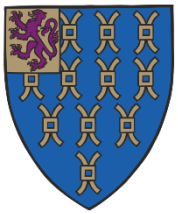
The Honourable Society of Lincoln's Inn



Student Law Journal

Volume VII

April 2025

Foreword

1. This marks the seventh volume of the Lincoln's Inn Students' Law Journal, a testament to its continued success and the expanding breadth of legal research. This year's edition features ten exceptional articles, each reflecting the hard work and intellectual curiosity of our student members, thereby reinforcing the Journal's role in advancing legal thought and practice.

2. The Journal remains committed to its core purpose: namely to provide students with an opportunity to publish and share their legal research with a wider audience.

3. This year's winning Lincoln's Inn Legal Essay Prize entry, authored by Lily Greenhough, provides a critical examination of the proposed reforms to unfair dismissal law, assessing the impact of the Employment Rights Bill and its limitations in safeguarding employees. Lily Greenhough highlights key shortcomings in the legislation, offering a thought-provoking perspective on contemporary employment law.

4. I am also pleased to highlight the winner of this year's Lord Millett Prize, Jaya Rana. Her essay offers a robust defence of the strict approach to fiduciary duty in English law, emphasising its role in ensuring legal certainty and trust. Jaya Rana carries out a robust case analysis. She challenges arguments for a more flexible framework and makes a compelling case for maintaining the law's rigidity.

5. This year we received thirty-one entries across our two competitions, the highest number since the journal's conception. This overwhelming response reflects the growing enthusiasm for legal scholarship among our student members and I hope this Journal continues to inspire rigorous debate and inquiry. My sincere thanks go to all the contributors, markers, and the editorial team for their ongoing support in making this publication possible. I look forward to seeing the Journal's continued growth.

Edward Cousins, Editor

28 March 2025

Contents

Unfair Dismissal Law is Still Unfair: What is Missing from the Employment Rights Bill

Lily Greenhough

The Employment Rights Bill has proposed progressive changes to almost all corners of employment law.[1] However, despite unfair dismissal reform being at the forefront of the proposals,[2] the Bill fails to go far enough. It is suggested this reflects undue priority to economic efficiency and the managerial prerogative over allowing unfair dismissal protection to be a mechanism for enhancing employee rights. It will be argued that more is needed to create a fair system of unfair dismissal. To do this, first the purpose of unfair dismissal law will be dissected. Second, the reforms advanced for unfair dismissal in the Bill will be examined. Finally, it will be advocated that there are four areas that should be added to the reform agenda to create a just regime of unfair dismissal.

The Purpose of Unfair Dismissal

The right to not be unfairly dismissed in England and Wales is a relatively new phenomenon. At common law, an employee could be dismissed at will so long as the notice period was respected.[3] However, in the backdrop of increased industrial action, statutory unfair dismissal protection was brought in via the Industrial Relations Act 1971 and is currently contained in the Employment Rights Act (ERA) 1996. So, unfair dismissal was initially conceived as a tool to promote economic efficiency by decreasing strikes, rather than to empower employees. Furthermore, the unfair dismissal regime created was deliberately limited in substantive scrutiny to retain the 'managerial prerogative'.[4] This is the idea that employers have the right to make determinations about their workforce in ways that suit them and their economic needs. The two principles of economic efficiency and managerial prerogative have been prioritised in the development of unfair dismissal law.

However, here is it argued we should move beyond these concerns. The reason for protecting employees from unfair dismissal should be grounded in a recognition of the unique violation on an unfairly dismissed person's identity and dignity. This requires an understanding of how employment stretches beyond financial sustenance. As Lord Hoffmann recognised, "a person's employment is usually one of the most important things in [their] life. It gives not only a livelihood

[1] Employment Rights HC Bill (2024-5) [11]
[2] The Labour Party, 'Make Work Pay' (2024) https://labour.org.uk/wp-content/uploads/2024/06/MakeWorkPay.pdf
[3] *Ridge v Baldwin* [1963] 2 All ER 66, 71
[4] Bowers and Clarke, 'Unfair Dismissal and Managerial Prerogative: A Study of 'Other Substantial Reason' (1981) 10 ILJ 34

but an occupation, an identity and a sense of self-esteem."[5] It is within this understanding of unfair dismissal that the current protection and its reforms will be considered.

The Reforms Proposed by the Employments Rights Bill

Despite the progress the Bill proposes, the reforms tabled to unfair dismissal are limited. As Unite's leader stated, "the legislation has more holes than Swiss cheese."[6] There are two key reforms proposed:

First, the proposal to make unfair dismissal protection a day-one right.[7] Under the ERA, an employee must be working two years before they are entitled to protection,[8] unless they are dismissed for a reason deemed 'automatically unfair'.[9] The rule has led to accusations of being discriminatory against women,[10] and goes against ILO recommendations.[11] However, despite the headline that unfair dismissal will be a day-one right, the bill tempers it by introducing a 'probationary period' in which it is easier to dismiss employees than under the standard scheme.[12] The current proposal is nine months.[13] Given the standard scheme provides limited protection, Bogg and Ford suggest the restrictions on dismissal in the prohibitory period present a modest challenge.[14] So in reality, there may be little extra protection.

Second, the Bill seeks to make dismissal for failing to agree to variation of a contract an automatically unfair reason for dismissal.[15] This reflects the "justifiable outcry" to P&O's firing and rehiring scandal.[16] It prevents calculated business moves to lower the contractual standard of employment rights in the cheapest way possible. But, the Bill allows employers to justify the dismissals if they were to eliminate/significantly mitigate financial difficulties and that the employer could not reasonably have avoided the need to make the variation.[17] Bogg and Ford call this an "ingenious compromise" by protecting employees but giving room to employers in genuine

[5] *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518 [35]
[6] Iain Watson, 'Labour's new deal for workers: A fight postponed?' *BCC News* (9 October 2024) https://www.bbc.co.uk/news/articles/c153dzy1kj4o
[7] (n.1), s.19
[8] ERA 1996, s.108(1)
[9] *Ibid*, s.108(3)
[10] *R v Secretary of State for Employment, ex parte Seymour-Smith (No 2)* [2000] 1 All ER 857
[11] International Labour Organization, 'Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment' (2009), pg 6 file:///Users/lilygreenhough/Downloads/wcms_171404.pdf
[12] (n.1) Schedule 2, Paragraph 3
[13] (n.6)
[14] Bogg and Ford, 'From 'Fairness at Work' to 'Making Work Pay': A Preliminary Assessment of the Employment Rights Bill' (*UK Labour Law*, 14 October 2024) https://uklabourlawblog.com/2024/10/14/from-fairness-at-work-to-making-work-pay-a-preliminary-assessment-of-the-employment-rights-bill-by-professor-alan-bogg-and-professor-michael-ford-kc/
[15] (n.1), s.22
[16] Barnard, 'P&O Ferries and employment law' (*UK in a Changing Europe*, 23 March 2022) https://ukandeu.ac.uk/po-ferries-and-employment-law/
[17] (n.1), s.22(3)

financial distress.[18] However, as discussed below, the courts have interpreted other statutory unfair dismissal provisions incredibly loosely so there is a fear that the defence will strip the provision of any substance.

The Need for Further Reform

To allow for a just system of unfair dismissal law grounded in employee's rights, it is argued four reforms are required:

Status

Only those who reach the status of employees are entitled to unfair dismissal protection.[19] So, 'limb b workers' are not entitled to it.[20] If unfair dismissal law is to be protected given the personal affront it has, it is hoped at minimum this protection would be expanded to a large percentage of the workforce, as protection from discrimination has done.[21]

Statutory Cap

The Conservative party's 2013 reform changed the cap on compensatory damages for unfair dismissal from a flat cap to being based on the claimant's weekly income.[22] This is one of the few reforms by the last administration that the Bill does not tackle. This means it is cheaper and easier to fire low-paid, more economically vulnerable employees. To accurately capture the loss to employees of unfair dismissal, the cap should be removed. This will not mean every dismissed employee will be given lucrative payouts, but rather the courts can assess the damages. There is a mitigation duty to seek further employment, which would limit it.[23]

Reasons for Dismissal

The interpretation of the five 'potentially fair reasons' under the ERA needs to be addressed.[24] Although the burden is on the employer to demonstrate a valid reason,[25]

Davies and Freeland argue that "how widely, openly and inclusively" the reasons have been defined means that s98(1)-(3) effectively operate as a procedural rather than a substantive requirement.[26]For example, the threshold of what is considered misconduct is very low, meaning minor digressions can be career-ruining.[27] It is clear the purpose of this relaxedness is to pay respect to the employer's right to control their workforce. However, as Collins argues, the

[18] (n.14)
[19] ERA 1996, s.94(1)
[20] *ibid*, s.230(3)(b)
[21] The Equality Act 2010, s.83(2)(a)
[22] The Enterprise and Regulatory Reform Act 2013, s.15
[23] *Dunnachie v Kingston-upon-Hull City Council* [2004] UKHL 36, [2005] 1 AC 226
[24] ERA 1996, s.98(1)-(3)
[25] *ibid*
[26] Davies and Freedland, *Labour Law*, (2nd edn, Weidenfeld and Nicolson 1984) 469–71
[27] Collins, 'Finding Fault in the Law of Unfair Dismissal: The Insubstantiality of Reasons for Dismissal' (2022) 51 ILJ 598, 609-12

statutory language of s98 suggests a more stringent standard, requiring a justifiable reason.[28] It should thus be reinterpreted.

