴⁹ criminalise the acts of knowingly or recklessly making a statement that is false or misleading in purported compliance with a requirement to disclose information. None of the other instruments provide for the offence to have been committed on the basis of recklessness, despite potentially covering the same economic operators. Confusingly, one instrument⁵⁰ makes it an offence for A to prevent B from complying with a requirement an inspector imposes upon B, while the other instruments make no mention of this offence. They settle for saying that it is an offence without reasonable excuse to fail to comply with a requirement imposed by an inspector.

As another example, while the Veterinary Medicines Regulations 2011 define premises the inspector can gain access to as any place, vehicle, trailer, container, stall, moveable structure, ship or aircraft, none of the other instruments take this step towards clarification. And the title of regulation 12 of the Alien and Locally Absent Species in Aquaculture (England and Wales) Regulations 2011⁵¹ is 'Entry and inspection of land and premises' despite there being no power of inspection granted in that regulation: just a power of entry. This means we

46 Such as s 3(8) of the Children Act 2004, which (following other statutes) provides for the inquiry and investigation powers provided for in s 250 of the Local Government Act 1972 to be given to the Children's Commissioner for England with the substitution of 'the person appointed to hold the inquiry' for the Commissioner.

47 Reg 14(3)(a).

48 HL Paper 224, HC 354–xxxiii. While it is not the purpose of this article to examine the parliamentary process, it is postulated that a lack of rigour in scrutiny provided by the relevant parliamentary committees may well have contributed to these outcomes.

49 Energy Information Regulations 2011, SI 2011/1524, reg 12(1)(b) and the Storage of Carbon Dioxide (Inspections etc) Regulations, SI 2012/461, reg 4.

50 Storage of Carbon Dioxide (Inspections etc) Regulations 2012, SI 2012/561, reg 4.

51 SI 2011/292.

have to rely on the courts once more to interpret legislation purposively⁵² where the gateway should have made it entirely unnecessary to do so.

A lack of openness

It is possible that some of these inconsistencies could be explained if good reasons were given. It is therefore unfortunate that such debate would be ill-informed: the gateway carries out its task with a surprising degree of secrecy when compared to how impact assessments are formulated and disseminated. Submissions to the Home Office from individual government departments are not published, and there is no disclosure of the process gone through to scrutinise each instrument in the explanatory notes, explanatory memorandums or impact assessments that are attached to each instrument.

Good practice in this respect can be found elsewhere within government. The Powers Review undertaken by HM Revenue and Customs⁵³ culminating in Schedule 36 to the Finance Act 2008 (among other statutes) is an excellent example of openness and deliberation in the development of civil powers for tax inspectors. A comprehensive and thoughtful analysis of the proportionality and necessity of powers, and safeguards connected thereto, was undertaken with involvement from interested external parties. An implementation oversight forum was set up by ministers to ensure the powers bedded in well and the safeguards worked properly without detriment to the public interest in the enforcement of taxation law.

Conclusion: A lack of rigour within the drafting process

That these examples of particularly sloppy drafting pass the powers of entry gateway gives much cause for concern about its effectiveness. This attitude turns to one of real worry about the extent to which the limits on these powers are policed when one realises the criminal offences attached to these instruments (for obstruction and the like), which are among the most confused, will have had to pass a *second* governmental gateway controlled by the Ministry of Justice.⁵⁴

Conclusions

This article has discussed the effectiveness of two key controls on powers of entry and associated coercive powers: post-legislative interpretation and pre-legislative internal drafting controls. The impact of these powers on the citizen should not be underestimated, so it is disappointing that it has become clear that there is so much room for improvement in both areas. So far as the interpretation of such provisions by the judiciary is concerned, it appears from the line of recent cases that an insufficiently detailed approach is being taken, bordering on the lackadaisical. The senior English courts are now very clearly departing from good practice carried on at least in Scotland and from well-established principles: should they

52 For example, *dicta* in *Ward v Commissioner of the Police of the Metropolis* [2006] 1 AC 23 (HL) 29 suggests part of the reasoning why search powers were granted was because the word 'search' was used in the title of the relevant section.

53 HM Revenue and Customs, 'Review of HMRC's Powers, Deterrents and Safeguards' <<http://www.hmrc.gov.uk/about/powers-appeal.htm>> accessed 16 May 2013.

54 Ministry of Justice, 'Criminal Offences Gateway Guidance' <<http://www.justice.gov.uk/downloads/legislation/criminal-offences-gateway-guidance.pdf>> accessed 14 May 2013.

continue along this perilous course, the risk of Convention non-compliance looms large, at the very least. A return to old principles would more effectively support fundamental rights and give better effect to Parliamentary intentions. In terms of drafting practices, the new powers of entry gateway has had some real successes in introducing safeguards that should not be belittled, but the lack of consistency and poor levels of coherence continuing to dog instruments scrutinised by the gateway show it has much to do, along with others, in achieving the Government's recently announced objective of 'Good Law' when drafting legislation.⁵⁵

55 Cabinet Office, 'Good Law' <<https://www.gov.uk/good-law>> accessed 14 May 2013.

The criminal law's treatment of twenty-first century copyright pirates: A treacherous new frontier for property offences

Jeff Vinall

1. Introduction

Internet use is indisputably a commonplace of modern life, with all the manifold advantages that it brings. However, with internet use comes internet misuse and despite the apparent immateriality of cyberspace, real and consequential harm can be done thereby. Recent judgments demonstrate that the civil law is now developing to modernise its approach to extant legal concepts in the light of the changing ways with which harm can be done via the internet. Libel and defamation law, for example, has readily and flexibly adapted to cover defamatory statements made on social networks such as Facebook, as in *Applause Store Productions Ltd v Raphael*,¹ and even Twitter, as in *Cairns v Modi*,² a case brought to particular prominence recently in the wake of defamatory allegations made on Twitter regarding Lord McAlpine.

Unfortunately, as will be shown, the criminal law has not been as quick to adapt to a comparable threat: intellectual property abuse. The position of a lone internet 'pirate', downloading another's intellectual property without permission, is so barely impacted on by the criminal law as to be effectively excluded from criminal liability altogether. The position of those distributors who effectively make such piracy possible is only barely more adequate, and various loopholes exist that are frequently taken advantage of. These inadequacies are, it will be argued, not due to any legitimate policy considerations, but rather the fact that interference with intellectual property rights today differs so greatly in form from the legal structure required of interference with property rights in physical property. Property offences have, due to their particular legal strictures, been largely unable to accommodate *intellectual* property rights. Specialised copyright offences have also fallen short of criminalising this behaviour, due to the slow pace with which our legislature has responded to the threat of digital piracy. It is therefore submitted that the criminal law urgently needs to undergo relatively radical modernisations if it is to protect property rights in the modern era, as civil remedies alone are insufficient.

Against this proposition, it might be argued that either the criminal law's concern with property rights does not extend to intellectual property or even that the criminal law does not formally recognise property rights at all, but rather criminalises certain acts independently of their interference with these rights. It will be shown that there is no reason to exclude intellectual property from the criminal law's protection. As the Hargreaves *Review of Intellectual Property and Growth*³ has concluded, intellectual property rights are vital to our economy – as vital, at least, as other property rights. This, it will be argued, makes them socially valuable, given the importance of economic stability. Thus, to continue to effectively exclude a right

1 [2008] EWHC 1781 (QB), [2008] Info TLR 318.

2 [2012] EWCA Civ 1382, [2013] 1 WLR 1015.

3 Ian Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (Business, Innovations and Skills Committee, May 2011).

that is of particular value to society from the protection of the criminal law, which punishes acts detrimental to the communal good, ought not to be countenanced.

2. The wrong of copyright piracy

'Piracy', as used here, refers to an individual involved in copyright infringement using the internet. A particularly provocative description of this practice has been advanced by copyright owners' groups, for example

'No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had.'⁴

However, such a metaphor might also be criticised as demonising copyright infringers. To argue that piracy ought to be criminalised firstly requires a proper consideration of the wrong involved in this particular form of copyright infringement.

Already referred to above is the finding of the Hargreaves *Review of Intellectual Property and Growth*⁵ that intellectual property rights are vital to the modern economy. Evidence reveals that intellectual property activity improves productivity and profitability in firms and is directly reflected in higher stock market values,⁶ suggesting that the robust ability to protect intellectual achievements stimulates innovation and creativity. Gould neatly confirms this Schumpeterian contribution of intellectual property protection to economic growth with his finding that 'under a regime of open markets, we might expect competitive forces to stimulate innovation *and intellectual property protection to induce even more of it*'⁷ (emphasis added). There being such a weight of evidence suggesting that copyright and intellectual property is as economically important (and therefore as morally valuable, given that economic stability both directly and indirectly⁸ contributes to individual welfare) as any other property right, there appears little reason not to interpret property offences reasonably liberally to cover infringement of such intellectual property rights. Such evidence on the economic advantages of intellectual property rights in general goes at least some way to suggesting that intellectual property violation should attract its own criminal sanction.

When considering internet 'piracy' in particular, evidence to support criminalisation can be found in studies that suggest that illegal downloading of material does cause harm to the copyright owner – as mentioned in part 2; however, the studies in this area are not conclusive. There are difficulties in assessing statistical information on piracy and sales – not least of which is the fact that such statistics tend to be controlled by a lobby that 'allies the phar-

4 Recording Industry of America.

5 Hargreaves (n 3).

6 Christine Greenhalgh and Mark Rogers, *Trade Marks and Performance in UK Firms: Evidence of Schumpeterian Competition through Innovation* (Economics Series Working Papers 300, University of Oxford, Department of Economics, 2007).

7 David M Gould and William C Gruben, 'The Role of Intellectual Property Rights in Economic Growth' (1996) 48(2) *J Dev Econ* 346.

8 See, for example, Alisa C Lewin, 'The Effect of Economic Stability on Family Stability Among Welfare Recipients' (2005) 29(3) *Eval Rev* 223–40.

maceutical, tobacco and creative industries' whose contribution to the debate surrounding intellectual property has been criticised by some as 'unhelpful, redolent with self-interest and short-termism.'⁹ (It is therefore recommendable that, in order to secure criminal sanctions for copyright infringement, the industry lobby cooperates better with statistical studies.) In lieu of this data, the most high-profile studies have been based on non-representative samples. For example, a sample of US college students¹⁰ concluded that piracy reduced expenditure on music albums by 10 per cent and a larger sample of European individuals¹¹ concluded that expenditure could be reduced by as much as 30 per cent. In particular, the data suggests that potential customers' spending reductions are concentrated on popular material, thus producing a much greater effect where they do occur.¹² These significant reductions in copyright holders' revenue could certainly constitute a concrete harm to copyright holders, the like of which would, it is submitted, be a proper target for criminalisation. A recent European Commission Joint Research Centre report¹³ conversely suggests that more modern studies¹⁴ show that illegal file-sharing can have a positive effect on legal online downloading. However, even if this emerging body of data is accurate, this can still be seen as a harm to copyright holders who will typically see profits decrease when sales are rerouted to this lower-priced medium by piracy. All such studies are, of course, additionally burdened with the difficulty of investigating a hypothetical – the likelihood that legal purchases would have occurred, had piracy not taken place – as well as the problem of underreporting of dishonest activity. However, the available evidence does appear to suggest that there is an element of harm (to copyright holders and the economy generally) caused by piracy, which does merit the attraction of criminal sanctions.

Against this must be balanced the welfare benefits associated with allowing internet piracy to take place. Studies, including those quoted above, show a rise in pirates' welfare when music can be downloaded for free.¹⁵ This welfare benefit, which can result in a monetary gain for individuals greater than the loss inflicted on copyright holders,¹⁶ arises from a reduction in losses experienced by the consumer. However, it might be argued that the welfare of consumers is simultaneously reduced by the consequent reduction in music production and potentially also reductions in quality and diversity of that which is produced, brought about by the harm inflicted on copyright holders.¹⁷ Additionally, the welfare of consumers will be reduced if the intellectual property rights regime is undermined by piracy, as this has the potential, as detailed earlier in this part of the article, to weaken and destabilise the

9 Stuart Macdonald, 'All My Own Work: Intellectual Property Rights and the Reinvention of Innovation' (2013) 35(1) EIPR 4.

10 Rafael Rob and Joel Waldfogel, *Piracy on the High Cs: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students* (Working Paper No 10874, National Bureau of Economic Research, October 2004).

11 Alejandro Zentner, 'Measuring the Effect of File Sharing on Music Purchases' (2006) 49 JL & Econ 63–90.

12 David Blackburn, *On-line Piracy and Recorded Music Sales* (Harvard University, 2004).

13 Institute for Prospective Technological Studies, *Digital Music Consumption on the Internet: Evidence from Clickstream Data* (Digital Economy Working Paper 2013/04).

14 eg Irène Bastard, Marc Bourreau, François Moreau, *L'impact du Piratage sur l'Achat et le Téléchargement Légal: une Comparaison de Quatre Filières Culturelles* (Working Paper, 2012).

