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Louise Cheung

Southampton Student Law Review, Editor-in-Chief

July 2013

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Foreword

This year's edition of the Southampton Student Law Review once again contains an eclectic mix of papers that reflect the wide variety of research interests prevalent in Southampton Law School. The combination of theoretical and doctrinal analyses contained in this volume is testimony to depth of knowledge and the expertise of Southampton's graduates and undergraduates. This work has often been produced alongside the topics being studied formally and is generated by a love of the subject and deep curiosity about the ways in which the law operates in court and in society.

The authors selected for inclusion expose some fundamental issues and tensions within the law today. For instance, theoretical questions are raised about the application of Foucault's theories to the law and what they reveal about the operation of power, while the role of law in relation to the Human Rights Act 1998, the Court of Justice, and the rule of law with regard to the constitutional place of the judiciary are also assessed at length. More concrete concerns from the commercial world are addressed in papers about the legal rules that apply to hostile takeovers and the complex operation of market practices. As one might expect from a Southampton Law School publication, there is also a paper that explores some recent developments in Maritime Law, locating them clearly within their commercial context. And, reflecting another of the School's strengths, issues involving the law's approach to asbestos exposure and human health are discussed in detail in a paper that critiques recent case law on the subject.

I am delighted to have had the opportunity to review this latest edition of the Southampton Student Law Review. I hope and expect that everyone who discovers it will find it an enlightening read.

Hazel Biggs

Professor of Healthcare Law & Bioethics

Head of Southampton Law School

July 2013

Defence Tactics in Hostile Takeovers – An Analysis of the Rules Imposed on the Pursued Target

Simen H. Stokka

The aim of this article is to examine the applicability of defence tactics which would be favorable to the board of a target company when trying to ward off a hostile takeover attempt. The assessment will mainly focus on how takeover defence tactics are regulated in the U.K, where the scope for the target board to employ such tactics is substantially restricted.

Further, this article will assess the distinct approach adopted to regulate takeover defensive measures in the State of Delaware U.S, and discuss whether British takeover regulation should be altered in order to give the target company board of directors more flexibility to adopt defence tactics.

Introduction

The term takeover is commonly used when a publicly traded company[1] (offeror) offers to acquire sufficient shares to obtain control of another (offeree), in return for cash and/or securities[2]. The takeover is described as hostile when the offeree board does not support the bid. Actions taken by the offeree board of directors to ward off the hostile takeover attempt are referred to as defensive measures or defence tactics[3].

Takeover defensive measures developed among UK company boards after the emergence of hostile takeovers in the early fifties. In the wake of World War II both the inflation and real estate values in the UK rose rapidly, and higher quality financial reporting of companies` earnings was required by virtue of the Companies act 1948[4]. These factors in combination with undervalued

[1] This article will focus on takeovers of publicly traded listed corporations.
[2] Wild, C. and Weinstein, S. *Smith and Keenan`s Company Law,* Pearson Education, 15th Ed. (2011), at p. 540.
[3] For the purposes of this article the terms "defensive measures" and "defence tactics" will be used synonymous and in a broad sense, covering not only measures which would directly frustrate a bid, but also measures which might have a more indirect deterrent effect on a hostile bid.
[4] Armour, A. Jacobs, J.B. and Milhaupt, C.J. *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, (2011) Harv. Int. L.J. 52 (1), 221, 233.

corporate assets and superficially low share prices[5] made many companies attractive acquisition targets.

However, to prevent takeovers of their representative companies, the company directors responded by adopting defensive measures, such as paying out higher dividends to shareholders to thrive up the share prices, selling off valuable company assets, and issuing blocks of new shares in the company to a friendly third party holder to counteract the takeover. An example of a drastic defence tactic from 1953 was the scheme adopted in the *Savoy Hotel* affair, where the Berkeley Hotel in fear of a hostile takeover essentially transferred the hotel property to a friendly third party in return for shares in that company[6].

The shareholders of target companies did not respond well to the measures adopted by their directors and proclaimed that it was "inappropriate for directors to take steps that would materially affect control of a company—such as issuing large blocks of unissued shares—without shareholder approval"[7].

After extensive litigation contests regarding takeover defence tactics in the sixties, investor's calls for regulation were met by the issue of the *City Code on Takeovers and Mergers 1968*. The City Code was administered by the *City Panel on takeovers and Mergers*. The Panel was granted authority as a self-regulatory organization by the London Stock Exchange, the Board of Trade and trade associations from the Working party to initiate sanctions for breaches of the Code, and the system introduced by the Code has "proved remarkably enduring" in governing takeover disputes from its origin and up until today[8].

Since its origin, the Code has represented a substantial restriction of the opportunity for target company directors to apply defensive measures. In the current version of the Code[9], the most prominent provision in this regard is rule 21. Rule 21 prohibits the offeree company from taking any action which might frustrate the offer or deny the shareholders the opportunity to decide on the merits of a bid without shareholder approval, if they have reason to believe that a takeover offer might be imminent. Rule 21 is reinforced by General Principle 3 of the Code, which proclaims the shareholders right to decide on the merits of a bid.

When the Code was issued in 1968 the Panel did not have statutory authority to enforce it. Compliance to the Code was ensured by a process referred to as "cold shouldering", where the banks and other investors refused to deal with companies proclaimed by the Panel as violators of the Code, and thereby forced directors to comply in order to obtain investment capital for the

[5] Johnston, A. *Takeover regulation: historical and theoretical perspectives on the City Code*, (2007) CLJUK, 422, 427-428.
[6] Johnston (*above note 5*) at 429.
[7] Armour, Jacobs and Milhaupt (*above note 4*) at 235.
[8] Armour, Jacobs and Milhaupt (*above note 4*) at 237.
[9] The Panel of Takeovers and Mergers, *The Takeover Code*, Tenth Edition, September 2011.

future[10]. However, after the implementation of the *EC Takeover Directive*[11] in 2006, the UK was required to designate the authorities competent for supervising takeover bids "with all the powers necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made or introduced pursuant to this Directive"[12]. Consequently, the rules of the Code were adopted with statutory effect by the Companies Act 2006[13], enabling the Panel to give rulings and impose sanctions for breach of the Code[14].

A main purpose of the Takeover Directive is to facilitate takeovers and "a truly integrated EU capital market"[15]. Article 3 of the Directive contains a set of General Principles, providing for minimum standards which the Member States must ensure compliance to[16]. Upon the implementation of the directive in the UK, the Takeover Code already contained provisions fairly similar to those of the directive, and the Code was maintained very much in the same form as before the implementation of the directive[17]. Consequently, an in depth assessment of the provisions of the Directive is not considered practical for the purposes of this article.

However, it is worth noting that Article 9.2 – 9.4 of the Directive contains a board neutrality rule similar to rule 21 of the *Takeover Code*, which, if stringently implemented by all Member States, would represent substantial European harmonization in relation to takeover defensive measures in public companies. The significant authority and flexibility to derogate from the provisions of the Directive on a national level has however counteracted such harmonization[18]. The board neutrality rule "goes straight to the heart of one of the biggest and oldest controversies in European company law", and "seven countries have chosen to opt out of the board neutrality rule, while eighteen have chosen to opt in"[19] [20]. It has even been argued that the flexibility to derogate from the Directive on a national level could "foster[.] protectionism"[21].

Alongside the Takeover Code, both the *Companies Act 2006* and the *UK Listing Rules*[22] contain rules which would prohibit directors of public

[10] Saulsbury IV, A. *The Availability of Takeover Defenses and Deal Protection Devices For Anglo-American Target Companies*, (2012) Del. J. Corp. L. 115, 124.
[11] The European Parliament and the Council of the European Union, *Directive 2004/25/EC on takeover bids*, 21 April 2004.
[12] Takeover Directive Art. 4.5.
[13] Companies Act (CA) 2006, pt. 28, s. 943.
[14] See CA 2006, pt. 28, s. 945.
[15] See Sjåfjell, B. *Towards a Sustainable European Company Law, with the Takeover Directive as a Test Case,* Kluwer Law International (2009) at para. 14.2.
[16] Takeover Directive Art. 3.2
[17] Button, M. *A Practitioner`s Guide to The City Code on Takeovers and Mergers 2006/2007*, City and Financial Publishing (2006) para. 10.2.3.
[18] Takeover Directive Art. 4.5.
[19] As per 2007.
[20] Sjåfjell (*above not 15*) para. 14.4.2.2.
[21] Wooldridge, F. *Some important provisions, and implementation of, the Takeovers Directive,* (2007) Comp. law. 293, 294.
[22] The Financial Services Authority, *The Listing Rules*, February 2004.

companies from adopting a number of measures to deter a takeover bid. In particular, target company directors must be cautious not to compromise their fiduciary duties to only exercise their powers "for the purposes for which they are conferred"[23] and to act "in good faith" to "promote the success of the company for the benefits of its members as a whole"[24]. Considering the extensive prohibition of defensive measures in the Takeover Code rule 21, it might seem redundant to put much emphasis on these broader company law provisions. However, a breach of directors` fiduciary duties might result in more serious sanctions against the directors than a breach under the Code, such as having to personally compensate the company for loss resulting from a breach of duty[25].

Further, rule 21 of the Code does not prohibit takeover defence tactics before a bid situation is imminent. The provisions of the CA 2006 and the Listing Rules therefore becomes important to determine what measures the offeree board may adopt to safeguard itself from a hostile takeover in advance.

In the remainder of this article, the legal framework presented above will be used to clarify which ones of the most practical defence tactics can be adopted by an offeree board seeking to ward off a hostile offeror. Chapter 2 will discuss defence tactics in a bid situation, while Chapter 3 will focus on possible defence tactics before any takeover offer is imminent.

A particularly topical issue with regards to the discussion in Chapter 2 is the amendments made to the Takeover Code in 2011. In the wake of the controversial acquisition of the iconic British company *Cadbury Plc* by *Kraft Food Inc* in 2010, commentators argued that the long term interests of the company and its employees were often suppressed by investors, and that it had become too easy for hostile takeovers to succeed[26]. Consequently the Takeover Panel made a number of changes to the Code, aimed at reducing the tactical advantage of the offeror in UK takeovers, and redressing the balance more in favor of the offeree company[27]. The changes might give the offeree board of directors more freedom of action to defend the company against a hostile offeror.

Chapter 4 of the article will put motion on the distinct approach to takeover defence tactics in U.S. Delaware jurisprudence. U.S. target companies are permitted to adopt aggressive defensive measures. The most prominent example is the highly controversial "poison pill", which typically involves the issuing of rights to shareholders (e.g. a right to subscribe for shares at significant discount), triggered on the occasion of another company acquiring more than a specified percentage of the offeree company shares without the

[23] CA 2006, pt. 10, s. 171.
[24] CA 2006, pt. 10, s. 172.
[25] CA 2006 pt. 11, ss. 260-264.
[26] Clarke, B, *Reviewing takeover regulation in the wake of the Cadbury acquisition – regulation in a twirl*, (2011) J.B.L. 299.
[27] The Takeover Panel, *Review of Certain Aspects of the Regulation of Takeover Bids*, 21. July 2011 (RS 2011/1) p. 1.

recommendation of the board[28]. Some argue that the use of poison pills, especially when adopted in combination with a staggered board[29], has in practice given the offeree board veto power over any bid for the company, no matter how beneficial to the shareholders[30].

Both the U.S. and the U.K. can be classified under the "Anglo-American" system of corporate governance, based on dispersed ownership in public corporations, and the threat that the company may become an acquisition target if it fails to maximize the share price is a key mechanism in both jurisdictions[31]. It is therefore conspicuous that the U.S. courts and U.K. have adopted such a different approach to whether or not offeree directors are allowed to take certain defensive measures.

On the basis of these differences between the U.K. and the U.S. approach I will discuss whether British takeover regulation should be altered, in order to give the target company board of directors more flexibility to adopt defence tactics. I will delimit my assessment regarding defensive measures in the US to Delaware jurisprudence. Enjoying status as the "premier home for corporations today", Delaware and its corporate jurisprudence is the most significant in the U.S.[32]

Defence tactics when a hostile takeover bid is imminent

This chapter of the article will discuss the applicability of defence tactics in the situation when a hostile takeover offer has been made, or when, at a preceding stage, there is reason to believe that a *bona fide* offer might be imminent.

Regulatory limitations: The Takeover Code

In a bid situation, the most prominent regulation of takeover defensive measures is to be found in the Takeover Code. It is therefore necessary to provide an analysis of the function and restrictions of the Code.

Compliance to the Code is ensured by the Takeover Panel "through a consensual approach with the parties engaged in takeover activity", and by focusing on "the specific consequences of breaches of the Code with the aim of providing appropriate remedial or compensatory action in a timely manner"[33]. After the implementation of the Takeover Directive the Panel has been

[28] Eaborn, G. *Butterwoths Takeovers: Law and Practise* (2005) Chapt. 10 by Nelson-Jones, M., LexisNexis Butterwoths (2005), at p. 419.
[29] A board composition where directors are grouped in different classes and only one class is open to election every year.
[30] Monks, R. A. G. and Minow, N. *Corporate Governance*, Blackwell Publishers Ltd. 2nd Ed. (2001), at 200.
[31] Armour, J. and Skeel, D. A. jr. *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, Geo L.J. [95:1727] , at 1727.
[32] Black, L. S. Jr. *Why Corporations Chose Delaware*, (2007) Delaware Department of State Division of Corporations.
[33] Button (*above note 17*) para. 1.11.

granted authority to restrain a person from acting in breach of the rules, give compensation rulings, or, if appropriate, take disciplinary actions[34].

Besides promoting equivalent treatment of shareholders of the same class by offerors, the main purpose of the Code is to ensure that the shareholders of an offeree company are treated fairly and not deprived from the opportunity to decide on the merits of a takeover. It is this latter demand Rule 21 of the Code essentially is designed to meet when prohibiting "any frustrating action" in the absence of shareholder approval, if the offeree board has "reason to believe that a *bona fide* offer might be imminent"[35].

If specific defensive actions are adopted with the approval of the company shareholders (e.g. by a shareholder resolution), the shareholders ought to be aware of the consequences of allowing the relevant actions, and are not deprived from deciding on the merits of a subsequent bid. In *Bamford v Bamford*[36], where the target company issued shares to a friendly third party in a hostile bid situation, it was affirmed that the company directors will not be held liable for defensive measures adopted with the consent of the shareholders.

To determine what will amount to a "frustrating action" under the Code, a natural starting point is the non-exhaustive list of prohibited actions in Rule 21.1. letter b. By virtue of this provision company directors cannot:

> *(b) (i) issue any shares or transfer or sell, or agree to transfer or sell, any shares out of treasury;*
> *(ii) issue or grant options in respect of any unissued shares;*
> *(iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;*
> *(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or*
> *(v) enter into contracts otherwise than in the ordinary course of business.*

All of the actions mentioned in this list would have the effect of making the offeree company more difficult or less attractive to acquire. Actions such as issuing or selling shares out of treasury, or selling off material assets, possibly at significant discount, might seem irrational. However, when facing a hostile offeror who wishes to acquire the company and replace the board of directors, it is a well-known threat that the offeree directors might adopt such measures in pursuing their own self-interests to maintain their jobs[37].

In addition to the specific measures mentioned in Rule 21.1(b), a number of other actions have the potential to be regarded as frustrating actions prohibited by the rule. For instance, the offeree directors might be tempted to declare significant dividend payments when trying to convince the

[34] See CA 2006, pt. 28, s. 945.
[35] Takeover Code rule 21.
[36] *Bamford* v *Bamford* [1970] Ch. 212.
[37] See e.g. Armour and Skeel (*above note 31*) at 1733.

shareholders to reject an offer. Such declarations of dividend otherwise than in the normal course of business during an offer period might be regarded as frustrating actions, and the Takeover Panel should be consulted in advance before initiating such payments[38]. Similarly, increasing the company`s financial commitments in relation to the company`s service contracts or pension schemes might make the company less attractive to the bidder. If the increased financial commitment is material, it will be regarded as a frustrating action by the Panel[39].

Some of the measures mentioned in rule 21.1 are, however, permitted by the Takeover Code to a certain extent. For instance, the acquisition of assets with a relative value lower than 10 % will in normal circumstances, unless the assets are of particular significance to the company, not be regarded as of "material amount" and will consequently be permitted[40]. The offeree directors are also permitted to enter into or amend service contracts within the ordinary course of business, such as a genuine promotion or a new appointment[41]. However, such permitted actions are unlikely to constitute any influential defense against an offeror when adopted within its limitations[42].

A variety of other actions than the ones mentioned above might amount to frustrating actions under the Takeover Code. A clear example of a frustrating action under rule 21 is the "poison pill" defence, commonly used in Delaware jurisprudence[43]. Also, the so-called "Greenmail" defence, which involves buying out management who has a large stake in the company at a substantial premium, and is "possibly the most unconscionable way of avoiding takeover"[44], clearly amounts to a frustrating action under Rule 21 of the Code.

Despite the guidance provided by the specific prohibitions and Notes to rule 21 of the Code, it is not always clear to the offeree board whether a specific action is to be regarded a frustrating one. In such dubious incidents, rule 21 explicitly requires that "The Panel must be consulted in advance if there is any doubt as to whether any proposed action may fall within this Rule". These requirements ensure the Panel control over any questionable cases. Since directors must consult the Panel to ensure their compliance to rule 21, it has been argued that takeover defensive measures are strictly prohibited in all circumstances in the UK[45]. However, the remainder of this article will argue that there are still some actions which the offeree board is permitted to take which might deter a hostile bidder.

In a hostile takeover context there are, off course, also other rules of the Takeover Code which deserve consideration, but which it falls outside the scope of this article to assess in detail. Some of these provisions will be

[38] Takeover Code rule 21.1, Note 3.
[39] Takeover Code rule 21.1, Note 7.
[40] Takeover Code rule 21.1, Note 2.
[41] Takeover Code rule 21.1, Note 5.
[42] The whole purpose of these limitations is to deprive directors from the opportunity to frustrate an offer and to secure the shareholders rights to decide on the merits of a potential bid.
[43] See Chapter 1 for a brief explanation of the "poison pill" defence.
[44] Monks and Minow (*above note 30*) at 199.
[45] Saulsbury IV (*above note 10*), at 142.

considered below, when assessing defence tactics which the offeree can adopt in a hostile bid situation.

However, some notice should be given in this section to rule 9.1 of the Code, which requires one or more person(s) acting in concert to make a mandatory offer for all the shares of the company if they acquire shares carrying "30% or more of the voting rights of a company"[46]. Although it is not commonly regarded as a defensive measure which the offeree can adopt to ward off a hostile offeror, the mandatory bid rule "certainly prevents creeping acquisitions of control and ensures that all shareholders share in the control premium"[47]. Still, it may be discussed whether the threshold should be set at a lower level than 30%. Due to the diverse ownership structure in U.K. companies, an acquirer will often maintain substantial control of the company before reaching 30% of the voting rights.

The relationship between the Code and directors fiduciary duties

Due to the strict prohibition of defensive measures imposed by rule 21 of the Takeover Code, other more general company law provisions in the CA 2006 and the UK Listing Rules will become more prominent when discussing defence tactics before a takeover offer is imminent, in Chapter 3 of this article.

However, it is important to keep in mind that more general directors' duties may operate and constrain directors' actions alongside the provisions of the Takeover Code. On some occasions, legal issues might also arise in relation to the connection between the rules of the Takeover Code and directors duties. An issue discussed in the literature is the duty under s. 172 of the CA 2006, for a director to act in the way "he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole"[48]. In the absence of case law regarding the interpretation of this rule after its codification, it is not entirely clear how far it constrains directors' decisions "about precisely how to pursue the success of the company"[49]. Robinson argues that if the provision does not restrain director's decisions to a substantial extent, section 172 creates a complexity in a takeover context, implicating that if "the directors honestly believe that a looming takeover would be substantially detrimental to the company and their long-term goals have not been realised, directors should allot shares to prevent it"[50]. Besides probably representing an execution of directors powers for an improper purpose under CA 2006 s. 171, such share allotments in a bid situation is explicitly prohibited by rule 21.1 of the Takeover Code.

By reference to Governmental aims upon the codification of s. 172 to maintain shareholder primacy in a more sophisticated way, where other "stakeholders interests would become important too", and remarks by Lord Mandelson that directors should to a greater extent be permitted to consider other long-term

[46] Takeover Code rule 9.1 (a).
[47] Johnston (*above note 5*) at 451.
[48] CA 2006 pt. 10, s. 172.
[49] Robinson, S. W. *A change in the legal wind – how a new direction for corporate governance could affect takeover regulation* (2012) I.C.C.L.R 292, at 300.
[50] Robinson (*above note 49*) at 300.

interests then those of the shareholders, Robinson is able to find some support in favor of allowing defensive measures such as share allotments in the situation described above[51]. Such an effect on hostile takeovers is hard to reconcile with previous case law establishing directors' duties to exercise their power for a proper purpose[52][53]. And although the Court of Appeal in the more recent case of *Criterion Properties v Stratford Properties LLC* from 2003[54] "refused to consider the general question of whether defending against a predator could be a proper purpose", this would "at best" implicate that "the court did not feel this was an area on which English law provided a clear solution"[55].

It is the view of the author that although the wording of the CA 2006 s. 172 might open up for it in certain situations, it is unlikely that the legislators intended it to have the effect of requiring or permitting the directors to allot shares or apply other defence tactics prohibited by the Takeover Code in a hostile bid situation. Further, based on the assumption that Rule 21 of the Code is specifically designed to regulate defensive measures in hostile takeovers, it appears reasonable to require the directors to obtain authorization from the shareholders before e.g. issuing new shares, even if they believe a takeover would be detrimental to the company.[56]

Obstructive litigation

Another issue which has been debated in the literature is the ability for the board of a target company to initiate obstructive litigation. By obstructive or tactical litigation is meant the initiating of legal proceedings before or during the course of a takeover bid which is tactical in nature, and not aimed at solving substantive legal issues the claimant is determined to settle[57]. Rather, the purpose is to prevent or delay a takeover bid[58].

However, while such litigation is almost to be regarded as standard procedure in Delaware courts, both the Takeover Panel and the UK courts consistently seek to prevent parties in a takeover to engage in obstructive litigation, much due to the self-regulatory system of the Takeover Code[59]. A study by Armour

[51] Robinson (*above note 49*) at 300-301.
[52] See *Howard Smith v Ampol Petrolium Ltd* [1974] AC 821, where a share allotment not exercised for the purposes for which it was granted constituted a breach of directors` duties.
[53] See *Hogg v Cramphorn Ltd* [1967] Ch 254.
[54] [2003] 1 WLR2108.
[55] Kershaw, D. *The illusion of importance: reconsidering the UK`s takeover defence prohibition* (2007) I.C.L.Q. 267, at 289.
[56] See Mukwiri, J. *Directors` duties in takeover bids and English company law*, (2008) I.C.C.L.R. 281, at 286; Which argues that "to resolve the complexity between directors general duties and specific duties in a takeover situation, directors` duties should be treated as being sui generis to a class of stakeholders affected by the actions of directors of the company involved in a takeover bid". And that "this should be confined to takeover rules contained in the Code, and provisions under Pt 28 of the CA 2006 (implementing the takeover Directive)".
[57] Ogowewo, T. I. *Tactical litigation in takeover contests* (2007) J.B.L. 589 at 596-597.
[58] See Payne, J. *Takeovers in English and German Law*, Chapt. 6 by Underhill, W. and Austmann, A., Hart Publishing (2002), at 117.
[59] Kenyon-Slade, S. *Mergers and Takeovers in the US and UK Law and Practise*, Oxford University press NY (2003), para. 10.27.

and Skeel has found that only 0.2% of hostile bids were litigated in the U.K. from 1990-2005[60].