The Band of Reasonable Responses

Upon being faced with what is now the ERA, s98(4), the courts developed the BORR test to determine the fairness of a dismissal.[29] If a dismissal falls within a band of reasonable responses which a reasonable employer might have adopted it will be fair.[30] Baker highlights that the weight of commentary has been critical of BORR.[31] This reflects that it is rare for a dismissal to be found to be substantively unfair. It was stated in *Haddon v Van den Bergh Foods Ltd* that BORR leads "tribunals into applying what amounts to a perversity test" as it allows extreme views to be included.[32] Instead, a proportionality analysis may be the most suitable way to address fairness and strike a balance. Proportionality looks at the necessity of the dismissal whilst allowing for considerations of the impact on the employee.[33] As Baker highlights, deference to the employer is considered within necessity.[34] Since proportionality is already used in discriminatory dismissals, it is a familiar tool for tribunal judges.[35]

To conclude, although the Employment Rights Bill is a welcomed development for starting the train of reforms to unfair dismissal, it is argued much more is needed to create a just system of protection grounded in the rights of employees.

[28] *ibid*, 603-08
[29] *Iceland Frozen Food v Jones* [1983] ICR 17, 24
[30] *ibid*
[31] Baker, 'The "Range of Reasonable Responses" Test: A Poor Substitution for the Statutory Language' (2021) 50 ILJ 226, 236
[32] [1999] ICR 1150, 1151
[33] See *Bank Mellat v Her Majesty's Treasury (no.2)* [2013] UKSC 39, [2014] AC 700
[34] (n.31), 255-63
[35] *Allonby v. Accrington & Rosendale College* [2001] EWCA Civ 529, [2001] IRLR 364, 370

The 'Undue Harshness' of Fiduciary Duty in English Law: An Analysis of Judicial Interpretation of the Roles of Equity and Legal Certainty

Jaya Rana

Millet LJ provides an oft-cited definition of the fiduciary in *Bristol and West Building Society v Mothew* as he 'who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence'.[1] He goes on to emphasise that, beyond the duty of acting in good-faith, with diligence, and in avoidance of conflicts of interest, the 'distinguishing obligation' is that of 'single-minded loyalty';[2] this unwavering duty is the founding rationale of fiduciary relationships, the high standard to which we subject fiduciaries merely preserves the integrity of the concept. The law on fiduciaries is unquestionably harsh; it simply falls to determine whether such severity is 'undue'. Despite the many descriptions of fiduciary legal fundamentalism as 'anachronistic' in its rigidity, and implications that the devout servitude it demands is nothing more than a 'fusty relic of an earlier era'[3] this essay maintains that, without these unrelentingly severe obligations, the concept of the fiduciary ceases to be. Accordingly, the certainty, predictability, and constancy inherent to the English notion of fiduciary duty must, at all costs, be preserved; it is only strict legal application that can ensure this. This essay will argue that, in spite of its harshness, the rigour of the law of fiduciaries is not *undue* but instead essential to the continuation of fiduciary relationships.

The contentious case of *Boardman v Phipps* is broadly acknowledged as the defining case on this matter.[4] Though Wilberforce LJ (and later the House of Lords) found breach despite the parties acting in good faith, it is Lord Upjohn's vehement dissent which has attracted much approval. This speech has formed the modern basis for the argument that the 'unduly harsh' law on fiduciaries requires softening. This essay submits that the majority judgment, upholding the strict position on fiduciaries, is to be preferred. This approach is founded on a clear and tangible doctrine (unlike the reasoning championed by Upjohn), upholds the integral foundations of fiduciary relationships, offers the merits of predictability, and as was illustrated in *Boardman*, is not entirely dismissive of compromise.

Keech v Sandford is an important historic example of the strictness of the duty of loyalty.[5] King LJ notes that though it 'may seem hard that the trustee is the only person of all mankind who might not have the [trust property]', it is 'very proper that the rule should be strictly pursued, and not

[1] *Bristol and West Building Society v Mothew* [1997] 2 W.L.R. 436 [18]
[2] Ibid.
[3] Deborah DeMott, 'Fiduciary Obligation Under Intellectual Siege' [1992] 30 *Osgoode Hall Law Journal* 471, 476
[4] *Boardman v Phipps* [1967] 2 AC 46 HL
[5] *Keech v Sandford* [1726] 25 ER 223

in the least relaxed'.[6] A century on, we see that this strictness remains resolute, and for good reason. In *Learoyd v Whiteley*, trustees were held liable for lacking due-diligence in their investment of trust funds.[7] Such an unbending approach is conducive to maintaining the high bar to which we rightly subject individuals holding fiduciary positions. The strictness demonstrated by the vast majority of fiduciary caselaw over the past few centuries, often unflatteringly termed as 'harshness', upholds legal clarity. Unlike Upjohn's dissent (and those cases which have since championed it) which rely on the immeasurable and unstable notion of 'reasonability', the strict approach is steeped in the far more reliable notion of duty. By creating a binary sense of right and wrong in the sphere of fiduciary relationships, an unparalleled certainty has taken shape. This stable, well-founded approach is not destabilised by arbitrary (and inherently indeterminable) concepts of subjective morality, unlike the alternative softened approach which can never accord with the clarity demanded by the law. Upjohn's dissection of the phrase 'possibly may conflict' in *Boardman*, and his theoretical distinction between 'real sensible possibility of conflict' and 'conceivable possibility [which might] result in conflict',[8] is, though admirable, ultimately unworkable: its irresolvable subjectivity makes it an unreliable basis upon which to construct a body of law. The definition of 'reasonable' in this context is too broad; it would result in anarchic self-determinism in the courts of what is acceptable in contexts of fiduciary relationships, setting a dangerous precedent with even more dangerous policy implications.

Having established that the strict approach is a much firmer, more reliable basis upon which to construct law on this matter, it is worth reiterating that fiduciary law is not harsh for harshness' sake. The relationship between principal and agent has often been compared to that of servant and master. Whilst I don't deny the strictness of the law in this respect, such an analogy is overblown. It seems not to account for any degree of compromise offered by the orthodox approach, which in *Boardman* proves to be present; in appealing to the Trustee Act 1925 and the decision in *Cradock v Piper*,[9] Denning carefully balances the need for due renumeration, with the necessity of certainty and stringency in legal principles in the fiduciary arena. *This* is the type of softening or compromise, if any, that should be championed. Though 'fiduciary remedies are notoriously potent'[10] and unwarranted punishment should by no means be taken lightly, recent judicial attempts at compromise have been unsatisfactory, and have only eroded the vital principle of legal certainty. In *Foster Bryant Surveying v Bryant*, the Court of Appeal acknowledged that, though fiduciary duties apply, trustees' actions should be considered within the broader context.[11] This lax approach, despite its merits, must not be tolerated: dilution of legal certainty, and subsequent endangerment of predictability in the courts and overarching justice must be avoided at all costs. In spite of *Foster* and cases which followed suit, the overwhelming majority of courts still adhere to the orthodox position, and thankfully so.

[6] Ibid. [61] (King LJ)
[7] *Learoyd v Whiteley* [1887] UKHL 1
[8] [1967] 2 AC 46 HL [33]
[9] *Cradock v Piper* [1850] 41 E.R. 1422
[10] Paul Miller, 'Justifying Fiduciary Remedies' [2013] *University of Toronto Law Journal* 570, 571
[11] *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200

The traditional approach 'unquestionably has the virtue of predictability about it'.[12] and this is of immeasurable value. We must not, in the pursuit of flexibility, lose the basic building-blocks of the law and invaluable principles which govern fiduciary duty. As put by Cranworth in *Aberdeen Railway v Blaikie*, 'it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting [...] with the interests of those whom he is bound to protect'.[13] Despite the 'flamboyant judicial rhetoric' it has attracted,[14] the central ethos of fiduciary law is not complicated. Whilst in *Boardman*, Upjohn attempts to redirect the Cranworth's meaning, overanalysing the language and undervaluing the obvious overall message, such clarity is hard to refute. Upholding a degree of objectivity in interpreting 'possibility of conflict' is of paramount importance to ensure the workability of fiduciary law – to introduce notions of 'reasonability' or 'realness', as the softer approaches do, only works to confound and, as has demonstrably proven true, introduce manipulable loopholes.

This essay does not deny the harshness of fiduciary law. But to call such harshness 'undue' so neglects the elemental need in fiduciary contexts for *trust*. Though some jurisdictions do adopt more lenient approaches (as is evidenced by Australia's abundant caselaw which demonstrates their loosening grip around fiduciary duties), England should by no means follow suit. It is best summarised by Getzler, who firmly holds that 'fiduciary law is premised upon the *unremitting force of the fiduciary du*ty'; such 'rigid enforcement' is the 'backbone of equity's protection against the abuse of trust'.[15] It would take exceptionally strong reasoning to justify undermining the precedents which have evolved to form our current fiduciary law. It is my submission that this high bar has not yet been met. With the firm orthodox approach comes clarity of law and an incentive for those who enter fiduciary relationships to carry out their duties 'selflessly and with undivided loyalty',[16] as is required for the success of any fiduciary operation. Though the fiduciary's onerous duty of loyalty can be considered overly demanding, this unwavering adherence ensures the prioritisation of equity; fiduciary duties are purposely framed in exacting, uncompromising terms because they must be to safeguard the vulnerable position of beneficiaries.

[12] Alastair Hudson, *Understanding Equity & Trusts* (7th ed., Routledge, 2021), ch. 7
[13] *Aberdeen Railway v Blaikie* [1854] UKHL 1 Macq. 461 [136]
[14] Deborah DeMott [1992] 472
[15] Joshua Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in Andrew Burrows and Alan Rodger (eds) *Mapping the Law* (OUP, 2006), ch. 31
[16] Paul D. Finn, *Fiduciaries Obligations* (Law Book Company, 1977) p.4.

Reforming Police Immunity: Balancing Protection and Accountability

Saurabh Bhalla

The doctrine of police immunity, under the heading of qualified immunity, has long been a cornerstone of legal protection afforded to law enforcement officers in the United States. Originally intended to shield officers from personal liability for actions undertaken during their employment, the doctrine sought to prevent frivolous lawsuits and enable officers to perform their duties without constant fear of legal retribution. However, present-day application of police immunity has raised significant concerns about accountability, fairness and erosion of public trust in law enforcement. Reforming police immunity to restrict its application to specific circumstances, determined on a case-by-case basis, is necessary to strike a balance between protecting officers acting in good faith and ensuring accountability for clear constitutional violations. This essay argues for such a reform, advocating that the status quo allows officers to evade responsibility for misconduct, disproportionately harms marginalised communities and undermines the rule of law. By narrowing the scope of police immunity, the legal system can achieve a more equitable balance between protecting public officials and upholding justice for victims of police misconduct.