15 Rob and Waldfogel (n 10).

16 *ibid.*

17 This could never be empirically proven although Rob and Waldfogel, *ibid.*, concede that it is a possibility in their concluding remarks.

economy and bring about associated harm to individual welfare. A view must therefore be taken of the net welfare implications of piracy. It is true that a simple glance at the number of copyright holders losing monetarily compared with the greater number of consumers gaining monetarily might prompt one to invoke the utilitarian argument 'the greatest happiness of the greatest number is the foundation of morals and legislation'¹⁸ and deem piracy to be unfit for criminalisation. However, the picture has been shown to be more complex. When the indirect though immeasurable effects caused by the impact of piracy upon music production and the economy more generally are taken into account, it is the contention of this article that there is no significant welfare benefit to consumers that could offset the harm produced by piracy.

Any argument that piracy has become a necessary part of internet culture is also flawed. The fact that piracy is, to a certain extent, seen as socially acceptable¹⁹ is symptomatic at least in part of the failure of the criminal law to stigmatise piracy. It is likely that most 'reasonable and honest people'²⁰ would consider piracy dishonest (especially given the evidence discussed in part 2 of this article) as it involves evading the price legitimately charged for the same material and media campaigns in recent years have focused on presenting piracy as immoral.²¹ In light of the relatively minor acts of dishonesty that are currently caught within the law of theft and fraud, it would be a moral inconsistency, breaching principles of fairness and justice, were the law not to afford similar treatment and independent criminalisation to wrongs comparable in their moral seriousness if not in their method of performance. The argument that piracy is fit for criminalisation therefore stands.

Even conceding that online copyright infringement is a wrong that ought to be prevented, it might be said that civil remedies are able to provide a sufficient deterrent without the need for criminalisation, which should be avoided where possible. However, this article will argue that although civil remedies for copyright infringement already exist, they do not provide the level of deterrence through stigma and punitive action that criminal sanctions can. The aforementioned Hargreaves review already implicitly highlighted the many shortcomings of the current system, saying of the current copyright regime: 'ineffective rights regimes are worse than no rights at all: they appear to offer certainty and support for reliable business models, but in practice send misleading signals. Widespread disregard for the law erodes the certainty that underpins consumer and investor confidence.'²² Frustrated prosecution attempts by the CPS and failed private prosecutions, which will be discussed in section 4 below, both indicate that the current regime, consisting of mainly civil remedies, is insufficient for prosecutors and industry lobbies. Although internet piracy is often described as 'illegal', it will be shown that it is not, in the criminal sense, and the law would be more certain, consistent and conducive to a healthy economy if all online acts of copyright infringement, both facilitation and private consumption of pirated material, were prohibited.

18 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon Press, 1879).

19 For analysis of the 'low moral intensity' of software piracy, in particular, see Jeanne M Logsdon, Judith Kenner Thompson, Richard A Reid, 'Software Piracy: Is it Related to Level of Moral Judgment?' (1994) 11 JBE 849–57.

20 To borrow the language of *R v Ghosh* [1982] QB 1053 (CA).

21 See, for example, the famous Motion Picture Association of America campaign entitled *You Wouldn't Steal a Car* (2004), which presented internet piracy as a comparable wrong.

22 Hargreaves (n 3)

3. The current position of the criminal law

It is the contention of this article that the typical modern infringement of intellectual property rights – internet piracy for private use – almost entirely avoids the contours of criminal liability. If one were to download, for one’s own use only, through whatever illegitimate means, an unauthorised electronic copy of a music track, cinematic film or video game, one could not be liable for theft or even for any criminal offence related to breach of copyright. The discussion here will first focus on the liability of a person acting solely to obtain the copy for his own private use; however, it should be noted that those who *upload* or otherwise make available unauthorised copies may be criminally liable in other ways. This will be discussed in the following section. Here, though *prima facie* it might seem most appropriate to consider offences that might be contained within Acts that seem aimed at information technology offences or copyright infringement, it will be shown that the Computer Misuse Act 1990 and Copyright, Designs and Patents Act 1988 both offer relatively weak opportunities for criminalising piracy and so they will be discussed later.

It is necessary to consider first the perhaps more serious possibility – and certainly the nomenclature preferred by copyright holders and their supporters – that intellectual property infringement ought to be considered theft.²³ Two possibilities arise at this juncture: either one might attempt to show that theft of the pirated thing itself (be it music, a film or a videogame, for example) is made out or one might attempt to demonstrate that theft of the *copyright* in the pirated thing is made out.

The first of these possibilities can be easily seen to be unviable, for a host of reasons. A person can only be guilty of theft, under the Theft Act 1968, if he ‘dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it’. Dishonesty will likely be found to be present in all cases of ‘piracy’, as a jury applying the natural meaning of the word or the *Ghosh*²⁴ test are likely to find that ‘reasonable and honest people’ would consider avoiding the purchase price that others pay for the same material to be ‘dishonest’ – especially taking into account the evidence discussed in part 2 of this article. The pirated thing will, of course, belong to (or be in the control of, in line with the Act’s section 5 elaboration) another. Appropriation, though less obviously present, might also be argued for – the pirate will necessarily assume the rights of an owner in another’s data in order to copy it and obtain a copy for himself. Even the oft-criticised *Briggs*²⁵ requirement that there be some physical engagement with property would be fulfilled, as the judgment there requires only very minimal physical interference of the kind that could be made out simply by interaction with the mouse and keyboard in the process of downloading. On this model, the ‘other’ from whom the pirate appropriates the data will usually be a consenting distributor of pirated data, who will be ‘in control of’ it for section 5 purposes. This too would be unproblematic for the courts as the *Hinks*²⁶ line of cases have unequivocally decided that a consensual transfer of property, regardless of its standing in civil law, can amount to appropriation for the purposes of theft.

23 See, for example, the name chosen by FACT, the Federation Against Copyright Theft.

24 *Ghosh* (n 20).

25 [2003] EWCA Crim 3662, [2004] 1 Cr App R 34.

26 [2001] 2 AC 241 (HL), see also *Gomez* [1993] AC 442 (HL) and *Morris* [1984] AC 320 (HL).

Damningly, however, digital intellectual property will always, ultimately, be information in that it will consist entirely of bytes of digital information stored and accessible on a computer. Thus, any attempt to bring this form of piracy within the ambit of theft would require a reversal of *Oxford v Moss*.²⁷ Although the Theft Act 1968 states that intangible property can be stolen, the judge in this case held that information cannot constitute property for the purposes of theft. While normative arguments can be made against this decision (and will be discussed below, when suggesting reforms) it is undoubted that this decision represents the current law.

Additionally, of course, how can the online pirate be said to 'intend to permanently deprive' anyone of the information, when the distributor from whom he derives it retains his own copy? This is an argument that should be distinguished from *R v Lloyd*²⁸ in that where that case involved temporary deprivation of the (physical) films by means of borrowing, which was held not to suffice for theft under the Act, this scenario is one where the defendant does not purport to deprive someone of property at all, but purports to copy information. The English courts have not decided a case directly in point here; however John Cross noted in 1991²⁹ that the Canadian case of *Stewart v The Queen*³⁰ had made the reasonably obvious decision that there could be no sense of deprivation in such a scenario. Even England's extension of deprivation in section 6 of the Theft Act does not assist in bringing piracy within the scope of 'intention to permanently deprive' – the pirate does not treat the original data as his to dispose of; he is free to dispose of his own copy but has no power to dispose of the copy held by the person who provided it to him, still less that held by the creator of the work. These two highly doubtful issues – whether the pirated thing is 'property' for the purposes of the Act and whether there is intention to permanently deprive – would make a conviction for theft of the pirated thing itself impossible.

In relation to the second possibility, theft of the *copyright* in the pirated data, Simester and Sullivan make the interesting statement³¹ that a person copying a textbook not only cannot deprive the owner of the book, but is similarly unable to deprive the copyright owner of their copyright. If true, this would mean that, although the pirate dishonestly appropriates the copyright in that he assumes one of the rights of an owner, theft could not be made out as intention to permanently deprive would be absent. This might be strongly argued against in that, the underlying purpose of the copyright being to provide the copyright owner with proper reimbursement when his work is reproduced, interference with this right deprives the owner of a benefit that forms part of his property in the same way that the remaining capacity of an overdraft was held to form part of the property of victims in *R v Kohn*.³² Cross, however, in his aforementioned article,³³ adds weight to the argument that there can be no deprivation by noting that the Canadian Supreme Court decided in *Stewart*³⁴ that copyright was not deprived simply by copying, as the owner's right to sue for infringement remained as great

27 (1979) 68 Cr App R 183 (QB).

28 [1985] QB 829 (CA).

29 John T Cross, 'Protecting Confidential Information Under the Criminal Law of Theft and Fraud' (1991) 11 OJLS 264, 267.

30 (1988) 41 CCC (3d) 481, (1988) 50 DLR (4th) 1.

31 Simester and Sullivan, *Criminal Law Theory and Doctrine* (4th edn, Hart, 2010) 489.

32 (1979) 69 Cr App R 395 (CA).

33 Cross (n 29) 267.

34 *Stewart* (n 30).

as it had been prior to the copying. Respectfully, however, it is submitted that whether the Theft Act 1968 includes theft of copyright turns not on the issue of intention to permanently deprive – which, as shown, might be argued to be present, as are dishonesty, appropriation, and the circumstance element of the copyright belonging to another – but rather whether copyright can constitute ‘property’ itself for the purposes of the Theft Act.

The leading authority on this point is *Rank Film Distributors Ltd v Video Information Centre*,³⁵ where the defendants had been making physical copies of certain video cassettes. Lord Fraser makes the obiter remark that the Theft Act 1968 ‘applies to theft of ‘property’ that is defined in a way that does not appear to include copyright’. This is consistent with part of Lord Denning MR’s judgment in the Court of Appeal that is not contested by the judgment of the Law Lords: the Act ‘covers nearly all kinds of property. But it does not cover the form of industrial property known as copyright.’ This is perhaps surprising – Simester and Sullivan, for example, argue that breach of copyright violates a chose in action³⁶ and section 4 (1) of the Act explicitly provides that property, for the purposes of the Act, includes ‘things in action’. Although there exists some debate³⁷ about whether intellectual property rights, as rights *in rem*, can be properly seen as choses in action, the Act further includes ‘other intangible property’, which is yet more readily applicable to the concept of copyright. It must also be noted that the decision in *Rank Film Distributors*³⁸ was made prior to the introduction of the Copyright, Designs and Patents Act 1988, which may be significant in that the Copyright Act 1956 introduced copyright only as an ‘exclusive right’, whereas the newer Act in section 1 (1) clearly defines copyright as ‘a property right’. All this throws some doubt on the correctness of the remarks in *Rank Film Distributors*³⁹ but does not rob them of their guiding authority. Any argument that the decision might be different today is highly speculative; it must at present be presumed that the Theft Act offences do not include theft of copyright.

An additional potential avenue of criminal liability for the lone pirate is the other major property offence: fraud. However, the prospects for establishing liability under the Fraud Act 2006 are much slimmer than those under the Theft Act. The Fraud Act requires either a false representation for the section 2 offence, a failure to disclose information that one is under a legal duty to provide for the section 3 offence or an abuse of position for the section 4 offence. All these offences require simply an intention ‘to make a gain for himself or another’ or to ‘cause loss to another or to expose another to a risk of loss’ rather than intention to permanently deprive. In this respect, these offences might be a better fit for the internet era given the difficulty shown above in making out intention to permanently deprive in relation to data. Intention for the pirate to make a gain (including keeping what he already has) or expose the copyright holder to loss in money or property, as section 5(2) of the Act stipulates, would be much more easily shown. Realistically though, none of these offences can be applied to internet piracy – a tenuous argument might perhaps be advanced that a false representation is made to the computer when accessing the downloaded material, by claiming the authority to so access. ‘False representations’ can be made to computers by virtue of section 2(5) of the Act, which includes submissions in any form to any system or device designed to deal with communications. However accessing a computer program or file usually requires only the

35 [1982] AC 380 (HL).

36 Simester and Sullivan (n 30) 489.

37 Edward Sykes and Sally Walker, *The Law of Securities* (5th edn, Law Book Co of Australasia, 1993) 759.

38 (n 35).

39 *ibid.*

most nominal of 'representations' in the form of an implicit and very indirect representation that the user has authority to access the data. Although the case for a charge under this offence is potentially stronger where data is protected by Digital Rights Management (DRM) or similar technologies that would require a representation to the software in order to secure access, such a case is the exception rather than the rule. Most pirated software will typically have had the DRM systems disabled or removed prior to being distributed. Exceptional situations where this has not occurred might be covered by the offence of fraud by false representation or might be better provided for by the offences created in section 1 of the Computer Misuse Act 1990, securing unauthorised access to computer material. Standard cases of music or film piracy where no DRM software is contravened, however, are unlikely to fall within the ambit of either criminal charge as the access to the material requires no authorisation.