The negative attitude of the takeover panel towards tactical litigation is evident from its statement in relation to the bid by *Minorco Plc* for *Consolidated Gold Fields Plc* from 1989[61]. In this case, continued law suits by Consgold, based on EU and UK competition law, were referred to the Takeover Panel by Minorco. The Panel emphasized the importance of litigation not becoming a tactical weapon for the target to prevent its shareholders from considering the bid on its merits, and stated that even though litigation that has the effect of compromising an offer may be appropriate in certain circumstances, the shareholders should be entitled to decide whether or not to litigate. The continuing of legal challenge consequently required shareholder approval[62].

Despite the virtually absent occurrence of tactical litigation in the UK, the Takeover Panel was concerned that the implementation of the Takeover Directive, with its requirement for a statutory framework governing takeovers, would result in an increased risk for tactical litigation during takeover contests[63].

However the concerns of the Panel have proved unfounded, as the implementation of the Directive has not changed the policies previously developed. Upon the implementation of the Directive the position of the Panel and the takeover Code was "simply endorsed"[64]. Even though the formal legal status of the Code was lifted, the Panel still has the authority to "give rulings on the interpretation, application or effect of rules" in the Code of a binding effect[65]. And the initiation of litigation for obstructive purposes would clearly amount to a frustrating action under Rule 21 of the Takeover Code.

The legal position described above is further reinforced by the consistent resistance of U.K. courts to permit any litigation for tactical purposes. In *Regina v Panel of Takeovers and Mergers Ex parte Datafin Plc. and Another* from 1987, Sir Donaldson, J. in the Court of Appeal emphasized that it is not for the court to substitute the judgment of the Panel unless in the hopefully "unthinkable" event "of the Panel acting in breach of the rules of natural justice", and that the relationship between the Panel and the court was expected to be "historical rather than contemporaneous"[66]. These statements clearly indicate that the court will not intervene in an ongoing takeover process.

[60] Ogowewo (*above note 57*) at 609.
[61] Panel Statement on the bid by Minorco Plc for Consolidated Gold Fields Plc, May 9, 1989.
[62] See also Kenyon-Slade (*above note 59*) para. 10.29.
[63] Ogowewo (*above note 57*) at 592.
[64] Mukwiri, J. *The Myth of Tactical Litigation in UK Takeovers* (2008) Journal of Corporate law Studies, 8, 373, at 380-381.
[65] CA 2006 pt. 28 s. 945.
[66] *Regina v Panel of Takeovers and Mergers Ex parte Datafin Plc. and Another* [1987] Q.B. 815, at 841-842.

In the subsequent decision of *Regina v Panel on Takeovers and Mergers ex parte Guinness* from 1989, Sir Donaldson sought to confirm and clarify his statements from the *Datafin* decision, which he thought had been misunderstood by academic writers. He declared that "contemporary intervention" of the Panel`s rulings by the courts would "usually either be impossible or contrary to public interest", but that "no similar objections would apply to a retrospective review of its [the Panels'] actions [...]"[67].

From the statements in the "Datafin" and the "Guinness" judgment read in conjunction with the authority given to the Takeover Panel, it is evident that the interference of the courts during the course of a takeover process is very unlikely.

The offeree board of directors will consequently not be able to use tactical litigation before the English courts to prevent or delay a takeover bid.

However, another way to initiate tactical litigation could be to refer the offer to the European Commission or Competition Commission. However, if adopted for tactical purposes to prevent or delay a bid, the initiating of such proceedings is unlikely to have any effect. Although on a more flexible basis, rule 21 of the takeover Code would still apply during the course of such proceedings, and 28 days deadline to announce a firm intention to make an offer in rule 2.6 of the Code will normally be suspended[68]. Consequently, it is difficult to see any point in initiating such proceedings to delay the bid.

Defense tactics which might be permitted and effective in a hostile bid situation

Having considered the expansive restrictions on defence tactics in a bid situation, the presentation will now turn to discuss permissible measures which might have the effect of deterring a hostile offeror. The measures which will be examined more closely includes using the new PUSU regime of the Takeover Code, seeking another and more friendly "white knight" bidder, and convincing, within the regulatory framework on disclosure of information, the shareholders to reject the bid.

Using the new "PUSU" regime of the Takeover Code

As mentioned in the introduction of this article, a number of changes were made to the Takeover Code in light of the numerous debates in the wake of the controversial takeover of the iconic British company *Cadbury Plc* by *Kraft Food Inc* in 2010.

The main reason behind the controversies was Kraft`s announcement promising to keep open Cadbury`s factory at Sommersdale at the beginning of the bidding procedure, while announcing the opposite at the end. This caused significant British job losses and criticism that Kraft had either been "incompetent in its approach to the Sommersdale factory or that it used a

[67] *Regina v Panel on Takeovers and Mergers ex parte Guinness* [1990] 1. Q.B. 146, at 158.
[68] Takeover Code rule 12.2(a) and Note 4 to rule 21.1.

"cynical ploy" to improve its public image during its takeover of Cadbury"[69]. Kraft also received formal criticism by the Takeover Panel for its conduct[70].

In a wider corporate policy context, concerns were raised that institutional shareholders pursuing short-term objectives had gained too much influence in the decision process in takeovers[71].

Following up on these concerns, the Takeover Panel issued a Consultation Paper[72] discussing possible changes, and a Response Paper[73] to the responses received in 2010. In March 2011 the Panel issued a new Consultation Paper[74], this time containing concrete proposals for amendments to the Code, before a final Response Statement[75] was issued in July 2011. This rather in depth procedure resulted in a few significant changes to the Takeover Code, constructed to redress the balance more in favor of the offeree in a takeover context.

One of the disadvantages to the offeree board which the Takeover Panel aimed to redress was protracted virtual bid periods, caused by potential offerors announcing that they consider making an offer, but without committing itself to do so[76]. Consequently, the takeover Panel introduced an automatic "Put Up or Shut up Regime" (PUSU), where the mere identification of an offeror announcing a possible offer[77] triggers a 28 days deadline for that offeror to either announce a firm intention to make an offer, or announce that it will not make an offer[78]. If the offeror announce an intention to not make an offer, it is suspended from approaching the target for a period of six months[79].

The automatic PUSU regime is generally beneficial to the offeree board, since it will not be under siege by rumors and speculations interfering with the daily operation of their business for an extensive period of time[80]. Further, although the regime was not believed to have a significant deterrent effect on potential offerors by the Panel[81], it might, in the context of takeover defensive tactics, enable the offeree board to ward off less prepared offerors[82], which are not capable of announcing a firm intention to make an offer within the 28

[69] House of Commons Bussiness, Inovation and Skills Committee, *Mergers, acquisitions and takeovers: The takeover of Cadbury by Kraft*, Ninth Report of Session 2009-2010 (HC 234), at p. 3.
[70] See The Takeover Panel, "*Kraft Food Inc Offer for Cadbury Plc*", Panel Statement May 26, 2010.
[71] Ibid.
[72] The Takeover Panel, Consultation Paper Issued by the Code Committee of the Panel, *Review of Certain Aspects of the Regulation of Takeover Bids*, 1 June 2010, (PCP 2010/2).
[73] The Takeover Panel Code Committee, *Review of Certain Aspects of the Regulation of Takeover Bids*, (RS 2010/22).
[74] The Takeover Panel, Consultation Paper Issued by the Code Committee of the Panel, *Review of Certain Aspects of the Regulation of Takeover Bids, Proposed amendments to the takeover Code*, 21. March 2011, (PCP 2011/1)
[75] The Takeover Panel, *Review of Certain Aspects of the Regulation of Takeover Bids*, 21. July 2011 (RS 2011/1)
[76] PCP 2011/1, p. 4.
[77] Takeover Code, rule 2.4a.
[78] Takeover Code, rule 2.6a.
[79] Takeover Code, rule 2.8.
[80] See RS 2011/1 pp. 9-11.
[81] RS 2011/1, p. 9.
[82] See RS 2011/1 pp. 10-11.

days deadline, simply by identifying the offeror in an announcement to the Panel. Consequently, this new opportunity for the offeree to put pressure on a hostile bidder might be implemented and regarded as a part of the offeree board`s defence tactics, although it may not be effective when facing a well prepared bidder which will comply to the time limit without major difficulties, and therefore may not constitute an effective defensive measure in traditional terms.

It is also notable that the board of an offeree company has the authority to request the Panel to grant an extension of the 28 days deadline for the offeror[83]. Upon their proposal to implement the PUSU regime, the Takeover Panel believed "that the ability for the offeree company to request an extension of this deadline will mean that most potential offerors will have sufficient time in which to prepare their offers"[84]. However, this statement will only hold truth when the offeree board actually wants to use their authority to request an extension. This is fairly unlikely in the event of a hostile offeror which the board is eager to ward off. By not requesting an extension, the offeree consequently may deter the hostile bidder in this situation.

Seeking white knights

A target company facing a hostile takeover bid by an offeree seeking to achieve better use of the company`s assets by, among other things, replacing the company board of directors and management, might benefit from searching the market to find other possible bidders which are more likely to be friendly towards and cooperate with the target board in the future. Seeking another and more "friendly" potential bidder and merely creating a preferable alternative to the hostile offeror does not frustrate any offer, and is unlikely to be criticized by the shareholders[85]. However, directors of the offeree ought to be aware that actively seeking another bidder might make it difficult to argue in favor of independence in a defense document[86].

The target company board may seek an alternative bidder, in order to find a bidder which will act friendly towards them in terms of letting them run the company without many material changes in the future, or simply to achieve the highest price possible for its shareholders, or both. The target must, however, ensure that it complies with the provisions regarding disclosure and competitive bidding contests under the Takeover Code[87].

To ensure fair competition, rule 20.2 of the Code imposes a duty on the offeree board to, on request, provide the hostile offeror with the same amount of information as the alternative friendly offeror is given. However, the

[83] Takeover Code rule 2.6c
[84] RS 2011/1 p. 9.
[85] See Butterworths Takeovers (*above note 28*) para. 10.112.
[86] Butterwoths Takeovers (*above note 28*) para. 10.112.
[87] See in particular Takeover Code rule 20.2 and rule 32.5.

requirement for a request by the offeror enables the offeree to withhold information which the offeror has not specifically asked for[88].

Secondly, "one of the principal concerns of a potential "White Knight" will be to avoid a bidding war with the original offeror"[89]. Where a competitive situation between two or more bidders continues to exist in the later stages of the offer period, the competitive bidding procedure in Rule 32.5 of the Takeover Code must be complied with. "That procedure will normally require final revisions to competing offers to be announced by the 46th day following the publication of the competing offer document but enable an offeror to revise its offer within a set period in response to any revision announced by a competing offeror on or after the 46th day"[90].

Deal protection

The post Cadbury / Kraft changes made to the Takeover Code in 2011 also introduced a total prohibition of inducement fees and other deal protection measures[91]. Inducement fees and certain other implementation agreements was until then permitted by the Takeover Code, on the basis that they were practical in order to encourage an otherwise reluctant offeror to make an offer. However, they became common market practice which practically all offerors insisted upon, and by placing the financial risk in the event of the takeover being unsuccessful on the offeree, it had the effect of "tying in" the offeree to the deal. Consequently, it gave the first (hostile) offeror a significant advantage, and deterred other offerors from bidding for the company[92][93].

The new prohibition of deal protection agreements in the Takeover Code relocates the financial risk of an unsuccessful takeover and places it on the offeror[94]. Further, the prohibition is subject to the consent of the Takeover Panel[95], and the Panel will normally consent to the offeree company entering into an inducement fee agreement with a competing "White Knight" offeror, provided that the agreed fee is *de minimis* (normally no more than 1% of the offeree company value)[96]. Since potential alternative bidders will often be reluctant to get themselves involved in any bidding procedure, this provides a practical device for the offeree board.

In summary, the general prohibition of implementation agreements enables the offeree directors to more actively seek an alternative bidder when facing a hostile takeover attempt without having to be concerned about expansive responsibilities towards the first offeror. And further, the opportunity to make implementation agreements with a preferred bidder makes it easier for the

[88] Takeover Code rule 20.2 Note 1.
[89] Payne (*above note 58*) at 115.
[90] Takeover Code rule 32.5.
[91] See Takeover Code rule 21.2a.
[92] Clarke (*above note 26*) at 301.
[93] RS 2011/1 p. 39.
[94] See however Saulsbury IV (*above note 10*) at 159; Which argues that the absence of deal protection might also cause bidders to offer lower prices to account for the relocation of risk.
[95] Takeover Code rule 21.2a.
[96] Takeover Code, rule 21.2. Note 1.

offeree board of directors to seek alternative bidders when facing a hostile takeover attempt.

Convincing the shareholders to reject the offer – simply winning the argument

A defence tactic which is guaranteed to be effective when successfully adopted is to convince the shareholders to continue to trust their management and reject the hostile offer. Taken into consideration the expansive limitations on defence tactics for offeree directors and the general principle that shareholders ultimately are the ones who decide on the merits of a bid[97], winning the battle of words with the bidder by issuing a convincing defense document and through other communication channels often becomes the most decisive defensive action of the offeree[98].

The offeree board of directors may take several actions in order to convince their shareholders to reject a bid. They will issue a defense document and lobby major shareholders, financial analysts and media. The media and other financial commentators might prove particularly useful when a company with strong national identity is threatened by a foreign takeover, or when significant job losses or other employee rights are at risk[99].

The defense document is the formal channel for the offeree`s communication, and must be issued to the shareholders and the employees of the company[100]. In addition to the board`s opinions on the offer, it must contain the advice of an independent financial adviser. In the document, the offeree board of directors will typically include any arguments indicating that the offeree company is undervalued on the market and that the offer is inadequate. The defence document often becomes quite pompous and glaring[101].

In addition to emphasizing their own abilities and plans for the future, the offeree might benefit from criticizing the offeror. This might involve arguments such as the offeror`s motives being improper (e.g. that the offeror wants to strip the company from its assets etc.), or that the financial condition of the offeror is unsatisfactory. However, arguments regarding the economic condition of the offeror will probably only have significant influence where shares in the offeree are part of the offer. In a plain cash bid situation, it is dubious if the offeree shareholders will be much interested in future economic prospects of the offeror[102].

However, both when presenting arguments to the effect that an offer is unsatisfactory, and when criticizing the offeror, the offeree board must make sure information is provided to shareholders equally[103]. Further, they must

[97] Takeover Code, GP 3.
[98] See e.g. Payne (*above note 58*) at 119.
[99] See e.g. the debates relating to the takeover of *Cadbury Pl*c by *Kraft Food Inc*.
[100] See Takeover Code rule 25.
[101] See Cadbury`s Defense Document in the takeover of *Cadbury Plc* by *Kraft Food Inc*, issued December 14 2009.
[102] See Stedman, G. *Takeovers,* Longman Law. Tax and Finance (1993), para. 18.4.1.
[103] Takeover Code rule 25.

not mislead the shareholders of the market, and give them sufficient information and advice to reach a properly informed decision[104].

The Takeover Code contains detailed requirements with regards to the specific information issued. In particular, it is important to make notice of the detailed requirements for profit forecasts and asset valuations in Rule 28 and Rule 29 of the Code[105]. Rule 28 requires, in essence, a profit forecast issued by the offeree to include the assumptions the forecast is based on, as well as reports from accountants and financial advisers.

In July 2012, the Code Commission issued a Consultation Paper[106], proposing several amendments to the requirements for profit forecasts and other information published during the offer period.

It is outside the scope of this article to assess in detail the rather complex amendments proposed. However it shall be mentioned that the proposals aim, among other things, at creating more proportionate requirements and a more logical framework for profit forecasts alongside more detailed requirements to this effect. Moreover, the proposals also seeks to amend the requirement towards the offeree to disclose any material changes to information published in an offer document under rule 27 of the Takeover Code, to take place "promptly after their occurrence"[107].

Noteworthy additional requirements to the information disclosed by an offeree are also imposed by Rule 19 of the Takeover Code, which lay down standards of care for the information, and also regulates e.g. advertisements, telephone campaigns, interviews and debates[108].

Finally, the post Cadbury/Kraft changes made to the Takeover Code in 2011 included more expansive disclosure and transparency rules which might be useful for the offeree board when trying to convince its shareholders to reject a hostile bid. A purpose of the new requirements is to enable the shareholders to make a better informed decision on the merits of an offer, and to provide better general market understanding on the impact of takeovers[109].

Consequently, the takeover Code now provides for the defence document to contain an estimate of the aggregate fees and expenses expected to be incurred by the offeror in relation to the offer, including, among other things, legal and other advisory fees[110]. If the fees are expansive, the directors might be able to exploit this information to convince the shareholders and others that the takeover is "advisory driven", as opposed to driven by realistic prospects for

[104] Takeover Code rule 23.1.
[105] See also Weinberg, M. *Weinberg and Blank on Takeovers and Mergers,* Sweet & Maxwell London 5th Ed (2011), para. 4-7100.
[106] The Takeover Panel, Consultation Paper Issued by the Code Committe of the Panel, *Profit Forecasts, Quantified Financial Benefits Statements, Material Changes in Information and Other Amendements to the Takeover Code* (PCP 2012/1).
[107] PCP 2012/1 at p. 1-2.
[108] See Kenyon-Slade (*above note 59*) para. 10.36.
[109] PCP 2010/2 p. 31-32.
[110] Takeover Code rule 25.8 and Rule 24.16.

the offeror to generate more value for the company`s assets. If the information disclosed also indicates that the offeree company is financially troubled, it might provide the offeree directors with a good argument towards the shareholders, especially if the offer is equity financed.

After the changes in 2011 the Takeover Code further require the offeror to disclose details of their future plans for the company and their employees[111], and for the offeree defense document to contain a separate opinion from the employee representatives on the effect of the takeover in relation to employee issues[112]. Although many shareholders will be more interested in the size of the offer, complaints by employee representatives might enable the offeree board to put more pressure on them to reject an offer in the future, both through their own communication and media.

Defence tactics before a bid is imminent

Rule 21 of the Takeover Code only restricts defence tactics by the offeree board from the time when they have reason to believe that a takeover bid might be imminent. The provisions in the CA 2006 and the Listing Rules consequently becomes the most important restrictions on defensive strategies adopted to avid a future hostile takeover at an earlier stage, and will be given a brief assessment in this chapter. However, it must be kept in mind that these regulations apply generally, and might result in serious sanctions for breach also in a bid situation.

Further, this chapter will consider some of the more important specific actions the offeree board can take at an advance stage in order to prevent a future hostile takeover bid. However, it will become evident that most of the measures which would be favorable also at this advance stage require shareholder approval.

Regulatory limitations: The Companies Act 2006

The CA 2006 does not impose restrictions on directors particularly aimed at regulating takeovers. Still, the overriding duty to promote the success of the company for the benefit of its members as a whole in section 172, and the duty to exercise their powers for the purposes for which they are conferred in section 171 of the Act, provides for an opportunity to hold directors liable if defence strategies detrimental to the company are adopted[113].

It is important to notice that sections 171 and 172 cannot be interpreted as a requirement for directors to take positive actions to facilitate or encourage an offer. It has been pointed out that this absence of a positive duty might constitute a divergence between the legal duties of directors and the

[111] Takeover Code, rule 24.2.
[112] Takeover Code rule 25.9.
[113] See Chapter 2 for a closer analysis on how ss. 171 and 172 operates and relates to the Takeover Code in the face of a takeover bid.

expectation of shareholders[114], who tend to expect the directors to encourage any offer which might give them a chance to gain a premium.
By virtue of section 170 (4) the director's fiduciary duties under CA 2006 shall be interpreted and applied in accordance with the already existing common law rules and practice[115].

Long before the codification of the principle in section 171, UK courts have put much emphasis on directors' duty to exercise their powers for a proper purpose. As expressed by Lord Greene in *Re Smith and Fawcett Ltd* from 1942, the directors must exercise their powers "bona fide in what they consider—not what a court may consider—is in the best interests of a company..."[116]. The courts will not question the correctness of a management decision when it is bona fide arrived at[117], but the purpose for which the court made its decision. If the primary motive of a decision by the directors was their own self-interest, their exercise of directors' powers will be questioned[118]. Consequently, if the directors of an offeree board adopt defensive measures either before or in a bid situation with the primary purpose of protecting their own jobs, the courts might consider it a breach of their fiduciary duties under CA 2006[119].

Other sections of the Companies Act 2006 might also be relevant in a pre-bid defence context. If for instance the directors want to issue new shares, they will need authorization to do so by the company`s articles or by shareholders resolution[120], and any shares issued must be offered to already existing shareholders before being issued to independent parties[121]. These so-called shareholder pre-emption rights can, however, be excluded, either in general or in relation to allotments of a particular description, by the company`s articles or by special resolution[122]. These restrictions would prevent e.g. the issuance of a block of shares to a friendly third party who wishes the target to remain independent from being implemented without shareholder approval to the transaction[123].

Mention should also be made of section 831 of the CA 2006, which prohibits public companies from making a distribution (e.g. to pay out dividend) "if the amount of its net assets is not less than the aggregate of its called-up share capital and undistributable reserves" and "the distribution does not reduce the amount of those assets to less than that aggregate"[124]. In practical terms this implies that the company needs to have a very healthy balance sheet in order to make any substantial dividend payment as a part of their defence strategy[125].

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[114] Weinberg and Blank (*above note 105*) para 4-7039.
[115] CA 2006 s. 170 (4).
[116] *Re Smith &Fawcett Ltd*. [1942] Ch 304, p. 306. See also Kenyon-Slade (*above note 59*) para. 10.01.
[117] See *Howard Smith Ltd v. Ampol Petrolium Ltd* [1974] A.C. 821.
[118] Weinberg and Blank (*above note 105*) para. 4-7136.
[119] For the situation where a board who honestly believe a takeover would be detrimental to the company as a whole, see the discussion in Chapter 2.
[120] CA 2006, pt. 17a, s. 551.
[121] See CA 2006, pt. 17a, s. 561 – 577.
[122] CA 2006, pt. 17a, s. 570.
[123] Payne (*above note 58*) at 112.
[124] CA 2006 pt. 23 s. 831.
[125] Kershaw (*above note 55*) at 278.

The Listing Rules

The Listing Rules[126] contains a set of provisions, made and enforced by the UKLA (UK Listing Authority), which must be complied with for the company to be listed on a UK stock exchange. A substantial breach of the rules might be sanctioned with a cancellation of the company`s listing[127].

The most important part of the Listing Rules in relation to takeover defence tactics is Chapter 10, which require listed companies to obtain shareholder approval before entering into significant transactions, principally acquisitions and disposals, depending on the classification of the transaction[128]. In particular, the Listing Rules 10.4 and 10.5 defines transactions amounting to 25% of the company`s gross capital, profits, or market capitalization as first class transactions which require shareholder approval pursuant to rule 10.37.

In the context of hostile takeovers these requirements are relevant because they constrain the company from selling off a substantial amount of their important asses as a part of their defence strategy[129], either after the emergence of a hostile offeror, or before—in order to make the company less attractive to potential prospective offerors[130].

Chapter 10 does not apply to transactions of a revenue nature in the ordinary course of business[131]. It is however unlikely that such a "regular" transaction will have any decisive defensive effect.

Tactics to prevent a hostile takeover in the future

Beyond the measures mentioned above, which require shareholder approval also in a pre-bid context, this article will now provide an overview of some selected measures which could be particularly practical at a pre-bid stage.