Qualified immunity in the United States can be traced back to section 1983 of the *Civil Rights Act* 1871[1] which was created to provide remedies for individuals who believed their constitutional rights had been violated by state actors, including law enforcement.[2] Originally, it was conceived as a tool to protect African Americans from discrimination and violent law enforcement practices. Section 1983 was meant to ensure that state actors who used their powers to infringe on citizens' civil rights could be held accountable. However, the introduction of qualified immunity through decisions of the Supreme Court of the United States in *Pierson v Ray*[3] and *Harlow v Fitzgerald*[4] substantially narrowed the scope of accountability for law enforcement officials. The judicially developed doctrine protects law enforcement officers from civil liability unless it can be shown that 'the officers should have known they were violating clearly established law, because a prior court case had already deemed similar police actions to be illegal'.[5] This is a very high standard to meet, making it extremely challenging for any injured party whose constitutional rights were violated by police officers to seek redress. In *Kisela v Hu*ghes[6], Justices Sotomayor and Ginsburg dissented with the majority opinion by writing that 'such a one-sided approach to

[1] 17 Stat. 13
[2] ibid.
[3] 386 U.S. 547 (1967)
[4] 457 U.S. 800 (1982)
[5] 'Qualified Immunity' (Equal Justice Initiative) <https://eji.org/issues/qualified-immunity/> accessed 17 November 2025
[6] 584 U.S. (2018)

qualified immunity transforms the doctrine into an absolute shield for law enforcement officers'.[7] They further added:

> The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.[8]

The erosion of responsibility under police immunity has led to widespread criticism, with legal scholars arguing that it undermines the protections meant to safeguard citizens' rights.

The doctrine of police immunity is used as a tool to perpetuate a culture of impunity. Rather than shielding law enforcement officers from unjustified lawsuits, it allows police to engage in constitutional violations and subsequently rely on the 'clearly established' standard to avoid facing consequences. The clearly established standard is legal fiction— 'judges have ignored altogether the question of whether an officer acted lawfully. This way courts avoid setting a precedent for future cases which allows the same conduct to repeatedly go unpunished'.[9] This was seen in *Baxter v Bracey*[10] where Mr. Alexander Baxter, a homeless Black man, was bitten by a police dog after surrendering to the police with his hands in the air. He sued for excessive force, claiming a violation of his constitutional rights protected by the Fourteenth Amendment. To meet the clearly established law requirement, Mr. Baxter relied on *Campbell v City of Springboro*[11] where it was held that '... officers had violated a person's rights when they released a police dog on a man who had surrendered by lying down'.[12] Although the facts of Mr. Baxter's case closely mirrored the precedent, shockingly, 'the court held that this precedent did not clearly establish that it was unconstitutional to release a police dog on a suspect who had surrendered by sitting with his arms raised'.[13] Legal scholar Angela D. Minor stated that:

> The efficacy of the doctrine has created a legal paralysis of unconstitutional treatment of minorities. The laws created to protect basic civil rights for African Americans and other minorities have been dismantled by the precedence given to qualified immunity.[14]

---

[7] ibid 15.
[8] ibid.
[9] Equal Justice Initiative (n 4).
[10] 751 Fed. App'x 869 (6th Cir. 2018)
[11] 700 F.3d 779 (6th Cir. 2012)
[12] Equal Justice Initiative (n 4).
[13] ibid.
[14] Angela D. Minor, 'Black Lives Still Matter: The Unconstitutionality of the Reasonableness Standard in the Doctrine of Qualified Immunity' (2024) 27 University of the District of Columbia Law Review <https://heinonline.org/HOL/LandingPage?handle=hein.journals/udclr27&div=7&id=&page=> accessed 18 November 2024

This gives rise to a disturbing concern; while the law is designed to protect citizens, it is interpreted in a manner that allows for an unaccountable abuse of power.

Supporters of police immunity argue that the protection of police officers from frivolous lawsuits is vital and personal liability may affect their ability to carry out their role in high-stress situations. They assert that officers require the legal protection of police immunity to make time-sensitive decisions without fearing personal financial detriment if their actions are later held to be wrong. In *Harlow v Fitzgerald*[15], the Supreme Court enunciated the importance of protecting officers from legal burdens which could distract them from their duties.[16] Police immunity 'allows officers breathing room to make reasonable but mistaken judgments'.[17] This perspective overlooks the lack of accountability for clear violations, which perpetuates misconduct and undermines the public's confidence in law enforcement. While it is important to protect officers from unreasonable suits, the broad liberties granted under police immunity may result in officers avoiding responsibility even when their actions are illegal and damaging to the rule of law.

Restricting police immunity to narrowly defined circumstances serves two crucial purposes: holding officers accountable for misconduct and restoring public trust in law enforcement. For marginalised communities, particularly African Americans, the inability to seek legal redress for police misconduct has contributed to a deep sense of distrust towards law enforcement. Limiting police immunity ensures officers are protected only when acting within clearly defined legal boundaries while providing victims of misconduct a route to seek restitution. The high-profile deaths of George Floyd and Breonna Taylor underlined the urgent need for reform. Mr. Floyd's case was settled with the City of Minneapolis

> for $27 million before qualified immunity ever could be raised. This is likely because the city anticipated the blowback that would come from arguing that the case against Derek Chauvin should be dismissed because Floyd's family could not point to a prior case with nearly identical facts. But if George Floyd's case had not received the press scrutiny it did and had not inspired the same degree of public attention and rage, a lawyer for the city of Minneapolis could well have argued that qualified immunity shielded Chauvin from liability.[18]

A fundamental shift in the approach to police immunity is necessary if the United States is to rebuild trust in its law enforcement.

Restricting police immunity to specific situations would restore the balance of justice by ensuring that officers who violate constitutional rights face consequences for their actions. This would align

[15] *Harlow* (n 3).
[16] ibid 816.
[17] Ashcroft v al-Kidd 563 U.S. 731 (2011)
[18] Joanna Schwartz, 'Qualified Immunity is Burning a Hole in the Constitution' (Politico, 19 February 2023) <https://www.politico.com/news/magazine/2023/02/19/qualified-immunity-is-burning-a-hole-in-the-constitution-00083569> accessed 18 November 2024

the United States with international norms, such as the United Kingdom, where law enforcement officers can be held civilly liable for misconduct under a more achievable standard but in extremely limited circumstances. The United States has fostered a double-standard system where police are afforded extremely high levels of protection, creating an environment where misconduct goes unpunished. Restricting police immunity to specific circumstances would not paralyse law enforcement but rather encourage better practices and stronger safeguards against abuse.

In conclusion, restricting police immunity is necessary to restore justice and accountability within the United States legal system. The current doctrine of police immunity allows officers to evade responsibility for violations of constitutional rights, undermining the rule of law and perpetuating misconduct. By narrowing police immunity in civil law, law enforcement officers would be held to ensure that constitutional rights are respected, and the public could trust law enforcement officials to operate within the boundaries of the law. To achieve this, the United States must embrace reform prioritising accountability, transparency and justice—not only for victims of police misconduct but to ensure the integrity of the legal system. Restricting police immunity represents a necessary step towards a more just society, where law enforcement is not above the law but bound by it.

A nuclear weapon or just an ordinary injunction? Freezing Orders and the "Good Arguable Case" test.

Ishaan Bhardwaj

Introduction

Freezing injunctions, often termed "*nuclear weapons*" are a powerful equitable remedy employed in varied contexts from local property disputes to multi-billion-pound fraud cases.[1] They prevent respondents dissipating their assets to avoid enforcement. To take one high-profile example, the freezing order application in the *Magomedov* litigation covered $ 8.8 billion.[2]

This essay examines the "good arguable case" test, the first limb of the three-stage legal test for freezing orders. Section I will argue in favour of the traditional conception of "good arguable case" as "*more than barely capable of serious argument*".[3] Section II will critique the Court of Appeal in *Dos Santos v Unitel SA* [2024] EWCA Civ 1109. This wrong turn conflated the merits tests for freezing injunctions and American Cyanamid interim injunctions. The two remain distinct remedies.

Section I: "Good Arguable Case"

The traditional "good arguable case" test was outlined in *The Niedersachsen* [1983]. The applicant's case had to be "*more than barely capable of serious argument*" but needed no more than half a chance of success.[4] A rival interpretation is derived from the jurisdictional context.[5] Per this test, the applicant must prove it has a better argument on the material available, recently applied in *Harrington & Charles Trading Co Ltd v Mehta* [2022] EWHC 2960 (Ch). This test resulted in a comparatively higher threshold as to obtain a freezing order with greater evidence needed to establish a "*much better argument on the material available*".[6]

The Niedersachsen "good arguable case" test was correct for two reasons.

First, imposing a higher burden for freezing orders escalates the interlocutory stage into "mini-trials". This compounds expenses and time delays.

[1] *Dos Santos* v *Unitel* SA [2024] EWCA Civ 1109 [128]

[2] Commercial Court rejects on notice application for $8.8 billion freezing order", One Essex Court, October 30th 2023 < https://www.oeclaw.co.uk/news/view/commercial-court-rejects-on-notice-application-for-8.8-billion-freezing-order > accessed 21 November 2024

[3] *Dos Santos* v *Unitel* [7]

[4] Ibid

[5] *Four Seasons Holdings Incorporation* v *Brownlie* [2017] UKSC 80 [7]

[6] *Harrington and Charles Trading Company Limited (in liquidation)* v *Jatin Rajnikant Mehta* [2022] EWHC 2960 (Ch) [255]

Second, the purpose of freezing orders is undermined. Freezing orders are often necessary in factually complex, hotly contested fraud cases. They are urgent in nature. If this jurisdiction test applied, the claimant could face challenges gathering evidence to meet this higher test at interim hearings, under tight deadlines. This favours defendants, risking claimants losing the enforcement safeguard that freezing orders provide.