Finally, having found slim recourse to criminal charges for property offences, it might be thought that the Copyright, Designs and Patents Act 1988 would provide concrete criminal charges under which to prosecute online piracy. However, this Act actually deals far more with civil remedies for copyright infringement than it does criminal sanctions. This is perhaps surprising given that the Act's drafting was informed by a Committee on Copyright and Designs Law chaired by Whitford J, which reported that the criminal sanctions under the Copyright Act 1956 were 'of little use and little used'.⁴⁰ In his analysis of this report, Gerald Dworkin similarly came to the assessment that 'the criminal remedies in the Copyright Act are quite inadequate to deal with pirate activity in the entertainment industries'.⁴¹ Lord Denning MR had also judicially criticised the criminal law provisions against piracy at the time, saying 'the criminal law is too slow and the penalties too small'.⁴² However, the Whitford committee's recommendations did not go far enough – they targeted the problem of piracy insufficiently by seeking to criminalise only distributors and by making the new criminal offences too specific to the contemporary problem of physical piracy of tangible things (such as copying of video tapes). As a result, the section 107(1)(c) and section 107(2) offences were created, implementing the committee's suggestion that 'possession in the course of trade' ought to be an offence. By virtue of section 107(1)(c), possession of any copyright-infringing 'article' (defined as including an 'item of any description' by section 178) is an offence if done in the course of a business, with the requisite *mens rea* 'a view to committing any act infringing the copyright' and knowledge or reason to believe that the article is copyright-infringing. Section 107(2) additionally makes it an offence to make or possess an article designed or adapted for copying copyright works while 'knowing or having reason to believe that it is to be used to make infringing copies for sale or hire or for use in the course of a business'. However, neither offence can apply to the pirate operating purely for personal gain by downloading material. First, such a person will of course be operating outside of any business; however it might also be doubted whether bare information, ruled to be outside the scope of 'property' for the purposes of theft, would be considered an 'article' and whether obtaining that data on a hard drive could be considered 'possession'. No other criminal offence in the Copyright, Designs and Patents Act approaches imposing liability for downloading material purely for private use.

40 *Whitford Committee Report on Copyright and Designs Law* (Cmnd 6732, 1977) para 708.

41 Gerald Dworkin, 'The Whitford Committee Report on Copyright and Designs Law' (1977) 40 MLR 6 685, 693.

42 [1982] AC 380 (HL), 406.

Overall, it is clear that, despite a number of offences seemingly aimed at creating liability surrounding this area of dishonesty, none of them succeed in imposing *criminal* sanctions on the internet pirate operating privately for personal gain. This may be considered proper by some; however this article will, in part 3, make the case for reform of the current law and, in so doing, discuss the potential advantages of criminalising the consumer of pirated material. First, though, the position of those who distribute pirated material should be made clear.

4. The position of facilitators: An independent crime? Derivative liability?

The criminal liability might be different for those who facilitate internet piracy through actually providing content to other pirates in one way or another (such people will here be referred to as ‘facilitators’ or ‘distributors’). This is additionally relevant in that certain behaviours typical of those infringing intellectual property rights for private use could be viewed as facilitating further infringement by others – in particular peer-to-peer file sharing, specifically through the ‘BitTorrent’ protocol, whereby the downloading of material involves the concurrent uploading of the parts that have been downloaded: in order for the user to obtain data, he must automatically make parts of the file available to other users, who in turn do the same.

First, in the straightforward case of piracy websites providing content to download normally, it must be noted that, unlike piracy consumers operating for private enjoyment, distributors face an at least considerable prospect of being caught by the criminal charges in section 107 of the Copyright, Designs and Patents Act 1988. As shown in part 1 of this article, there would be much difficulty in trying to include possession of digital information under the section 107(1) or (2) offences that criminalise ‘possession’ of infringing ‘articles’, as information is not considered ‘property’ elsewhere in the law and so may be outside the scope of ‘an item of any description’, even if virtual control of the data could be said to be ‘possession’. There might be an argument that the installation on a hard drive of infringing material might be considered making or possessing an article ‘adapted’ for making copies of infringing material contrary to section 107(2), discussed in part 1; however this is highly speculative. Section 107(2A) makes it an offence to communicate to the public any work if one knows or has reason to believe that in so doing one is infringing copyright in that work, and this is probably the more appropriate Copyright Act offence on which to focus for the liability of distributors. However, this section only applies if either the communication is done in the course of a business or is done otherwise than in the course of a business to such an extent that the owner of the copyright is prejudicially affected.

The first possible condition, that the communication is done in the course of a business, is relatively straightforward, and it can easily be imagined that some piracy websites, hosting copyrighted material for commercial gain through advertising revenue might be caught by this clause. However, even this is not guaranteed – the Act contains little guidance on the meaning of ‘in the course of a business’ and the courts have had some difficulty in interpreting the phrase. In connection with copyright infringement, the best authority on the point is *Bzik v Poland*⁴³ where Mitting J advised that the meaning of the phrase ‘is ultimately a matter of judgment’. In another area of the law – specifically unfair contract provisions – Elizabeth Macdonald has noted that an act will only be considered to occur ‘in the course of a busi-

43 [2012] EWHC 1308 (Admin).

ness' if it is '(i) integral to the seller's business, in itself, or (ii) if merely incidental to that business, regularly occurring'.⁴⁴ Although Macdonald argues for a broader interpretation of the phrase in the civil law, she notes that 'it is appropriate to narrowly construe a provision which sets the limits of criminal liability';⁴⁵ and so, in the present context, the courts may be unwilling to broadly interpret the concept. For this reason, it may be difficult to prove that internet piracy is done in the course of a business, as it cannot be said, if buying a car for use in the logistics of a freight company is not integral to the freight business,⁴⁶ that providing copyrighted material is integral to securing advertisement revenue on the internet. If this is so, the prosecution would need to prove that, despite being incidental to the business, the piracy was regularly occurring, which may be difficult.

Otherwise, the need to prove that a communication 'to such an extent as to affect prejudicially the owner of the copyright' occurred may be fatal to any prosecution. From the wording of the statute, it is presumably not enough for the copyright owner's copyright to be infringed in order to qualify as prejudicially affected, otherwise the requirement would be meaningless; further loss must be proven. However, any loss on the part of the copyright owner as a result of piracy would be speculative. As has been illustrated in part 2 of this article, although it may seem a *sine qua non* of piracy that the copyright owner suffers an economic loss, there exist countervailing arguments, for example the aforementioned European Commission Joint Research Centre report, which suggests that, at least in the realm of music, piracy does not adversely affect the eventual sales of the pirated product.⁴⁷ Evidence in this area is conflicted, with many other reports claiming sales, in particular of popular material, can be harmed by digital downloading.⁴⁸ This demonstrates that there is, at the very least, no consensus that the speculative losses entailed would be anything like sufficient to constitute concrete prejudicial effect as required by the statute.

Thus, the ambit of this section as regards internet piracy may be effectively restricted to commercial ventures, itself a difficult distinction to establish, and even these could only be liable in strictly defined circumstances. The person maintaining a website can only 'communicate' work if it falls within the section 20 definition – it must 'broadcast' or 'make available' the offending material. HHJ Ticehurst in *R v David Michael Rock and David Paul Overton*⁴⁹ has suggested that 'make available' will be strictly construed in accordance with its ordinary and natural meaning.⁵⁰ HHJ Ticehurst additionally ruled that regulation 17 of the Electronic Commerce (EC Directive) Regulations 2002 implemented certain parts of the EU Electronic Commerce Directive to the effect that a statutory defence of providing only a 'mere conduit' to information was established. Websites that do not initiate transmissions, select the recipient or alter the information contained therein – as, for example, many websites offering only hyperlinks to infringing information found elsewhere – will not be liable to any sanction (criminal or civil). Notably, the restrictive elements of paragraphs 42 to 44 of the Directive,

44 Elizabeth Macdonald, "In the Course of a Business" – A Fresh Examination' (Web Journal of Current Legal Issues, 1999).

45 *ibid.*

46 *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321 (CA).

47 Institute for Prospective Technological Studies (n 13).

48 Blackburn (n 12).

49 *R v David Michael Rock and David Paul Overton*, Case No T20097013, at Gloucester Crown Court, HHJ Ticehurst.

50 As it was in the Australian case *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

limiting the ‘mere conduit’ defence to those operating and maintaining a communication network, were not incorporated into the Regulations and thus, HHJ Ticehurst held, did not apply in England and Wales⁵¹ (as a directive, binding only ‘as to the result to be achieved’, the UK legislature was rightly seen in this case as having the freedom to choose the ‘form and methods’ by which to implement this result.)⁵²

Individuals running piracy websites therefore cannot be liable under the Copyright, Designs and Patents Act unless they both operate as part of a business and directly ‘make available’ infringing material (without acting as a ‘mere conduit’). A glance across typical piracy websites reveals that, even where advertisements suggest that the website could be described as a business, these sources (such as the ‘TV-Links’ family of sites) typically do not host material themselves, instead linking to unwitting file hosting services that have been used by individuals to host infringing material. The maintainers of such websites that unwittingly host the material would lack the *mens rea* of knowing or having reason to believe that they are infringing copyright (assuming they cannot be said to have ‘reason to believe’ they are infringing copyright, which presumably requires expeditious compliance with ‘notice and take down’ procedures when notified that they are hosting infringing material). Alternatively, facilitators increasingly themselves host only torrent files (the notorious ‘Pirate Bay’, which boasts of well over one billion visits per month, is an example of such a site). These allow the recipient’s computer to automatically source the infringing material from a number of different computers, all of which are themselves undertaking the same ‘torrenting’ process and could not themselves be said to be operating ‘in the course of a business’. Evidently, in either situation the websites that provide such resources, although probably the biggest contributors to piracy, do not fall foul of the Copyright Act offences.

Lacking any substantive offence with which to charge defendants, prosecutors have naturally looked to the area of complicity and inchoate offences. Vitally, however, the criminal liability of ‘facilitators’, if any, cannot be derivative (as demonstrated above, there would be no principal offence with which to charge downloaders as copyright infringement for private use has not been criminalised). The courts have exceptionally found that persons who run file-sharing websites can be guilty of conspiracy to defraud in respect of copyright owners, as for example Anton Vickerman, who ran the website ‘surfthechannel’ and was privately prosecuted by the Federation Against Copyright Theft in 2012.⁵³ The use of the highly versatile common law offence of conspiracy to defraud avoids the typical problems associated with prosecuting a crime of facilitation in that no substantive offence or complicity is required – both of which would, it has been argued above, be insurmountable difficulties in cases of intellectual property infringement. Because the requirement, as stated by Viscount Dilhorne in *Scott v Metropolitan Police Commissioner*,⁵⁴ is merely that the conspirators intend to ‘injure some proprietary right’ (Lord Diplock says ‘depriving (...) of some property or right, corporeal or incorporeal’), the offence is well suited to copyright infringement cases in the current legal climate for, unlike the offence of conspiracy contained in the Criminal Law Act 1977, no inherently criminal act needs to be planned. The fact that a property right – as section 1 of the Copyright, Designs and Patent Act 1988 unequivocally declares copyright to

51 *R v David Michael Rock* (n 49).

52 Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47, art 288.

53 *R v Anton Benjamin Vickerman*, Case No T2009 7188, at Newcastle upon Tyne Crown Court.

54 [1975] AC 819 (HL).

be – is intended to be injured suffices for the mental element of conspiracy to defraud. This rather indirect route to prosecution of facilitators might be criticised not only for its failure to recognise intellectual property infringement as inherently criminal, which this article will argue it ought to be, but also for the resultant label applied to facilitators. That these internet pirates are only recognised as conspirators and never principals, even after the substantive injury of property rights occurs, breaches the principle of fair labelling advocated by Professor Ashworth.⁵⁵

Moreover, in stark contrast to the finding of the court in Vickerman's 'surfthechannel' case, a number of related cases have been decided differently. A jury unanimously acquitted Alan Ellis of the same offence for running the file-sharing facilitation service 'Oink' in 2010, following evidence that, rather than conspiring to defraud, he believed himself to be helping promote some musicians without any objection from the music industry (with which he was in contact). HHJ Ticehurst held in the same year⁵⁶ that the Federation Against Copyright Theft had erred in seeking to privately prosecute David Rock, again for conspiracy to defraud, after he ran 'TV-Links', because a charge of communicating the work to the public contrary to the Copyright, Designs and Patents Act 1988, though weak, would have provided a statutory alternative as preferred by the Attorney General's guidelines on prosecution. The Crown Prosecution Service in 2011 decided against even offering evidence in relation to similar charges against George Cartledge and Stephen Lanning for 'FileSoup', a website that facilitated the finding of peer-to-peer torrents, their lawyers telling the court that it was 'neither necessary nor appropriate to continue to pursue the matter in a criminal court'.⁵⁷ A number of rationales can be drawn from these cases. First, only private prosecutors will be willing to run the charge of conspiracy to defraud, given the judicial reaction to the CPS bringing such charges in defiance of the Attorney General's guidelines, and even then will only be successful in very limited circumstances.