Monitoring share register movements

In order to identify possible future bidders, knowing who buys up in the company can be favorable to the offeree board. Under Rule 5 of the Disclosure and Transparency Rules (DTR)[132], an investor acquiring 3% of the voting share capital in a company must, when reaching 3% and for each 1% threshold thereafter, notify its percentage of voting rights to the issuer. This enables the

[126] Financial Services Authority, *The Listing Rules* 2004.
[127] Listing Rules para. 1.19.
[128] Butterworths Takeovers (*above note 28*) para 10.97.
[129] See Kershaw (*above note 55*) at 278-279.
[130] The use of such a measure will however have a detrimental effect to the target company and is therefore unlikely to be used unless the target board has strong reasons to believe that a hostile takeover attempt by an unidentified bidder is likely to take place in the near future..
[131] Butterworths Takeovers (*above note 28*) para 10.97.
[132] Financial Services Authority (FSA), Disclosure and Transparency Rules.

offeree to see whether a potential hostile offeror is acquiring shares in the company, and to be better prepared when a bid situation arises.

Breaches of DTR rule 5 are treated very seriously. This was illustrated when the FSA in August 2011 fined Sir Ken Morrison 210.000 pounds for failing to disclose a reduction of shareholdings from over 6% to 0.9% in Wm Morrison Supermarkets from 2009-2010. Justifying the claim, it was emphasized by the enforcement and financial crime division that timely and accurate disclosure of shareholdings and voting rights is a "fundamental component of properly informed security markets"[133].

However, while the example of strict enforcement above underlines the reliability and information value of DTR rule 5, the rule has probably become less important for the purposes of preparations against potential hostile takeover attempts after the introduction of the new PUSU regime of the Takeover Code. By triggering this regime the target is now enabled to require a potential offeror to disclose its intentions within 28 days[134]. The offeree has consequently become less reliant on DTR rule 5 for the purposes of preparation against potential hostile bidders.

Defensive issuance of shares

Defensive share issuances by the offeree to protect itself against being exposed to hostile takeover bids in the future, can be done by agreements with other companies to hold large but non-controlling blocks in each other, or simply by issuing a block of shares to one friendly holder[135]. If imposed for defensive purposes without shareholder approval, such share issuance may represent a breach of the directors fiduciary duties to exercise their powers for a proper purpose and to act in the interests of the company as a whole[136]. However, most of these restrictions only prohibit the issue of shares without shareholder approval. This might be exploited by the directors of the offeree by obtaining a general resolution which allows them to issue new shares and excludes shareholder pre-emption rights, at a time where no bid is in sight and the shareholders might not be entirely aware that they are denying themselves the prospect of a future bid[137].

Issuance of shares by the offeree directors endeavored at protecting their own positions might not be in the best interests of the company[138]. However, it might be difficult for the shareholders to establish that the prime motive of the directors was to promote its own interests and not to give commercial benefit to the company. It is "not unusual for a company to issue a block of shares to another company with which it wishes to have a close commercial relationship" in the U.K.[139].

[133] Financial Services Authority (FSA), Press Release 072, 16.08.2011.
[134] See the discussion of the regime in Chapter 2.
[135] See Weinberg and Blank (*above note 105*) para. 4-7044 and para. 4-7050.
[136] CA 2006 pt. 10 ss. 171 and 172.
[137] Weinberg and Blank (*above note 105*) para. 4-7045.
[138] CA 2006 s. 172.
[139] Weinberg and Blank (*above note 105*) para. 4-7053.

An early example of defensive share issuance by the offeree directors is *Hogg* v *Cramphorn*[140], where the offeree had created an employee trust, to which it issued shares carrying special voting rights, and thereby successfully prevented the anticipated offer. Emphasizing the majority shareholders right to decide on the merits of a takeover bid, Buckley J. held that the directors had used their powers to issue shares for the improper purpose of defeating a takeover[141].

However, in the *Hogg v Cramphorn* case the share issuance had not been approved by the shareholders in general meeting, and if it had been, "criticism that the directors were by the issue of shares attempting to deprive the the majority of their constitutional rights would have ceased to have any force"[142]. Consequently, the directors of the offeree might benefit from issuing shares to a trust for employees in order to prevent a takeover, if they can obtain approval by the shareholders in general meeting[143].

Defensive merger

It is evident from the discussion above that finding another and friendlier "white knight" bidder may be a useful device for the offeree board in a bid situation. However, if the offeree fears to be exposed to a hostile bid in near future, it might benefit from dealing with it in advance by merging with suitable partner. This will give the offeree board more time to plan the merger.

Merger as a defensive tactic is similar to defensive share issuances, since a major motive is to place a large block of shares in friendly hands. However, in addition to keeping control of the enlarged company in friendly hands, a defensive merger will also have the effect of making the whole enterprise much larger. The enlarged size and possible diversification of interest following a merger might make the company indigestible to a potential offeror[144].

The board of the offeree should however be aware that "inquiries for a defensive merger may galvanise a potential bidder into action", and make an offer which is difficult to refuse before the merger transaction is carried through[145].

The distinct approach adopted to takeover defence tactics in Delaware jurisprudence

This chapter will assess the most common defensive measures adopted by Delaware target companies and how the courts of Delaware respond to those defences. Further, the findings will be used to discuss whether it would be

[140] *Hogg* v *Cramphorn Ltd* [1967] 1 Ch 254.
[141] Hogg v Cramphorn, p. 264.
[142] *Hogg v Cramphorn*, p. 266-267. See also Kenyon-Slade, para. 10.83.
[143] Weinberg and Blank (*above note 105*) para. 4-7050 – 4-7051.
[144] Weinberg and Blank, para. 4-7063.
[145] Weinberg and Blank, para. 4-7064.

favorable to grant the target board a greater discretion to adopt defensive measures also in the U.K.

The use of poison pills and other defence tactics in Delaware U.S.

Target companies in the U.S. in general have a broad authority to apply defensive measures which will effectively deter the bidder when facing a hostile takeover. In the U.S. there has never been any regulatory regime to restrict takeover defensive measures. Some requirements relating to disclosure and the procedure in tender offers was introduced by the Williams Act in 1968, but unlike the U.K. self-regulatory regime the Act neither imposed any mandatory bid rule nor any provisions restricting the application of defense tactics adopted by a target[146]

In the absence of governmental interference on a federal level, and due to the fact that Delaware hosts "more than 50% of all U.S. publicly traded companies and 63% of the Fortune 500"[147], the most prominent forum for the development of the rules governing hostile takeovers in the U.S. is the courts of Delaware[148].

With no formal or self- regulatory regulation of takeover defensive measures, neither on a governmental or State level, Delaware target company directors were free to adopt a variety of defensive measures, only subject to the censorship of Delaware courts on a case-to-case basis. Having no significant regulation to adapt to, it is not surprising that the courts did not adopt a strict approach towards defensive measures, but rather assessed the proportionality of the specific measure taken in each individual case.

An underlying element which might have influenced the courts in their "liberal" approach towards defence tactics might have been a desire to maintain Delaware's status as the "home of corporations". While proclaiming that this is nothing new, Davidoff uses the recent *Airgas* case from 2011[149] to argue that legal participants of Delaware has a "strategy for continued dominance" and not to risk "driving corporations to charter outside Delaware", which affect juridical decision making[150].

One of the first tactics Delaware Target company directors used to exploit the flexibility offered by the courts was to initiate tactical litigation[151]. Studies has reported that litigation featured in "at least one-third of all takeover attempts in the United States" in 1985, and litigation was at that time considered by some to provide the best chance of success for a target seeking to remain independent[152].

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[146] Armour, Jacobs and Milhaupt (*above note 4*) at 241.
[147] Delaware Division of Corporations online, at http://corp.delaware.gov/
[148] Saulsbury IV (*above note 10*) at118.
[149] *Air Products and Chemicals Inc v Airgas Inc*, C.A. Nos. 5249 (Del. Ch. Feb. 15, 2011).
[150] Davidoff, S. M. *A Case Study: Air Products v Airgas And The Value Of Strategic Judicial Decision-Making* (2012) Colum. Bus. L. Rev. 502, at 505.
[151] See the discussion of tactical and obstructive litigation in the UK, in Chapter 2, for the practicability of this tactic.
[152] Ogowewo (*above note 57*) at 602.

Several other defence tactics have been adopted by target company boards and permitted by the courts of Delaware. Measures which are prohibited by the Takeover Code in the U.K, such as issuance of new shares to a third party, acquiring or selling off company assets, increased dividend payments etc. may all be adopted as long as they fulfill the legal doctrine from the *Unocal* case of 1985[153]. In this decision it was held that a target company was permitted to adopt defensive measures proportionate to the threat posed by an offeror, if it had reason to believe that it would damage legitimate corporate interests of the target[154]. This requirement has been known as the "*Unocal test*". The burden to prove that a defensive action is reasonable in a specific context is placed on the offeree board.

The *Unocal test* is decisive also in relation to the defence tactic which is regarded as "the most important modern antitakeover device"[155], namely the poison pill. Poison pills, or shareholder right plans as they are formally called, will typically involve the issuing of rights to shareholders, e.g. a right to subscribe for shares at substantial discount, triggered on the occasion of another company acquiring more than a specified percentage of the offeree company shares, without the recommendation of the board[156]. This version of the pill is often referred to as a "flip in" pill. The "flip over" pill has similar effects, the difference being that a "flip over" provision "instead enables shareholders to purchase stock in an acquiring company upon the merger of the target into the acquirer"[157]. Needless to say, these features make the acquisition of the target impossible without the approval of the offeree board.

However, a strategy which the hostile bidder can adopt to meet a poison pill is to endure in so-called proxy contests, which implies the hostile offeror approaching the shareholders of the target to convince them to replace management with their own candidates, which can redeem the poison pill[158]. This however, is a cumbersome path to take, and especially if the poison pill is accompanied with a staggered board provision, which allows directors to serve "multi-year terms whose starting and ending dates are staggered relative to each other, so that the entire board does not sit for election each year"[159]. Consequently, offerors will not be able to replace directors within a year.

The first decision from the Delaware courts which confirmed poison pills as an accepted defensive measure was the 1985 case of *Moran v. Household International*[160]. In this case it was held that the validity of a poison pill was to be evaluated under the *Unocal* proportionality standard described above. Since then, they have been commonplace among U.S. publicly traded companies.

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[153] *Unocal Corp v Mesa Petrolium Co*, 493 A2d 946 (Del. 1985).
[154] *Ibid* at 955-957.
[155] Barry, J. M. and Hatfield J. W. *Pills and Partisans: Understanding Takeover Defences* (2012) U. Pa. L. Rev. 160 (3) 633, at 641.
[156] Butterwoths Takeovers (*above note 28*) at 419.
[157] Barry and Hatfield (*above note 155*) at 642.
[158] Armour, Jacobs and Milhaupt (*above note 4*) at 247.
[159] Barry and Hatfield (*above note 155*) at 645.
[160] *Moran v Household International Inc*, 500 A.2d 1346 (Del. 1985).

The poison pill still is an applicable defensive measure for the directors of Delaware registered companies today. This was confirmed by the Delaware Chancery Court in the *Airgas* case from 2011[161]. In this case the Airgas board of directors had adopted a poison pill in the form of a "flip – in" shareholder rights plan, where the offeror`s acquisition of 15% of the company voting rights entitled all other shareholders to purchase shares containing voting rights at substantial discount. The court held that the adoption and the continued adherence of the poison pill was a proportionate response to the threat posed by Air products. The decision consequently does not change the Unocal test, and it is "in line with a number of recent decisions in which the Delaware Supreme Court and the Delaware Chancery Court has endorsed the validity of the poison pill as a defensive device"[162].

However, evidence suggests that poison pills might be on a downward trend in the U.S. In 2011 only 867 public companies had operative pills, compared to 2200 in 2001, and juridical comment seems to have become increasingly skeptical to the pill[163]. Further, it is conspicuous that such a trend is discovered simultaneously with the increase[164] of the same type of investors who called for regulation of defensive measures in the U.K. in the fifties – sixties, the institutional shareholders. It remains to be seen if poison pills will continue to play a significant role in U.S. hostile takeovers in the future.

Is board neutrality truly desirable in a hostile bid situation?

As mentioned in the introduction of this article, the divergence in attitude towards the poison pill and other defence tactics in US Delaware and in the UK is conspicuous when taken into consideration that both jurisdictions promote diverse ownership and shareholder primacy.

How to regulate hostile takeovers is obviously much dependent on how to balance the conflicts of interests which may arise between the company directors and its shareholders. At first glance the U.K. approach appears to be the more shareholder -friendly one, since the offeree directors are prohibited from frustrating a takeover which the shareholders wants to compete in order to obtain a premium.

On the other hand, those in favor of permitting poison pills and other defence tactics typically claim that permitting defence tactics provides an excellent tool for offeree directors to push up the offer price, and causes higher premiums for the shareholders[165]. Kershaw comments that the bargaining power of the target directors to increase shareholders premiums in such a way depends on

[161] *Air Products and Chemicals Inc v Airgas Inc*, C.A. Nos. 5249, 5256 (Del. Ch. Feb. 15, 2011).
[162] Delahaye, B. *Still alive: poison pills and staggered boards as hostile takeover defences – the battle for Airgas* (case comment), (2012) I.C.C.L.R. 211, 215.
[163] Crivellaro, J. and Morgut, M. *The end of nocuous relations? New shareholders, poison pills and markets for corporate control* (2012) I.B.L.J 349, at 351. This article refers to Chancellor Chandler`s opinion in the Airgas case, which despite refusing to put aside the poison pill in casu concealed a clear criticism of the uncertainty and inefficiency of current judicial standards.
[164] Crivellaro and Morgut (*above note 163*) at 351.
[165] See e.g. Saulsbury (*above note 10*) at 145.

a variety of case-contingent factors, and that based on the surveys on the value implications of a ESB pill[166] "it remains a moot point whether takeover defences generate or destroy shareholder value"[167].

However, the value effect of poison pills also depends much on the actual willingness of the offeree directors to use the pill for the purposes of raising shareholder premiums. An argument of great influence in the U.K. is the Easterbrook and Fischel`s passivity thesis, proposing that if the authority to decide on the merits of a takeover was left with the offeree board, the directors` self interest in protecting their own jobs would often supersede the interests of the company as a whole[168]. In theoretical debates this argument has gained significant support also in the U.S.

However, it is the view of the author of this article that the directors' "self-interest argument" is occasionally given prevailing argumentative value without sufficient empirical support. To what extent directors might promote their own interests at the expense of the company or the shareholders will among other factors depend on how they perceive that it might impact their reputation, and other individual qualities. Further, as commented by Kershaw directors might, based on their "superior knowledge" have a better "understanding [of] the true value of the company"[169]. Consequently, if not greatly affected by their own self-interests in their judgment, it can be argued that the directors are in a better position than the shareholders to consider whether a takeover offer is inadequate.

On the other hand, even though this article argues that one cannot assume that directors will necessarily act in their own self-interests, it is true, as commented by Bebchuk, that "the interests of management does not fully overlap with those of shareholders" and that management cannot be automatically counted on to always act in the shareholders' best interests[170]. This distinction of interest between directors and shareholders sometimes generates extra costs[171], and there is a need for a market for corporate control which to some extent will be undermined by a broad discretion for the board to adopt takeover defences[172].

Another argument in favor of the board neutrality rule in the U.K. Takeover Code is the simple fact that it encourages a constant supply of potential bidders[173]. In combination with allowing them to exit from their holdings when they decide to do so, this can encourage shareholders to expect a future premium to a greater extent than they would if directors had the authority to

[166] Poison pill with an "Effective Staggered Board".
[167] Kershaw (*above note 55*) at 305-306.
[168] Armour and Skeel (*above note 31*) at 1733.
[169] Kershaw, D. *Company Law in Context: Text and Materials*, (2009) Oxford University Press, Web Chapter A: The Market for Corporate Control, at 107.
[170] Bebchuk, L. A. *The case for increasing shareholder power* (2005) Harv. L. Rev. 118 (3), 833, at 850.
[171] Often referred to as agency costs.
[172] Johnston (*above note 5*) at 450.
[173] Ibid.

frustrate hostile bids, and consequently to a greater extent encourage shareholder investments.

Significant challenges arise, however, if the argument above results in more short-term oriented investments. Robinson refers to a The Times survey from 2010 providing that the average holdings period of shares in FTSE companies was eight years in 1965 in comparison to only 7 months now, and argues that shareholder primacy in a takeover context has promoted this short-termism[174]. He comments that takeovers have not proved to "provide long-term value from traditional shareholder primacy", that "for investors, the only way to make gains is through short-termism", and that "for directors a short-term approach is demanded through the threat of a hostile takeover"[175]. While short-termism in nature has the potential to compromise the long term sustainability of companies, the latter argument provides for an interesting twist to the more established argument that the threat of a hostile takeover will cause the management to improve their performance.

A logical result of the prohibition of defensive measures would be that it, by making it easier for hostile bidders to succeed, contributes to a larger amount of takeovers than would the allowance of such measures. If one assumes that takeovers generally cause companies to make more efficient use of their assets and generate more value, the board neutrality rule in its current version would represent a favorable solution in terms of community economy.

However, in practice, although the high level of tolerance for defensive measures has resulted in U.S. takeover offers being less likely to be hostile than U.K. offers, and hostile takeovers being less likely to succeed in the US, the "overall level of takeover activity [in the U.S.], adjusted for the size of the economy, actually seems slightly higher than in the United Kingdom"[176]. Further, according to Saulsbury, "several empirical studies testing different time periods and sample sizes of deals in the U.S. have shown that poison pills increase takeover premiums between 7.8% and 21.4%"[177]. Saulbury further argues that the Delaware system is more flexible than the strict prohibition in Rule 21 of the Takeover Code, in that it "allows corporate boards to structure corporate transactions in a manner best tailored to the particular circumstances their corporations face"[178].

Among the arguments discussed above in this chapter, especially the implication that defensive measures may contribute increase premiums for the target shareholders, the argument that a strict prohibition of defence tactics can provide an incentive for short-termism, and the consideration that directors are in a better placed position to understand the true value of the company, suggests that a strict prohibition of defence tactics might not be the

[174] Robinson (*above note 49*) at 293.
[175] Robinson (*above note 49*) at 294.
[176] See Armour and Skeel (*above note 31*) at 1738-39, which presents an M&A transaction table which shows that 0.85% of takeover bids announced in the UK from 1990-2005 were hostile, whereupon 43% were successful, while in the US 0,57% of all takeover offers in the same period were hostile and 24% succeeded.
[177] Saulsbury (*above note 10*) at 145.
[178] Saulsbury (*above note 10*) at 128.

most favorable device to regulate takeovers. The arguments presented might provide a basis to suggest that the Takeover Panel should consider revising the board neutrality rule of the Takeover Code, to the effect of giving offeree company directors' greater influence over the fate of takeover bids.

Conclusion

It is evident from the discussion in this article that the Takeover Code gives the directors' of offeree companies very little authority to affect the fate of hostile takeover bids. Even though the Code does not apply before a hostile bid might be imminent, especially the directors' fiduciary duties and the Listing Rules restrict directors from guarding themselves against hostile bids without shareholder approval also at an advance stage.

When compared to the approach adopted by the courts of Delaware U.S. the differences are conspicuous. The Delaware courts has essentially permitted defensive measures which allow the offeree board to control the fate of a hostile takeover bid, as long as they can defend the measures adopted as proportionate to the threat posed by the hostile offeror.

Based on an assessment of the positive and negative implementations of prohibiting takeover defence tactics, this article proposes that the Takeover Panel might consider replacing the strict prohibition of defence tactics in the Takeover Code with more flexible rules. The Takeover Panel has recently (2011) changed the Code in an attempt to increase the power of the offeree *vis a vis* the offeror. As submitted in Chapter 2 these changes may, depending on the circumstances, provide the directors' of the offeree with an increased opportunity to indirectly affect the fate of a hostile takeover bid. However, as long as Rule 21 of the Code continues to operate, the influence of offeree directors will still be moderate in most cases.

It must be emphasized that the article does not suggest a free authority for offeree directors to adopt detrimental defence tactics admitting them to "just say no" to any offeror. What is argued against is a strict general prohibition of defence tactics. Even though more flexibility has an unpleasant tendency to create legal uncertainty, based on the discussion in Chapter 4 more flexible rules are desirable to enable a shift away from shareholder primacy[179] and to give directors and other stakeholder interest more authority to affect the fate of a hostile takeover.

It is outside the scope and ambition of this article to discuss in detail the specific defence tactics the Panel may consider to permit. However, a possible instrument to provide more flexible rules could be to introduce certain exceptions to the board neutrality rule, e.g. in cases where the board is able to establish a proper and well-founded purpose behind defending the company against a takeover. It may be adequate to permit certain defence tactics where solid and demonstrable facts indicate that a takeover, for instance, is likely to

[179] See Robinson (*above note 49*) at 299.

be detrimental to the long-term sustainability of the company and the interests of its employees.

If one should introduce exceptions to the board neutrality rule however, a significant challenge would be to provide criteria's which are sufficiently clear, robust and examinable to avoid unnecessary legal uncertainty and misuse by target company directors. Further, potential conflicts and disharmony with the European Community law is an issue which would require due consideration. Nevertheless, a pure assessment of the practical implications of takeover defence tactics provides convincing arguments in favor of not operating with an absolute prohibition. Thus, it is the view of the author of this article that the Takeover Panel should consider to revise the board neutrality rule in order to provide a more flexible and expedient solution.

Political Constitutionalism and Legal Constitutionalism: Where does the Judiciary Lie at the Heart of this Tension?

Sarah Pearson

This article discusses the current tension between political and legal constitutionalism and the position of the judiciary within this debate. A brief historical analysis is used to outline the UK's traditional political constitutional system, before being contrasted with this newly developing legalistic way of constraining power. The Westminster model of political accountability is discussed as an inadequate constitutional safeguard, and instead, the judiciary are seen to take an activist stance towards holding the government to account. The concept of Parliamentary supremacy is considered and compared with the strengthening notion of the rule of law. The judiciary are highlighted as pushing for a greater role in upholding individual rights through the development of judicial review, the implementation of the Human Rights Act and the creation of a UK Supreme Court. The article concludes that the traditional constitutional model remains important, but that a shift can been seen within the judiciary as they start to gain more confidence, power and legitimacy. The UK still retains its political uncodified constitution and its principle of Parliamentary supremacy, but there is now an increasing level of legal checks to help bolster the ineffectual political means and an increasing recognition of the courts as impartial defenders of rights.

Introduction

In recent years, the judiciary have seen an increased ability to wield power illustrated through the ratification of the European Convention on Human Rights,[1] the subsequent enactment of the Human Rights Act,[2] the expansion of judicial review claims, and the creation of the United Kingdom (UK) Supreme Court.[3] The shift in judicial responsibilities is part of a larger constitutional change: the move from a political constitution to a legal constitution. The struggle between these two constitutional theories is mirrored by the competing ideas of Parliamentary supremacy and the rule of

[1] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos. 11 and 14) (ECHR).
[2] Human Rights Act 1998.
[3] Constitutional Reform Act 2005.

law, and at present it is unclear where the judiciary fits appropriately between the two. Each theoretical standpoint has been pushing for dominance; however, there is a compelling argument to suggest that legal constitutionalism has recently been vying most strongly for that position.

Political Constitutionalism and Legal Constitutionalism Outlined

Traditionally, the UK has had a political constitution, a concept interlinked with Parliamentary sovereignty, the fusion of powers, majoritarian notions of democracy and political methods of accountability. The legislature is perceived within this model as holding the most theoretical power and legitimacy. This is because Parliament, as an elected body, is seen to represent the interests of the majority and is therefore trusted to hold government to account through political means. However, the UK model of constitutionalism is slightly different in practice, with government holding considerable power. The legislature and executive within this model are fused together; government officials are drawn from the House of Commons and the House of Lords, making effective legal checks and balances difficult to maintain. There is no clear separation of powers, a concept traditionally thought important to guard against abuses of power, and thus provide a more accountable way of governing.