As such, I agree with Justice Butcher. He upheld the *Niedersaschsen* test as good law in *Magomedov* v *TPG Group* [2023] EWHC 3134.[7]

Section II: "Serious Issue to Be Tried"

In *Isabel dos Santos* v *Unitel SA* [2024] EWCA Civ 1109, Sir Julian Flaux and Lord Justice Popplewell upheld "good arguable case".

However, they equated good arguable case to a "serious issue to be tried", the test for interim injunctions.[8] Proprietary or copyright injunctions, they reasoned could be equally invasive.[9] Further, freezing orders were hardly exceptional, granted regularly in the Business and Property courts.[10] Finally, concerns unique to freezing orders could be judged per the third limb of the test, whether granting freezing orders were "*just and equitable*".[11]

Respectfully, they overreached. Equating freezing and interim injunctions loosens the test for granting a freezing order. This cannot be dismissed as an overly technical or academic concern. Many cases have granted freezing orders on a "*narrow margin*" as LJ Jackson did, in *Kazakhstan Kagazy*.[12] The precise wording of the test matters, particularly for orders potentially freezing billions of pounds. Three arguments are proposed, countering this wrong turn.

I. Nuclear Weapons

First, freezing orders are invasive, described as "nuclear weapons" due to their practical impacts on defendant businesses.[13] Conversely, LJ Popplewell suggests this term "*inapt*", with freezing orders differing little from proprietary injunctions.[14]

While LJ Popplewell's view is attractive in theory, the practical impact is incomparable. Freezing orders can and do reach billions overseas, particularly WFO's (Worldwide Freezing Orders). In 2008 Mobil, a Bahamian company froze $12 billion in assets of a Venezuelan Oil company (PDV).[15] Furthermore stringent asset disclosure requirements may reveal commercially sensitive

[7] *Magomedov* v *TPG Group* [2023] EWHC 3134 [27]
[8] *Dos Santos* v *Unitel SA* [131]
[9] Ibid. [128]
[10] Ibid. [129]
[11] Ibid. [128]
[12] *Kazakhstan Kagazy* v *Arip* [2014] EWCA Civ 381 [53]
[13] *Dos Santos* v *Unitel SA* [128]
[14] Ibid
[15] *Mobil Cerro Negro Ltd* v *Petroleos de Venezuela SA* [2008] 2 All ER (Comm) 1034 [4]

information, and enhance compliance burdens. Freezing orders can harm a defendant's reputation, affecting future financing and credit opportunities.

Finally, freezing orders can be a bargaining tool, to pressure a settlement.[16] This is not itself a problem. However, if the merits test is set too low, as "serious issue to be tried" would entail, this provides the claimant with disproportionate strategic advantage.

For these reasons, Justice Nugee was correct in *Holyoake* v *Candy* [2016] *EWHC 970 (*Ch) to distinguish freezing orders from *American Cyanamid* injunctions, due to their invasive, outsize commercial impact.[17] Otherwise there is a greater risk of freezing injunctions being granted wrongfully, effectively favouring the claimant.

Finally, LJ Popplewell suggests freezing orders are unexceptional. However, all legal dispute concerning the meaning of "*good arguable case*" has occurred in multi-million or billion dollar worldwide freezing orders. This is no accident. *Unitel* and *Magomedov* illustrate this risk clearly with £580 million and $8.8 billion at stake.[18] This constant litigation over "good arguable case" suggests a need for urgent clarity in precisely these global, high-profile freezing orders, to delimit the parameters of this potentially nuclear remedy.

II. Different costs principles

Second, differing costs rules justify a higher threshold test for freezing orders. For *American Cyanamid* injunctions, courts reserve costs until trial, awaiting the claim's conclusion.[19] However, as Sir Julian Flaux concluded, when granted a freezing order is not "*interim*".[20] There is greater finality with freezing orders, as costs are rarely revisited at trial. Furthermore, for *American Cyanamid* injunctions, if the right is not established at trial, it can "*be said the interim injunction should not have been granted*".[21] Yet, a freezing order can be correctly granted, even when the claim eventually fails.

The gravity of a freezing order is consequently higher. The Court of Appeal reasoned inconsistently in equating merits tests for interim and freezing injunctions, whilst diverging on costs. As Justice Foxton recently argued, this provides theoretical justification for a higher merits test for "good arguable case" than the standard, *American Cyanamid* injunction. [22]

---

[16] Saranovic, Filip, '*Rethinking the scope of freezing injunctions*' [2018] Civil Justice Quarterly, 37 (3), 384.
[17] *Holyoake* v *Candy* [2016] *EWHC 970 (*Ch) [10]
[18] Commercial Court rejects on notice application for $8.8 billion freezing order", One Essex Court, October 30th 2023 < https://www.oeclaw.co.uk/news/view/commercial-court-rejects-on-notice-application-for-8.8-billion-freezing-order > accessed 21 November 2024
[19] *Unitel SA* v *Dos Santos* [2024] EWCA Civ 1109 [117]
[20] Ibid. [118]
[21] Ibid. [119]
[22] The Big Freeze: The Rise and Rise of the Mareva Junction, David Foxton, 30th October 2024, Judiciary.uk, available at: <https://www.judiciary.uk › uploads › 2024/11>

III. The Enforcement Principle

Third, the unique legal principle behind freezing orders is the enforcement principle, confirmed recently in *Convoy Collateral*.[23] Freezing orders seek to prevent the defendant dissipating funds "*which could be the subject of enforcement*".[24]

The enforcement principle is inescapably global. It illustrates how freezing injunctions diverged from American Cyanamid injunctions. In *Convoy Collateral* the enforcement principle is rationalised by three trends characterising the global financial system since the 1970s. First, funds are instantaneously transferred across jurisdictions via information technology. Second, commercial litigation is routinely global. Third offshore companies expanded.[25] Consequently, *Convoy* it was suggested the flexibility of equity must adapt to such changes.[26]

It follows that the enforcement principle targets highly liquid assets. Third parties operating worldwide, like banks will watch such flows, meticulously monitoring risk and potentially obstructing transactions. Clearly, freezing orders have diverged in trajectory and principle from interim injunctions, which remain more localised and subject to precise restrictions. The term "worldwide freezing order" (WFO) simply has no equivalent for interim injunctions. Consequently, transferring the merits test for interim injunctions to this inherently global context may have unintended effects where assets are structured across jurisdictions.[27] If a lower threshold merits test is applied, and freezing injunctions are granted wrongfully, the impact is now truly global and difficult to reverse.

Conclusion

The "good arguable case" test in *The Niedersachsen* has stood the test of time. As Justice Butcher confirmed in *Magomedov*, and as reconfirmed by the Court of Appeal in 2024, this represents a sufficiently high threshold to balance the claimant's need for equitable protection, whilst enabling the potentially catastrophic consequences of this "nuclear weapon" to be used.[28] However, the conflation with "serious issue to be tried" represents a wrong turn. Freezing orders belong to a unique, global class of their own. In fact, their "nuclear" potency appears only to be strengthening over time amidst globalisation and technological advance. Ironically, the best response remains a return to roots, to *The Niedersachsen*.

[23] *Convoy Collateral* v *Broad Idea* [2021] UKPC 24 [101] – [102]
[24] Ibid. [86]
[25] Ibid. [59]
[26] Ibid.
[27] Ibid. [19]
[28] *Magomedov* v *TPG Group* [27]

Space: the forgotten frontier?

Owen Henderson

One of the lesser-known victims of recent geopolitical crises was the United Nations' Open Ended Working Group (OEWG) on Space. In response to resolution 76/231, the OEWG was formed, meeting four times before its collapse in September 2023, with the goal of "reducing space threats through norms, rules, and principles of responsible behaviours"[1]. More states than ever before have active space programmes with plans for increased activity in space, alongside a fast-growing pool of private actors. This paper argues that the current legal framework of "international space law" or *corpus juris spatialis*[2], centered around the 1967 Outer Space Treaty[3] is unable to effectively govern such activity, particularly in the field of resource extraction, which is expected to be a reality in the coming decades. Such commercialisation of space by both public and private actors requires the ambiguities surrounding non-appropriation and property rights in the OST to be resolved, to ensure a coherent, and equitable approach across jurisdictions.

The Outer Space Treaty

In response to the growing tensions of the mid-twentieth century, the United Nations General Assembly unanimously endorsed in 1966 the "Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space, including the Moon and Other Celestial Bodies" ("the Outer Space Treaty"). With over one hundred and fifteen current parties, the OST is the most comprehensive attempt to bring activity in near, and far orbit, within the ambit of international law.

The treaty laid down three key principles, those being: assertion of the right of all mankind to explore space and its use for the common 'benefit', per Article I; establishment of the principle that space and celestial bodies (planets, asteroids etc.) are non-appropriable by states, per Article II, and; the responsibility of any and all launching states for all activities carried out and/or damage caused by vessels in space, per Article VI and VII. Article VI is supplemented by the later Convention on Registration of Objects Launched into Space of 1976, requiring the state to register track all objects launched (including later, debris), as well as notify the UN of such. Article VII similarly, is complemented by the Convention on International Liability for Damage Caused by Space Objects, of 1972.

[1] Almudena Azcárate Ortega and Hellmut Lagos Koller, 'The Open-Ended Working Group on Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours: The Journey so Far, and the Road Ahead' (2023) 48 Air and Space Law, p.1.