The cases also highlight, for example, that the conspiracy must be to provide directly the infringing material. Websites that direct their users to material hosted by another cannot be prosecuted even under the conspiracy to defraud charge, due to the statutory 'mere conduit' defence.⁵⁸ Effectively, therefore, a successful prosecution for conspiracy to defraud requires a similar 'making available' as the criminal offences found in the Copyright, Designs and Patents Act. It is additionally unclear to what extent the successful prosecution in *R v Anton Benjamin Vickerman*⁵⁹ relied on the fact that he had coordinated his efforts towards running and maintaining 'surfthechannel' with several others through direct communication. The definition in *Scott v MPC*⁶⁰ does stipulate that the offence can only be fulfilled by 'an agreement by two or more' so, in many cases where the facilitation is done without any agreement (explicitly to defraud) being made with others, this offence too may prove unsatisfactory for prosecuting those who facilitate piracy. Even where a prosecutor is willing to use this charge, therefore, such restrictive requirements indicate that conviction would be unlikely.

55 Andrew Ashworth, *Principles of Criminal Law* (6th edn, OUP, 2009) 78.

56 *R v David Michael Rock* (n 49).

57 Christopher Williams, 'Prosecutors Drop "Piracy" Case Against Film Sharing Website' (*The Telegraph*, 24 February 2011) <<http://www.telegraph.co.uk/technology/news/8345801/Prosecutors-drop-piracy-case-against-film-sharing-website.html>> accessed 13 May 2013.

58 *ibid.*

59 (n 53).

60 *ibid.*

Essentially, therefore, two criminal charges could be levelled at those facilitating internet piracy. If infringing material is directly made available *in the course of a business*, which itself could be difficult to show, then the Copyright Designs and Patents Act 1988 section 2A charge may be brought. Alternatively, if the infringing material is directly made available after agreement with another person or persons, then the infringing party might be charged with the protean common law offence of conspiracy to defraud. However, it has been demonstrated that the typical facilitation of internet piracy will not come within the ambit of either charge and will be as free from criminal liability as internet piracy for personal use.

5. A case for reform?

Should the position be different? Should intellectual property rights – in this context, those associated with data that might be pirated via the internet – be protected by the criminal law? This article will argue that there are valid normative arguments for doing so, and present differing methods by which this might be done. The criminal law, it will be argued, must develop.

First, it might be argued that the property offences ought to include within their ambit protection of intellectual property. This is in line with Jaqueline Lipton's argument that one way of coping with the problem of intangibility in relation to property offences is for 'reasonably general statutory offences (...) to be liberally interpreted by courts'.⁶¹ Of course, such liberal interpretation could pose a threat to the clarity required by the rule of law. However the re-interpretation argued for here is one that does not extend beyond reasonable limits, and may even create more uniformity and certainty in the law. As noted in the first part of this essay, the property offence of theft is reasonably generally worded – it even includes, in theory if not so much in practice,⁶² intangible property and things in action. If the property offences are primarily centred around the protection of property rights (as may be debated, in the light of the inchoate drafting of the fraud offences, or decisions such as *Hinks*,⁶³ which protect more against exploitation than deprivation of property rights per se) then there would need to be good reason not to reasonably liberally interpret their provisions – in effect, to exclude copyright from the protection of the property offences. It is the contention of this article that there exists no such reason, given the arguments in favour of upholding intellectual property rights that were advanced in part 1.

If this logic is followed, the criminal law of theft perhaps ought to be judicially interpreted to cover internet piracy. For the reasons discussed in the first part of this article, it would be incredibly difficult to frame a theft charge on the basis that the information itself, the pirated data, is stolen, due to the problems surrounding not only the definition of property (easily fixed via a timely and recommendable reversal of *Oxford v Moss*⁶⁴) but also the impossibility of saying that anyone is permanently deprived of the data itself when it is copied. However, the second scenario considered in the earlier part of this article, charging theft of copyright, is more feasible as intention to permanently deprive can be argued to be present. One might well adopt the position articulated by John Cross in relation to trade secrets, but which might

61 Jaqueline Lipton, *Property Offences into the 21st Century* (JILT, 1999) 1.

62 Note the decision not to treat copyright as property in *Rank Film Distributors Ltd v Video Information Centre* (n 35).

63 [2001] 2 AC 241 (HL), see also *Gomez* [1993] AC 442 (HL) and *Morris* [1984] AC 320.

64 (n 27).

equally be applied today to other types of intellectual property such as digital copies of music, films or video games.⁶⁵ By considering information as containing an additional component of value – in this case, the lawful distributors' exclusive right to copy and sell (thus receiving reimbursement for) their digital property – and labelling this value a 'property' right (as section 1(1) of the Copyright, Designs and Patents Act states copyright is), a pirate should properly be able to be convicted of theft. This would, as discussed above, require the overruling of comments that copyright is not property, approved by the House of Lords decision in *Rank Film Distributors*,⁶⁶ but this is a desirable modernisation for the criminal law. Additionally, this shift in the law would require the courts to hold that the copyright infringer intends to permanently deprive the owner, *contra Stewart*,⁶⁷ though again the case can be made that this is a desirable and wholly reasonable liberal interpretation of the concept of deprivation as the owner is deprived of a part of their property right where copying is allowed to take place without criminal sanction, as they are robbed of the reimbursement they could otherwise expect.

Alternatively, if one argues against this article's first proposition on the grounds that the property offences do not necessarily aim at protecting all property rights, and indeed they do at present shy away from dealing with those property rights vesting in intangible things, then another of Lipton's suggestions for dealing with the problem of intangibility arising in the consideration of modern property offences may pose a solution. She writes that 'the relevant legislature can always enact a specific new offence to deal with that particular class of case'.⁶⁸ As this article has shown, the UK legislature has thus far failed in this task. Although the introduction of the Copyright, Designs and Patents Act 1988 appeared to be aimed in part at criminalising piracy,⁶⁹ it did not forestall the techniques that would go on to be used by modern digital pirates. The second proposal to be made by this article, then, is that if the courts are not willing to recognise copyright theft as falling within the requirements of the Theft Act 1968, then Parliament should enact new criminal sanctions to deal with internet piracy. This may be the preferable solution, recognising that data piracy today may not respond to the logic behind property offences, and instead seeking to address this as a distinct, though comparable, wrong. Innovation in this area by the legislature is also to be preferred to judicial extension of the common law, in order to ensure the stability and certainty required by respect for the rule of law and, in particular, to avoid continuing the almost farcical situation engendered by the use of the overly protean offence of conspiracy to defraud in respect of pirates.

How, then, could a new offence be drafted in order to catch internet piracy? This article will first propose an offence that might target those who facilitate piracy. The problem with the current specific offence that comes closest to criminalising the facilitation of piracy, as discussed in part 2, is the requirement that infringing material be 'made available'. This, combined with the 'mere conduit' statutory defence, prevents the prosecution of the most popular piracy websites, which either link to content hosted elsewhere or encourage peer-to-peer sharing ('torrenting') through a hands-off approach. A new offence to catch those running such websites would need to refer to 'communication to the public' without specifying

65 Cross (n 28) 271.

66 (n 35).

67 *Stewart v The Queen* (n 30).

68 Lipton (n 61).

69 The Whitford Committee Report (n 40) was explicitly concerned with combatting piracy.

any ‘making available’, so would have to be free of the limiting definition of ‘communicate’ found in section 20 of the 1988 Act. It would also need to be exempt from the mere conduit defence, and so the legislation would need to make clear that, in respect of this offence, the Electronic Commerce (EC Directive) Regulations 2002 would not apply (this is within our competence as the UK government retains the power to choose the ‘form and methods’ through which EU Directives are implemented.)⁷⁰ The requirement that the activity be done ‘in the course of a business’ would also need to be removed so that facilitation would be a crime whatever the context. Introducing a *mens rea* element, so that pirates inadvertently ‘torrenting’ material and unwittingly communicating it to the public thereby are not caught by the facilitation offence, would be prudent. This would also prevent over-criminalisation as too broad an offence would risk being unworkable due to the sheer number of offenders. The communication to the public would have to be done, for example, with an ‘intention that further infringement of the copyright would take place as a result’. This new offence might read:

3. A person who infringes copyright in a work by communicating the work or part of the work to the public commits an offence if he intends that further infringement of the copyright will take place as a result.
4. For the purposes of this offence, section 20(2) of the Copyright, Designs and Patents Act 1988 will not apply and communication to the public will include directing the public to infringing copies of the work.
5. For the purposes of this offence, Electronic Commerce (EC Directive) Regulations 2002 regulation 17 will not apply.

Such an offence, if made as an amendment to the Copyrights, Designs and Patents Act, would go a long way toward reducing the availability of illicit downloads. However, it would also be worth complementing this with a lesser, perhaps summary, offence targeted at consumers, for intentionally receiving such a communication.

1. A person who receives a communication of a work which infringes copyright in that work commits an offence if he does so intentionally, knowing that the communication infringes copyright in the work.

This could be of benefit in deterring the individuals who consume pirated material and thus provide the lifeblood of the piracy community (and provide the target audience for advertisements that make piracy profitable for the distributors). Making the offence punishable only on summary conviction and dealing with piracy consumption offences in the same manner as traffic offences, through the use of fines, would ensure that the high volume of offenders would not congest the courts.

What are the alternatives? The US has taken a different approach and criminalises most infringing *reproductions* of copyright material, even for private financial gain, but this still requires the value of the works infringed to be in excess of \$1,000.⁷¹ Such an offence would be an effective alternative to the suggested criminalisation of facilitating piracy; however this

70 TFEU art 288 (n 52).

71 17 USC § 506(a) and 18 USC § 2319.

high monetary threshold could be a barrier to effectively prosecuting most private pirates. France, interestingly, marries its criminal sanctions for copyright infringement directly to the civil law in this area: any publication of works that violates any law or regulation forms the *délit* of *contrefaçon*⁷² (the delict, or wrong, of counterfeit). The concept of 'publication', however, might meet the same problems as 'making available' in that the normal meaning of publication involves the work being prepared and issued rather than simply communicated. Additionally, the French solution fares no better in imposing liability on those who merely download, and never publish, infringing material. The European Union offers no better alternative; it has generally followed the prevailing methodology of its member states and left copyright infringement as a matter for civil courts rather than criminal ones. Any argument that civil remedies would be sufficient to combat piracy is demonstrably flawed as this article has shown, and as is evidenced by the poor effectiveness and public backlash in the wake of speculative invoicing and threatened lawsuits on the behalf of media groups. Clearly, a legislative response of the kind outlined above is needed.

This would be a most controversial step, and may face criticism from those who oppose treating ideas as property; new popular movements such as the Pirate Party, a burgeoning political group advocating relaxation of copyright laws, for example, may voice opposition. This controversy will only be stoked by decisions such as the recent American ruling in the *ReDigi* case,⁷³ which suggest that online purchases are better described as buying a licence than as buying a product (in this particular ruling, it was held that music files could not be resold, even where the file was removed from one person's hard drive and placed on another). Such a decision – treating intangible property as if it were not property at all – is akin to the direction taken in *Oxford v Moss*,⁷⁴ and could arrest movement towards the desirable position where intellectual property rights are properly protected, unless breaching copyright is independently criminalised. For this reason, industry lobbies should accept that in order to combat piracy, they will have to stop fighting in opposite directions. Either such groups must allow intellectual property to become like tangible property in its treatment by the law, moving within the scope of theft or becoming protected by independent sanctions, with the added rights this would give consumers balanced by the sanctions afforded for dealing illicitly with such property, or they are likely to find that intellectual property will remain loosely protected by the law. As advanced earlier, the industry lobbies should look to cooperate with studies on piracy and further the cause of recognition of intellectual property rights for *everyone*, not just when it suits them. Changes to copyright law in the light of new media may also prompt a conversation on changing the length of copyright term, given the increased ease of making and distributing copyrighted works; this too is a price the industry may have to pay for changes to legislation. Self-interest on all fronts – from lobbies or from pirates – is to be opposed when seeking the best way to advance property rights into the twenty-first century.

6. Conclusion

This article has shown that the current provisions of the criminal law are not sufficient to impact upon the most common types of internet piracy. Individuals who pirate material for private use are untouched by any criminal law. Those who facilitate such piracy can only be criminally liable in very specific, narrow circumstances and prosecutions in this area are

72 Code de la propriété intellectuelle, Arts L335–2 – L335–4.

73 *Capitol Records, LLC v ReDigi Inc*, No 12–0095, 2012 US Dist.

74 (n 27).

both rare and unlikely to succeed. Civil remedies exist, but simply do not perform the deterrent function that the criminal law could, through punitive measures and the associated stigma. The current system, therefore, is an ineffective intellectual rights regime. This is brought about not by valid policy considerations, but by the difficulty of keeping up with the changing face of piracy – attempts have been made, unsuccessfully, to control copyright infringement. One suggestion made by this article is that piracy could be controlled if property offences were interpreted more liberally, so that ‘copyright theft’ could be treated as such. The importance of copyright in the modern age might prompt reconsideration of the issue of whether or not copyright can be property, protected by property offences such as theft. Alternatively, if one argues that information in the digital age does not respond to the logic of the property offences, for example by highlighting that information can be copied without the owner being deprived of it, then rather than stretching the current law, piracy could be recognised as a distinct wrong by the enactment of specific offences. In this case, current copyright legislation should be updated to extend criminal sanctions, certainly to catch all facilitators of piracy if not also the end users themselves, which would provide perhaps the best system for combatting piracy on all fronts.