The basis of political constitutionalism within the UK predominantly rests on the principle of parliamentary sovereignty, a notion derived from the UK's rejection of powerful and controlling monarchs through the English Revolution, resulting in the Glorious Revolution of 1689. Although the monarchy was restored under Charles II, a new relationship was formed between the Crown and Parliament. By 1688 the courts recognised this supremacy of the legislature, which became known as the rule of recognition.[4]

In contrast, a legal constitution is theoretically based upon the rule of law. There is a stronger emphasis on the separation of powers and a desire for a system of legal checks and balances on those in power. The judiciary within this model help to control and limit the executive by remaining separate and impartial. It is this model of governance which the UK must aspire to in order to protect fundamental rights and safeguard against tyranny. The separation of powers between the executive and legislature would be difficult to alter and reform due to its historical entrenchment, however there is now a noticeable separation with the judiciary. The historical and political constitution of the UK has thus become fractured in recent years with a shift towards a more legal constitution, and a consequent breakdown of the traditional Westminster model. This development is most evident when looking at the changing powers of the judiciary.

[4] A Le Sueur, M Sunkin, JEK Murkens. *Public Law* (1st edn, Oxford University Press 2010) 62.

Accountability Mechanisms

Political accountability is achieved through Members of Parliament (MP) having the mandate to call the government to account through a process of continued scrutiny; for example, prime minister questions, select committees, written and oral questions, or debates. However, the courts have also played a role in recent years with the expansion of judicial review, helping to provide a check on governmental power. The difficulty with this legalistic system of checks and balances is the judiciary's lack of legitimacy. The judiciary are unelected and can therefore not be said to represent the majoritarian views of the population in the same way that an elected legislature can. On the other hand, the weakness of Parliament in holding the government to account suggests the courts have been forced to assist. Lord Hailsham expressed his concerns of the growing unconstrained power of government in 1976 with the phrase: "elective dictatorship".[5]

The Westminster model of political accountability may arguably be regarded as failing, leading to a gap in which the judiciary is able to fill by stepping "into the territory which belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended".[6] The judiciary therefore help "to avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers".[7] There are several factors that have contributed to the breakdown of this model: government controlling Parliament, the shift from collective cabinet government to prime ministerial government, the rise of delegated legislation made by ministers, an increase in multi-level governance (through devolution and European incorporation) and a crisis of public confidence with, for example, the MP's expenses scandal. The final factor that can either be seen as contributing to the breakdown, or occurring as a result of it, is the rise of the judicial power.

Parliamentary Sovereignty and the Rule of Law

In recent years the judiciary has become increasingly activist, defiant and discretionary in order to help hold government to account. Jeffrey Jowell traces the development of administrative law and identifies the judicial move into the constitutional realm.[8] This is based on Lord Diplock's grounds for judicial review (set out in the *GCHQ* case)[9] of illegality, irrationality and procedural impropriety. The first theory of judicial review, as advocated by Professor Christopher Forsyth,[10] is that of ultra vires; this is the view that the courts are merely upholding the intention of Parliament by checking that bodies have not exceeded their powers. The alternative view, that supported

[5] Lord Halisham of St Marylebone, *The Dilemma Of Democracy* (Collins 1978).
[6] R v Secretary of State for the Home Department, Ex parte Fire Brigades Union [1995] 2 AC 513, 567 (HL).
[7] Ibid.
[8] J Jowell, *The British Constitution in the Twentieth Century*: *Administrative Law* (Vernon Bogdanor ed, Oxford University Press 2002).
[9] *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 375 (HL).
[10] C Forsyth, *Judicial Review and the Constitution* (Hart Publishing 2000).

by Jowell[11] himself and those Such as Paul Craig,[12] is that judicial review is based upon the rule of law. For those such as Jowell, Craig and Ronald Dworkin,[13] the rule of law should be seen from a substantive rights conception that citizens have rights and duties, including political rights against the state.

Despite this tension between the rule of law and Parliamentary sovereignty, the latter still remains an inherent and dominant feature of the constitution. This principle was traditionally defined in the words of Dicey: "[Parliament] has under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament".[14] In 1974, the courts were seen to respect and confirm the enrolled bill rule in the case of *British Railways Board v Pickin.*[15] Lord Reid illustrated his deference to Parliament and his understanding of its historical background: "The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution . . . I must make it plain that there has been no attempt to question the general supremacy of Parliament."[16] However, the courts have expressed concerns about Parliamentary sovereignty and the power of government; such issues arose obiter in *Jackson v AG,*[17] a case involving a challenge to the validity of the Hunting Act 2004 and the Parliament Act 1949. Jackson lost the case, but in spite of this it was thought to "open the door"[18] for individuals to challenge the validity of a statute. In the case there was an awareness of the changing role of the judiciary expressed by Baroness Hale and a suggestion that the courts may not follow Parliament if they were to act unconstitutionally: "the courts will treat with particular suspicion any attempt to subvert the rule of law".[19] However, Baroness Hale concludes that currently "the constraints upon what Parliament can do are political and diplomatic rather than constitutional".[20] Nevertheless, the courts are beginning to question the traditional political mechanisms of accountability and the principle of Parliamentary sovereignty.

A similar pattern of change can be seen with the rule that Parliament cannot bind its successors. The implied repeal rule was confirmed in the case of *Ellen Street Estates Ltd v Minister of Health,*[21] but challenged by Laws LJ in *Thoburn v Sunderland City Council.*[22] Laws argued that implied repeal does not apply with statutes which are of constitutional importance and suggests: "We should recognise a hierarchy of Acts of Parliament: as it were ordinary statutes and constitutional statutes."[23] Previously all statutes were regarded as

[11] J Jowell, 'The rule of law's long arm : Uncommunicated decisions' [2004] Public Law 246, 246-8.
[12] P Craig, 'Constitutional foundations, the rule of law and supremacy' [2003] Public Law 92, 96-97.
[13] R Dworkin, 'Political Judges and the Rule of Law', in *A Matter of Principle* (OUP 1985) 11-12.
[14] Le Sueur (n 3) 73.
[15] *British Railways Board v Pickin* [1974] AC 765 (HL).
[16] Ibid, 782.
[17] *Jackson v AG* [2005] UKHL 56 (HL).
[18] Le Sueur (n 3) 599.
[19] *Jackson v AG* [2005] UKHL 56 (HL), [159].
[20] Ibid.
[21] *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 (CA).
[22] *Thoburn v Sunderland City Council* [2003] QB 151 (QBD).
[23] Ibid, 186.

untouchable by the courts, they could not question their validity and authority without contradicting the concept of Parliamentary sovereignty; however, this recent bicameral categorization of statutes by Laws LJ indicates an attempt to stretch the traditional notions of constitutionalism by creating an exception. This erosion of Parliamentary supremacy has thus strengthened in recent years: the *Thoburn* case is dated 2003 and *Jackson* 2006. This may make it possible for the judiciary's power to continue to grow to the point at which decisions are made in 'constitutional cases'.

The Creation of the UK Supreme Court

If this potential power to review 'constitutional cases' arises in the future it is likely to be used by the highest appellate court in the UK, the Supreme Court established in 2009.[24] This shift away from the Appellate Committee of the House of Lords has allowed for a large symbolic change in constitutional theory by forming a separation of powers and an increased independence of the judiciary. Judicial review claims have allowed the court to scrutinize government policy in general. However, there are indications that the newly formed Supreme Court could become a constitutional court. Lord Phillips expressed his view that "if parliament did the inconceivable, we might do the inconceivable as well". [25] The reference made here would apply to a situation for example, of Parliament enacting legislation which is not compliant with the Human Rights Act 1998, or offends constitutional principles to the extent that the Supreme Court is willing to step in and make a coercive order against the government minister responsible for the legislation. This would be the first indication of a dramatic shift towards a legal constitution and a Supreme Court akin to the US Supreme Court. This suggestion of the potential growth in power of the UK Supreme Court was also signposted by Lord Steyn in the *Jackson* case: "the classic account by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle... In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish".[26] Their Lordships are thus advocating that Parliamentary Supremacy might be limited by the Justices of the Supreme Court in exceptional circumstances where an attempt is made by parliament to, for example, abolish judicial review.

Therefore, the UK Supreme Court can be highlighted as being a contributing factor in the shift towards legal constitutionalism. It has the potential to flex its muscles in a way that the House of Lords could not due to its increased independence and legitimacy. The Supreme Court is accessible, open and transparent, a combination which could lead to the Justices taking a more

[24] Constitutional Reform Act 2005.
[25] C Coleman, Interview with Lord Phillips, the head of the Supreme Court (2 August 2011).
[26] [2005] UKHL 56, [102].

activist role against Parliament. Even the name "Supreme" seems to insinuate that the court will become a constitutional court. The future powers and functions of this newly formed Supreme Court has been affected by the UK's ratification of the European Convention on Human Rights (ECHR).

The Human Rights Act

The growth in relations with Europe has led to the courts taking on greater responsibility. Despite an obvious growth in relations with Europe through the UK's Member State status in the European Union, it is the ratification of the European Convention on Human Rights[27] in 1950 and its incorporation into domestic law in 1998 through the Human Rights Act[28] which is of significant interest here. This European influence has "encouraged the judiciary to play a greater constitutional role".[29] The European Court of Human Rights, based in Strasbourg, enforces the ECHR and it is in this area that the UK Supreme Court has the ability to use judicial activism to a greater extent. Before the 1998 Act, individuals were forced to travel to Strasbourg to access rights, and consequently, one of the reasons for incorporation of ECHR into domestic law was to enable access to these rights in the domestic courts. The 1998 Act allowed for the rule of law to be strengthened so that the courts can now, as well as Parliament, provide a check on governmental power which may be described as: "bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable".[30] In other words, the courts act in addition to the political methods of accountability rather than replacing and superseding them completely.

The UK Supreme Court has needed to analyse and define its own horizontal relationship with Strasbourg in order to set out the respective powers of each court. In *R v Horncastle*,[31] the Supreme Court made it clear that this relationship did not necessarily require the strict following of judgments by Strasbourg. In other words, the Supreme Court did not consider itself to be bound to follow the judgments automatically, but rather interpreted section 2(1) of the Human Rights Act to take Strasbourg jurisprudence "into account" in the literal sense. This section is therefore to take "into account" alongside other factors and as a strong indication of the law, but not as an automatic binding precedent. The Supreme Court therefore has the ability to facilitate this legal constitutional shift through judicial dialogue with Strasbourg.

By enacting the Human Rights Act 1998, it is Parliament itself that has altered the dynamics of the judicial-executive relationship and threatened the concept of Parliamentary supremacy, by giving the courts the ammunition of human rights to fire at the executive if they fail to comply with the ECHR. In one sense then the gun is loaded for the Supreme Court to defend and play an activist role where necessary.

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[27] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos. 11 and 14) (ECHR).
[28] The Human Rights Act 1998.
[29] A Tomkins, *Public Law* (1st edn, Oxford University Press 2003) 24.
[30] CJS Knight, '*Bi-polar sovereignty restated'* [2009] Cambridge Law Journal 361.
[31] *R v Horncastle and another* [2009] UKSC 14 (SC).

The Expansion of Judicial Review

As a result of this strengthened connection with human rights, the courts have more power with broader notions of the rule of law. This has led to an expansion of judicial review. Jonathan Sumption recognises this movement and criticizes the way in which "the uncertain boundary between policy-making and implementation has become more porous."[32] This reflects the political constitutionalist viewpoint that the courts interpret and apply the law, rather than creating it. Therefore, Sumption, though critical of the shift, highlights the heart of the tension: there is no clear boundary between politics and the law.

Judicial review must be examined in light of these European constitutional developments. The case of *R v Ministry of Defence, Ex parte Smith*[33] pre dates the Human Rights Act and falls within what may be defined as a domestic constitutional rights case of anxious judicial scrutiny under Wednesbury[34] unreasonableness. The case involved a challenge to the blanket ban on homosexuals in the military with the claimants arguing on Wednesbury grounds that the policy was irrational; they lost the case at both the High Court and the Court of Appeal. Lord Bingham adapted the Wednesbury test but this was insufficient as ultimately the policy was held to be rational. However, the case was taken to Strasbourg (*Smith and Grady v UK)*[35] and a proportionality approach was adopted based on the idea that the more serious the interference with the Article 8 right, the greater justification for such interference is needed. This did not bind the domestic courts at the time, nevertheless, since the Human Rights Act, the courts can apply this form of reasoning which holds a lower threshold than the Wednesbury test when presented with ECHR based claims. This adoption of reasoning can be seen in the case of *R (Daly) v Home Secretary*.[36] This particular case was set in the context of politically embarrassing prison breakouts. A blanket policy was fixed for prison guards to search or look over correspondence, and for cell searches to take place without the prisoner being present. A judicial review challenge was brought arguing that the policy infringed on basic common law rights such as the right to legal professional privilege. The case was decided based on common law principles, however it was articulated in the case that the same result could be achieved by reference to the European Convention.[37] Thus, an approach very similar to that of proportionality was adopted as the courts now felt they had more legitimacy in applying rights recognised by the ECHR. If the Wednesbury approach had been adopted the blanket policy would have been likely to survive. Therefore, although proportionality is not

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[32] Jonathan Sumption QC, '*Judicial and Political Decision-Making – The Uncertain Boundary*', FA Mann Lecture, 9 November 2011. 6. Downloadable at http://www.legalweek.com/digital_assets/3704/MANNLECTURE_final.pdf (accessed 20th March 2012).

[33] *R v Ministry of Defence, Ex parte Smith* [1996] QB 517 (CA).

[34] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[35] *Smith and Grady v The United Kingdom* App no 33985/96 [1999] IRLR 734 (ECtHR).

[36] *R v (Daly) Secretary of State for the Home Department* [2001] 2 AC 532 (HL).

[37] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos. 11 and 14) (ECHR), Article 8.

itself a freestanding ground of judicial review it is relevant in constitutional rights cases.

The two cases help to demonstrate the shift from a political constitution to a more legal constitution. The first case was essentially a masked policy decision with the courts having less power to uphold rights. The Wednesbury test has a very high threshold: "a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere".[38] This has been criticised as too vague and ill defined. Such a test is characteristic of a political constitution as there is a requirement for judicial self-restraint in order not to encroach into substantive decision-making. The second case in contrast allows the court legitimised flexibility in reasoning. The common law in that instance provided the correct outcome whilst the ECHR acts as a support giving the court the confidence to defend rights. Therefore, the Human Rights Act has allowed for the courts to potentially take a closer look at the decision taken within a judicial review claim, providing an opportunity for a more intensive review process.

Conclusion

Political constitutionalism and legal constitutionalism are models of how to structure and to constrain power within a state. The UK has its root centred in the political sphere due to the organic growth of the constitution entrenched in history, whereas other systems with a 'written' constitution may write in legal safeguards to ensure checks on power. The UK judiciary is therefore having to slowly adapt to this general shift towards legal constitutionalism. There is no quick fix as there is no codified constitution in which rules can be altered. The courts have therefore assumed responsibility through case law. This process of gradually gaining confidence, power and legitimacy has been accelerated somewhat by the Human Rights Act 1998. This could perhaps indicate that the judiciary have been pushed into their new role: through the failure of the political model and through the increased powers conferred on them through the Human Rights Act. This awareness by the executive and legislature to protect fundamental rights shows an evolution in constitutional thinking; power needs to be constrained and legal mechanism are arguably most effective. The developments to date underlined a gap in accountability, which has had to be filled by the courts through an expansion of judicial review claims. Nevertheless, the UK still retains its political uncodified constitution and its principle of Parliamentary sovereignty, but there is now an increasing level of legal checks to help bolster the ineffectual political means and an increasing recognition of the courts as impartial defenders of rights.

[38] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (CA).

Reinforcing the Internal Market through Non-Discrimination and Unfettered Market Access

Irena Markitani

The European Court of Justice has essentially utilised two tests so as to establish and reinforce an internal market within the European Union in which the freedom of movement of goods, persons, services, establishment and capital is preserved. The two tests utilised are the "non-discrimination" and the "market access". These two different tests exist due to the uncertainty as to the purpose of the rules which in turn reflects the uncertainty as to the proper basis of the internal market the European Court of Justice seeks to materialise. The non-discrimination test aims mainly to remove nationality based barriers; whereas the market access test aims to ensure economic freedom. The Article discusses how these two tests had been applied and evolved within the different freedom areas; analyses the purpose and thus, the significance of each test; and then, comments upon their implications on European economic integration and Member State regulatory autonomy.

Introduction

Free movement rules are pivotal to the accomplishment of the main objectives of the European Union (EU) and particularly to the establishment of an internal market[1] which is described in Article 26 of the Treaty on the Functioning of the European Union (TFEU) as "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured...". The European Court of Justice (ECJ) has developed and refined the rules associated with these freedoms, aiming to achieve the realisation of the internal market. However, there is still much controversy about the proper test that should be utilised in the application of these rules, stemming from the uncertainty of their purpose i.e. whether they are concerned with the removal of nationality barriers to trade or with ensuring economic freedom. I will first proceed to delineate the approach of the Court in respect of free movement of goods which has been the most controversial and then, for free movement of persons, services, establishment and capital, while commenting upon the significance of each approach in each context. I will then, comment upon the uncertainty surrounding these two tests and lastly, examine the implications of each for European economic integration and Member State regulatory autonomy.

[1] Article 2 Treaty on European Union

Free Movement of Goods

The key article on free movement of goods is Article 34 TFEU which provides that "quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States". "Quantitative restrictions" are capable of indisputable interpretation i.e. restrictions as to the amount of imports by reference to any factor. More problematic is the interpretation of "measures having equivalent effect" which was defined by the Court in *Dassonville* as referring to "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade"[2]. This broad definition is capable of encompassing any national regulatory measure even if it does not discriminate between domestically produced and imported goods thus, restricting the extent of Member States' regulatory autonomy.

However, it was not until *Cassis de Dijon*[3] refined this principle that this potential realised. The Court in *Cassis* stated that since there was no European legislation harmonising the issue in question, it was legitimate for Member States to regulate in relation to it[4]. However, the court further expressed the "mutual recognition principle" which provides that there is no reason for products complying with the laws of a Member State not to be sold in all other States as well[5]. Therefore, it was held that any state refusing the importation of certain goods because they do not meet some regulation imposed by its domestic laws, will have to justify this measure on the basis of either specific derogations provided by Article 36 TFEU or public-interest objectives known as mandatory requirements and further, to demonstrate that the rule in question constitutes necessary and proportionate means to achieve that end. This principle is known as the "rule of reason"[6].

Therefore, the mutual recognition principle aiming at economic integration had been mitigated to reinforce the regulatory autonomy of the States through the notion of mandatory requirements. However, this decision also mandates to the conclusion that the Court signals its competence to review Member States' policies since it had accepted measures such as a ban on Sunday opening etc. to fall under Article 34 TFEU and thus, effectively utilised this Article "to challenge national regulatory legislation rather than specifically as a tool of market integration"[7].

It is worth-mentioning that at the time, the Community political process was unable to bring about the necessary harmonisation mainly due to the requirement of unanimity in most legislative fields. However, the choice of the Court to take up quasi-legislative role by adopting a broad standard and a

[2] C-8/74 *Procureur du Roi* v *Dassonville* [1974] ECR 837, para 5.
[3] C-120/78 *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649.
[4] *ibid.*, at para. 8.
[5] *ibid.*, at para. 14.
[6] *ibid.*, at para. 8.
[7] Emily Reid "Regulatory Autonomy in the EU and WTO: Defining and Defending its limits" (2010) 44 (4) JWT 877, 880.

balance test, over-burdened its workload[8]. Moreover, its involvement in assessing any market regulation entailing a margin of discretionary powers eroded its legitimacy[9]. Therefore, the case of *Keck*[10] which was decided when Community political process was more proactive is to be viewed as a necessary development in this context.

The Court in *Keck*[11] excluded from the scope of Article 34 TFEU selling arrangements i.e. rules governing the way products are sold, to discourage "the increasing tendency of traders to invoke [Article 34 TFEU] ...as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at [imported] products..."[12]. The Court reasoned this exclusion based on the fact that selling arrangements do not generally have the effect of preventing or impeding access to the market for imported goods any more than is the case for domestic products[13]. However, the exclusion was subject to the proviso that the selling arrangements in question apply to all traders and "affect in the same manner, in law and in fact, the marketing of domestic [...and imported] products"[14]. Consequently, "Keck proviso" emphasises the differential impact of a rule upon domestic and imported goods on market access which could arguably be translated to a non-discrimination criterion.

However, even if the Court in *Keck*[15] was aiming to rein in the use of Article 34 TFEU as a deregulatory instrument[16], it had been severely criticised for its formalistic approach in distinguishing between product requirements and selling arrangements; and for the uncertainty surrounding the meaning of the latter. There is further, much controversy surrounding the "Keck proviso" i.e. whether it encompasses discriminatory measures or further, includes non-discriminatory rules impeding market access and thus, risking to bring once again under the remit of Article 34 TFEU any national measure. In *Gourmet International*[17] the Court referred to the proviso in terms of market access, but applied it on the basis of discrimination which regarded as the key consideration in its application.

The present rules applicable to free movement of goods are hard to discern because of the various approaches utilised by the Court as to its interpretation and qualification. More recently, it invariably utilises market access language which though applies mainly based on differential treatment, "double burden"

[8] Miguel Poiares Maduro, 'Harmony and Dissonance in Free Movement' in Andenas M and Roth W (eds), *Services and Free Movement in EU Law* (OUP 2002) 47.
[9] *ibid.*, at 52.
[10] Joined cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097.
[11] *ibid*.
[12] *ibid.*, at para. 14.
[13] *ibid.*, at para. 17.
[14] *ibid.*, at para. 16.
[15] *ibid*.
[16] Reid (n 7) 881.
[17] C–405/98 *Konsumentombudsmannen (KO)* v *Gourmet International Products AB (GIP)* [2001] ECR I–1795.

or discrimination. AG Maduro in *Alfa Vita*[18] explained the Court's approach as adopting three criteria "which amount in substance to identifying discrimination against the exercise of freedom of movement"[19]. The first criterion is direct or indirect discrimination. The second one is "double burden" which includes measures imposing supplementary costs on imported products, when this stems from the fact that national rules did not consider the particular situation of imported products which already had to comply with the rules in their state of origin. The third criterion essentially included regulations which protect the position of certain economic operators in the national market or make intra-Community trade more difficult than trade within the national market. The latter criterion though expressed in market access terms, is arguably based on discrimination since it entails the element of comparison. However, there are legal theorists who argue that the Court had gone beyond discrimination applying a purely "market access" test[20].

Free Movement of Capital, Persons, Services and Freedom of Establishment

The rules relating to the other freedoms had been developed in a different way by the Court but they had all followed more or less the same "route". Initially, a non-discrimination test was applied and more recently there was a shift towards the "market access" test firstly in relation to services and freedom of establishment, subsequently in relation to persons and finally in relation to capital. The delay in the fields of persons and capital was caused due to the reluctance of the Court to utilise a test which would potentially restraint Member States regulatory autonomy in areas involving politically contentious matters.

Nevertheless, the market access terminology finally prevailed in all freedoms, arguably constituting the way towards convergent approaches for all of them. I will briefly refer to few cases relating to the freedom of services and persons to illustrate this recent trend. In *Säger*[21] Article 56 TFEU which prohibits restrictions on the freedom to provide services within the Community was interpreted as including "not only the elimination of all discrimination...but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of the provider of services established in another Member State where he lawfully provides similar services"[22]. Following this case the approach of the Court has been whether the regulation has an impact upon market access and then, whether this can be justified[23]. Importantly, most rulings, where this approach was followed e.g.