[2] Zachos A Paliouras, 'The Non-Appropriation Principle: The Grundnorm of International Space Law' (2014) 27(1) Leiden Journal of International Law 37 MLA 9th Ed. Paliouras, Zachos A', vol 27 (2014)

[3] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967)

Sovereignty and Property Rights

Article II of the OST makes the fundamental principle of *corpus juris spatialis*, that of non-appropriation[4]. This is a dramatic shift from the territory based dynamic that international law paradigms deal with, as regards affairs on earth. It seeks to give effect to the essence of Article I: that space is to be considered "the province of all mankind", a form of common heritage to be shared and explored, not a *terra nullis* to be appropriated[5]. The principle therefore bars states, and by extension through a strict reading, private entities (who are assumed to be treated as the responsibility of the states under Articles VI and VII) from claiming property rights over celestial bodies. There is now, however, debate over whether this extends to resources contained in or on said bodies. Resources contained on celestial bodies are of an extremely diverse, and valuable nature. They have the potential to be exploited on bodies such as the moon, with ice hypothesised as a plentiful precursor for propellant manufacturing, all the way to asteroids, where the prospect of mining for precious minerals and metals used in chip and semiconductor manufacturing is an increasingly realistic geo-political and economic policy consideration[6]. In 1979, the Moon Agreement[7] sought to counter this very issue, with Article 11(5) compelling states to establish an international regime to manage the exploitation of any resources on celestial bodies, with a clear insistence on the non-appropriation principle holding strong, and equitable distribution of all exploited materials. Yet, none of the space-faring powers at the time signed this agreement, and it was a failure. As of writing, only eleven states are parties to the agreement, none of which have active space programmes.

Legislating in the OST Gaps

As it stands, therefore, there is no clear guidance on how one might obtain property rights over such materials in line with the OST. Some scholars have argued that given the fact sovereignty cannot apply in space, by virtue of Article II, private property rights cannot be acquired, as they are null in the absence of a sovereign guarantee[8]. This however, has not prevented states from legislating on their own. The United States passed in 2015 the Space Resource Exploration and Utilization Act (SREU) that authorises private bodies to claim property rights over resources that are commercially extracted. This would appear to be in clear contradiction of the OST, yet because of the vague nature of the OST there is no clear consensus in the literature as to whether this is indeed the case. The US is not alone either, with Luxembourg also having passed a 2017 law[9] stating that "space resources are capable of being owned" (Article 1), albeit requiring permissions be granted by the state in the first instance.

---

[4] Paliouras (n 2)

[5] Rossana Deplano, 'INCLUSIVE SPACE LAW: THE CONCEPT OF BENEFIT SHARING IN THE OUTER SPACE TREATY' (2023) 72 International and Comparative Law Quarterly 671.

[6] Helene Kröll and Maximilian Conrad, 'Beyond the Outer Space Treaty A Comprehensive Analysis of Current Challenges in Space Policy' (2023).

[7] Agreement Governing the Activities of States on the Moon and other celestial bodies (1979)

[8] Andrew Lintner, 'Extraterrestrial Extraction: The International Implications of the Space Resource Exploration and Utlilization Act of 2015' (2016) 40(2)

[9] Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace

One can argue that the prohibition on state appropriation applies to resources that constitute part of the celestial bodies. As states are responsible for all actions launched from their territory under Article VI and VII, it is irrelevant that they are private actors – In the eyes of *corpus juris spatialis*, it is the state that is responsible. The prohibition therefore holds. On other hand, it can be contended that the ambiguities of the OST should be liberally interpreted, and therefore, where there is no explicit prohibition, a wide reading should permit activity, so long as it does not violate the intention of the OST – that being the peaceful use of the shared commons for 'benefit' (Article I) [10]. Furthermore, some might argue that while sovereigns cannot lay claim to resources, private actors can, particularly harnessing a broad interpretation of 'benefit' along economic lines, as was seen in the US House of Representatives report that underpinned the passing of SREU[11] .

The need for reform

Regardless of whether it contradicts the spirit of the OST, legislation like the SREU is opportunistic in exploiting the ambiguities of the OST, to bolster a burgeoning domestic market for space commercialisation. Arguably, in the absence of a domestic regulatory mechanism to bolster the provisions under the SREU, nor any clear means by which claimants of rights can establish and enforce said rights, the impact of the act is null, other than potentially abrogating the state's international obligations, or stoking tensions[12].

There is no question that the opportunities of resource extraction have the potential to alleviate many challenges on earth, yet there is real concern that unilateral moves to grant private property rights within the gaps of the OST will benefit only wealthy economies, given their established dominance in commercial space activities[13]. A space age "gold-rush" event risks endowing wealthy nations with a monopoly on such extraction, exacerbating existing global inequalities, and tensions. Without a stronger legal system there is both uncertainty over recognition of unilaterally granted resource rights, and the possibility of new conflict between actors with competing interests. A wholesale updating of the OST is unlikely given the current geo-political climate, though in the long-term, clarification of the *grundnorm*[14] that is non-appropriation, is urgently needed, as is certainty over extraction, the role of commercial entities, and resource utilisation. Rather, given there is a clear desire on the part of states to continue to abide by their international obligations, uptake of the Moon Treaty of 1979, would provide certainty to developing and least developed countries over equity of access, and provide the impetus needed to setup a much-needed regulatory body for resource allocation and extraction.

[10] Lintner (n 8)
[11] H.R. 1508 Report With Minority Views
[12] Amanda M Leon, 'Mining for Meaning: An Examination of the Legality of Property Rights in Space Resources, 104 Va', vol 497 (2018)
[13] Deplano (n 5)
[14] Paliouras (n 2)

The way the tide flows: Expanding the remedy of equitable compensation and the utility of common law damages principles

Kelvin Justiva

The relationship between rights and obligations arising in equity and at common law has long been debated, perhaps even more so after administrative fusion through the 1873-75 Judicature Acts[1]. Likewise, it has been discussed to what extent principles governing remedies in equity and at common law should over time be aligned to develop a more unified system of law[2].

Equity remains innovative, stepping in to fill gaps left by the common law. However, it is not always clear whether equitable remedies should be utilised to fill any one perceived gap and, even if so, what their content should be. This has become an issue in deciding whether and how to expand awards of equitable compensation, illustrated by two recent cases, the *Frio Dolpin*[3] and more recently the *Prestige*[4].

These decisions expand equitable compensation beyond its traditional confinement of 'special' relationships, such as trusts and fiduciaries, to financial compensation for breach of an equitable obligation to arbitrate a dispute. However, the judgments (quite reasonably) stop short of providing a principled approach governing future use of equitable compensation in similar circumstances. This article reviews the new developments and proposes a framework to govern the use and content of any award. It is argued that courts should promote consistency between equity and common law, and that equitable compensation should in these circumstances be governed by existing rules for common law contract damages.

The nature of equitable compensation

Breach of equitable obligations may in certain circumstances give rise to claims for equitable compensation[5]. This remedy was traditionally thought only to arise from 'special' relationships[6]. More recently, the Court of Appeal explained in *Auden v McKenzie*[7]:

> *"Equitable compensation is the personal remedy (as opposed to a tracing or proprietary remedy) available against trustees, or others in a fiduciary position, whose acts or omissions amount to a breach of trust or fiduciary duty…*"

[1] See Virgo, *The Principles of Equity & Trusts* (5th edn), p25-28
[2] See Burrows, Oxford Journal of Legal Studies 22(1):1-16 (2002): *We Do This At Common Law But That In Equity*
[3] Argos Pereira Espana SL v Athenian Marine (Frio Dolphin) [2022] 2 Lloyd's Rep 387
[4] London Steam-Ship Owners' Mutual Insurance Association v Kingdom of Spain (Prestige) [2024] 1 WLR 2331
[5] AIB Group (UK) plc v Mark Redler & Co [2015] AC 1503
[6] Nocton v Lord Ashburton [1914] AC 932, 955-957
[7] [2020] BCC 316, [31]

However, despite historical restrictions, the categories giving rise to equitable remedies should not be regarded as closed. For example, monetary relief has been awarded for breach of confidence[8], and insurers exercising rights of subrogation to bring a claim may be bound by equitable obligations 'equivalent' to those contractually binding the insured[9].

The expansion of equitable compensation continued in the following case.

The Frio Dolphin

An insurer was subrogated to a bills of lading contract claim in respect of damage to a cargo of frozen fish. The insurer brought claims in Spain against the apparent shipper, contrary to an arbitration clause in the contract. The insurer was held to be bound by a Derived Rights Obligation ("DRO") not to arbitrate which had been breached. A DRO applies as an equitable obligation where a party wishes to benefit from rights derived from a contract (e.g. by assignment, subrogation or direct action statute) such that they can only take the rights subject to corresponding obligations in the contract.

The High Court held, for the first time, that a monetary award should be available as equitable compensation, because otherwise there may be no remedy for breach of a recognised equitable obligation which would render the obligation ineffective.

The Prestige

Extension of equitable compensation to DRO breaches was again considered in litigation following the oil tanker *Prestige* sinking in 2002, causing significant damage around the Spanish and French coast. Spain brought proceedings against the shipowners' insurers in Spanish courts pursuant to a Spanish direct action statute. However, an arbitral tribunal found that Spain was bound by an equitable obligation derived from the insurance contract not to pursue the dispute other than by London arbitration. Due to the breach, the arbitrator awarded equitable compensation under the principle established in the *Frio Dolphin*.

The award was challenged by Spain but confirmed by the High Court. While the tribunal could not grant an anti-suit injunction due to state immunity, or damages in lieu of such injunction under s.50 Senior Courts Act 1981, a claim for equitable compensation was allowed.

[8] Force India Formula One Team Ltd v Malaysia Racing Team [2012] EWHC 616 (Ch)

[9] Airbus SAS v Generali Italia SAS [2019] 1 CLC 903

Butcher J explained at [336]:

> *"This is a case of the breach by Spain of an equitable obligation which is 'equivalent'… to the contractual obligation which the insured itself would have owed. Breach of the contractual obligation would give rise to a remedy in damages. I do not see why there should not be a corresponding monetary remedy for breach of the equivalent equitable obligation."*

Equity thus intervenes to remedy breach of an obligation which is otherwise difficult to enforce.

Restricting and quantifying equitable compensation

The *Prestige* is currently going to the Court of Appeal. It is submitted that the issue on equitable compensation was correctly decided, but it is worth going further and considering general principles related to its future application and the quantum of compensation awarded.