The nature and basis of disgorgement damages for breach of contract

Imran Tehal¹

Introduction

This article considers the ‘devilishly difficult’² subject of gains-based damages for breach of contract. Its focus shall be the nature and basis of *Wrotham Park* and *Blake* damages.³ These damages are controversial since they are not based on the general principle in English law that damages compensate for loss or injury. The difference is that in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,⁴ the claimant was awarded only a proportion of the defendant’s profits, whereas in *Attorney-General v Blake*,⁵ the claimant was awarded an account of all the defendant’s profits.

The discussion in this article is divided into two parts: (i) the nature of these damages, in which compensatory, restitutionary, substitutionary and vindicatory theories will be analysed; and (ii) the basis for these damages, in which deterrence, punishment and corrective justice will be explored. It is beyond the scope of this article to lay down precise criteria as to when and where they should be available. Overall, it will be concluded that *Blake* and *Wrotham Park* damages are disgorgement damages separated by degree and not kind, and that the difference of degree is ultimately based on the level and nature of wrongdoing involved. Moreover, it is corrective justice, and not deterrence, that provides the normative foundation for this wrongdoing analysis. Contract law must ultimately recognise a secondary disgorgement interest if it is to properly recognise the harm to the victim in these cases and to respond appropriately.

The nature of *Wrotham Park* and *Blake* damages

[A] court cannot determine whether damages ought to be awarded unless it first knows what function those damages are performing.⁶

Courts have paid little attention to the true nature and function of disgorgement damages. This is because they fail, for the most part, to understand the nature of disgorgement itself. Courts often use the term ‘restitutionary damages’ as if it were synonymous with ‘disgorgement damages’. Restitutionary damages require the promisor to return (or ‘give back’) a ben-

1 St John’s College.

2 A Burrows, ‘No Restitutionary Damages for Breach of Contract’ [1993] LMCLQ 453, 453.

3 Katy Barnett’s excellent new monograph on the subject has been extremely useful: K Barnett, *Accounting for Profit for Breach of Contract* (Hart Publishing, 2012).

4 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

5 *Attorney-General v Blake* [2000] UKHL 45, [2001] 1 AC 268.

6 R Cunnington, ‘The Measure and Availability of Gain-Based Damages for Breach of Contract’ in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 218.

efit unjustly received. Disgorgement damages, by contrast, are not based upon the promisee ‘conferring’ and the promisor unjustly ‘receiving’ a benefit. Disgorgement damages are based on the promisee’s interest in having the promisor disgorge (or ‘give up’) a benefit made at the expense of the promisee.⁷ Allied to this misunderstanding is judicial conservatism. The courts’ natural tendency, in these situations, is to construct doctrinally acceptable compensation and restoration analyses. Failing to deal with disgorgement in its own right prevents sensible discussion of how this area of the law can be rationalised and developed.

Ultimately disgorgement damages must be recognised as a separate head of damages, and not contorted to fit compensatory, restitutionary, substitutionary or vindicatory theories.

The nature of Blake damages

Accounts of profits are regularly awarded outside of contract law, most commonly for breaches of fiduciary duties. In those contexts, they are ‘neither compensatory nor restitutionary’.⁸ They simply ‘strip the [defendant] of the unauthorised profits he has made’⁹ – in short, they force the defendant to disgorge his profits. Nevertheless, it has been proposed that accounts of profits in contract law are different, in that they must be compensatory or restitutionary. Ultimately, however, these theories fail to stand up to close analysis. Accordingly, there is no reason to depart from the view elsewhere in the law that these are disgorgement damages.¹⁰

George Blake was a member of the British Secret Intelligence Service. During his time of service he acted as a spy for the Soviet Union. He was convicted and sent to prison. Having managed to escape and flee, he published an autobiography. This was in breach of his employment contract, in which he had promised not to disclose any official information obtained during his time of employment. The House of Lords held, by a majority, that he had to disgorge all his profits to the Crown.

The award in *Blake* cannot have been compensatory, since there was no loss to the Crown.¹¹ Nor could it be restitutionary since it did not involve the returning of a benefit conferred by the Crown upon Blake; his profits were derived from the royalties paid to him by a third party publisher.

However, it has been proposed that the damages awarded in *Blake* were compensatory, but in a different sense. Judicially, the clearest pronouncement is Lord Chadwick’s in *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc*¹² (WWF). His Lordship explained

7 MA Eisenberg, ‘The Disgorgement Interest in Contract Law’ (2006) 105 Michigan Law Review 559, 560–1.

8 *Muraj v Al-Saraj* [2005] EWCA Civ 959 (CA), [108] (Parker LJ).

9 *ibid.*

10 Edelman’s rejection of the term ‘account of profits’ is supported: J Edelman, ‘The Measure of Restitution and the Future of Restitutionary Damages’ (2010) 18 Restitution Law Review 1, 7. He rejects the term for two reasons: first, because the claimant wants an order for disgorgement of profits not an accounting procedure, and secondly, to avoid the idea that the remedy is only available for equitable wrongdoing, such as breaches of confidence or fiduciary duty.

11 ‘[T]hese awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person’s loss unless loss is given a strained and artificial meaning’: *Blake* (n 5) [279] (Nicholls LJ).

12 *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2006] EWHC 184 (Ch).

that, since no financial loss could be readily identified, the damages should instead be seen as ‘a flexible response to the need to compensate the claimant for the wrong (...) done to him’.¹³ Unfortunately he failed to elaborate.¹⁴

Nonetheless there are compensatory theories that support Lord Chadwick’s reasoning: treating account of profits as either (i) a proxy for compensation, or (ii) as damages for a lost opportunity to bargain.¹⁵ According to the first theory, an account of profits is simply equity’s method of compensating where loss is difficult to measure. However this fails to account for *Blake* itself, where there was no loss to the Crown at all. Moreover, accounts of profit are subjectively measured, based on actual profits, whereas substitutive compensation is based on an objective value (the subtraction from the claimant’s dominium).¹⁶ The second theory is more sophisticated.¹⁷ As Lord Scott explains, ‘the Crown had been deprived by Blake’s breach of contract of the ability to forbid or to license on its own terms the publication of the book. This was a loss created by the breach of contract. It was a loss capable of being attributed a monetary value.’¹⁸ However it is difficult to see how the Crown lost anything, given that they would not, at any price, have allowed Blake to breach and publish.¹⁹

The nature of Wrotham Park damages

In *Wrotham Park*, the defendant, Parkside Homes, erected homes on its land in breach of a restrictive covenant. In the High Court, Brightman J refused to grant either an injunction restraining future building on the land, or requiring the demolition of any buildings erected in breach of the covenant, explaining that it would have been an ‘unpardonable waste of much needed homes’.²⁰ Instead he awarded the claimant 5% of the defendant’s profits, amounting to £2,500, as a ‘quid pro quo [or reasonable fee] for relaxing the covenant’.²¹

Since then, a host of different theories have been put forward attempting to explain the nature of these damages. Ultimately the best view is that they are simply partial disgorgement damages.

13 *ibid* [59].

14 His Lordship did quote a passage from Lord Nicholl’s judgment in *Blake* in support of his view. However, that passage in fact supports the opposite conclusion: Cunnington (n 6), 228; A Burrows and E Peel (eds), *Commercial Remedies* (6th edn, OUP, 2003) 129.

15 Cunnington (n 6) 229–31.

16 *ibid* 229.

17 A Phang and P-W Lee, ‘Rationalising Restitutionary Damages in Contract Law’ (2001) 17 *Journal of Contract Law* 240, 258–61; J O’Sullivan, ‘Reflections on the Role of Restitutionary Damages to Protect Contractual Expectations’ in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002), 344–5.

18 Lord Scott, ‘Damages’ [2007] LMCLQ 465, 468.

19 ‘The concept of a notional bargain (...) was, perhaps, too bizarre to contemplate’: *WWF* (n 12) [46] (Chadwick LJ).

20 *Wrotham Park* (n 4) 811.

21 *ibid* 815.

The compensatory view

Two types of compensatory theory have been put forward: (i) compensation for loss theories, based on compensating factual loss, and (ii) substitutive compensation theories, based on compensating lost rights.²²

The first compensation for loss theory claims that *Wrotham Park* damages compensate ‘a lost opportunity to bargain’.²³ According to the theory both parties would have been willing to engage in a bargaining process the outcome of which would have been the acceptance by the claimant of a reasonable sum from the defendant, in order that the defendant be released from a negative obligation, or for the obligation to be relaxed. By unilaterally breaching, the defendant deprives the claimant of that opportunity, and should *ex hypothesi* be required to pay a reasonable sum representing that ‘loss’.

Logically, on such a view, there must have been an opportunity for the release or relaxation of the obligation, and both parties must have been willing to engage in a negotiating process.²⁴ However neither of these was true in *Wrotham Park* itself.²⁵ First, there was no opportunity to release. The second defendants, who purchased the properties from Parkside Homes, completed their purchases after the houses had been completed, by which time the covenant was unenforceable. Hence, at no time would the claimants have been able to enforce the covenant against them. This leaves the theory seriously defective, since it fails to account for cases where the contract or covenant was not specifically enforceable. Secondly, as Brightman J recognised, the claimants ‘would clearly not have granted any relaxation’.²⁶

As such, McInnes has refined the lost opportunity to bargain theory. According to this second theory, the hypothetical bargain is simply a mechanism by which to determine a value for the claimant’s right.²⁷ ‘The focus is (...) on the reason why the claimant could have demanded a bargain in the first place.’²⁸ That reason, according to McInnes, is the need to protect the claimant’s right of dominium. Where a contract is intended to protect property rights,²⁹ and those rights are infringed, the claimant loses his right of dominium. That loss is ‘reparable’ by the payment of a reasonable fee.³⁰

22 Cunningham (n 6) 215; R Stevens, *Tort and Rights* (OUP, 2007), 59–62.

23 RJ Sharpe and SM Waddams, ‘Damages for Lost Opportunity to Bargain’ (1982) 2 OJLS 290; SM Waddams, ‘Gains Derived from Breach of Contract: Historical and Conceptual Perspectives’ in R Cunningham and D Saidov (n 6) 192; *Tito v Waddell No 2* [1977] Ch 106, [355] (Megarry V-C); *Jaggard v Sawyer* [1995] 1 WLR 269 (CA) [281–2] (Bingham LJ), *WWF* (n 12) [29] (Chadwick LJ). *Against Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361 (CA), [1369–70] (Lord Steyn); [2003] 1 All ER (Comm) 830 (CA), [45] (Mance LJ), [57] (Gibson LJ).

24 A Burrows, ‘Are Damages on the “Wrotham Park Basis” Compensatory, Restitutionary or Neither?’ in D Saidov and R Cunningham (n 6) 170.

25 Cunningham (n 6) 221.

26 *Wrotham Park* (n 4) 815.

27 M McInnes, ‘Gain, Loss and the User Principle’ (2006) 14 *Restitution Law Review* 76, 85.

28 *ibid.*

29 McInnes does not explain whether his account extends beyond property rights.

30 *ibid.* 81.

However this is very difficult to support. First, while the claimant's rights have been infringed they cannot be said to have been 'lost'.³¹ Where, for instance, the rights infringed were specifically enforceable and the claimant himself failed to enforce these remedies, it is not the act of wrongdoing that deprives the claimant of his right of dominium.³² Secondly, the notion of 'restoration' is questionable.³³ McInnes' approach is designed to restore the infringed right to the pre-wrong position. In *Wrotham Park* this could only have been achieved by protecting the right *in specie*. However, a mandatory injunction to demolish the houses was explicitly rejected. Alternatively, the court could have determined a value representing the infringement to the right of dominium, and awarded that. It did not. The focus was on what the claimant could reasonably have demanded from the defendant in a hypothetical negotiation. Overall the court decided that what was 'fair...in all the circumstances'³⁴ was for the claimant to be awarded 5 per cent of the defendant's profits. In *Gafford v Graham*,³⁵ another breach of restrictive covenant case, the Court of Appeal similarly emphasised the hypothetical negotiation. Nourse LJ explained that the valuations representing 'a far more realistic guide' as to what might reasonably have demanded were to be preferred. Those valuations represented 'the approximate mean'³⁶ between the profits generated and the enhanced value of the land, not the infringement to the right of dominium.

Burrows has speculated that McInnes had in mind, not a lost right of dominium, but a lost opportunity to exercise the control afforded by proprietary rights.³⁷ However, this does not fit with *Wrotham Park* either. In *Wrotham Park*, the claimants did not lose that opportunity since, in failing to seek an interlocutory injunction to prevent the building of the houses, they themselves decided not to implement it. When they sought a final mandatory injunction, after the houses had been built, the court refused. Hence, the doctrine fails to explain those cases where the claimant simply decided not to exercise his right, or where the court, and not the defendant, denied the opportunity.³⁸

A final theory is that *Wrotham Park* damages are a form of 'objective' compensation, designed to compensate a lost right to performance.³⁹ As Cunnington explains, 'the objective value of the right infringed will be exactly the same as the objective value of the benefit received by the defendant'.⁴⁰

However this does not reflect how courts actually determine quantum. As Clarke J explained, in *Lane v O'Brien Homes*,⁴¹ the calculation of the award 'is not a precise mathematical

31 *ibid* 44–5; Burrows, 'Damages on the "Wrotham Park Basis"' (n 24) 173.