[18] C-158/06 & C-159/04 Alfa Vita Vassilopoulos AE, formerly Trofo Super-Markets and Carrefour Marinopoulos AE v Elliniko Dimosio, Nomarchiaki Autodioikisi Ioanninon [2006] ECR I-8135, Opinion of AG Maduro, paras 43-35.
[19] *ibid.*, at para. 46.
[20] Reid (n 7) 883.
[21] C-76/90 *Säger* v *Dennemeyer & Co. Ltd.* [1991] ECR I-4221.
[22] *ibid.*, at para12.
[23] Reid (n 7) 884.

Gebhard[24] (freedom of establishment), can be arguably justified on the basis of indirect discrimination since the measures in question affected foreigners much more than locals. Another leading case is *Bosman*[25] (free movement of persons), where it was ruled that non-discriminatory measures "which exclude or deter a national...from leaving his country of origin in order to exercise his right to freedom of movement ... constitute an obstacle to that freedom..."[26].

Uncertainty

Davies argues that even if the Court "speaks the language of discrimination increasingly rarely"[27] and utilises instead the "market access" criterion, the application of the latter entails the comparison element and thus, the non-discrimination principle[28]. However, others argue that the court had moved beyond discrimination and the substantial hindrance of market access is gradually emerging[29].

This uncertainty which is caused by the absence of the proper institutional objective of the free movement rules is further enhanced by the fact that discrimination and market access are concepts eminently fluid capable of changing meanings according to the economic and political context to which they are utilised. Crucially, their meanings could be stretched as to encompass each other i.e. a rather strict market access test based on "disparate impact" may constitute an alternative to a broad indirect discrimination criterion which remarkably requires different situations to be treated differently.
Furthermore, the Court has not yet clearly articulated "market access" test which had been given various interpretations by legal theorists e.g. on the basis of "double burden", impediment on or hindering market access etc. The latter which is most widely accepted though, is capable of encompassing every national regulation and would require complex economic and social judgments by the Court. Therefore, this approach had been accused as too naïve since the analysis is at the level of lawyers with no serious attempt to introduce any economic theory or market analysis in its application[30].

Implications

In any event, market access test can be essentially differentiated from non-discrimination by questioning whether movement or access to the market is restricted and not whether it is more restricted than for nationals[31]. Thus, any

[24] C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.
[25] C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR 1-4921.
[26] *ibid.*, at para 96.
[27] Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International 2003) 56.
[28] *ibid.*, at 93.
[29] Gráinne De Búrca, 'Unpacking the Concept of Discrimination in EC and International Trade Law' in Barnard C and Scott J (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 183.
[30] Davies (n 26) 58.
[31] *ibid.*, at 93.

national regulatory measure relating to trade may fall under the market access test and consequently, free movement rules are to be utilised as instruments guaranteeing unfettered access to the market. This approach stems from the pursuance by the Court of deeper integration to establish an internal market where competition at the level of goods and services is unfettered. Moreover, as AG Jacobs stated in Leclerc: "If an obstacle to trade exists, it cannot cease to exist simply because an identical obstacle affects domestic trade"[32] thus, justifying the review of non-discriminatory measures. However, this test may assist traders seeking to challenge regulations restricting their commercial freedom even though these are not addressed to imported goods etc., threatening to undermine legitimate national regulation. The eventuality may be deregulation since this approach is more intrusive to states' regulatory autonomy and thus, threatens to undermine the possibility of diversity at state level and to discourage experimentation by national legislators[33] within the frames of fruitful competition. Market access then, risks a race to uniformity and perhaps more radically a "race to the bottom" in the sense of degrading the standards of market regulation, though this is unlikely due to political constraints.

On the other, a discrimination test aims to remove nationality-based barriers to trade and thus, does not threaten the regulatory autonomy of the states even though indirect discrimination may prove considerably broad. This approach is also compatible with the principle of subsidiarity which requires decisions in the EU to be made as closer to the individual as possible. However, the economic integration within EU is likely to remain static if a solely non-discrimination test is utilised since it primarily aims to remove nationality based barriers to trade and not any other obstacles to ensure unfettered access to other Member States' markets and economic freedom in general. Therefore, it is unlikely that an internal market, integrated in its full potentials is to be established.

Conclusion

The inherent difficulty with the non-discrimination test is to find a "like" domestically produced good to compare with the imported one[34] even though it generally offers more objectivity and certainty than market access which is rather fluid and open to various interpretations. To the extent that the objectives of the internal market require opening-up the national markets non-discrimination test appears inadequate. Market access may be more efficient in achieving economic liberalisation, though such approach as Reid argues "requires explicit expression to ensure accountability and legitimacy"[35]. Therefore, it seems logical that the Court should utilise a test that promotes

[32] Cathrine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' in Barnard C and Scott J (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 205.
[33] *ibid.*, at 218.
[34] Reid (n 7) 833.
[35] *ibid.*, at 901.

economic integration without eroding member states' regulatory autonomy either by combining the two tests or modifying any one of them.

Court of Justice Fostering the Integration of Europe

Daniel Spisiak

This short article attempts to critically evaluate the role of the European Court of Justice as the main catalyst in interpretation and implementation of the European Community laws. The article considers the key legal doctrines established and developed by the European Court of Justice over the decades, such as direct and indirect effect, state liability, supremacy and the preliminary rulings mechanism. This is done by the critical evaluation of the fundamental decisions of the court. In concluding remarks, the article comments on the importance of the European Court of Justice as the main facilitator of the European integration.

Introduction

This article will attempt, with reference to the European Treaties and the jurisprudence of the Court of Justice, to critically evaluate the role played by the Court of Justice in ensuring that in the "interpretation and application of the Treaties the law is observed and sufficient remedies are provided by Member States to ensure effective legal protection in the fields covered by Union law."[1]

The requirement placed on the European Court of Justice (henceforth ECJ), to ensure that the interpretation and application of the Treaties law is observed, is encrypted into Article 19(1) TEU.[2] The first paragraph of the Treaty article is with no doubts one of the most important provisions within Title III of the Treaty, as it could be argued that the present Union law "is as much the result of the case-law of the Court as of the text of the founding and the amending treaties". [3] This clearly demonstrates that the influence of the ECJ in observance and development of the Treaties law "has been extraordinary."[4]

Equally significant is the second part of the Article 19(1) TEU which requires effective legal protection by providing remedies in the fields covered by the Union law. Similarly, as discussed in the paragraph above, it could be argued that effective legal protection is to quite a large extent a result of case-law produced in Luxembourg since 1957.[5]

[1] Art. 19, Consolidated version of the Treaty on European Union (OJ 2010 C83/01).
[2] Consolidated version of the Treaty on European Union (OJ 2010 C83/01).
[3] T. Tridimas, 'The Court of Justice and judicial activism' (1996) European Law Review 199, 199.
[4] T. Tridimas, 'The Court of Justice and judicial activism' (1996) European Law Review 199, 199.
[5] E.Frederico Mancini, 'The Making of a Constitution for Europe' (1989) 26 Common Market Law Review 595, 595-596.

Therefore, in order to fully evaluate and analyse the role of the ECJ it is necessary to discuss the most significant 'legal doctrines' and legal principles established and developed by the ECJ throughout the decades. Firstly, it is essential to comment on the Article 267 TFEU (ex 234 TEC)[6], which contains preliminary ruling procedure, which has a seminal importance for development of the Union law.[7] Consequently, it is vital to closely examine the principles of direct effect, supremacy and further developments of the ECJ such as direct effect of Directives, indirect effect and state liability within the '*acquis communautaire*'.

Article 267 TFEU

Generally, the Treaty as such is drafted in general terms, which means it gives a mere framework rather than giving substantive and precise definitions.[8] In some cases, the text of the Treaties is left purposively open. This is due to inability of the Member States (henceforth M/S) and their respective delegations to reach agreement.[9] Occasionally it was decided to leave the issue untouched and unresolved so the Court can step in and decide.[10] The ingenuousness of the Treaties, therefore put the European Court of Justice into the position of an "interpreter of a legal system and principles of the law"[11] within the Union. Put in different words, it could be argued that the ECJ over the years gradually constitutionalised the Treaties and at the same time transformed itself into a court exercising the function of a constitutional court.[12]

This process of European constitutional re-discovery would not be possible without Article 267 TFEU[13]. The preliminary rulings procedure could be seen as the "jewel in the Crown of the ECJ's jurisdiction."[14] This is mainly because the preliminary ruling procedure provided a meeting point between the Union and the M/S's legal orders. This means that the original relationship between Union and M/S changed from being horizontal and bilateral to being more vertical and multilateral.[15] What is meant by this change is that the national courts became main enforcers of the Union law under the protection and supervision of the ECJ. Equally, in relation to more multilateral relationship, it could be argued that the judgments of the ECJ are "increasingly held to have

[6] Consolidated Version of the Treaty on the Functioning of the European Union (OJ 2010 C83/01).
[7] Bo Vesterdorf, 'The Community court system ten years from now and beyond: challenges and possibilities' (2003) European Law Review, 303, 308.
[8] T. Tridimas, 'The Court of Justice and judicial activism' (1996) European Law Review 199, 204.
[9] Bo Vesterdorf, 'The Community court system ten years from now and beyond: challenges and possibilities' (2003) European Law Review, 303, 309.
[10] ibid, p 205.
[11] Lord M. Stuart, 'Problems of the EC: Transatlantic Parallels", (1987) 36 International and Comparative Law Quarterly, 187.
[12] T. Tridimas, 'The Court of Justice and judicial activism' (1996) European Law Review 199, 204.
[12] ibid, p 206-207.
[13] Consolidated Version of the Treaty on the Functioning of the European Union (OJ 2010 C83/01).
[14] P. Graig and G. de Burca, 'EU Law: Text, Cases, and Materials (4th edition, OUP, 2008) 460.
[15] T. Tridimas, 'Knocking on Heaven's Door: Frangmentation, Efficiency and Defiance in the Preliminary Reference Procedure', (2003) Common Market Law Review 40, 9-50, 10.

either a *de facto* or *de jure* impact on all other national courts."[16] In terms of legal substance, art. 267 TFEU clearly defines a situation when the ECJ shall give preliminary reference ruling. Hence, the Court of Justice shall have jurisdiction to give preliminary rulings concerning following:

> (a) The interpretation of the Treaty;
> (b) The validity and interpretation of acts of the institutions of the Community and of the ECB;
> (c) The interpretation of the statutes of bodies established by an Act of the Council, where those statutes so provide.[17]

Further development of the preliminary reference mechanism was shaped by several significant cases. The *Budesbaugesellschaft*[18]case set out the factors which need to be taken into consideration whenever the ECJ determines whether the body making reference is a tribunal or a court for this purpose. However, this list of factors is not exclusive, neither exhaustive and the application of these criteria is not always straightforward.[19] Accordingly, moving away from detailed analysis of referral procedure, it was the *CILFIT*[20] and *Da Costa*[21] cases which are of crucial importance. It could be argued that both cases considerably enhanced the authoritative nature of the ECJ's judgments. Going back to the multilateral relationship considered above, it is clear that both cases had immense impact on all national courts, mainly by developing what could be seen as *precedent* and limiting M/S in using the *acte clair* doctrine.[22]

Clearly, preliminary rulings procedure had an extensive impact on the Union law and it could be concluded that it is "through preliminary rulings that the ECJ has developed concepts such as direct effect and supremacy."[23]

Both concepts could be seen as the result of the judicial activism developed by the ECJ in its race for ensuring the effective legal protection within the Union. Moreover, when discussing principles of direct effect and supremacy, one must start with the two seminal cases of *Van Gend en Loos*[24] and *Costa* v *ENEL*[25], which still remain the most famous of all the ECJ's rulings.[26]

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[16] Bo Vesterdorf, 'The Community court system ten years from now and beyond: challenges and possibilities' (2003) European Law Review, 303, 306.
[17] Art 267 of the TFEU (OJ 2010 C83/01).
[18] C-54/96 *Dorsch Connsult Ingenieurfesellschaft mbH* v *Bundesbaugesellschaft Berlin mbH* [1997] ECR 1/4961.
[19] T. Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure', (2003) Common Market Law Review 40, 9-50, 10.
[20] C 283/81 *CILFIT Srl v Ministero della Sanita* [1982] ECR 3415.
[21] C 28-30/62 *Da Costa en Shaake v Nederlandse Belastingadministratie* [1963] ECR 31
[22] H. Rasmussen, 'Remedying the Crumbling EC judicial system' (2000) 37 Common Market Law Review, 1071, 1109.
[23] F. Mancini and D. Keeling, 'From CILFIT to ERT: The Constitutional Challenge facing the European Court' (1991) 11 YBEL 1, 3.
[24] C 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos* v *Nederlandse Adminisratie der Belastingen* [1963] ECR 1.
[25] C 6/64 *Flaminio Costa* v *ENEL* [1964] ECR 585.
[26] R. Errera, 'ECJ-Preliminary ruling under art.234 EC' Case Comment, (2007) Sum, Public Law, 385, 386.

Van Gend en Loos and Costa v ENEL landmarks

The facts of both cases are not of the greatest importance thus it is unnecessary to deal with them in greater detail. In the case of *Van Gend en Loos*[27] the ECJ was asked via preliminary ruling whether the Article 12 of the EEC Treaty (now Article 30 TFEU) had direct application within Union law and, if so, whether a national of a M/S could invoke this right in national court to be protected?[28] Majority of M/S simply opposed to this idea, as they argued that the international Treaties were "really just a compact between States and did not give rise to rights that individuals could enforce in their national courts." [29] However, as already mentioned, *Van Gend en Loos* was a pioneering judgment, which diverged M/S proposals and established that Treaty articles shall have direct effect.[30]

The European Court of Justice's view in *Van Gend en Loos* was not to scrutinise what drafters of the Treaty had in mind when drafting, but actually focus on the purpose, aim and the objective which the Treaty provision is trying to pursue.[31] This so called purposive approach was a first sign of teleological method of interpretation used by the ECJ, which has gradually become one of the key characteristics of the court.[32] The teleological method of interpretation in its purity proves that reliance only on the language is simply incapable of providing the right and necessary answers, since the Treaties themselves are imbued by teleology.[33] As Judge Pescatore established:

> "[...]the Treaties establishing European Communities are based upon concept of objectives to be attained. In this context the teleological method is by far the best [...] as it is particularly suited to the special characteristics of the Treaties [...]."[34]

It could be equally argued that another reason behind the *Van Gend en Loos* judgment is ECJ's new perception of individuality within the Community. The court perceived and visualised individuals "as being equal subjects of the Community law."[35]

A number of academics agreed that the concept of the 'new legal order' established in the *Van Gend en Loos* was a basis for another pronounced judicial achievement, namely, the general principle of supremacy. The TFEU does not contain a clear provision dealing with supremacy, except the well-

[27] [1963] ECR 1.
[28] C 26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos* v *Nederlandse Adminisratie der Belastingen* [1963] ECR 1, 12.
[29] K. Lenaers & D. Gerard, 'The structure of the Union according to the Constitution for Europe: the emperor is getting dressed' (2004) European Law Review, 289, 294.
[30] [1963] ECR 1, 13.
[31] T. Tridimas, 'The Court of Justice and judicial activism' (1996) European Law Review 199, 204.
[32] Craig, P, 'Once upon a Time in the West: Direct Effect and the federalization of EEC Law' (1992) 12 Oxford Journal of Legal Studies, 453, 459
[33] T. Tridimas, 'The Court of Justice and judicial activism' (1996) European Law Review 199, 205.
[34] C-235/***95****AGS Assedic Pas-de-Calais v François Dumon and Froment, liquidator and representative of Établissements Pierre Gilson* [1998] ECR 4531, supra note 47.
[35] P. Pescatore, 'The Doctrine of 'Direct Effect': An infant disease of Community Law' (1983) 8 European Law Review 155, 158.

known Declaration 17[36], which merely implies that the supremacy principle is established by the ECJ's case law, pointing out the significant case of *Costa* v *ENEL.*[37] In this seminal case, the ECJ deployed a number of arguments to justify the supremacy principle, touching upon the spirit of the Treaty and integration. However, only the latter argument, which discusses the possibility of M/S to negate Union law by passing inconsistent legislation, is seen as evident enough. The ambit of the supremacy principle was further developed in the case of *Internationale Handelsgesellschaft*[38], where the ECJ held that not even the significant rule of national constitutional law could challenge the supremacy of directly applicable Union law.[39]
Arguably, having discussed significant cases and their impact on the Union law, it could be said that the ECJ had and still has much discretion in deciding which Union law, including any primary and secondary legislation, will have a direct effect and, thus, be directly applicable.[40]

Beyond the direct effect: 'indirect effect'

This discretion resulted in another expansion pack of Union law principles. Firstly, it was the direct effect of the regulations, which was affirmed in the *Slaughtered Cow*[41] case. Simultaneously, in the case of *Amsterdam Bulb*[42], the ECJ established a rule, which states that M/S cannot adopt legislation which would alter, obstruct or obscure the direct effect of Union law regulation.[43]

It could be argued that Union growth is largely dependent on adoption and implementation of Directives in numerous areas such as social relationship and quality of life, as an example.[44] Therefore, the ECJ went even further into the development of direct effect. In the case of *Van Duyn*[45], the ECJ was asked whether Directives could possibly have a direct effect within the Union's legal body. The answer of the court was affirmative. The main reasoning behind this decision was legal integration and legal effectiveness.[46] However, in following case of *Marshall*[47], the Court did not linger on the expansion of the ambit of direct effect. Unsurprisingly enough, the ECJ held that the direct effect cannot be pleaded against individuals, unless this individual body is an 'organ of the State'.[48]

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[36] Declaration 17 concerning primacy as set out in 11197/07 (JUR 260).
[37] [1964] ECR 585.
[38] C 11/70 *International Handelsgesellschaft mbh* v *einfuhr-und Vorratsstelle fur Getreide und Futtermittel* [1970] ECR 1125.
[39] Karan J Alter, 'Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe' (Oxford University Press, 2001) 18.
[40] B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order' in Paul Craig and Grainne De Burca (eds) The Evolution of EU Law (Oxford University Press, 1999) 181.
[41] C 93/71 *Leonosio* v *Italian Ministry of Agriculture and Forestry* [1973] CMLR 343.
[42] C 50/76 *Amsterdam Bulb BV* v *Produktschap voor Siergewassen* [1977] ECR 137.
[43] para 41 and 42, C 50/76 *Amsterdam Bulb BV* v *Produktschap voor Siergewassen* [1977] ECR 137.
[44] E. Frederico Mancini, 'The Making of a Constitution for Europe' (1989) 26 CMLRev, 595, 599.
[45] C 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.
[46] P. Graig and G. de Burca, 'EU Law: Text, Cases, and Materials (4th edition, OUP, 2008) 280.
[47] C 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723.
[48] R. Mastroianni, 'On the Distinction between Vertical and Horizontal Direct Effect of Directives: What role for the principle of equality?' (1999) 5 E.L.P. 417-419.

The development of an effective legal protection within Union jurisdiction did not end, as the ECJ consequently developed the principle of the 'indirect effect' as the result of the loophole, which did emerge after rejection of the horizontal direct effect of the Directives. The principle of the 'indirect effect' was established in the case of *Van Colson*[49] and horizontally expanded in the case of *Marleasing SA*.[50] In the former, the ECJ established the obligation to interpret national law in order to ensure that individuals have guaranteed an effective and adequate remedy given to them under Union law. What this essentially meant, is that when the M/S fail to fully or correctly implement the Directives, individuals, even in the absence of the direct effect, may derive their rights 'indirectly'.[51] The ECJ constructed its reasoning on the basis of Art 4(3) TEU in conjunction with art. 288 TFEU and arguably also on the basis of the principle of *effet futile* stating that it is up to national courts to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of the Union law, as far as it is possible.[52]

State liability principle

The last step within the legal protection, but not the least, is with no doubts the principle of state liability for the breaching of Union law. Despite the pure fact that the ECJ at first adopted a view of 'no new remedies' for breach of Union law, cases such as *Factotarme I*[53], or *Munoz*[54] in a way forced the Court to reconsider this approach. In the joined cases of *Francovich*[55], the ECJ held that the principle of state liability is inherent in the Treaty and that this compensation mechanism should be available in cases of breach of the Union law.[56] Another important feature arising from this case was a requirement of a damages remedy for a breach of Union law. This very complex doctrine and the conditions under which a state could be held liable were further expanded by the duo of cases, *Brassserie*[57] and *Factotarme*.[58]

Conclusions

Having analysed the main legal principles established and developed by the ECJ throughout the decades, it could be argued that role of the ECJ in ensuring the interpretation of the Treaties and the effectiveness of legal protection is almost undeniable. In fact, one could agree with the statement

[49] C 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891.
[50] C-106/89 *Marleasing SA* v *La Commercial Internacionale de Aliemntacion SA* [1990] ECR 1-4135.
[51] para 56, C 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891.
[52] Para 26, C 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891.
[53] C-213/89 *The Queen* v *Secretary of State for Transport, ex p. Factortame Ltd* [1990] ECR 1-2433.
[54] C-253/00 *Munoz* v *Frumar* [20020 ECR I-7289.
[55] C-6 and 9/90 *Franchovich and Bonifaci* v *Italy* [1991] ECR I-5357.
[56] P. Craig, 'Francovich, Remedies and the Scope of the Damages Liability' (1993) 109 Law Quarterly Review 595.
[57] C-46/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* [1996] ECR 029.
[58] C-48/93 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR 029.

that the ECJ case-law in this respect almost coincides with the making of a new constitution for Europe.[59]

[59] E. Frederico Mancini, 'The Making of a Constitution for Europe' (1989) 26 CMLRev, 595, 595.

Foucault's Conception of Power: an ideology and hegemony deficit?

Paul Mokuolu

Michel Foucault was a French philosopher largely renowned for his unusual conception of power. He perceived power to be an elusive entity; something that couldn't be owned or possessed. This piece considers whether this conception of power precludes such notions as ideology and hegemony. It begins by providing a coherent understanding of Foucault's theory of power before exploring these notions of ideology and hegemony and critically assessing their compatibility with this unconventional conception of power. We subsequently consider whether the preclusion of these concepts of ideology and hegemony from Foucault's conception is problematic. Ultimately, we find that Foucault's conception of power is self-defeating; crumbling under the pressures of his own argument.

Introduction

Michel Foucault was a very prominent French historian and philosopher who has commonly been noted as the most influential social theorist of the latter half of the 20th century. However, it was Foucault's unconventional conception of power that warranted him much attention: either in the form of repugnance or admiration. Particularly, it has been claimed that one of the fundamental problems with Foucault is the deficit of a concept of either ideology or hegemony. This piece seeks, first, to analyse his unique notion of power, before evaluating this pivotal claim.