It may be difficult to establish the character and content of equitable compensation. Its core function is to compensate loss, but as observed by Lord Toulson in *AIB v Mark Redler* at [76]: *"Equitable compensation and common law damages are remedies based on separate legal obligations. What has to be identified in each case is the content of any relevant obligation and the consequences of its breach."* Common law rules of causation and remoteness have consequently been held not to apply to some types of breaches (e.g. breach of trust in *Target Holdings v Redfern*[10]).

Nonetheless, breaches of similar obligations in equity and common law should give rise to remedies which are at least equally similar. It is submitted that both the availability and content of compensation awarded for breaches like those in the *Frio Dolphin* and the *Prestige* can and should reflect common law damages for breach of contract in an equivalent situation, including restrictions such as causation and foreseeability. This reflects a suggestion that the law, for the sake of coherence and certainty, should where possible, move towards fusion of equity and common law principles[11].

Further support comes from Millet LJ in *Bristol & West Building Society v Mothew*[12]:

> *"Although the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context it is in my opinion a distinction without a difference… There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case."*

More widely, the common law approach should be a guide in expanding equitable compensation around a contractual context. Additionally, and perhaps controversially, common law principles

[10] [1996] AC 421
[11] See Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn)
[12] [1998] Ch 1, p17

provide not just adequate but sufficient levels of restriction. There is no need to further complicate the remedy with typical equitable discretion dependent on factors of unconscionability. Causation and remoteness are perfectly capable in themselves of providing such discretionary control.

Finally, quantifying the award can similarly be done by rules of common law damages. Importantly, this means that equitable compensation could, subject to causation and foreseeability, not only cover costs incurred in challenging wrongfully brought litigation, but wholly neutralise any judgment debt awarded in those proceedings.

Conclusion

The cases discussed show that innovation in equity continues to play an important role in filling gaps left by the common law. However, in expanding equitable obligations and remedies, it is important to clarify the underlying principles to avoid unintended consequences. Indeed, a principled approach has increasingly characterised the development of equity over the past 150 years and been a key driver behind its success in the modern world. Furthermore, for the sake of a unified and coherent legal system, equitable and common law remedies working in similar areas should work in similar ways. That requires a degree of fusion. As remedies like equitable compensation expand, there should, where possible, be alignment with equivalent common law rules including restrictions such as remoteness and causation. Where necessary, rules of equity which remain merely for historical reasons should be rejected, strengthening the effect of the remaining useful equitable principles. To take a phrase from Butcher J in the *Prestige*, such an approach *"reflects the way in which the tide is and should be flowing in this area of the law."*

Taming the Unruly Horse: Rethinking the Public Policy Exception in Conflict of Laws

Rose Li

Public policy serves two functions in Conflict of Laws (CoL). For one, it serves as an escape mechanism to displace fixed choice of law rules in favour of forum law. Public policy therefore represents a form of choice of law exceptionalism. Additionally, it operates to preclude the recognition and enforcement of foreign judgments. Its exceptional functions necessitate a satisfactory theoretical justification. Such a justification must not only inform *when* public policy can be appropriately invoked by the English courts, but also explain *why* public policy is a necessary mechanism in CoL.

Citing the oft-repeated judgment by Justice Burrough, "Public policy is a very unruly horse, and when you get astride, you never know where it will carry you".[1] In CoL, its unruly nature is twofold. First, conceptually, its very existence conflicts with the normative structure of CoL. Second, public policy has been criticised as an exercise of judicial discretion without principled limits.

Conceptual Challenges

Comity upholds the horizontal equality of sovereign states and the extraterritorial application of foreign laws. It presumes that there is some kind of obligation between sovereign states to apply foreign law. By allowing states to substitute foreign law in favour of forum law as a matter of judicial discretion, public policy therefore appears at odds with comity.

Public policy also appears incompatible with CoL's commitment to value-pluralism. Value pluralism recognises that there is no single, universally applicable set of laws shared by all legal systems. It accommodates different states' legal authority to enact different private law rules based on its own conception of private law justice. Permitting courts to reject foreign law due to substantive differences flies in the face of this pluralist commitment.

Doctrinal Development

In view of the varied factual circumstances that triggered public policy's application, Professor Alex Mills posited three underlying principles, which, he argues, guides the discretionary approach undertaken by English courts.[2]

One principle is that when public policy is invoked, it must reflect the relativity of the norm shared between the forum and foreign states involved. A plethora of cases, however, supports the

[1] *Richardson v. Mellish* 130 E.R. 542

[2] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 JPIL 201

contrary. Public policy was consistently invoked to displace first-order choice of law rules where no relativity of shared norms exists. In *Somerset v Steward*[3], a Scottish slave trader sought to forcibly transfer a slave he purchased in Virginia out of England. English choice of law rules required that Virginia law governs. Lord Mansfield, however, refused to apply Virginia law on grounds of public policy, famously declaring that "The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political"[4]. Similarly, in *Oppenheimer v Cattermole*[5], Lord Cross refused to apply a Nazi decree that sought to deprive Jewish citizens of their property rights, on grounds that the racially discriminatory law constituted a grave infringement of human rights. These landmark cases demonstrate that, contrary to Mills' claim, it was precisely the *differences* in substantive norms that triggered public policy's operation.

Beyond a human rights context, *Kuwait Airways v Iraqi Airways*[6] held that an Iraqi decree, which sought to acquire title of Kuwaiti aircrafts unlawfully seized during its invasion of Kuwait, violated public policy. Though Lord Hope relied heavily on international law norms, Mills' theory remains wanting. According to Mills' proximity principle, where public policy is invoked as a part of a choice of law enquiry, it must reflect the proximity between the dispute and the forum. Notably, however, *Kuwait Airways* had a total lack of factual connection with England.[7] In cases where the presence of relativity is accompanied by a total absence of proximity, Mills' principles are wanting in justifying public policy's invocation. This is because the principles alone cannot explain how they are to be balanced against each other, nor can they justify public policy's operation on a theoretical level.

A Rule-of-Law approach

One element shared by all public policy cases is that the substantive norm breached by the foreign law is deemed fundamental. If public policy is invoked only when a foreign law violates a fundamental norm of the forum, how should the English courts appropriately distinguish between fundamental and non-fundamental norms that it is committed to? Fundamental norms of the forum, in my view, is determined by the precise role public policy plays in relation to the rule of law.

What underlies concerns about public policy is the view that a discretionary power to invoke public policy poses a *prima facie* threat to the rule of law. This perceived tension is, however, misguided. A substantive conception of the rule of law maintains that the rule of law's purpose is not merely to guide the behaviour of the law's subjects, but to ensure that the positive law applied by courts complies with fundamental values found in the common law tradition.[8] In the CoL context, the rule of law ensures that the foreign law applied by the English courts *counts as law*

[3] *Somerset v Stewart* 98 E.R. 499
[4] Ibid [19]
[5] *Oppenheimer v Cattermole* [1976] AC 249
[6] *Kuwait Airways v Iraqi Airways* [2002] 2 WLR 1353
[7] Ibid [10]
[8] Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law' (1997) 21 Public L 467

according to fundamental values found in the common law tradition.[9] Conceived in this way, public policy does not threaten the rule of law. Instead, as Joanna Langille argues, "public policy defines and polices the frontiers of legality in the common law tradition".[10] As Lord Cross astutely reasoned in *Oppenheimer*, "[c]ourts of this country ought to refuse to recognise it *as a law at all*".[11] Therefore, a norm is fundamental, and thus capable of invoking public policy, if it is a rule-of-law value of the forum.

Conceptual Compatibility

An absence of a relativity requirement does not render an approach irreconcilable with comity. A rule-of-law approach holds that, as required by English choice of law rules, English courts will apply another state's substantive law *so long as it is capable of being applied as a law in the forum.* This neither denies the authority of a foreign legal order to enact its own private law rules, nor does it reject the foreign state's legal authority for its laws to have extraterritorial effect in the forum. Comity does not preclude rule-of-law considerations of the forum; it merely requires states to apply foreign *law*. It does not require that all foreign law be considered *law* without regard of the forum's rule-of-law requirements.[12]

A rule-of-law approach is equally compatible with value-pluralism because it does not permit English courts to refuse a foreign law's application due to arbitrary differences in the content of their respective laws. It only permits courts to evaluate the content of foreign laws based on rule-of-law requirements alone.[13]

Doctrinal Coherence

Recall that Mills' theory cannot account for cases such as *Somerset* and *Oppenheimer* because the norm breached is not shared by the foreign state. Once it is recognised that a breach of the forum's fundamental rule-of-law norms constitute an appropriate basis for invoking public policy, these cases reflect a coherent line of precedents. Though Lord Hope's reasoning in *Kuwait* heavily relied on international law norms, this does not point unequivocally to a requirement of relativity. Rather, the case confirms that adherence to international law norms, such as prohibition on unlawful seizures of property, are of "fundamental importance" to the rule of law.[14]

Further, under a rule-of-law approach, proximity is neither an appropriate nor a determinate factor for invoking public policy. Territorial connecting factors are first-order considerations affecting choice of law rules. Public policy is, however, a second-order question concerning the application of said choice of law in the forum. In other words, proximity affects which law applies

[9] Joanna Langille, 'Frontiers of Legality: Understanding the Public Policy Exception in Choice of Law' 73(2) UTLJ 234
[10] Ibid 217
[11] Ibid (n 5) [277-8]
[12] Langille (n 8) 237
[13] Ibid 238
[14] Ibid (n 6) [20]

to a particular case; it does not determine whether that law *is capable of being applied* by the forum court.

The rule-of-law approach is therefore to be preferred from both conceptual and doctrinal perspectives.

Conclusion

The discretionary exercise of public policy has been criticised as unprincipled, as one which risks the collapse of first-order CoL rules altogether, and as one which undermines the normative framework within which CoL operates. Though courts have much-flogged the unruly horse, its precise doctrinal and theoretical underpinnings have seldom been clarified. Once a rule-of-law approach is established, it becomes clear that its unruly reputation obscures its steadfast character. The perceived threat public policy poses to the rule of law and to CoL's foundational underpinnings is misguided. Rather, public policy should be understood as a necessary safety net that polices and defends the forum's frontiers of legality, both in proceedings where one has appropriately assumed jurisdiction and in proceedings where assets within one's own jurisdiction are concerned.