32 *ibid* 44.

33 T Al-Tawil, 'Does Restitution for Wrongdoing Give Effect to Primary or Secondary Rights' *Can JL & Jurisprudence* 24 (2011) 243, 251–3.

34 *Wrotham Park* (n 4) 816.

35 *Gafford v Graham* [1998] EWCA Civ 666 (CA).

36 *ibid* 87.

37 Burrows, 'Damages on the "Wrotham Park Basis"' (n 24) 173.

38 *ibid*.

39 Cunnington, 'The Assessment of Gain-Based Damages for Breach of Contract' (2008) 71 *MLR* 559, 564–7.

40 *ibid* 566.

41 *Lane v O'Brien Homes* [2004] EWHC 303 (QB).

process'.⁴² In *Vercoe v Rutland Fund Management Limited*,⁴³ Sales J, having examined the previous authorities, outlined the factors involved. His Lordship explained that there were three factors behind a determination: (i) bargaining power,⁴⁴ (ii) any additional factors affecting the just balance to be struck, and (iii) proportionality to the interest in performance.⁴⁵ The second factor provides an insight to the way in which fairness and discretion permeates the whole doctrine. It includes considerations of the claimant's expectations as to the 'seller' of the right,⁴⁶ as well as considerations of the defendant's conduct.⁴⁷ Indeed explicit considerations of conduct have become increasingly prominent. For instance, in *Vercoe*, Sales J explained that the defendant's 'lack of candour amounting to shabby and underhand treatment (...) [was] a factor which properly underscores the legitimacy of making a comparatively generous assessment'.⁴⁸ Moreover in *Luxe Holdings Ltd v Midland Resources Holding Ltd*,⁴⁹ conduct was the principal factor behind the determination of quantum with Roth J bemoaning the '[defendant's] unacceptably low standard of commercial morality'.⁵⁰ As Roth J explained the defendant had made 'blatantly untrue'⁵¹ statements clearly intending to give the claimant false reassurances, so that he would not initiate legal proceedings.

The substitutive view

An alternative view has been put forward by Stevens.⁵² His view is that disgorgement damages are a substitute for the value of an infringed right.⁵³

This is a difficult view. As Burrows explains, it is 'flawed in imagining that we sensibly can, or would want to, put a value on the right that has been infringed without considering the consequential impact of that infringement'.⁵⁴ Why should a gain of £500 be treated the same as a gain of £500,000? After all, it would undermine the conventional understanding of damages, and specifically the law on mitigation, to allow a claimant to recover substantial damages from the defendant when a claimant has not mitigated the effects of breach.⁵⁵

42 *ibid* 30.

43 *Vercoe v Rutland Fund Management Limited* [2010] EWHC 424 (Ch).

44 While Sales J does not himself use this term, it is submitted that this is the best way of understanding what he meant. Sales J rather obtusely used the expression 'the likely parameters given by ordinary commercial considerations bearing on each of the parties' at [292]. However if we consider the passage from *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45 to which Sales J refers, Lord Walker speaks more clearly of the attitude and willingness of the parties to buy and sell based on their relative bargaining positions: [53] (Lord Walker).

45 *Vercoe* (n 43) [292].

46 Based on information available at the date of the breach. Evidenced in both *Pell Frischmann* (n 44) at [291], and *Vercoe* (n 43) at [304].

47 *Vercoe* (n 43) [292].

48 *ibid* [311].

49 [2010] EWHC 1908 (Ch).

50 *ibid* 65.

51 *ibid*.

52 R Stevens (n 22).

53 *ibid* 60; J Edelman, 'The Meaning of Loss and Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, 2009) 211, 219.

54 Burrows, 'Damages on the "Wrotham Park Basis"' (n 24) 185.

55 *ibid*.

The vindicatory view

A variation on Stevens' approach has been put forward by Pearce and Halson.⁵⁶ In their view, *Wrotham Park* damages are 'vindicatory damages'.⁵⁷ This rights-based remedy is intended to vindicate or provide a 'measure of recognition'⁵⁸ for the violation of the primary right.⁵⁹

However such a view is even harder to accept than Stevens'. For a start, it is subject to the same difficulties attending Stevens, in terms of neglecting the consequential impact of rights. But the real difficulty is that it goes even further. The award not only ignores consequential impact, but fails to respond directly to the seriousness of the rights infringement.

The restitutionary view

By contrast, Edelman has proposed a 'restitution for wrongdoing' account.⁶⁰ The purpose of the award, according to Edelman, is to 'reverse wrongful transfers of value'⁶¹ between claimant and defendant. It is the wrongful appropriation of the claimant's rights that must be reversed, with the reasonable fee award representing the 'use value' of the proprietary or quasi-property right appropriated. This award, according to Edelman, should not depend upon whether the breach was intentional or profitable.⁶²

However, while novel, Edelman's account is very difficult to accept. For a start, it is inconsistent with the existing law on restitution.⁶³ Specifically, it 'elides an important analytical distinction between subtractive transfers or "takings" and non-appropriative interferences with rights'.⁶⁴ As Cunningham explains, while the owner of the servient tenement in *Wrotham Park* made more extensive use of its own property than was permitted, it is hard to understand how anything was transferred from the owner of the dominant tenement.⁶⁵ Barnett critiques Edelman's theory by applying it to *Experience Hendrix*.⁶⁶ There, the claimant, Experience Hendrix, was the successor in title to the estate of Jimi Hendrix. It had entered into a settlement agreement with the defendant, PPX, allowing PPX to use specified master tapes for recording purposes. In breach, PPX used master tapes not listed on the settlement agreement. The Court of Appeal unanimously held that Experience Hendrix was entitled to a reasonable proportion of the profits arising from breach. However there was (i) no real transfer between claimant and defendant, and (ii) no intention, on the part of Experience Hendrix, to exploit

56 D Pearce and R Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 OJLS 73.

57 *ibid* 87.

58 *ibid* 74; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [8] (Bingham LJ).

59 *ibid* 74.

60 J Edelman, 'Restitutionary Damages and Disgorgement Damages for Breach of Contract' (2000) *Restitution Law Review* 129; J Edelman, *Gain-Based Damages – Contract, Tort, Equity and Intellectual Property* (Hart Publishing, 2002) 65–78.

61 Edelman, *Gain-Based Damages* (n 60) 1.

62 *ibid* 173.

63 A Burrows, *The Law of Restitution* (2nd edn, OUP, 2002) 462; C Rotherham, 'The Conceptual Structure of Restitution for Wrongs' (2007) 66 CLJ 172, 176: 'this new analysis represents nothing less than an attempt to redraw fundamentally the taxonomy of the law of restitution'.

64 Rotherham (n 63) 173.

65 *ibid* 177.

66 *Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830 (CA).

any opportunity inherent in the property. As for the first, PPX only received value from third parties to whom it sold its recordings and, as for the second, Experience Hendrix's aim was simply to protect the quality of released recordings. As Barnett puts it, the notions of 'transfer' and 'value', under Edelman's analysis, are ultimately too 'diffuse and imprecise'.⁶⁷

The partial disgorgement view

Since all these theories are not convincing, the only sensible view is that *Wrotham Park* damages are partial disgorgement damages. According to the partial disgorgement view, there is a spectrum of disgorgement damages, with full disgorgement at one end stripping the defendant of all his profits,⁶⁸ and partial disgorgement along the way stripping only a proportion of those profits.⁶⁹ That is to say the defendant is made to 'give up' a proportion of his profits. The exact amount is based on what the court, in all the circumstances, believes to be reasonable.

This explains the courts' recourse to a wide set of considerations in determining quantum. The 'hypothetical bargain' is merely a convenient fiction courts use to calculate a reasonable fee. The court must determine what is 'a fair price'⁷⁰ for the release or relaxation of the relevant negative covenant. That is not based solely on what would have happened had a hypothetical negotiation taken place. It includes 'any additional factors particularly affecting the just balance to be struck between the parties'. This includes conduct, as well as, for instance, concealment of breach. In *Amec Developments Limited v Jury's Hotel Management (UK) Limited*,⁷¹ concealment was not found. However, the court explained that the hypothetical negotiations could be shifted forward in time as well as the quantum of damages increased 'on the grounds that fairness requires it'.⁷² Hence the courts are, in reality, 'imposing a licence fee ex post facto (...) in light of the actual profits made by the defendant'.⁷³

Nevertheless objections can be made of such an approach.⁷⁴ First, there is the objection that *Wrotham Park* damages are based on anticipated, and not actual, profits. As Cunnington argues, actual profit is only 'an evidential presumption of the profit that was anticipated at the time of breach'.⁷⁵ In which case, it is rebuttable if not relevant to the hypothetical negotiation between the parties.⁷⁶ Secondly, there is the objection that the defendant does not need to

67 *ibid.*

68 Subject, in certain circumstances, to an allowance for skill and effort: Barnett (n 3) 196–200. Note that I disagree with Barnett's views on advertence, since I believe the basis for disgorgement damages is wrongdoing, not deterrence.

69 Barnett (n 3) 157.

70 *Vercoe* (n 42) [292]

71 *Amec Developments Limited v Jury's Hotel Management (UK) Limited* [2000] EWHC Ch 454.

72 *ibid* [32].

73 Barnett (n 3) 158.

74 *ibid* 157–60.

75 Cunnington (n 39) 574.

76 *ibid* 573; *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [35] (Neuberger LJ); *Pell Frischmann* (n 44), [48]–[50] (Walker LJ).

have made any actual profit for an award to be made. This would appear to be supported by a passage in *Experience Hendrix*.⁷⁷

Ultimately, neither of these objections is convincing.⁷⁸ The most powerful response is a principled one. If courts award ‘attributed gain’⁷⁹ there is a risk that they award what are effectively punitive damages.⁸⁰ The clearest example is the award in *Pell Frischmann*.⁸¹ There, the Privy Council awarded US\$2.5 million (awarded as a proportion of the anticipated profit) when the actual profit made by the defendants was, at most, in the region of US\$1 million and US\$1.8 million. There are specific replies to both objections as well. The first objection does not fit with the fact that the hypothetical licence agreement is merely a convenient fiction courts use to calculate a reasonable fee. The second objection ignores the possibility that the promisor made a ‘negative gain’ or ‘effective profit’ in not performing and saving expenses.⁸²

The basis of disgorgement damages

The basis behind disgorgement damages is corrective justice, not deterrence.

The difficulties with the deterrence rationale

The primary justification for awarding disgorgement damages is deterrence.⁸³ Deterrence has both a specific and a general aspect:⁸⁴ specific in the sense of deterring the breaching party from repeating his wrongful conduct; general in the sense of eliminating the profit motive for any and all parties.

As Barnett explains, deterrence is forward-looking in nature.⁸⁵ It looks beyond the moral claims of the parties, and emphasises the future conduct of contracting parties.⁸⁶ The aim is to protect the institution of contract from a systemic risk of inadequate protection.

The deterrence rationale should, however, be rejected on three grounds: first its failure to provide a sufficiently powerful normative link between the claimant and the defendant’s gains; secondly the practical limits of a deterrent approach; and finally the deterrent effect

77 *Experience Hendrix* (n 66) [26]: ‘In such a context it is natural to pay regard to any profit made by the wrongdoer (although a wrongdoer surely cannot always rely on avoiding having to make reasonable recompense by showing that despite his wrong he failed, perhaps simply due to his own incompetence, to make any profit). See also *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 (PC).

78 Barnett (n 3) 157–60.

79 D Friedmann, ‘Restitution for Wrongs: The Measure of Recovery’ (2001) 79 *Texas Law Review* 1879, 1883–4.

80 Barnett (n 3) 159.

81 *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45.

82 Barnett (n 3) 156, 158.

83 This point is well made in: J Edelman, *Gain-Based Damages* (n 60), 83–6; C Rotherham, ‘Deterrence as a Justification for Awarding Accounts of Profits’ (2012) 32 *OJLS* 537, 538; Barnett (n 3) 26. While Rotherham avowedly focuses on accounts of profits; the shortcomings of the deterrence rationale that he identifies are applicable to the whole spectrum of disgorgement damages.

84 Barnett (n 3) 26.

85 *ibid.*

86 C Rotherham, ‘“Wrotham Park Damages” and Accounts of Profits: Compensation or Restitution?’ [2008] *LMCLQ* 25, 54.

of legal remedies that do not have an explicit deterrent aim, and the deterrent effect of non-legal sanctions.

Turning to the first, Lord Scott, writing extra-judicially, has warned that damages awarded on the basis of deterrence ‘should be pursued with great caution’.⁸⁷ He reasons that there is a disconnect between the claimant’s personal rights and the benefit to the public at large. As Weinrib puts it, a deterrent rationale ‘fails to link the damages that the plaintiff receives to the normative quality of the defendant’s wrong’.⁸⁸ The claimant is awarded a ‘windfall’ to serve a public policy role. A public policy rationale that is outside the norms governing the parties’ interaction. In reply, it is submitted that the rationale for disgorgement damages should properly recognise and vindicate the wrong to the claimant, and not place disgorgement damages at the bottom of the notional hierarchy of remedies, employed periodically to fill gaps on public policy grounds.