Before we can even proceed to evaluate Foucault's conception of power, and whether it is starved of a concept of ideology or hegemony, we must understand what Foucault's notion of power actually is. The closest thing we get to of a unified definition of power by Foucault can be found in *The History of Sexuality, vol. 1: An Introduction*,[1] where he describes power as "the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization".[2] Thus, the most significant attribute of Foucault's conception of power is that it is relational. No

[1] Michel Foucault, *The History of Sexuality, vol. 1: An Introduction* (Pantheon Books 1978)
[2] Ibid 92

individual or institution possesses power within itself; power is only able to manifest through interaction with other things or beings. As a result, power's primary existence cannot be found in a 'unique source of sovereignty',[3] which only illustrates power's peripheral effects, but is found in force relations. However, power isn't simply to be found in relations, it is inherent in *every* relation, making it omnipresent, coming from everywhere and everything. This is a very abstract conception of power, contrary to more conventional notions that assert power to be a quality capable of being possessed by and concentrated in some individual or institution. Foucault unequivocally asserts that power "is not an institution or structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society". [4]

This notion of power is quite profound when compared with notions presented by other theorists. Let's take Karl Marx for example. Marx believed that power structure was inherent in economics, and the people who possessed power were those who control the means of production. For Marx, in a capitalist society, the bourgeoisie possessed the power and used it to oppress the proletariat. However, Foucault would argue that power doesn't belong to a particular class and so the bourgeoisie did not hold any static power, it simply exercised power when interacting with the proletariat. Thus, in his *The History of Sexuality, vol 1,*[5] Foucault proceeds to make a number of propositions about power. The first is that it is not a tangible 'thing' that one can gain or lose, but is exercised from innumerable points of relation. The second claim is that power relations are not separate or external to other types of relations (such as economics, knowledge, sex), but are in fact immanent and internal to them. Furthermore, because power is inherent in every relationship, power relations are not limited to a ruler/subject model and can come from the bottom up, being a positive force of productivity rather than merely oppression. Even more unconventional is Foucault's claim that power relations are both intentional and non-subjective; power is always exercised with aims and objectives that, sometimes, even transcend those of the individuals/institutions actually exercising the power. Finally, Foucault argues that resistance is inherent in power relations. However, "*there is no single locus of great refusal...instead there is a plurality of resistances*".[6] Thus, rather than a great revolt or uprising, resistance is spread among a multiplicity of points and periods. In light of these premises, Foucault claimed that to correctly analyse the mechanisms of power, it is necessary to break away from the system of Law-and-Sovereign, and decipher power mechanisms on the basis of a strategy that is immanent in force relationships.[7]

However, fundamental to Foucault's conception of power is knowledge, which acts as the vehicle of power. In his *Discipline and Punish,*[8] Foucault implores us to abandon the belief that renunciation of power is what leads to

[3] Ibid 93
[4] Ibid 93
[5] Foucault (n1)
[6] Ibid 95-96
[7] Ibid 97
[8] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (Trans. Alan Sheridan, London: Allen Lane, Penguin Books 1977)

knowledge. Instead, he makes the profound statement that "power produces knowledge".[9] However, Foucault doesn't hesitate here. He proceeds to claim that there is a direct implication between power and knowledge; power relations cannot exist without a correlative field of knowledge and vice versa. Central to this power-knowledge relationship is the role of discourse, which must be explained if we are to understand this interplay between power and knowledge. Now, generally speaking, the term discourse usually refers to written or spoken communication. However, Stuart Hall, in his article,[10] explained Foucault's definition of the term as "a group of statements which provide a language for talking about – a way of representing the knowledge about – a particular topic at a particular historical moment".[11] However, discourse isn't limited to being merely linguistic, but is also about practice. In an attempt to analyse discourse, Foucault exhorts us to do away with the traditional history of ideas or thought as being an uninterrupted continuity. Instead, in *The Order of Things,*[12] he claims that "it is rather an enquiry whose aim is to rediscover on what basis knowledge and theory became possible... such an enterprise is not so much a history, in the traditional meaning of the word, as an 'archaeology'".[13] This is the method by which, through analysing discourse, Foucault is able to discern discontinuities in the conditions of human knowledge, also known as 'episteme'. He presents us with, and implements, this archaeological method in *The Archaeology of Knowledge*.[14] Yet most important, and relevant, is the connection between discourse and power. In fact, arguably, it is in discourse that power manifests itself the most. This is because, according to Foucault, physical objects and actions can only exist *meaningfully* within discourse. This stems from Foucault's adoption of a constructivist theory of knowledge; namely, that humans produce knowledge and meaning from their experiences. Thus, for Foucault, subjects such as 'madness', 'punishment' and 'sexuality' exist, but they can only hold meaningful value within discourse. A good example would be marital rape. Although the actual act has always existed, it was only through discourse that it developed meaning; half a century ago, it ceased to exist as a discursive reality – marital rape, as an offence, has only fairly recently been given legal recognition. This brief understanding of discourse leads us back to the knowledge-power relationship that is so crucial to Foucault's notion of power. Through discourse, knowledge is created. However, the fusion of knowledge and power produces truth. As Hall simply puts it "knowledge linked to power, not only assumes the authority of 'the truth' but has the power to *make itself true*."[15] This notion will be further expanded upon later, when I discuss whether or not Foucault lacks a conception of ideology.

[9] Ibid 27
[10] Stuart Hall, "Foucault: Power, knowledge and discourse", *Discourse theory and practice: A reader* 72 (2001): 81.
[11] Ibid 72
[12] Michel Foucault, *The order of things: an archaeology of the human sciences*, (Routledge 1970)
[13] Ibid xxi -xxii
[14] Michel Foucault, *The Archaeology of Knowledge*, (Trans A.M. Sheridan Smith, New York: Pantheon Books 1972)
[15] Hall (n10) 76

Another of Foucault's seminal works integral to his conception of power is *Discipline and Punish.*[16] This is largely due to his use of Jeremy Bentham's Panopticon prison model to demonstrate how the development of modern discipline functions to disindividulize power. Bentham's Panopticon was used by Foucault as a paradigmatic representation of disciplinary technology of punishment. Foucault described this architectural figure as a large courtyard with the cells surrounding a central tower. The cells are like "small theatres, in which each actor is alone, perfectly individualized and constantly visible".[17] Each individual, in his cell, "is securely confined to a cell from which he is seen from the front by the supervisor; but the side walls prevent him from coming into contact with his companions. He is seen, but he does not see; he is the object of information, never a subject in communication".[18] And within this setting lies the true influence and effect of the Panopticon, which Foucault determines as "to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power".[19] This pertains to a functioning of power that does not need to actually be exercised by any one individual. Through this, a power relation is created and sustained through a machine rather than a particular individual. For such a model to work, Bentham put forward two principles; that the power should be visible and it should be unverifiable. It should be visible so that tower will continually be within the inmate's view, yet unverifiable so that the inmate will "never know whether he is being looked at at any one moment; but be sure that he may always be so". [20]

As a result of this model, the inmate must behave as if he is under permanent surveillance (even if no guard is actually present) and, in doing so, constrains himself. The guard or watcher no longer needs to exercise any power because the inmate adopts both roles of this power relation and effectively becomes the "principle of his own subjection".[21] The main theme of this model is the disindividualisation of power. As Foucault states, the Panopticon "is an important mechanism, for it automatizes and disindividualizes power". [22] Power resides in the mechanism or machine as opposed to the individual. However, the Panopticon must be understood in a general sense as defining power relations in terms of everyday life. As Foucault stated, "it is polyvalent in its applications; it serves to reform prisoners, but also to treat patients, to instruct schoolchildren, to confine the insane, to supervise workers"[23] and so forth. The result of this is that we now live in a panoptic machine. It is even possible to see such a structure in our own culture, such as the technological advances that allow the tracking of one's movement.

However, there are a number of possible criticisms of this model. The nature of the Panopticon leaves the central watchtower open to abuse. Because power can't be possessed or obtained, anyone is able to exercise it. This may not be a

[16] Foucault (n8)
[17] Ibid 200
[18] Ibid
[19] Ibid 201
[20] Ibid
[21] Ibid 203
[22] Ibid 202
[23] Ibid 205

problem where there is honourable guard keeping watch over prisoners, or a concerned teacher is keeping watch over unruly schoolchildren. However, where a psychopath or malicious child enters the central tower, a serious predicament arises. And this is the problem with the Panopticon; its efficiency and workability is highly dependent upon virtuous characters inhabiting the central tower. Yet another dilemma lies in wait. Foucault asserts that the tower doesn't need to be occupied for power to be exercised because the subject will never know whether he is being looked at at any one moment and will, thus, police himself. However, the subject might suspect that the watcher is bluffing, and engage in a bluff of his own by doing what is prohibited. Now, if the watcher is absent or passive when this action is done, the other subjects may begin to question whether there is any such exercise of power upon them and the whole structure falls apart & the central tower loses its effectiveness. On the other hand, the subject's taunts may lead the watcher to exert force, or make an example out of the rebellious subject, which arouses the danger of tyranny.

Ultimately, what Foucault really intended to show in *Discipline and Punish*[24] (through the example of the Panopticon) is how, from the 17th and 18th century onwards, a new economy of power was established; "procedures that allowed the effects of power to circulate in a manner at once continuous, uninterrupted, adapted, and 'individualized' throughout the entire social body". [25] This new technology of power was much more efficient (economically, and in other ways) and much less wasteful; the fact that it was more humane than the brutal executions that preceded it, was just a collateral benefit according to Foucault.

Ideology

Now that Foucault's notion of power has been discussed, the next issue to tackle is whether it lacks a conception of ideology or hegemony. If the conclusion is in the affirmative, then it will also be necessary to consider whether this lack of ideology or hegemony is actually a problem. It seems fitting to begin with the issue of an ideological conception. Though the term was used, following the French Revolution, to describe a science of the study of the origin and nature of ideas, today it has suffered abuse within the political sphere. Richard V. Burkes, in his *A Conception of Ideology for Historians,* [26] claimed that there is no word that has been so 'diversely employed' as ideology, stating that "its range of denotation spans such varied referents as the Sorellian myth, the nebulous Weltanschauug of the Germans, mere propaganda, and even "ideas" generically considered".[27] Even Karl Marx himself brings his own notion of ideology to the table; albeit causing more confusion than clarity. For Marx, ideology formed part of the superstructure of

[24] Foucault (n8)
[25] Michel Foucault**,** James D**.** Faubion and Paul Rabinow, *Power (The Essential Works of Foucault, 1954-1984),* Vol 3 (Penguin Books 2002) 120
[26] Richard V. Burks, 'A Conception of Ideology for Historians' (1949) *Journal of the History of Ideas* 10, 183
[27] Ibid 183

a society, which was produced as a result, and reflection, of economic relations ("the base"). Thus, in a capitalist society, Marx's conception of ideology consisted of a false-consciousness, which was wielded by the bourgeoisie as a way of preventing the proletariat from realizing their oppression and exploitation.

Yet, the question remains as to whether Foucault had his own conception of ideology. Prima facie, it would seem that such a question can be answered with minimal effort as Foucault can be found, in one of his many famous interviews, criticising the notion of ideology as being "difficult to make use of".[28] He puts forward three reasons for this disdain of ideology. The first is that it always stands in virtual opposition to something else which is supposed to count as truth. The second is that the concept of ideology refers, necessarily, to something of the order of a subject. The third and final reason is that ideology stands in a secondary position relative to something which functions as its infrastructure, as its material, economic determinant, etc. However, greater depth into Foucault's reasoning concerning an ideological conception is needed to fully appreciate his view.

In *Truth and Ideology: Reflection on Mannheim's Paradox,*[29] Willard A. Mullins verifies that 'truth' and 'ideology' are usually seen as antagonistic to one another, with ideology being commonly defined by writers as a misrepresentation of truth. We have recently seen how this definition has been somewhat upheld in Marxism. Thus, it would seem that to understand Foucault's approach to ideology, it would be useful to refer to his conception of truth. However, as we have previously established, Foucault is not an advocator of an absolute, universal truth. Borrowing Nietzsche's use of genealogy, he believes that knowledge and truth are produced by the tensions and struggles, throughout history, between particular institutions, fields and disciplines. In his interview on 'Truth and Power',[30] Foucault unequivocally rejects truth as a transcendent entity, reserved for the free spirits or liberated individuals. On the contrary, truth is of the world, being created by different societies through discourse. He claims that "each society has its regime of truth, its 'general politics' of truth: that is, the types of discourse which it accepts and makes function as true".[31] Truth, through scientific discourse, is produced under the control of political and economic apparatuses (such as media, university, the army, etc). Thus, if universal truth is a myth and the truth that reigns is a truth, that is accepted as such, through discourse, then the notion of ideology ceases to exist. According to the definition held by Karl Marx and many others, the whole idea of ideology is contingent upon the existence of an absolute truth; without truth, ideology crumbles. For Foucault, the 'false-consciousness' created by the bourgeoisie, to keep the proletariat in check, is merely the exercise of power, through discourse, to create a regime of truth. Marxism is no truer than the capitalist regime. This seems to be what Foucault means when he says it is necessary to think of the political problems

[28] *Foucault, Faubion*, Rabinow (n25) 119
[29] Willard A. Mullins, 'Truth and Ideology: Reflection on Mannheim's Paradox' (1979) Vol 18 *History and Theory*, 141
[30] *Foucault, Faubion*, Rabinow (n25)
[31] *Ibid* 131

"not in terms of 'science' and 'ideology' but in terms of 'truth' and 'power'".[32] As a result, we can conclude that, at least with regards to a Marxist definition of ideology, Foucault ceases to have such a conception of ideology.

However, in *Publicity's Secret: How Technoculture Capitalizes on Democracy*,[33] Jodi Dean refers to what she calls 'an upgrade' of the popular concept of ideology, formulated by Slavoj Zizek.[34] For both Zizek and Dean, the concept of ideology goes far beyond being a 'false-consciousness'. As Dean asserts "people know very well what they are doing, but do it nonetheless".[35] Ideology instead refers to the way actions are materialized into a set of beliefs, which uphold traditional cultural institutions; actions manifest an underlying belief that persists, regardless of what one knows. In reference to *this* definition of ideology, it could be argued that Foucault's notion of power does maintain a conception of ideology; the truth produced, through the exercise of power, in each society could be interpreted as his conception of ideology. Actions, through the use of discourse, are materialized into a set of beliefs, i.e. the truth for that society. Thus, fabricated truth becomes ideology. Understandably, this is a difficult argument to accept as it directly opposes the much accepted notion of ideology as being something that distorts truth rather than embodies it.

Hegemony

The next issue to tackle concerns the question of hegemony. Now, the term 'hegemony' can be traced to the Greek verb *hēgeisthai*, which means 'to lead'.[36] In Ancient Greece, a hegemony was the dominance or supremacy of one city-state (polis) over others. The leader city-state, also known as the hegemon, would, by the means of cultural imperialism, establish an indirect dominance over the other city-states. This dominance would be illustrated through the politics and character of the inferior states. However, these days, the term has been extended to include, not just city-states and societies, but the dominance of countries over others. In the early 20th century, the Marxist philosopher Antonio Gramsci formulated his own conception of hegemony to include cultural hegemony; the predominance of one social class over others. Early in his *Prison Notebooks*,[37] Gramsci defines hegemony as the "*spontaneous* consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group".[38] He further notes that this consent is *historically* caused by the prestige enjoyed by the dominant group because of its position and function in the world of production.[39]

[32] Ibid 132
[33] Jodi Dean, *Publicity's Secret: How Technoculture Capitalizes on Democracy* (Cornell University Press 2002)
[34] Zizek Slavoj, *The Sublime Object of Ideology* (London; New York: Verso 1989)
[35] Ibid 5
[36] A.M Macdonald, *Chambers Twentieth Century Dictionary* (W&R Chambers Ltd 1977) 604
[37] A. Gramsci, *Prison Notebooks* (Columbia University Press 2010)
[38] Kate A. F. Crehan, *Gramsci, Culture and Anthropology* (University of California Press 2002) 102
[39] Ibid

This notion of consent is extremely significant. Dominant groups don't need to impose their values on the subordinate groups through use of direct force. Rather, the subordinate groups come to acknowledge their inferiority (in terms of power, economic wealth, etc) and, thus, consent to the rule of the 'superior' group. This could be illustrated through UK politics, where the working-class accepts a rule by the Conservative party by voting them into power. Most importantly, it is crucial to note the essence of hegemony as being one of psychological dominance; it works at the level of people's minds as they accept a rule by the superior, as opposed to physical restraint or coercion.

When considering hegemony as a cerebral manipulation, it is possible to see such illustrations in Foucault's *Discipline and Punish*[40] - particularly in the form of the panopticon. Earlier in this piece, the model was explained as a central tower, from which it was possible to observe all cells and prisoners, though the prisoner himself has no view of the interior of the tower. However, in (necessarily) assuming that he is under permanent surveillance, the prisoner constrains himself and monitors his own behaviour. He becomes the subjected and the 'subjector'. However, this technology of power was to be applied beyond the walls of a prison. The exercise of this power made it unnecessary to "constrain the convict to good behaviour, the madman to calm, the worker to work, the schoolboy to application and the patient to the observation of the regulations".[41] This closely resembles the effects of hegemony, which also eradicates the need for use of force. Both the panopticon and hegemony implement into the mind of the subjected a self-constraint. In a similar way to hegemony, the subject of the panopticon model acknowledges the dominance and omniscience of whoever occupies the central tower and subjects himself to that rule by controlling his own behaviour.

However, there are two crucial ingredients of a conception of hegemony missing from Foucault's notion of power. The first is the possessive nature of power. The concept of hegemony necessarily implies the possession of power by the dominant group; a power that can be wielded and used by a particular institution. After all, surely, it is this possession of power that makes the ruling group superior and makes the other groups consent to such a rule. However, as has already been established, Foucault views power as intangible, i.e. something that cannot be gained or lost: power can only be exercised. With regards to the panopticon model, the panopticon is simply the apparatus through which power is exercised. Any individual (or, theoretically speaking, institution) can enter the machine (central tower) to exercise the power, but that is all. A true interpretation of the panopticon model in terms of hegemony, would cast the central tower as the dominant state or institution as opposed to a machine which merely enables individuals to exercise power. The second ingredient refers to the repressive nature of hegemony. Gramsci seems to interpret hegemony with negative connotations, almost as a 'false-consciousness' similar to a Marxist conception of ideology. For Gramsci, hegemony was quite plainly an exploitation of the less powerful social classes

[40] Foucault (n8)
[41] Ibid 202-203

by the superior class. However, for Foucault, power is productive as well as coercive. He fittingly poses the question that "if power were anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it?"[42] Thus, a top-down exercise of power, for Foucault, is not merely manipulative, but also productive. Hypothetically, this productive view of power could be compatible with an 'updated' conception of hegemony. In this way, Foucault could be seen as having his own construction of hegemony. However, due to Foucault attributing an intangible, non-possessive quality to power, which seems to lie at the heart of hegemony, a conception of hegemony cannot be read into Foucault's work.

The problem

Since it has been clearly established that Foucault's conception of power lacks a conception of both ideology and hegemony, the final remaining issue to be decided is whether this deficiency is actually a problem. Foucault's lack of a concept of ideology seems to be appropriate considering his thoughts on power. As discussed above, Foucault does not agree with the proposition that power represses and truth liberates. On the contrary, he sees the two notions as being inextricably interwoven. The exercise of power, through discourse, produces knowledge and, ultimately, truth. Taking into account this view, a conception of ideology, as defined by Marxism, would only be inconsistent with the former. In fact, in many ways, the lack of a notion of ideology actually compliments Foucault's conception of power.

However, there are a few difficulties inherent with such a notion of power that ignores a conception of ideology. Firstly, the former permits the justification of horrendous atrocities. An adequately graphic example would be the ideology of the Nazi Party, which propagated fascism and the supreme rule of the Aryan master race over all other races. Such an ideology, giving birth to the holocaust, led to the death of millions of Jews. Now, for the majority, this was an unforgivable crime against mankind and a disgusting perversion of the truth. Yet, this is the precise nature of an ideology according to Gramsci and many other academics. However, as Foucault chooses not to deal with the notion of ideology in his work, he is bound, by his own conception of power, to interpret Nazism as truth. Nazism is merely involved in what Foucault terms a 'game of truth', which can be defined as "a set of procedures that lead to a certain result, which, on the basis of its principles and rules of procedures, may be considered valid or invalid", or put more simply, "a set of rules by which truth is produced".[43] Furthermore, Foucault claims that one of the five important traits that characterize truth is that "it is produced and transmitted under the control of a few great political and economic apparatuses (university, army, media, etc)".[44] We know for certain that Nazism was propagated through the education system, army and media. Thus, for Foucault, Nazism was the dominant truth for German until another discursive practice arose to fabricate another regime of truth. This lack of moral

[42] Foucault, Faubion, Rabinow (n25) 120
[43] Geoff Danaher, Tony Schirato, Jen Webb, Understanding Foucault (Allen & Unwin 2000) 40
[44] Foucault, Faubion, Rabinow (n25) 131

accountability in Foucault's work proves to be a great stumbling block in his conception of power. Slavoj Zizek also finds a weakness in this denial of ideology. In *The Spectre of Ideology*, he fiercely questions (and ridicules) Foucault's attempt to build a bridge between micro-procedures and the spectre of power.[45] Zizek accuses Foucault of trying to explain this away with complex, yet empty, rhetoric; for Zizek, the semblance of a supreme body or unique summit cannot be a peripheral effect of the plurality of micro-practices. This concern, while legitimate, seems to be futile; Foucault's explanation is the inevitable conclusion arising from a concept of power that is only relational; a power that can't be possessed, gained or lost.

This same problem is also evident in his lack of a conception of hegemony. Its absence permits the oppression of social classes, interpreting such exercise of power as productive. Foucault seems to suggest that power can never be wholly repressive because people obey it. However, it can be argued that there is a flaw in such reasoning in the sense that he fails to take into account the possible fear or hopelessness of the oppressed. A city-state or social class can only repress another if the latter is *able* to be repressed. If that is the case, then the vulnerable social class hardly have a choice but to obey; a directly adverse correlation cannot be made between obedience and repression. Furthermore, hegemony is a relational concept, not a static one, as it implies relations within social groups, between social groups, and between social groups and social structures. It reflects the fact that history is not linear, but is rather the product of political and economic struggle. An absence of such a conception distorts Foucault's understanding of history and power relations.

Conclusion

In conclusion, it appears that Foucault's conception of power allows little room for a conception of hegemony and ideology. As we have seen, their absence gives way to a number of difficulties. However, I think the fatal flaw of Foucault is that his conception of power contains the seeds of its own downfall. If truth is constantly being reproduced through new discursive practices, Foucault's assertions and notions are no more valid than Marxism or Bourdieu's 'habitus' theory. In effect, Foucault attributes to his conception the same scrutiny and mortality that he does to every other theory he undermines; only time will tell whether this notion of power will become more widely accepted.

[45] Slavoj Žižek, *Mapping Ideology* (Verso 1994) 1

Sienkiewicz v Greif (UK Ltd), Knowsley MBC v Willmore: A fair or logical decision?

Lyndsey Banthorpe

The article discusses the issues of causation surrounding mesothelioma claims in light of the recent decision of *Sienkiewicz v Greif (UK) Ltd, Knowsley MBC v Willmore* [2011] UKSC 10 and *Williams (Deceased) v University of Birmingham* [2011] EWCA Civ 1242; and whether these decisions can be considered fair and logical from the perspective of both the claimant and the respondent. Although the *Williams* case did not affect the exception itself, the article also discusses whether the exception to the 'but for' test should be extended or whether it should be limited as much as possible. Given that it is considered that mesothelioma claims are likely to peak in the coming years, the article offers are interesting argument as to what the courts could be expected to decide in the future.

Introduction

The issue of causation surrounding mesothelioma claims has been an area of flux and uncertainty for the past half a century. The recent case of *Sienkiewicz v Greif, Knowsley MBC v Willmore*[1] was hoped to shed some new light on this contentious zone, giving some form of certainty and predictability. Instead the Supreme Court ruled that its hands were tied to the precedent of the *Fairchild*[2] exception, the rule in *Barker*[3] as well as the will of Parliament[4], but sent out a warning of the unsatisfactory state of the outcome it felt obliged to reach[5].