Beneficiary's boon or proprietor's peril? — doctrinal contradictions in statutory overreaching as a case for its re-examination.

Samuel Marde Mehdiabad

It is paradoxical that while the law of property, with its long chains of incorporeal equities, estates, and interests, may appear a somewhat abstract expression of English law, its practical application often results in the profoundest of real-life consequences for litigants. This is strikingly apparent in disputes caused by the conflict of interests which may result from a disposition of real property by trustees without the consent of beneficiaries residing in that property; the latter can (and do) quite literally lose their homes along with their cases.[1] Competing principles enter into play: the ability of trustees to dispose of trust property without risk to a disponee has long been recognized as a doctrinal and commercial necessity; meanwhile, the impossibility of exactly replacing a proprietary interest has led English law to offer them longstanding special protection.[2]

The current system of land registration and transfer of title, provided by the Law of Property Act 1925 (LPA 1925) and Land Registration Act 2002 (LRA 2002), has as one of its chief aims the facilitation of conveyancing through the minimization of potential interference from unregistered beneficial interests in property.[3] It thus establishes that, by default, a registered disposition will defeat an unregistered interest; wronged beneficiaries are left to seek a remedy against their trustees *in personam* rather than *in rem*.[4] This relieves purchasers of trust property from the onerous requirements the common law would otherwise require before good title might be taken, which include investigation into trustees' authority to act, confirmation that all existing beneficial interests are defeatable, and even a duty to ensure the proceeds of sale are applied in accordance with trust purposes.[5]

This 1925/2002 system also seeks to protect—at least up to a point—the unregistered interests of beneficiaries, primarily through the existence of 'overriding interests'.[6] An example of an overriding interest might be one held by a person in actual occupation of the property.[7] These are exceptions to the general vulnerability of unregistered interests to registered dispositions, and can only be defeated if a disposition is made by—and any capital monies paid to—no fewer than two

[1] e.g. *City of London Building Society* v. *Flegg* [1988] AC 54; *Mortgage Express* v. *Lambert* [2017] Ch. 93, 102.
[2] *Flegg* 77; Charles Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' [1990] CLJ 49(2) 285–7; Stuart Anderson, 'The Proper Narrow Scope of Equitable Conversion in Land Law' [1984] LQR 100, 86.
[3] Peter Sparkes, 'Overreaching, trust breaking and underreaching' [2019] Conv. 1 14.
[4] As contemplated in the facts of *N3 Living Ltd.* v. *Burgess Property Investments Ltd.* [2020] EWHC 1711 (Ch.).
[5] Harpum [1990] 283–5.
[6] LPA s. 2(1,2); LRA 2002 sched. 1, 3; cf. a dictum of Lewison LJ on appropriate terminology, *Mortgage Express* v. *Lambert* [2017] Ch. 93, 102.
[7] LRA 2002 sched. 3(2).

trustees or a trust corporation.[8] If so, LPA 1925 s.2(1)(ii) provides that these interests are transferred from the property to the proceeds of sale in a process known as 'statutory overreaching'. These restrictions ensure the most vulnerable beneficiaries will immediately receive a commensurate interest in any capital monies accrued from the alienation of trust property, without first needing to establish one. Thus, the system of 1925/2002 is conventionally regarded as striking a balance between the rights of legal owners to dispose of their property, the rights of disponees to take good title, and the rights of beneficiaries to see their interests protected.[9]

The great weakness of this system from a beneficiary's point of view is, of course, that interests in property need not be substitutable for a monetary sum—a concern which has been raised since it was formulated in the 1920s.[10] While such substitutions may be the necessary price of guaranteeing good title to disponees by default, they have the potential to—particularly when a property suffers from negative equity—leave occupying beneficiaries homeless and without the means of securing a replacement.[11] In this, the 1925/2002 system is a retrograde step in terms of protecting beneficiaries.[12] Moreover, the Supreme Court has in recent years ruled that the foundation of beneficial interests under trusts of a family home pertain to an interest in a home *per se*, rather than as a financial investment: this casts great doubt on the ability of a monetary sum to adequately replace an interest in property.[13]

The law arguably better managed these issues before the Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996) came into force, through the now-obsolete concept of the 'trust for sale'.[14] This older default form of proprietary trust imposed a strict duty—albeit one that could be postponed indefinitely—on trustees to sell any trust property not held under a (now similarly obsolete) 'strict settlement' governed by the Settled Land Act 1925 (SLA 1925).[15] As a result, most beneficiaries' interests would only ever pertain to the proceeds of sale, thus making the question of the appropriateness of substituting proprietary interests with capital largely moot.[16]

The current 'trust of land' under TLATA 1996 ss. 4, 5, through lacking any such duty to sell, has instead exacerbated the interest/capital quandary. S. 6(5) adds a further complexity: 'In exercising the powers conferred by this section [these being the general powers of trustees to dispose of land] trustees shall have regard to the rights of the beneficiaries.' Ferris and Battersby have pointed out

[8] LPA 1925 s. 27.
[9] *Flegg* 73–4.
[10] Juanita Roche, 'Historiography and the Law of Property Act 1925: the return of Frankenstein' [2018] CLJ 77(3) 622.
[11] see Gwilym Owen, Dermot Cahill, 'Overreaching - getting the right balance' [2017] Conv. 1 35.
[12] cf. *Bristol & West Building Society* v. *Mothew* [1996] 4 All E.R. 698.
[13] *Stack* v. *Dowden* [2007] 2 AC 464–5, specifically the importance of the use of the property for the quantification stage.
[14] Mandated under LPA 1925 ss. 23–33 (since repealed); cf. TLATA 1996 ss. 4, 5.
[15] SLA 1925 s. 1; TLATA 1996 s. 2; LPA s. 25 (since repealed).
[16] see Romer L.J.'s analysis in *In re Bourne* [1906] 2 Ch. 427.

that, while this section has been described as 'an odd, even gnomic utterance of the legislature',[17] it has a 'statutory forbear' in the Settled Land Act 1882 s. 53 and SLA 1925 s. 107(1):[18]

> a tenant for life [SLA 1925 adds, 'or statutory owner'] shall, in exercising any power under this Act, have regard to the interests of all the parties entitled under the settlement [SLA 1925 adds, ','] and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

This section was interpreted by Lindley L.J. in *Re Marquis of Ailesbury's Settled Estates* as, '[the trustee] is to consider all the interests in the widest sense--not merely pecuniary interests, but wishes and sentimental feelings, and so on'.[19] One might also look to TLATA 1996 s. 11(1), which mandates the consultation of beneficiaries and the execution of the wishes of the majority. Far from being a doctrinal aberration, these provisions in the TLATA arguably reflect the old common-law principle that transfers of trust property are permissible only on condition that the proceeds of sale are used in accordance with the purposes of said trust.[20] The only real difference is that responsibility for this now—naturally—rests with trustees rather than disponees.

Although the Law Commission published a report on the LRA 2002 in 2018, it chose not to consider overreaching outside electronic conveyancing: notwithstanding the views of some consultees, it felt the mechanism fell outside the scope of its work.[21] The last time it dealt with overreaching in general was in 1989.[22] That beneficiaries of trusts should find themselves stripped of their interests is a clear injustice that English Law has sought to prevent for almost a millennium; yet it is one that statutory overreaching arguably facilitates as part of a system with a muddled doctrinal basis.[23] With the recent judgment in *Mortgage Express* v. *Lambert*,[24] in which corrupt trustees successfully overreached their beneficiary's equitable right to have their fraudulent transfer of title set aside in a use of statutory overreaching which has seen it labelled a 'trust breaking machine',[25] it would seem that a re-examination of the doctrine is becoming overdue.

---

[17] P. Kenny and Ann Kenny, 'The Trusts of Land and Appointment of Trustees Act 1996' in *Current Law Statutes 1996* (Sweet & Maxwell 1997) 46–7.
[18] Graham Ferris, Graham Battersby, 'The general principles of overreaching and the modern legislative reforms, 1996-2002' [2003] LQR 119 100–1.
[19] [1892] 1 Ch. 536.
[20] Harpum [1990] 285.
[21] Law Commission, *Updating the Land Registration Act 2002* (Law Com. No. 380 2021) 10.89.
[22] Law Commission, *Transfer of Land, Overreaching: Beneficiaries in Occupation* (Law Com. No. 188 1989).
[23] cf. A. W. B. Simpson, *A History of the Land Law* (2nd edn., OUP 1986) 173–207.
[24] 102, 105.
[25] Peter Sparkes, 'Overreaching, trust breaking and underreaching' [2019] Conv. 1 14.

The Human Rights Act 1998 and the Constitutional Balance: A Critical Evaluation of Sections 3 and 4 in Shaping the Parliament-Judiciary Relationship"

Jaya Rana

Section 3 (s.3) of the Human Rights Act 1998 (HRA) has been condemned as a 'radical instrument' which 'authorises judicial law-making'[26], undercutting orthodox principles by encouraging judges to stray from their interpretative function. The constitutional impact of s.3 turns on how courts construe the word 'possible' – a question which has spawned much debate. A narrow interpretation of s.3 results in a broader use of s.4 (the court's power to make Declarations of Incompatibility), and would not particularly disrupt orthodox understandings of the separation of powers and the rule of law, however, a broad reading of s.3 (resulting in a frugal use of s.4), would be somewhat more difficult to reconcile with the traditional idea that statutory interpretation is a matter for the courts, and enactment (and amendment) are considerations for Parliament. This essay argues that, though the provisions themselves had the capacity to radically destabilise orthodox understandings of the rule of law, in practice, the courts have tempered them, applying them tentatively and with great regard for constitutional boundaries. There is no doubt that the introduction of the HRA has blurred the borders between our governing limbs, initially threatening the notion of a sovereign Parliament and subservient courts, but the reality of this disruption has not been so bold as to actually alter the locus of sovereign power, nor constitute any radical transformation.