Secondly, deterrence provides less support for disgorgement damages than is often assumed.⁸⁹ For a start, there are shortfalls in knowledge. At a basic level, breaching parties often assume that the innocent party will be unaware of the breach or, if they are aware, will be reluctant to initiate legal proceedings.⁹⁰ While well-informed ‘repeat players’ in a commercial context can be expected to have some idea of the sanctions for breach, and act accordingly, there is likely to be far less knowledge on the part of ordinary homeowners breaching restrictive covenants.⁹¹ Moreover, it is questionable whether the rules will have a significant influence on how contracting parties behave. A key justification for disgorgement damages is that they provide incentives to promisors to negotiate with the promisee, and to buy their way out of negative obligations. But this is likely to only be true where parties are well-informed, their rights clearly delineated and the costs of bargaining relatively low.⁹² Indeed, where multiple rights holders are involved, as is often true with restrictive covenants benefiting different properties, strategic behaviour and a desire to hold out for extortionate payments are likely to preclude agreement.⁹³

Moreover, it should be recognised that under a deterrence rationale, the awards will have to be responsive to the level of deterrence perceived necessary to deter a particular type of conduct. Deterrence ‘is not an exact science’.⁹⁴ As such, it must be questioned what the ‘end point’ would be. After all, if awards are handed out regularly, and there is little impact on the behaviour of contracting parties, would the quantum of awards have to be increased, or the thresholds for availability of the awards lowered? If that were to happen, would it not move away from a notion of what is ‘fair’ as between the parties, and towards a notion of what is ‘fair’ between all parties, a veiled objective approach when disgorgement, as has been shown, is categorically subjective. While Barnett submits that the choice between full and partial disgorgement should be based on the reason why specific relief is unavailable,⁹⁵ Rotherham

87 Lord Scott, ‘Damages’ [2007] LMCLQ 465, 471.

88 E Weinrib, ‘Restitutory Damages as Corrective Justice’ (2001) 1 *Theoretical Inquiries in Law* 1, 1.

89 Rotherham (n 83) 538.

90 M Siems, ‘Disgorgement for Breach of Contract: A Comparative Analysis’ (2003) 7 *Edinburgh Law Review* 27, 54.

91 Rotherham (n 83) 559–60.

92 *ibid* 557–8.

93 *ibid* 558.

94 *ibid* 541.

95 Barnett (n 3) 161–5.

has demonstrated that deterrence is a much more complicated public policy aim that has to be cognisant, for instance, of the deterrent effect of sanctions outside of private law.⁹⁶ In this respect, it really should be questioned whether the judiciary, and not the legislature, is best suited to determine awards so entrenched in public policy. Moving away from a deterrence rationale and focusing instead on the private law relationship between the parties allows us to avoid these difficulties.

Finally, the deterrent effect of remedies not premised upon, or explicitly stated as premised upon, deterrence should not be underestimated. As Rotherham explains, a publicised finding of fault carries weight.⁹⁷ Most people avert risk, and are cognisant of the damage that can be done to their reputation, personal or commercial, and, where relevant, employment prospects.⁹⁸ Moreover, as Thel and Siegelman have explained, disgorgement damages act as a ‘bonding device’⁹⁹ between the parties, the promisor providing valuable assurance for which he is remunerated. Promisors stand to gain higher prices *ex ante* if promisees have confidence in their expectations being fulfilled.¹⁰⁰ Whether a party had all or only a proportion of his profits disgorged for wrongful breach makes little difference. It is the fact that the law recognised their wrongful action, and that they had to disgorge, that will undermine confidence in parties with whom they contract.

Corrective justice as a conceptual foundation

Since deterrence is not an adequate justification, it will be argued that corrective justice is the basis of these awards. Neither traditional corrective justice, nor recent theories, are convincing however. Nevertheless a corrective justice approach can work.

Explaining corrective justice

The key to corrective justice is the link between claimant and defendant, singling out and connecting them to a wrong.¹⁰¹ This ‘correlativity’ between the parties restricts the private law’s response to a single nexus of activity, that of restoring equality between the parties.

Loss and gain are understood in normative, as opposed to material, terms.¹⁰² A ‘normative’ conception focuses on the difference between what each party has, and ought to have, according to the norms regulating their interaction.¹⁰³ The baseline for normative gain and loss is the notion of ‘equality’.¹⁰⁴ Equality is the ‘formal representation of the norm that ought to obtain between doer and sufferer’.¹⁰⁵ Equality is maintained if both moral positions are

96 Rotherham (n 83), 551.

97 *ibid.*

98 *ibid.*

99 S Thel and P Siegelman, ‘You Do Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies’ (2011) 52 *William and Mary Law Review* 1181, 1228.

100 *ibid* 1227–8.

101 E Weinrib, *The Idea of Private Law* (Harvard University Press, 1995) 43.

102 E Weinrib, ‘The Gains and Losses of Corrective Justice’ (1994) 44 *Duke Law Journal* 277, 282–3; E Weinrib, *The Idea of Private Law* (n 101) 76–83.

103 Weinrib, ‘The Gains and Losses of Corrective Justice’ (n 102) 283.

104 Weinrib, *The Idea of Private Law* (n 101) 76–83.

105 Weinrib, ‘The Gains and Losses of Corrective Justice’ (n 102) 285.

maintained. If they are not, corrective justice operates to restore it. As Weinrib explains, the terms ‘gain’ and ‘loss’ simply signify the injustice committed between the parties.¹⁰⁶

Weinrib's rejection

Nonetheless Weinrib denies the application of corrective justice to disgorgement for breach of contract. The difficulty, in his view, is that while the commission of a wrong by the promisor provides ‘an intuitively plausible reason for requiring the promisor to surrender the gain’¹⁰⁷ it does not provide the reason for awarding that gain to the promisee. Entitlement to the profits the defendant has made would be to transform a contractual entitlement to performance into a proprietary entitlement to the profits made as a result of its breach.¹⁰⁸ He reasons that disgorgement is awarded to the promisee simply because he is ‘conveniently situated for assisting in the accomplishment of certain social goals’.¹⁰⁹ This is incompatible with the correlative structure of corrective justice, since these goals are external to the relationship between the parties.¹¹⁰

Recent theories

In recent years, more sophisticated theories have been put forward to overcome these difficulties. The theories can be divided into two branches: those based on compensation for loss, and those based on exclusive ownership rights. All have in common the aim of returning, or restoring, the promisee to the position that he would have been in had the contract been performed. However all are flawed.

Francesco Giglio puts forward a compensation for loss theory.¹¹¹ In his view, ‘reasonable fee’ awards that involve wrongful breaches of property rights compensate for a loss. He explains that

‘when a proprietary or quasi-proprietary interest has been affected (...) the victim is claiming on the basis of his own loss, not of the wrongdoer’s gain. The victim says to the agent: “you have used my thing and have appropriated a benefit which should be mine. I want it back.” (...)’.¹¹²

Since the defendant’s gain lies within the claimant’s right, a reasonable fee award restores the claimant’s property right to ‘pristine condition’.¹¹³

There are a host of difficulties with this theory.¹¹⁴ First, the owner often would not have taken advantage of the opportunity to gain in the way that the defendant did. Hence to say,

106 *ibid* 295.

107 Weinrib, ‘Punishment and Disgorgement as Contract Remedies’ (2003) 78 *Chicago-Kent Law Review* 55, 74.

108 *ibid* 77–81.

109 Weinrib, *The Idea of Private Law* (n 101) 77.

110 Weinrib, ‘Punishment and Disgorgement as Contract Remedies’ (n 107) 77.

111 F Giglio, *The Foundations of Restitution for Wrongs* (Hart Publishing, 2007).

112 *ibid* 8.

113 *ibid* 64.

114 Rotherham (n 86) 47–52.

as Giglio does, that ‘the potential for gain was part of my right and you deprived me of it’¹¹⁵ makes little sense in the vast majority of ordinary situations.¹¹⁶ Secondly, it is difficult to understand how the right is, or indeed can be, restored to ‘pristine condition’. As Rotherham explains, a reasonable fee award ‘simply enforces a right to such a fee’.¹¹⁷ The property rights themselves are not restored, only a right to damages, actionable on infringement of a property right, is enforced. This is equally true of the more narrow right to exclusive control of the property.¹¹⁸ In *Wrotham Park*, for instance, only the grant of a mandatory injunction would have ‘restored’ the property right, and this was not granted. Finally, Giglio is in a minority in insisting that the normative gain and loss is equal between the parties.¹¹⁹

Professor Benson and Botterell, by contrast, have put forward ownership theories. While different, they can both be rejected on similar grounds.

Professor Benson’s theory is based upon the transfer theory of contractual performance. According to this theory, rights of ownership are acquired derivatively by way of transfer at the time of contract formation.¹²⁰ The promisee acquires ‘an exclusive ownership right’¹²¹ granting exclusive authority to possess, use or alienate the benefit promised as against the promisor. In certain circumstances, that right can be misappropriated.¹²² Where the subject matter of the contract is unique, disgorgement damages should be available.¹²³ The aim of the award, as a ‘quantitative determination of injury’,¹²⁴ is to restore the claimant to the situation he would have been in had the contract been performed.

Andrew Botterell also adopts a transfer theory of contractual performance.¹²⁵ He distinguishes between generic and particular performance.¹²⁶ If the thing contracted for is not unique, the promisee can only expect generic performance, that is to say entitlement to the performance of a certain kind of action. Whereas if the thing contracted for is unique, the promisee can expect particular performance, that is to say entitlement to the object itself. In these situations, the promisee has ‘an antecedent claim [or right]’¹²⁷ to a specific action, which carries with it an implied promise that the promisor will not perform any action that makes it impossible.¹²⁸ As Botterell explains

115 Giglio (n 111) 54.

116 Rotherham (n 86) 48.

117 *ibid* 49.

118 *ibid*.

119 *ibid*.

120 P Benson, ‘Disgorgement for Breach of Contract and Corrective Justice: An Analysis in Outline’ in J Neyers, M McInnes and S Pitel, *Understanding Unjust Enrichment* (Hart Publishing, 2004) 311, 321.

121 *ibid* 321.

122 *ibid* 328. Botterell has claimed that this right is a ‘genuine incident of ownership’: A Botterell, ‘Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract’ (2010) *Legal Theory* 135, 144.

123 Benson (n 120) 327–30.

124 *ibid* 318.

125 A Botterell (n 122) 135.

126 *ibid* 145.

127 *ibid* 146.

128 *ibid* 150–4.

Weinrib seems to assume that if there is no proprietary right to a thing, there can be no right of ownership “nearby”¹²⁹ (...) if Alice has a right that Bert contractually perform some particular action A, then (...) Alice has an ownership right in A as well as an ownership right in any action of Bert’s that is incompatible with A.¹³⁰

As such, the promisee has ‘a right of ownership’ in the gains obtained by the promisor from any incompatible action.¹³¹

There are two difficulties with these theories. First, the transfer theory itself is questionable. As Smith puts it, ‘the rights that transfer theories suppose are transferred by contracts do not exist prior to the makings of the contracts’.¹³² Botterell replies that the ‘right’ to limit one’s freedom properly belongs to the individual making the promise.¹³³ However this reply does not properly address Smith’s objection. As Smith explained, it is not a right to act freely that is transferred, but a right to performance.¹³⁴ To take *Experience Hendrix* as an example, while the defendants, PPX, promised not to use certain master tapes, the freedom to limit themselves in this way did not properly ‘belong’ to them before the contract. The right to the use of the master tapes, and the freedom to exercise or limit that right, belonged to the promisee, Experience Hendrix. Hence the best view is that a right to performance was ‘created’, not transferred. The consequence of accepting Botterell’s view is to effectively transform a contractual right to performance into an equitable proprietary right,¹³⁵ entitling the claimant to the defendant’s gains. The second difficulty is the view that the claimant is placed in the position he would have been in had the contract been performed. As Barnett explains, this is simply not representative of the vast majority of ordinary contracts.¹³⁶ It is only really true of fiduciary contracts, where the fiduciary’s very duty is to make profits for the beneficiary.

Making corrective justice work

While a considerable amount of the groundwork has been laid down, two improvements must be made to the theory. First is the need to recognise different types of contractual interest and harm, and how corrective justice understands and reflects those differences. And secondly, there must be an acceptance that punishment is compatible with corrective justice. It is necessary to explain the gist of the improvements first, before refining them to apply to disgorgement for breach of contract. Overall, with these improvements we move away from notions of entitlement and ‘restoration’, towards a theory based on proportionality to wrongful action, which is both much more consistent with the nature of contractual breach in these situations and with the prevailing case law.

129 Barnett (n 3) 21.

130 Botterell (n 122) 150.

131 *ibid.*

132 S Smith, *Contract Theory* (OUP, 2004) 101.

133 Botterell (n 122) 148.

134 Smith (n 132) 120.

135 To employ Ben McFarlane’s terminology, a ‘right to a right’: B McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) 21–39; B McFarlane and R Stevens, ‘The Nature of Equitable Property’ (2010) 4 J Eq 1; Barnett (n 3) 21.