The key question however, is whether this decision was fair or logical. The logical nature of the decision will be tackled from three different angles; firstly, following on from recent legislation and statutory instruments such as the Compensation Act 2006, and the Diffuse Mesothelioma Compensation Scheme 2008; secondly from an epidemiological point of view which was strongly emphasised through the judgments of *Sienkiewicz*; and thirdly and

[1] *Sienkiewicz v Greif (UK) Ltd, Knowsley MBC v Willmore* [2011] UKSC 10
[2] *Fairchild v Glenhaven Funeral Services* [2002] 3 WLR 89
[3] *Barker v Corus UK Ltd* [2006] 2 AC 572
[4] Chris Miller 'Causation in personal injury after (and before) *Sienkiewicz*' (2012) *Legal Studies*, doi: 10.1111/j.1748-121X.2012.00227.x http://onlinelibrary.wiley.com/doi/10.1111/j.1748-121X.2012.00227.x/full Accessed 28th March 2012, at p.23
[5] *Sienkiewicz*, n. 1, Lord Brown [174]

most predominantly, from a precedent point of view. Fairness will be addressed from both the view of the defendant and the 'deserving claimant'[6].

A Logical Decision?

Legislation and Statutory Instruments

Looking to the recent legislation and statutory instruments that Parliament has enacted seeking to compensate victims of mesothelioma, namely the Diffuse Mesothelioma Compensation Scheme 2008 (DMCS) and section 3 of the Compensation Act 2006, it can be said that their Lordships' decision in *Sienkiewicz* is logical in that it follows the underlying rationale of these provisions. In particular, under the DMCS 2008 in the qualifying criteria and conditions in making a claim, there is absolutely no sight of a test of causation in order for a claim to succeed. There just merely needs to be proof that the victim has been exposed to asbestos in the UK[7] and that they have since developed mesothelioma[8]. Similarly in the Compensation Act 2006, the vocabulary used ("whether by reason of having materially increased a risk or for any other reason"[9]) to describe the liability of the responsible person or persons could be said to suggest parliamentary acceptance of this lower, less stringent test of causation. It is important to note however, as Lord Phillips corrected the Court of Appeal, that s.3 of the Compensation Act 2006 does not state that the responsible person *will be* liable in tort if he has materially increased the risk of the victim contracting mesothelioma, but where this liability has already been established, they will be liable for the whole of the damages, *in solidum*. This means that to establish liability it still remains a question of common law[10].

Epidemiological Evidence and Logic

Due to the gaps in the knowledge of the aetiology of mesothelioma, their Lordships discussed the use of epidemiological evidence as an attempt to fill this space. This would mean that where there was a gap in medical science preventing causation to be established in the conventional way, epidemiological evidence would step in to give a logical explanation of what was the most likely cause[11]. As Lord Phillips stated:

"*...where an agent is known to be capable of causing a disease, the comparison enables the epidemiologist to calculate the relevant risk that flows from the particular exposure.*"[12]

[6] Miller, n. 4, at p.4
[7] Department of Work and Pensions, 'Mesothelioma – the 2008 Diffuse Mesothelioma Scheme' http://www.dwp.gov.uk/healthcare-professional/benefits-and-services/mesothelioma-the-2008-diffuse-mesothelioma/ accessed 28 March 2012
[8] Alan McKenna, 'An Overview of the Legal Landscape of Negligently Inflicted Asbestos Related Conditions' (2011) 4 *Journal of Personal Injury Law* 205, 234
[9] Compensation Act 2006, s.3(1)(d)
[10] *Sienkiewicz*, n. 1, Lord Phillips [70]
[11] McKenna, n. 8, at p. 229
[12] *Sienkiewicz*, n. 1, Lord Phillips [82]

Despite this statement from Lord Phillips, he and the other justices placed some doubt over the use of epidemiological evidence as a way of establishing causation in mesothelioma cases. Lord Mance JSC in particular expressed grave concerns over using statistical knowledge to aid decision-making, stating that it is "undesirable" to "treat people and even companies as statistics."[13] This is supported by a later statement of Lord Phillips, stating that "*in the case of mesothelioma, epidemiological evidence alone has not been considered by the courts to be an adequate basis for making findings of causation.*"[14] He does however go on to say that, in the absence of anything better, epidemiological evidence and therefore logic, may be used to apportion damages between tortfeasors jointly liable for causing mesothelioma.[15] Jane Stapleton also highlighted the thoughts of Lord Rodger who suggested that to allow group statistics as the sole determination of actual causation would be to radically change the nature of the civil burden of proof, so much so that it would be out of the hands of the judiciary and in the hands of the legislature.[16] It is clear from these judgments that the highly uncertain nature of the aetiology of this disease cannot be overcome by statistical evidence alone.[17] The warnings suggest that despite the Supreme Courts' best efforts to work around this "rock of uncertainty"[18], mathematical logic is not the answer. It is perhaps more helpful to look at the logical flow of precedent.

Common Law Developments

It is here that the Supreme Court's decision can most appropriately be regarded as logical. From the mid-1950s the English courts have slowly modified the test of causation in medical cases with uncertain aetiologies. The starting point was the case of *Bonnington*[19]. The courts recognised that the conventional "but for" test of causation broke down in the face of causal over-determination, that is, whether there were multiple causal pathways to the injury.[20] Although *Bonnington* was a case of a cumulative or divisible disease, its lasting effect still today is to emphasise that uncertainty in scientific knowledge will not pose as a barrier to recovery for deserving and clearly wronged claimants.[21]

Next in the development of precedent was the case of *McGhee*[22]. This case modified *Bonnington* in that if the breach of duty demonstrated a material contribution to the *risk* of contracting a disease such as dermatitis, and the injury complained of occurred within this area of risk, this was sufficient to establish material contribution to the disease itself.[23] It also established that where there is one tortious exposure and another non-tortious exposure, this

[13] *Sienkiewicz*, n. 1, Lord Mance [190]
[14] *Sienkiewicz*, n. 1, Lord Phillips [97]
[15] *Sienkiewicz*, n. 1, Lord Phillips [106]
[16] Jane Stapleton, 'Factual Causation, mesothelioma and statistical validity' (2012) 128 (Apr) *LQR* 221, 230
[17] Sandy Steel and David Ibbetson, 'More Grief on Uncertain Causation in Tort' (2011) 70 (2) *Cambridge Law Journal* 451, 466
[18] *Sienkiewicz*, n. 1, Lord Kerr of Tonaghmore JSC [204]
[19] *Bonnington Castings v Wardlaw* [1956] AC 613
[20] Miller, n. 4, at p. 4
[21] *Ibid*
[22] *McGhee v National Coal Board* [1973] 1 WLR 1
[23] *Ibid*, at p.5-6

is no obstacle to applying the exceptional liability rule.[24] Next in the line is the infamous case of *Fairchild*[25] which limited the multiple agent aspect of *McGhee* to agents that operate substantively in the same way[26]. The key for this exception to apply was the impossibility of proving the connection between the tortfeasors' action and the harm caused.[27] The final step before the case of *Sienkiewicz* is the case of *Barker*[28]. In *Barker* the appellant died as a result of asbestos-related mesothelioma, as a consequence of a breach of duty of two previous employers, but also from exposure during a period of self-employment. The case therefore posed the problem of joint and several liability for material contribution to the risk of harm. The majority held that the damages should be apportioned between the employers in accordance with their contribution to the total risk of the claimant contracting the disease. This however led to injustices where the employer was insolvent or no longer existed, which subsequently led to the apportionment of damages in the *Barker* judgment being quickly overruled by s.3 of the Compensation Act 2006.The fact that the *Fairchild* exception will still apply where there was a non-tortious exposure as well as a tortious exposure, namely self-employment, demonstrates yet a further expansion of this exception that still has a lasting effect in common law.[29]
From the precedent background it can be argued that the decision in *Sienkiewicz* was a logical one, albeit the only one possible without overruling *Fairchild* and to maintain justice and fairness to claimants through relaxation of the 'but for' test[30]. It can be deemed logical in that it can be regarded as comparable to *Barker* extending tortious exposure asserted in *Fairchild* to non-tortious self-exposure, in the sense that *Sienkiewicz* has *extended Fairchild* to non-tortious ambient environmental exposure.[31]

Due to the uncertain cause and trigger of mesothelioma, it is still unclear whether it is the result of exposure to a single fibre that triggers the disease or whether it is triggered by a cumulative effect of a number of exposures, although it should be noted that the Australian High Court has rejected the single fibre theory in favour of the cumulative exposure theory[32]. What is clear is that once a malignant cell has begun to form, it is not aggravated by further exposure.[33] If it could be suggested that the cause of mesothelioma was cumulative exposure, the decision in *Sienkiewicz*, it could be argued, could be a logical development of *Bailey*[34]. In this case Waller LJ held that:

"*In a case where medical science cannot establish the probability that "but for" an act of negligence the injury would not have happened <u>but can establish that the contribution of the negligent cause was more than negligible</u>, the "but for" test is modified, and the claimant will succeed.*"

[24] Steel, n. 17, at p. 467
[25] *Fairchild*, n. 2
[26] Miller, n. 4, at p. 9
[27] Per Laleng, '*Sienkiewicz v Greif (UK) Ltd, Willmore v Knowsley MBC: A Material Contribution to Uncertainty*' (2011) 74 (5) *Modern Law Review* 767, 780
[28] *Barker*, n. 3
[29] Steel, n. 17, at p. 467
[30] *Ibid*
[31] K. Amirthalingam, 'Causation, Risk and Damage' (2010) 126 (Apr) *LQR* 162, 165
[32] Amaca Pty Ltd v Booth; Amaba Pty Ltd v Booth [2011] HCA 53 (14 December 2011)
[33] *Sienkiewicz*, n. 1, Lord Phillips at 19
[34] *Bailey v Ministry of Defence* [2008] EWCA Civ 883

In the case of *Sienkiewicz,* this could be analogous to the argument that anything more than *de minimis* will satisfy the test and that there is no need to showing a "doubling of risk". As Baroness Hale emphasized, this would be an unhelpful test when trying to quantify or establish a boundary as to what constitutes more than *de minimis.*[35] Lord Mance JSC concurred on this point, stating that it would form an "uncertain inroad" into this special rule of causation to allow a "doubling of risk" test.[36]

What these lines of authorities show is that the Supreme Courts' decision in *Sienkiewicz* can be regarded as logical in the sense that it follows the exception, designed to apply to cases of ambiguous causation.[37] Despite this being the case, there are concerns over whether the exception itself is logical. This is particularly evident from the opening of Lord Brown's judgment, suggesting that despite its logical arrival at the decision, he regarded it as highly "unsatisfactory" and reached via a "quixotic" path[38]. Lord Brown's comments thereafter regarding cases of mesothelioma radically departing from the rest of medical negligence law provide a bridge over into the question of fairness.

A Fair Decision?

There have been concerns that the exceptional rule for mesothelioma cases is unfair in that it gives the victims an unfair privilege that other physical injuries or diseases do not enjoy.[39] However, the expressions of the Supreme Court seem to suggest that this is a result of uncontrollable judicial creativity and there is now "no logical stopping place" from the first appearance of the *Fairchild* exception, to the now "Draconian" position.[40] Baroness Hale also recognised this, going further to say that even if they did want to achieve an arguably more fair approach in mesothelioma claims, Parliament would ultimately reverse their decision as they did in *Barker*. Baroness Hale elucidated, "...as Lord Rodger of Earlsferry JSC has explained, that is the logical consequence and there is nothing we can do about it without reversing Fairchild. Even if we thought it right to do this, Parliament would soon reverse us.".[41]

The "Draconian Effect" is the key argument as to why the decision in *Sienkiewicz* is unfair. It is argued that the rule as it stands after this decision is unduly harsh on defendants, especially those who are only responsible for relatively small or light exposure as in the present case, especially in *Willmore*[42], yet are still liable for full damages. It has been argued[43] that this

[35] *Sienkiewicz*, n. 1, Baroness Hale [169]
[36] *Sienkiewicz*, n. 1, Lord Mance JSC [188]
[37] Steel, n. 17, at p. 451
[38] *Sienkiewicz*, n. 1, Lord Brown [174]
[39] Steel, n. 17, at p. 468
[40] *Sienkiewicz*, n. 1, Lord Brown [183-184]
[41] *Sienkiewicz*, n. 1, Baroness Hale [167]
[42] Nicholas Bevan, '*Sienkiewicz v Greif (UK) Ltd:* personal injury – negligence – asbestos – mesothelioma' (2011) 2 *Journal of Personal Injury Law* 55, 58
[43] Miller, n. 4

is justified by the fact that the judiciary are bound by the will of Parliament.[44] However this does not make the exceptional rule fair. This was also the opinion of Lord Brown, when he expressly doubted the justification for such special treatment of mesothelioma cases.[45]

It is, however, two of the underlying policies of tort law that put into question whether or not *Sienkiewicz* can be regarded as fair. To be fair to the defendant, tort law sees that a party should not be held accountable for harm that he or she has not caused. But to be fair to the victim, tort law sees that a serious harm (like mesothelioma) should not unreasonably be denied a remedy.[46] This puts into conflict the ideas of corrective justice on the one hand, in that there must be a causation of harm for the law to correct it, against collective justice on the other. The idea of collective justice works on the basis of distribution of losses across groups of individuals that can best bear that burden.[47] This also links to the idea that at the centre of the tort of negligence lies the idea of accountability for the taking of an unacceptable risk by those owing a duty of care, to the detriment and causing harm to another. This seems to be the direction that the courts have decided to take.[48]

It is for these latter two policy reasons that the decision in *Sienkiewicz* can be regarded as fair as it meant that the estates of Enid Costello and Mrs Willmore were compensated for illnesses occurred by those that had a duty to protect them against such harm.[49] The exception was created due to the obvious injustices created by the conventional "but for" test. Since there have been no further developments regarding the aetiology of mesothelioma, in the interests of fairness the exception must remain to prevent future injustices.[50] Indeed, just because there is a lack of scientific knowledge to prove causation on the balance of probabilities this should not mean that deserving claimants are left uncompensated. The courts have been fair in limiting the scope of the exception to cases where it is *impossible* to reach this standard and where it can be shown that there has been a material contribution to that risk, that is, excluding *de minimis* claims.[51]

The use of a de minimis threshold as a benchmark to establish causation has been somewhat problematic to define. The Supreme Court made it clear that it should not be the 'doubling of risk' test in disguise, despite the impossibility of quantifying what actually constitutes *de minimis*.[52] This has left the ground between de minimis and qualifying threshold very wide and uncertain, leaving the decision to judges in individual cases to decide if the exposure does indeed meet this threshold.[53] Given the uncertain nature of what triggers the genetic mutations to develop mesothelioma, be it cumulative or a single fibre, this

[44] Under s.3(2)(a) Compensation Act 2006
[45] *Sienkiewicz*, n. 1, Lord Brown [186]
[46] Kenneth Warner, 'The Blame Game' (2011) 161 *New Law Journal* 835
[47] Steel, n. 17, at p. 467-468
[48] Laleng, n. 27, at p. 792
[49] David Managan, 'Seeking a Normative Solution for an Exceptional Situation' (2011) 3 *Journal of Personal Injury Law* 144, 150
[50] Steel, n. 17, at p. 456
[51] *Ibid*, at p. 459
[52] *Sienkiewicz*, n. 1, Lord Phillips [108]
[53] Warner, n. 46, at p. 836

could be seen as a fair consequence for employers that breach their duty of care towards their employees.[54]

Future Developments:

It has been suggested that the decision in *Sienkiewicz* will be narrowly construed in order to limit the scope of the exceptional rule and to ensure that it is not used an as analogy to extend the exception further into non-mesothelioma cases.[55] It could also be narrowly construed due to the comments many of the justices made about their unhappiness with the way the law has changed the test for causation. This is most vividly seen in Lord Brown's forceful comment, "*the law tampers with the "but for" test of causation at its peril*"[56].

It seems that the stern warnings given by some of the justices in *Sienkiewicz* have been taken account of in the recent case of *Williams (Deceased) v University of Birmingham*[57]. In this case, Mr Williams was exposed to asbestos whilst conducting a university experiment project in a tunnel beneath (but owned by) the University. The period of exposure was between 52 and 78 hours. It was held that the University should be judged by the state of knowledge and practice as in 1974, when Mr Williams was at the University, and on that state of knowledge it was *not* shown that Mr Williams "would be exposed to an unacceptable risk of asbestos related injury".[58] This marks two new steps in mesothelioma claims to restrict the *Fairchild* exception. Firstly, the claimant will have to show a sufficient degree of reasonable foresight, and secondly, the courts will have regard to the defendant's state of knowledge at the time of exposure, reducing the scope of the *Fairchild* exception by placing a higher onus on the claimant.[59] This is likely to make the standard of care fairer in that it will correlate with knowledge and awareness at the time of exposure.[60] It could be suggested that this is in line with the will of Parliament by comparing this to the recent Statutory Instrument on Lump Sum Payments 2012[61].

Conclusion

In conclusion, the case of *Sienkiewicz* should only be regarded as logical in the sense that it follows the development of this complex area of case law and came to the most logical decision possible. As Lord Reid stated in the case of *McGhee*[62] "*the legal concept of causation is not based on logic or philosophy*.

[54] *Sienkiewicz*, n. 1, Lord Phillips [110]
[55] Managan, n. 49, at p. 151-152
[56] *Sienkiewicz*, n. 1, Lord Brown [186]
[57] [2011] EWCA Civ 1242
[58] Nicholas Bevan, 'Case Comment: Williams v University of Birmingham: personal injury - negligence – asbestos' (2012) 1 *Journal of Personal Injury Law* 1; p.2
[59] Bevan, n. 58, at p. 7
[60] Elizabeth Carley, 'Personal Injury: Divided Loyalties?' (2012) 162 *New Law Journal* 55, 55
[61] Mesothelioma Lump Sum Payments (Conditions and Amounts) (Amendment) Regulations (Northern Ireland) 2012/83
[62] *McGhee*, n. 22

It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life"[63]. This could be the reason why the seven Justices in *Sienkiewicz* expressed uneasiness in using epidemiological evidence. It does seem somewhat illogical that in mesothelioma cases alone there is a drastic departure from the normal rule of causation. There are many diseases with uncertain aetiologies which do not benefit from such a privilege of a legal exception. It is perhaps in the interest of fairness and justice for the claimants that the exception still survives. After all, the law of tort of negligence, is there to compensate victims that have been wronged where due care has been overlooked and tortfeasors have breached their duty.

However, *Sienkiewicz* could mark the beginning of voluminous low level exposure claims which are expected to peak in 2015[64]. The boundaries of this special exception need redefining and the balance between the natural sympathy for asbestos victims and broader policy and floodgate arguments readjusting[65]. It seems that the Court of Appeal in the case of *Williams* have listened to the Supreme Courts calling for a less dogmatic approach, demanding a greater awareness of the implications of granting full liability for negligent increases in risk of low levels of exposure[66]. *Sienkiewicz* then, has acted as a pivotal case to reach a better balance between logic and fairness.

[63] *McGhee*, n. 22, at para. 5
[64] BBC News 28/03/12 - Asbestos: court ruling opens way for insurance claims: <http://www.bbc.co.uk/news/world-17535887> - Last accessed 28 March 2012
[65] Bevan, n. 58, at p. 55
[66] Miller, n. 4

Unsatisfactory Implication - A Case for Revision: *Dalmare SpA v Union Maritime Ltd and Valor Shipping Ltd* [2012] EWHC 3537 (Comm)

Mateusz Bek

Until the decision in *Air Transworld*[1] it had been trite law that unequivocal language was necessary in order to exclude from a contract a term implied by a statute. The recent judgement in *The Union Power*[2] serves as a useful reminder that the current state of the law in the area requires further clarification.

Background

By a Memorandum of Agreement ("the MOA") on the Norwegian Saleform 1993 dated 4 September 2009, Dalmare SpA ("the sellers") agreed to sell and Union Maritime Ltd together with Valor Shipping Ltd ("the buyers") agreed to buy the vessel Calafuria, now renamed Union Power.

Clause 11 of the MOA stipulated for the condition on delivery in the following terms:

> "The Vessel shall be delivered and taken over as she was at the time of inspection, fair wear and tear excepted. However, the Vessel shall be delivered with her class maintained extended to 30 September 2009 without condition/recommendation, free of average damage affecting the Vessels class. The Vessel's continuous survey cycles of machinery are to be as per current machinery continuous status attached hereto (attached "A"). Her International, National, Class and Trading Certificates clean, valid until 30 September 2009, except ISSC and SMC to be valid at time of delivery only, ...".

The buyers inspected the vessel on 18 August 2009. They failed to notice a reference in the class records to an incident in October 2002 referring to damage to the no. 1 crankpin of the main engine.

[1] *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm); [2012] 1 Lloyd's Law Rep. 349.
[2] [2012] EWHC 3537 (Comm).

The vessel was delivered to the buyers on 1 October 2009. During a special survey the crankpin bearings of nos. 2 and 4 units were examined and found in a satisfactory condition, leading to certification of all the crankpin bearings.

Subsequently, the ship departed on a ballast voyage. Shortly thereafter, the main engine broke down due to a failure of the no. 1 crankpin bearing. It was eventually found to be significantly undersize and oval.

The buyers argued that the sellers were in breach of the MOA either because the ovality was an "average damage affecting class" within the meaning of Clause 11 or because there was a breach of the implied term as to satisfactory quality implied into the MOA pursuant to section 14(2) of the Sale of Goods Act 1979 as amended ("the SOGA 1979"). Despite rejecting the former, the arbitral tribunal accepted the latter argument, refusing to submit to the proposition of the sellers that the wording of Clause 11 was inconsistent with the term to be implied since the vessel was sold "as she was".

Permission to appeal was given on the following question of law:

> "Whether a term as to satisfactory quality is implied into the Contract/MOA by section 14 of the SOGA 1979?"

Both the arbitral tribunal[3] and the Commercial Court[4] noted that the matter in question was one on which there had been no direct decision of the courts. Therefore, a comprehensive analysis of the issue at stake was essential to ensure a commercially sensible outcome.

Decision

Flaux J. held that the arbitral tribunal was correct in holding that Clause 11 of the MOA did not exclude the implied term as to satisfactory quality and that the sellers were thus in breach of that condition. Consequently, the appeal was dismissed.

Analysis

It was confirmed by the court that a term implied by section 14(2) of the SOGA 1979 can be excluded by the parties by virtue of section 55(1) of the Act. Since the sellers alleged Clause 11 to have had such an effect, it had to be determined by Flaux J. if that provision was inconsistent with implied term.[5] Having correctly identified and helpfully reiterated the fundamental principle, most recently considered by Rix L.J. in *The Mercini Lady*[6] and Cooke J. in *Air Transworld*, that clear language must be used in the contract, if the statutory implied term as to satisfactory quality is to be excluded, the judge failed to

[3] *Ibid.* at [8].
[4] *Ibid.* at [58].
[5] See section 55(2) of the SOGA 1979.
[6] *Bominflot v Petroplus Marketing ("The Mercini Lady")* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Law Rep. 442.

observe that the court in the latter case, paradoxically, circumvented the orthodox rule.

In *The Mercini Lady* a contract for the sale of a cargo of gasoil contained an exclusion clause in these terms:

> "There are no guarantees, warranties or misrepresentations, express or implied [of] merchantability, fitness or suitability of the oil for any particular purpose or otherwise which extend beyond the description of the oil set forth in this agreement".