136 Barnett (n 3) 21.

Different interests and harms

The first key improvement is recognising different types of contractual interest and harm.

In English contract law, there is a primary performance interest and a secondary compensation interest, given effect to and protected by different remedies and for different purposes.¹³⁷

The primary performance interest is based on the defendant's duty to perform.¹³⁸ The secondary compensation interest is both distinct from, and conditional upon, the primary performance interest. Compensatory damages respond to the loss arising from breach, and not to the breach itself. Failure to appreciate the distinction leads to the position where a claim for compensation would be in the nature of a claim to enforce a primary interest, which cannot be true.¹³⁹

This distinction is reflected by remedies for breach of contract. As Zakrzewski has explained, private law remedies are either replicative or transformative.¹⁴⁰ Replicative remedies replicate substantive rights whereas transformative remedies transform the original rights and duties. Replicative remedies, in contract law, distinguish between primary and secondary rights. Primary rights are protected by specific remedies such as specific performance and injunctions, whereas secondary rights are protected by substitutionary remedies such as damages.

Furthermore, contracts have both a tangible and an intangible aspect. The tangible aspect is the shifting of resources between the contracting parties, whereas the intangible aspect is the creation of valuable bonds of trust.¹⁴¹ As Al-Tawil explains, wrongful breach of the primary obligation to perform is an injustice upon the promisee, since it undermines his very position as a promisee.¹⁴² It undermines his authority to determine, by his own choice, how the promisor should act. It is not based on material or financial measurement.¹⁴³ To adopt Zakrzewski's terminology, specific remedies protect against the intangible harm caused by a failure to fulfil the primary duty to perform, whereas substitutionary remedies recognise the tangible harm that flows as a result.

However, traditional substitutionary remedies, specifically compensatory damages, do not adequately reflect the injustice and harm to the promisee in cases such as *Wrotham Park* and *Blake*. Neither the primary performance interest nor the secondary compensatory interest can be protected. Accordingly, Al-Tawil, adopting a corrective justice approach, proposes that the interest protected is in fact a secondary restitutionary interest.¹⁴⁴ The secondary na-

137 C Webb, 'Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation' (2006) OJLS 41, 45–49; *Photo-Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL), [848–51] (Diplock LJ).

138 Webb (n 137) 46.

139 *ibid* 49.

140 R Zakrzewski, *Remedies Reclassified* (OUP, 2005); R Zakrzewski, 'The Classification of Judicial Remedies' [2003] LMCLQ 477.

141 S Smith, 'Performance, Punishment and the Nature of Contractual Obligations' (1997) 60 MLR 360, 367.

142 Al-Tawil (n 33) 265.

143 *ibid* 262.

144 *ibid* 256.

ture of the interest is a key difference to existing corrective justice theories. The aim of these theories is well expressed by Giglio: '[i]f the defendant's gain is of something that lies within the right of the plaintiff, then the claimant's action must be directed towards the reintegration of the status quo ante the wrongful event'.¹⁴⁵ This is a role disgorgement damages cannot play. The injustice itself can only be undone by specific performance; damages can only undo the material embodiment of that injustice.¹⁴⁶ Disgorgement damages do not directly give effect to the performance interest.

Al-Tawil's theory is as follows.¹⁴⁷ Restitution for wrongdoing is 'triggered' by the wrongful action. It is not directed at a primary right, but at the defendant's gains. Those gains, which are a direct consequence of the wrong, represent the material embodiment of the intangible harm to the promisee. Under a restitutionary theory, that 'material embodiment' must be undone – whether in full or only a proportion depends upon whether the breach involves a breach of confidence or fiduciary duty or not.¹⁴⁸

While an important improvement, it is submitted that the interest is in fact a secondary disgorgement interest. This is in part due to the analysis in the first part of this article, and in part due to the fact that courts do, and should, look to the normative significance of all of the circumstances, not just breach itself. In fact, this is why this account of corrective justice is different. It does not hold that the gain is the material embodiment of the intangible harm to the promisee. The promisee's normative loss is not equivalent to the promisor's material gain. Disgorgement for wrongdoing is 'triggered' by the wrongful action, and the promisee's normative loss has to be valued based on all the circumstances. This requires focusing not only on the harm and wrongdoing of the breach, but how that wrongdoing manifested itself before and after breach as well. The emphasis is, of course, overwhelmingly on breach, that is to say matters such as the nature of the interest breached, and the seriousness of the infringement; but it is not blind to factors beyond that moment in time, such as the defendant's conduct before and after breach. Determining and providing a value for the normative loss should lead to an accurate determination of the quantum of damages that the claimant should receive from the defendant. Given the nature of these claims, this will always be taken from the defendant's profits.

However in order to demonstrate that this is permissible, it must be demonstrated that punishment is compatible with corrective justice. This requires that it gives prominence to the parties' expectations at all times, so as to avoid allowing punishment to serve a public policy rationale external to what has happened between the parties.

(ii) Punishment, disgorgement and corrective justice

As Barnett explains, disgorgement damages have an underlying retributive motive.¹⁴⁹ Disgorgement damages condemn the wrongdoer's behaviour by removing his profits. Since retribution is backward-looking and desert-based, the defendant must himself deserve punish-

145 F Giglio, 'Restitution for Wrongs: A Structural Analysis' (2007) XX Can JL & Jur 5, 18.

146 Al-Tawil (n 33) 269.

147 *ibid* 268–9.

148 *ibid* 268.

149 Barnett (n 3) 32.

ment, independently of the utility to society at large of that punishment.¹⁵⁰ Disgorgement damages are different from punitive damages in that they act as a ‘sharp axe’,¹⁵¹ placing the promisor, at worst, in the position he would have been had he performed as promised, and no more.¹⁵²

The view that disgorgement damages are retributive is, however, controversial. Traditional contract law claims that contract law is aimed at fulfilling the promisee’s expectations, not at punishing wrongdoing. And traditional corrective justice rejects any unilateral focus on the wrongdoer. Nonetheless that retribution does play a role, and can be accommodated within a corrective justice approach.

As to the first, it has to be accepted that in both full and partial disgorgement decisions, retribution has clearly been a factor in the courts’ reasoning. In the full disgorgement context, Lord Nicholls opened his speech in *Blake* with the line ‘My Lords, George Blake is a notorious, self-confessed traitor’,¹⁵³ and Lord Hobhouse, dissenting, admitted that ‘[t]he “just response” visualised in the present case is (...) that Blake should be punished and deprived of any fruits of [his wrongful] conduct’.¹⁵⁴ In the partial disgorgement context, considerations of conduct have become increasingly prominent. It was explicitly listed as a factor in *Vercoe*, and was the main factor behind the generous assessment in *Luxe*. This is not based on ‘whether the kind of bargain is one where parties should be deterred from breach’¹⁵⁵ but focused instead on desert and what happened between the parties to that contract.

As to the second, Weinrib rejects the idea that punishment is compatible with corrective justice for two reasons:¹⁵⁶ first, on the basis that unilateral focus on the defendant’s conduct is incongruous with the bipolar structure of corrective justice; secondly, on the basis that breach of contract does not usually constitute a punishable ‘wrong’, and that, if it did, that punishment would have to be outside of the private law.

However, as Pey-Woan Lee explains, Weinrib’s account depends upon a Hegelian account of punishment, which requires a punishable wrong to injure a ‘regime’ or ‘community’ of rights.¹⁵⁷ If one adopts Jean Hampton’s account of punishment instead, punishment can fit within a corrective justice framework.¹⁵⁸ Hampton’s approach is premised on the Kantian notion of human worth that Weinrib himself adopts, that all human agents have an equal and objective intrinsic worth.¹⁵⁹ Not only is punishment compatible with corrective justice, it is ‘critical in emphasising the role of private law in protecting the objective worth of the human agent’.¹⁶⁰ When the wrongdoer commits a wrong; he implies that his rights are of greater

150 *ibid.*

151 J Edelman, *Gain-Based Damages* (n 60) 17.

152 Thel and Siegelman (n 99) 1230.

153 *Blake* (n 5) [275].

154 *ibid* [295].

155 Barnett (n 3) 32.

156 Weinrib, ‘Punishment and Disgorgement as Contract Remedies’ (2003) (n 107) 66–7; P-W Lee, ‘Contract Damages, Corrective Justice and Punishment’ (2007) 70 MLR 882, 892.

157 Lee (n 156) 896.

158 *ibid* 897–8.

159 J Hampton, ‘The Retributive Idea’ in J Murphy and J Hampton (eds), *Forgiveness and Mercy* (Cambridge University Press, 1988) 111, 131–41.

160 Lee (n 156) 896.

worth than the victim's. Hampton calls this a 'moral injury'.¹⁶¹ A retributive response denies the wrongdoer's moral elevation and vindicates the equality between the parties.

Pey-Woan Lee applies the Hamptonian notion of punishment to punitive damages. She concludes that where one's liberty is violated, these damages compensate the victim for his moral injury.¹⁶² It is a hybrid remedy since it can be accommodated within Weinrib's corrective justice framework as a type of normative loss, while having a retributive foundation.¹⁶³

It is submitted that the notion can be applied to disgorgement damages as well. On the one hand, when the defendant does 'the very thing he contracted not to do',¹⁶⁴ he causes the claimant a moral injury. To take *Experience Hendrix* as an example, the claimants were reliant on PPX, the defendant, to keep its side of the bargain.¹⁶⁵ They could not obtain substitute performance since it was the quality of PPX's recordings specifically that Jimi Hendrix had been unhappy about before his death. Nor could they properly supervise performance, since they were embroiled in estate disputes at the time. As such, when PPX breached, they were effectively powerless to control the quality of releases of Hendrix's music. On the other hand, it is not true to say that claimants, in these cases, are 'compensated' for their moral injury. Courts look beyond the breach itself, at a range of factors, such as the quality of the breach, the defendant's conduct, his state of mind and any delay by the claimant. Nor is it as simple as awarding damages each time there is a breach; there are circumstances where it would not be appropriate to award disgorgement damages. For instance, if the defendant breached inadvertently, while labouring under a mistake that he was entitled to do so, or to avoid loss due to unforeseen circumstances.¹⁶⁶ Nonetheless, this neither rules out the application of a Hamptonian notion of punishment nor its applicability to disgorgement damages. As Lee herself puts it, the notion of loss is significant only because it establishes a correlation to the defendant's gain, not due to any intrinsic quality of 'loss'.¹⁶⁷ What matters is the establishment of a correlation between the defendant's conduct and the claimant's rights and that retributive punishment is proportionate to the wrongdoing.¹⁶⁸

Unfortunately it is beyond the scope of this article to discuss when exactly disgorgement damages should be available, and when courts should award full as opposed to partial disgorgement. Nonetheless a few comments can be made to explain the significance of a wrongdoing analysis.

First, this is not a top-down approach. That is to say, it does not ask why full disgorgement should not be awarded, and award it where it can, as a deterrence approach would. Instead

161 J Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659, 1671–85.

162 Lee (n 156) 898.

163 *ibid.*

164 *Attorney-General v Blake* [1998] Ch 439 (CA) 458 (Lord Woolf).

165 Barnett (n 3) 142.

166 This type of situation should, however, be limited by the theory of 'efficient termination'. According to this theory, termination must be by mutual consent, since that is the only way the parties can determine an amount the promisee will accept in lieu of performance. There is no unilateral breach by the promisor: Eisenberg (n 7) 572; P Mahoney, 'Contract Remedies and Option Pricing' (1995) 24 *Journal of Legal Studies* 139, 141.

167 Lee (n 156) 895.

168 *ibid* 897.

it is aimed at the fundamental question: ‘what is the just response to the wrong in question (...)?’¹⁶⁹ Secondly, while the availability of specific relief is clearly a key factor behind deciding whether to award full or partial disgorgement,¹⁷⁰ it should not be the only factor. This is to prevent ex post facto specific performance (in monetary terms). As has been explained, specific remedies and substitutionary remedies protect different aims for different purposes and, accordingly, damages remedies should always be focused on the just response to the wrong, not on providing what is effectively property rule protection to the right. Hence the ‘exceptional’ bar must be maintained for full disgorgement.

Conclusion

In conclusion, *Blake* damages and *Wrotham Park* damages are both disgorgement damages. They lie on a spectrum. They can be justified according to the relationship between the contracting parties before the court, without the need to resort to public policy rationales. However corrective justice must be accepted as the basis of disgorgement damages. All the circumstances must go towards determining the level of wrongdoing involved and how much the claimant deserves. The key improvement on past theories is to move away from notions of restoration and ownership entitlement, which fails to adequately distinguish between primary and secondary rights, and towards proportionality to wrongdoing.

169 *Vercoe* (n 43) [339] (Sales J).

170 Cunnington, ‘The Measure and Availability of Gain-Based Damages for Breach of Contract’ (n 6) 236; Barnett (n 3) 161–5: distinguishing between (i) where the court ‘will not’ order specific relief (partial disgorgement), and (ii) where the court ‘cannot’ order specific relief.

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