Rix L.J., delivering the leading judgement, felt bound by past authority to decide that the provision quoted above was insufficient for the purpose of excluding the implied condition as to satisfactory quality included in the SOGA 1979.[7] Such a stipulation can only be excluded by language which expressly refers to a condition. It was not open to the Court of Appeal to depart from that long-established legal consensus.[8]

In *Air Transworld* a contract for the sale of an aircraft incorporated the following exclusion clause:

> "THE WARRANTY, OBLIGATIONS AND LIABILITIES OF SELLER AND THE RIGHTS AND REMEDIES OF BUYER SET FORTH IN THE AGREEMENT ARE EXCLUSIVE AND ARE IN LIEU OF AND BUYER HEREBY WAIVES AND RELEASES ALL OTHER WARRANTIES, OBLIGATIONS, REPRESENTATIONS OR LIABILITIES, EXPRESS OR IMPLIED, ARISING BY LAW, IN CONTRACT, CIVIL LIABILITY OR IN TORT, OR OTHERWISE, INCLUDING BUT NOT LIMITED TO A) ANY IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE, AND B) ANY OTHER OBLIGATION OR LIABILITY ON THE PART OF SELLER TO ANYONE OF ANY NATURE WHATSOEVER BY REASON OF THE DESIGN, MANUFACTURE, SALE, REPAIR, LEASE OR USE OF THE AIRCRAFT OR RELATED PRODUCTS AND SERVICES DELIVERED OR RENDERED HEREUNDER OR OTHERWISE".

Despite there being no express reference to excluding any implied condition, Cooke J. held that the effect of the provision was to preclude every promise implied by law from application, in favour of the contractual set of obligations.[9]

Although the construction adopted in *Air Transworld* is commercially viable, it does not accord with the orthodox rule so reluctantly applied by the Court of Appeal in *The Mercini Lady*. It is submitted that the stringent principle should either be observed irrespective of the outcome or revised so as to permit an exclusion of a term implied by law in the absence of a specific reference where

[7] *Ibid.* at [59]-[61].
[8] *Ibid.* at [62].
[9] *Supra*, n. 1, at [29].

the spirit of the provision points to that effect. Adherence to the former approach in a case such as *Air Transworld* would produce a harsh, yet predictable, result. On the other hand, application of the latter solution might be said to reduce the certainty of the law at the expense of promoting commercial sense. Both Air Transworld Ltd and Bombardier Inc, being registered in Gibraltar and Canada, respectively, might simply have disparaged the nuances of English legal terminology.

In the present case, Flaux J. regrettably failed to comment upon the apparent conflict between the two authorities, citing them with approval in support for the same proposition.[10] Rather interestingly, instead of concluding the analysis by reiterating the well-established principle, the judge preferred to consider the character of the "as she was" provision contained in Clause 11 of the MOA in order to examine whether it was consistent with the term implied by section 14(2) of the SOGA 1979.[11] Astonishingly, having carefully analysed and robustly dismissed all submissions made by the sellers in relation to the meaning of the phrase "as she was", Flaux J. returned to the orthodox principle to emphasise the weight which should be given to such a long-standing rule.[12]

Conclusion

In the context of ship sale and purchase, the decision in *The Union Power* will be of no relevance if the Norwegian Saleform 2012 is employed, because Clause 18 of the contract excludes any term implied into the agreement by a statute. It remains, however, significant for the purpose of assessing the efficiency of a contractual provision allegedly excluding a term implied by a statutory instrument. It is with regret that Flaux J. did not express a view with regard to the contrasting rulings of Rix L.J. in *The Mercini Lady* and Cooke J. in *Air Transworld*, adopting himself an approach not free from ambiguities. Needless to say, an opinion of a High Court judge in the instant case would not in all probability dispose of the problem in entirety, yet it would have contributed to the ongoing debate. Determination of the issue by a competent court is highly desirable.

[10] *Supra*, n. 1, at [24]-[35].
[11] *Supra*, n. 2, at [36]-[63].
[12] *Supra*, n. 2, at [81].

How to Best Assess Public Authority Liability: The Human Rights Act 1998 or the Principles of Tort?

Kristian Foged

Since the enactment of the Human Rights Act 1998, a tension has manifested between the law of torts and the European Convention for the Protection of Human Rights and Fundamental Freedoms, particularly with regards to the question of how we assess the liability of and hold to account public authorities. The following article assesses the merits and shortcomings of both approaches and seeks to answer which of these is better equipped to address the liability of public authorities. The article focuses first on identifying and analysing the fundamental disparities of the purposes and the mischief that each system attempts to attach liability to. With a focus primarily on negligence, the key arguments for each system are then developed through an exploration of the cases where a public authority has faced liability for failing to confer a benefit of some kind. Through analysis of the case law, the article submits that the two systems have, at a fundamental level, different reasons and approaches as to the assessment of liability. As a result, each respective legal mechanism covers liability for distinct breaches. The article therefore concludes that there are two separate questions – one reflecting each of the two approaches – that must be employed by the courts in order to fully address the liability of public authorities; whether there has been a breach *of the duty and* whether *a right* has been breached.

Introduction

'As long as human rights law remained institutionally separated by the jurisdictional monopoly of Strasbourg court, these routes to liability ran happily in parallel. Their joinder came into question only once the enactment of the HRA ensured that the same, domestic, courts would become involved in both.'[1] As Du Bois illustrates, Section 6(1) of the Human Rights Act 1998[2] has given practitioners a new set of tools to work with when dealing with the liability of public bodies. However, the common law has its own approach to cases of such nature, bringing to light the question of whether 'the Human Rights Act 1998 provides a far better solution to address the liability of public authorities than the rigid adherence to general tort principles could ever achieve?'

[1] Francois Du Bois, 'Human rights and the tort liability of public authorities' [2011] L.Q.R 589, 607
[2] Hereon refered to as the HRA

In attempting to answer which of the two routes is more appropriate in assessing public authority liability, it is not enough to simply ask which one offers the greatest protection to either the state or individual's interests. Decisions concerning whether or not to attach liabilities to public authorities are inherently entrenched in deep public policy concerns. A fine 'balancing act' is carried out by the courts whereby the individual's interests are weighed against that of the public and the authorities serving it. Therefore, when comparing the HRA 1998 and tort principles, the assessment that needs to be made is which of the two routes balance these interests the best.

Focusing primarily on the tort of negligence, this paper will seek to assess the significance of the conceptual differences and difficulties between these channels of bringing a claim against a public body and assess how these differences manifest in practice. Conclusively, it will lead on to suggest that what is required is not one or the other, but rather that both are necessary means to correctly assign liability for public authorities.

Conceptual and practical disparity

The tension between seeking public authority liability under the HRA 1998 and through the principles of tort can be argued to stem from their fundamental differences in aim and the focus on which a claim is perceived. The common law's approach 'focuses attention on the putative wrongdoer...and it follows from this that the notion of *reasonable conduct* and *harm caused* often become central.'[3] On the other hand, the HRA 1998 and the Convention places its focus on '*a right*, [and] interferences with the right are presumed unlawful and it is up to the defendant to justify their actions.[4]'

The conceptual distinction between these two approaches rests on whether liability should be attached where a **duty** has been breached or if it should be when a **right** has been interfered with[5]. The question therefore arises: which approach is more appropriate to balance the scales to determine public body liability? To answer this we must examine how both routes establish liability.

After a right has been interfered with, the human rights route asks that two requirements are met in order to determine whether the interference with the right was justified: 1) that it pursues 'a legitimate aim' and 2) that the desired result is proportionate to the methods employed to achieve the aim[6]. This means that the balancing of public and individual interests is done at the justification stage – and after establishing the interference with the right[7] - allowing the courts to evaluate liability in light of the merits of each case.

[3] TR Hickman, 'Tort Law, Public Authorities and the Human Rights Act 1998,' in Duncan Fairgrieve, Mads Andenas and John Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (BIICL 2002), 20
[4] *Ibid.*
[5] It should be noted that not all areas of tort are duty based, the tort of trespass and false imprisonment are examples of rights based torts
[6] *Ashingdale v. United Kingdom* [1985] 7 EHRR 528 para 57
[7] TR Hickman (n 3) 21

Comparatively, tort principles question whether there should be liability in the first place. This is inherent within establishing a claim in negligence; namely finding whether, under the *Caparo* criteria, a duty of care exists and fundamentally, the third arm of the test which asks whether it is 'fair, just and reasonable' to impose liability in the given case.[8] Therefore, whilst human rights asks whether the aim is proportional subsequent to establishing an infringement of the right, tort principles seek to determine whether the public body should be liable at all. These different points of view must therefore be looked at with regards to their ability to evaluate public authority liability.

Lord Hoffman argues that tort principles allow the judicial system 'to avoid a trial altogether' saving public resources[9]. This is further acknowledged in *Z v UK*[10]. The danger of this pre-emptive approach, as has been criticised by the Strasbourg Court, is that it does not allow for cases to be evaluated on the basis of individual merit and 'which fails to distinguish between negligence with trivial effects and that with catastrophic results.'[11] In turn this also means that there is the danger of cases that breach rights not being heard on the basis of it being outside the authority's scope of duty.

Alternatively, under the HRA 1998 and Convention, the starting point is that 'interferences with the right are presumed to be unlawful and it is up to the defendant to justify their actions'[12]. On the surface, this would appear to be the more appropriate manner to balance public against personal interests; however, this approach embodies domestic concerns of further bolstering claims and it may 'rebut some of the public interest arguments which may otherwise have weighed against liability.'[13] However, this begs the question as to how well founded the fears of disparity between the two approaches truly are.

If the actual application of each of the approaches is scrutinised, it would seem there is less of a gap between them. *Osman v UK*[14] held that the strike out of the claim against the police in *Osman v Ferguson*[15] had breached Art. 6, the 'right to a fair trial'[16], however, on the facts of the case it was found that the police had not breached any rights under Art. 2 and its 'protection of life'.[17] This therefore tells us that, on the merits of the case, the claim would not have succeeded had there been a full trial in the domestic courts.

Conclusions from this analysis must, be taken with some caution in light of the case of *Z v UK*[18] where the reverse was found. Here the Strasbourg Court found that although there had been no breach of Art. 6 – and that the strike out was validated on acceptable public policy grounds, as opposed to

[8] *Caparo Industries Plc. v. Dickman* [1990] 2 A.C. 605
[9] Lord Hoffman, 'Human Rights and the House of Lords' [1999] 62 Mod. L. Rev. 159, 164
[10] *Z and Others v United Kingdom* (2002) 34 EHRR 3 para 82
[11] *Osman v United Kingdom* (2000) 29 EHRR 245, 299
[12] TR Hickman (n 3) 20
[13] Law Commission, *Administrative Redress: Public Bodies and the Citizen*, (Law Com No 187, 2008) para 3.178
[14] *Osman v United Kingdom* (n 11)
[15] *Osman v Ferguson* [1993] 4 All E.R. 344
[16] The European Convention on Human Rights (abbr. to ECHR or the Convention), Article 6
[17] *Ibid.*, Article 2
[18] *Z v United Kingdom* (n 10)

operating an immunity[19] - there had been a breach of Art. 3's 'prohibition from inhuman or degrading treatment' (and along with it Art. 13's 'right to an effective remedy')[20]. The disparity between the two approaches can also be seen in how they should assign remedies.

There is little debate regarding the fact that tort law provides larger remedies than actions under the HRA 1998[21]. However, Tort remedies are often provided on grounds of HRA breaches as well, and are not solely restricted to being awarded on the grounds of strict tort principles; as Steele concludes: 'it is tort law, rather than the HRA, that regularly awards damages in respect of rights violations.'[22] There is certainly merit to such a statement which can, partially, be accredited to the early pressure in the early years of the HRA 1998 for tort law to adjust to fully encompass human right protections, which has led to a narrow and somewhat confused understanding of the functions of both forms of remedy.[23] With an analysis of cases such as *Ashley*[24] concluding that 'it is also a function of tort law to allow private rights to be vindicated'[25] the result is the blurring of the lines between the functions of the two remedies, and causes a lack of cohesion as to what tort remedies are in fact meant to compensate. This is a needless development as the HRA 1998 is able to provide remedies itself.

The HRA 1998, has statutory powers to provide remedies under s. 8, meaning that, as can be implied by *Roche's* failure to plea a breach of Art 13,[26] "the common law need not provide a remedy because...where the Convention rights would be considered by the Strasbourg Court to have been breached, a sufficient remedy is provided by the [HRA 1998] itself."[27] Indeed "civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights"[28] Apportioning remedies according to whether a right must be vindicated or whether losses must be compensated allows for appropriate calculations of remedies and coherently divides the lines between the two systems. It is therefore the more desirable approach to assigning remedies.

Finally, this article addresses an area whereby the disparity between the two approaches to liability becomes particularly apparent; namely, omissions and when a public authority can be held liable for failing to confer a benefit.

[19] *Ibid.*, para 100
[20] ECHR (n 16), Article 3 and 13
[21] Lord Woolf, 'the Human Rights Act 1998 and Remedies,' in Duncan Fairgrieve and Mads Andenas (eds), *Judicial Review, in International Perspective: Volume II* (The Hague: Kluwer International, 2000) ch 30, 434
[22] Jenny Steele, 'Damages in tort and under the Human Rights Act: remedial or functional separation?' [2008] C.L.J. 606, 608
[23] *Ibid.*, 633
[24] *Ashley v Chief Constable of Sussex* [2008] UKHL 25
[25] Mary Arden, 'Human rights and civil wrongs: tort law under the spotlight,' [2010] P.L.140, 150
[26] *Roche v United Kingdom* (2006) 42 EHRR 30, para 138
[27] Jenny Steele, *Tort Law: Text, Cases and Materials* (2nd edn, OUP 2010), 456
[28] *Van Colle v Chief Constable of the Hertfordshire Police; Smith v Chief Constable of Sussex Police* [2008] UKHL, para 138 (per Lord Brown)

Problem area: failure to confer a benefit

It is generally perceived that "omissions do not lead to liability in tort...[and] that tort law is concerned with the protection of...'negative' rather than 'positive' right;"[29] therefore, "the rule that you are to love your neighbour becomes in law, you must not injure your neighbour."[30] This rule-of-thumb has been most apparent in cases dealing with public authorities. Although in principle it should not make a difference whether the defendant is an individual or public body, the case law has demonstrated the difficulty of holding public bodies liable for omissions[31]. This is not only attributed to the third arm of the *Caparo* test, but also the 'proximity' criteria has proved difficult to successfully argue.[32] The infamous case of *Hill*'s ratio was that there was no proximity between the victim and police[33]. In spite of this difficulty in establishing liability under tort's proximity and 'fair, just and reasonable' requirements, we must also recognise that it is often equally difficult to establish liability under Convention rights as the imposition of liability under such rights require the burdening of responsibility on the public authority to not be impossible or disproportionate.

Though it is true that the HRA imposes special duties on the state "to provide benefits, protection and security, or indeed simply to treat people with concern and consideration"[34] for its citizens, the reverse is also true; that due to its special role and responsibilities there are limits to what public policy will allow for public authorities to be liable for. Indeed, when speaking of positive obligations, the Strasbourg court acknowledged that "such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities."[35] Further to this, Hickman also notes the practical similarities between the two approaches stating that the "ECtHR[36] has adopted the language of 'duty' and reasonableness in relation to the positive obligations imposed on states to protect individuals from violations of rights."[37] The test for breaching Article 2[38] that was adopted in *Osman* exemplifies this.

In *Osman*, the test created requires that "it must be established that the authorities knew or ought to have known ... of the existence of a real and immediate risk to life of an identified individual or individuals," and secondly that the authority "failed to take measures **within the scope of their powers** which, **judged reasonably,** might have been expected to avoid the risk,"[39] a test which failed on the facts of the case itself. If we break down this test, the similarity to tort's *Caparo* criteria is noticeable; that the authorities "knew or ought to have known" relates to a notion of "foreseeability." That it

[29] Du Bois (n 1) 593
[30] *Donoghue v Stevenson* [1932] A.C. 562, as *per* Lord Atkin at para 44
[31] Consider the cases of *Stovin v Wise* [1996] A.C. 923 and *Gorringe v Calderdale MBC* [2004] 1 W.L.R. 1057
[32] Steele, *Tort Law* (n 27) 404-5
[33] *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53, 62
[34] Du Bois (n 1) 595
[35] *Osman v United Kingdom* (n 11) para 115
[36] *Abbreviation for* the European Court of Human Rights
[37] TR Hickman (n 3) 39
[38] ECHR (n 16), Article 2 : 'right to life'
[39] *Osman v United Kingdom* (n 11) para 116

needs to be "an identified individual" can be seen as being similar to the 'proximity' requirement, and the assessment of it being "within the scope of their powers...judged reasonably, might have been expected to avoid the risk" encompasses the third arm of whether it is 'fair, just and reasonable' to impose liability and the general reasonableness test of negligence. Though these similarities question the extent to which the 'HRA provides a far better solution to address public authority liability' there are still significant differences which merit our attention.

Firstly, we must also acknowledge that this test only relates directly to breaches of Art. 2; *Z v UK* exemplifies that domestic and supranational courts may evaluate other article breaches differently, as do other English cases that have successfully brought a claim against public authorities in tort which are considered below.

Secondly, as noted when discussing the conceptual differences, the test in tort remains separate and is evaluated prior to a breach. This is important as it makes the fault dependent on the duty aspect of the test when assessed conjunctively.[40] Finally, there is no requirement of 'harm' for a successful claim in human rights, and therefore damages are not a required remedy;[41] this means that the HRA approach focuses less on the arguments of "the unfairness or injustice in holding public bodies liable for potentially enormous losses,"[42] which are relevant considerations for the English courts at the duty stage.[43] It is perhaps relevant at this point to consider when each approach can lead to a successful claim.

In considering when a claim against a public authority may succeed in negligence, Donal Nolan points out that there appear to be "two principal circumstances in which a public authority may be held liable in negligence: first, whereby its positive conduct causes the claimant additional damage; and secondly where it failed to confer a benefit on a person towards whom it had assumed responsibility."[44] Let us see how well these two models fit in with actual cases.

As the public authority had created the risk and subsequently, negligently failed to supervise the young offenders, the case of *Home Office v Dorset Yacht*[45] falls under the first category. It is less clear as to which category the case of *Kent v Griffiths,*[46] where an ambulance failed to appear in reasonable time, should fall under – if not both.

The point to note about both cases, however, is that where tort held the public bodies liable for a breach, it is questionable whether an equally successful claim could have been made under Convention rights. Though *Dorset Yacht* may have had a claim under Protocol, Article 1's protection of property, this

[40] *Keenan v United Kingdom* (1978) 3 EHRR 104, paras 95-96
[41] TR Hickman (n 3) 43
[42] *Ibid.*
[43] Jane Stapleton, 'Duty of Care Factors: a Selection from the Judicial Menus,' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press – OUP 1998) 73-87
[44] Donal Nolan, 'The liability of public authorities for failing to confer benefits' [2011] L.Q.R 589, 271
[45] [1970] 2 W.L.R. 1140
[46] (*No 2)* [2001] Q.B. 36

seems unlikely as the damage was incurred by a third party hijacking the damaged yacht. Equally, as the victim in *Kent v Griffiths* suffered injury and not death, it is unsure which Convention article such a claim would fall under. This brings to light that there are circumstances where tort may not only be better at assigning public authority liability, but also the only form of redress.

The case of *Swinney v Chief Constable of Northumbria*,[47] where the police failed to protect an informant, and negligent precautions led to their details within the possession of the criminal in question, provides an interesting contrast to the Osman case. In *Swinney* the police were held liable as they had "assumed responsibility of the victim,"[48] placing it in the second category set out above, and was on that basis not struck out on the same policy grounds as *Osman*. Considering the breach of Article 3 in *Z v UK*, the case could be made that *Swinney* should have been afforded a protection under Convention rights as well. It is, however, significant to consider the limited grounds under which the *Osman* claim succeeded.

The nature of the *Osman* claim changed at appeal to Strasbourg, with the only successful plea being that of a breach of the 'right to a fair trial;'[49] therefore the question comes to mind whether any claim could have arisen successfully under Convention rights if a full trial been conducted in the first place. This seems unlikely considering both the cases of *Van Colle* and *Smith*,[50] were unsuccessful.

The case of *Brooks*[51] and the above examples represent insufficient protection under both tort principles and Convention rights. However, Convention rights should not be written off as being fully protected under tort principles. *Osman* still forced domestic courts to proceed more cautiously in regards to how and when they can strike out a claim. More directly, liability was only justifiably found in cases such as *Z v UK*, *TP and KM v United Kingdom*,[52] and *Roche v United Kingdom*[53] when the claimants sought to enforce their Convention rights. Some truth may therefore lie in Du Bois' analysis that "tort law focuses on the reasonableness of the behaviour, human rights law focuses on the reasonableness of the outcome."[54]

Conclusion

The ECtHR stated that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of community and the requirements of the protection of the individual's fundamental rights.'"[55]

[47] *(No 1)* [1997] Q.B. 464
[48] *Swinney v Chief Constable of Northumbria (No 1)* [1997] Q.B. 464, 482
[49] ECHR (n 16), Article 6
[50] *Van Colle; Smith* (n 28) 50
[51] *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24
[52] [2001] 2 FLR 549
[53] (2006) 42 EHRR 30
[54] Du Bois (n 1) 601
[55] *Soering v United Kingdom* (1989) 11 EHRR 439, para 89

However, in practice, a simple evaluation that the 'HRA 1998 provides a far better solution to address the liability of public authorities than general tort principles' is one that "underestimates tort...and overestimates the ECHR[56]". Conversely, there are difficult cases where tort principles and Convention rights overlap. A conflict of this nature, drawn from the case *Brockhill Prison*[57] case, is summarised by Hickman; "Which is to prevail? The claimant's rights or the reasonableness of the defendant's conduct?"[58]

Although this author finds much sense and sound reasoning in the principles of how tort should assign liability to public bodies, there is difficulty in accepting the current approach in practice. Too often the domestic courts find there to be 'no duty' owed to the claimant on public policy grounds. Even after the enactment of HRA 1998, "the English courts are [still] proving reluctant to consider claims directly under the HRA and remarkably adroit at finding that the common law is either sufficiently protective, or sufficiently flexible to protect rights."[59]

Though not expressing any favouritism towards either approach, the fact that the HRA 1998 makes it "unlawful for a public authority to act in a way which is incompatible with a Convention right,"[60] means that I find sympathy with the overruled comment of Rimer L.J. that "where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it."[61]

Furthermore, the HRA allows the courts to fill the 'gaps' in English law[62] when imposing public authority liability; however, as some of the case law covered above, there are equally gaps in the right encompassed under the ECHR.

There are cases which only amount to a breach of a duty by a public authority that are only covered by tort principles, but there are also cases where no duty has been breached (or no duty was found) and there has only been a violation of Convention rights. It is important that the law acknowledges both. Particularly when considering the different possible remedies under each head, we find a need for some cases to be remedied or vindicated by different sets of rules.

This author submits that, it is not a matter of a single question of which approach is more suitable for approaching the liability of public authorities. There are instead two separate questions which the courts and litigants should continue to engage in; 'has the authority breached their duty?' And, 'has the authority infringed upon any fundamental rights?' Should either of these be answered in the affirmative, cases must be assessed on their merits to find, respectively, whether the breach was reasonable or the infringement proportional. As Lord Hope stated in *Chester v Afshar;* "the function of the

[56] Richard Mullender, 'Tort, Human Rights, and Common Law Culture' (2003) O.J.L.S 23 (2) 301, 309
[57] *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2000] 3 W.L.R. 843
[58] TR Hickman (n 3) 29
[59] TR Hickman (n 3) 22
[60] HRA 1998, Section 6(1)
[61] *Smith v Chief Constable of Sussex* (CA) [2008] EWCA Civ 39, para 45
[62] TR Hickman (n 3) 23

law is to enable rights to be vindicated *and* to provide remedies when duties have been breached."[63]

[63] *Chester v Afshar* [2004] UKHL 41, para 87