The oft-cited notion of a singular 'construction' and 'implementation' of the courts is misleading. Concern arises specifically *because* there is no unified construction – no 'golden rule' to 'unlock all mysteries' – but instead 'a thousand and one interpretative criteria'[27]. The varying judgments in *R v A,*[28] *Bellinger v Bellinger,*[29] *Re S (A Child),*[30] and *Ghaidan v Godin-Mendoza*[31] illustrate this to be true. Lord Hope and Lord Steyn in *A* represent the two broad tranches of judicial opinion. Hope obliged courts to 'eschew overly fanciful interpretations', highlighting that s.3 is 'only a rule of interpretation' which cannot permit 'judges to act as legislators'.[32] Meanwhile, Steyn 'clearly endorse[d] the ability of the courts to give a strained meaning to legislation' in pursuit of convention-compatibility.[33] Steyn's approach is the more convincing, because, as he rightly notes, 'the White Paper made clear that the obligation goes far beyond the [current] rule'.[34] Had

[26] Richard Ekins, Graham Gee, *Joint Committee on Human Rights on 20 Years of the HRA* (2018) 6
[27] Francis Bennion, *Understanding Common Law Legislation* [OUP, 2000] 12
[28] [2001] UKHL 25
[29] [2003] UKHL 21
[30] [2004] UKHL 47
[31] [2004] UKHL 30
[32] *A* [108]
[33] Alison Young, 'Judicial Sovereignty' *CLJ* [2002] 53, 55
[34] *A* [44]

Parliament 'merely intended to codify current practice then they could have accepted Conservative amendments',[35] instead they specified an expansion of judicial power. Adopting the broad interpretation which this essay holds to be correct, Parliament has 'given the judiciary carte blanche to determine when it is impossible to interpret statutes' compatibly.[36] Yet, even with this 'carte blanche' in hand, the judiciary have resisted the urge to overuse these new-found powers, carefully avoiding any radical upheaval of conventional principles.

The decisions in *A* and *Mendoza* have been branded a wrong turning by those who favour literal interpretation. Such critics have voiced concerns about the implications of adopting a *Marleasing*-esque approach in English courts. I submit that whilst *A* took the abilities of s.3 to its limit, it did not radically transform constitutional understandings, and *Mendoza*, far from being a mistake, illustrates s.3 operating precisely as the drafters of the Act envisioned. The court elected to use s.3 in *Mendoza* to interpret 'as his or her wife or husband' to mean 'as if they were', and, as Steyn acknowledges, this was 'well within the power' of s.3.[37] Nicholls, invoking Lord Rodger, reaffirms that words implied under s.3 must 'go with the grain of the legislation'[38], and here they do. The governmental fearmongering around such a decision undermining the separation of powers is unwarranted. *Mendoza* applied s.3 fairly; their interpretation did 'no violence to the statutory language'.[39]

Bellinger is another example of courts using the HRA provisions reasonably, despite the seemingly unlimited power offered by the Act's ambiguous phrasing. Unlike in *A*, in *Bellinger*, the courts opted to use s.4 as they recognised that to use s.3 in a situation where major legal change was already anticipated would have 'far-reaching ramifications' and was thus 'ill-suited for the determination by courts'.[40] It is this exact mindfulness which has prevented constitutional mayhem, the courts dutifully keeping 'a close eye on the government's expected response while deciding which remedial course to pursue'.[41] This has been evidenced more recently in *Nicklinson v Ministry of Justice*,[42] where the court chose to invoke neither s.3 nor s.4 in the knowledge that parliamentary consideration was already overdue on the matter in question. Some argue that this judicial suspicion is itself a distortion of Diceyan ideals; Allan, identifying some detrimental effect of the politicisation of the judiciary, brutally brands this evolution of deference as 'an abdication of judicial responsibility'.[43] My response is one of practicality: it would be naive to think that courts will not consider the politics of their decision making. These considerations have always taken place in the courts and have only been intensified by the HRA. Further, such criticism fails

[35] Francesca Klug, 'Pepper v Hart and all that' *PL* [1999] 246, 253
[36] Young [2002] 65
[37] [2004] UKHL 30 [51]
[38] Ibid. [33]
[39] Robert Wintemute, 'Same-Sex Partners' *PL* [2003] 621, 628
[40] [2003] UKHL 21 [37]
[41] Chintan Chandrachud, 'Reconfiguring the Discourse on Political Responses to Declarations of Incompatability', *PL* [2014] 624, 630
[42] [2014] UKSC 38
[43] TRS Allan, 'Human Rights and Judicial Review' *CLJ* [2006] 671, 675

to recognise that s.4 is not a duty but a power; the decision to refrain from its use is an active choice of caution. It is my submission that the complexity of public law is better served by a system which declines to pigeon-hole its governing limbs.

Nicol describes the decision in *Re S* as a 'reaction to the judicial overkill of *A*', Steyn's 'volte face' since *A* demonstrating his 'change of heart' and settling of the issue in favour of restrictive interpretation.[44] This submission is unconvincing. It fails to acknowledge that the factual matrix in *Re S* fundamentally differs from those individual circumstances of *A*. This is the explanation for Steyn's changed approach, rather than any inherent change of heart regarding s.3: Steyn does not in *S* 'impugn the interpretive methodology adopted in *A*'.[45] Decisions around usage of s.3 or s.4 are steeped in considerations of the practical ramifications of such choices; when the implications are significant, piecemeal reform is not appropriate, and the courts rightly elect to use s.4 so as to not overstep the boundaries of their jurisdiction, and instead stimulate legislative change[46]. The aforementioned cases do not illustrate a confused judiciary unable to agree on boundaries of interpretation, but instead a judiciary sensitive to the significance of each case's factual characteristics and the consequences of their decisions.

There has also been concern that s.4 offers too much power to the judiciary in allowing the condemnation of Parliament's drafting. Bamforth reminds us that the power still sits with Parliament, as use of s.4 does not 'lay down a requirement' that Parliament *must* reconsider, imposing a political, but *not* legal, responsibility to invoke s.10.[47] However, Bamforth's point is somewhat dampened by Chandrachud's analysis of the politics that follow declarations of incompatibility. He notes that 'the space for political response' is smaller than it appears, as Parliament will avoid rejecting declarations for fear of the political repercussions of doing so.[48] While Chandrachud's essay rightly recognises that s.4 has transferred *some* political power to the judiciary, it has done so prudently, with mind to maintain the English constitutional arrangement; regardless of political pressure, final authority still ultimately rests with Parliament.

There is no doubt that courts' use of s.3 and s.4 has adjusted the boundaries between the governing limbs, permitting judges to move beyond their traditional interpretative dominion towards a more activist approach. However, this change has been sensible. The HRA was always intended to create change: the draftsmen were intent on 'bringing rights home' as was expressed in the 1997 White Paper,[49] and broadly this has been successful. Whilst s.3 and s.4 had the capacity to radically transform constitutional norms, the judiciary have taken it upon themselves to draw boundaries to prevent this. In doing so, we have seen a softening of the margins between governmental limbs

[44] Danny Nicol 'Statutory interpretation and human rights after Anderson' *PL* [2004] 274, 274-279
[45] Aileen Kavanagh, 'Statutory interpretation: a more contextual approach' *PL* [2004] 537, 538
[46] Ibid. 539
[47] Nicholas Bamforth, 'Parliamentary Sovereignty', *PL* [1998] 572, 573
[48] Chandrachud [2014] 624
[49] Home Office, *Rights brought home: the Human Rights Bill*, CM 3782 [1997] 1.14

without radical destruction; judicial response to the HRA has ensured that the separation of powers and rule of law have been preserved, only reframed to better fit a 21st century context.

Pleading Proprietary Estoppel Sans Land

Giorgio Rand

Introduction

Yearly thousands of law students are introduced to proprietary estoppel in Equity modules. Which is established where: (i) A makes a statement appreciating B ought to rely on it; (ii) B acts in the reasonable belief they have or will get an interest in land induced by A's statement; and, (iii) B suffers detriment if A is entitled to resile from the statement.[1] The recent and leading case, *Guest*, is silent to the land requirement but it is factually present in the Appeal.[2] However, the court has held proprietary estoppel in the absence of land twice: *Strover*[3] and *Fisher*.[4] This essay asks: can proprietary estoppel be successfully pleaded in the absence of land, i.e. if A promises B something that is *not* Freehold or Leasehold land?

Part I considers the land requirement, and Part II extrapolates the implications.

Part I – Sans Land

The original proprietary estoppel cases of the mid-Nineteenth Century are all concerned with land.[5] Equally, all post-*Guest* cases are farming succession disputes which are land based.[6] Cooke refers to proprietary estoppel as being "creative" and harnessing great utility.[7] One submits the crux of the doctrine is an equitable principle that creatively pursues justice rather than any strict legal formula; demonstrated by the of novel remedy where the Guest parents elect between a clean break accounting for early receipt or a life-time trust.[8] However, Cooke does not advance the "creative" estoppel having application outside of land claims.[9] Part of the issue in answering this topic is that the factual basis of the majority of recent proprietary estoppel disputes are farming related. *Guest* typifies this. This does impliedly accept the estoppel is not singularly about land, it is about land and associated other property. A farm is a business, this includes: a farm *house*, farming *chattels* (i.e. a tractor or livestock), and perhaps even farming *intellectual property* (e.g.

[1] David Neuberger, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity' (2009) CLJ 68(3), p.538; *Thorner v Major* [2009] UKHL 18 at [2], [20].
[2] *Guest v Guest* [2022] UKSC 27.
[3] *Strover v Strover* [2005] EWHC 860.
[4] *Fisher v Brooker* [2009] UKHL 41.
[5] *Duke of Beaufort v Patrick* (1853) 17 Beav 60 (canal through private land); *Loffus v Maw* (1862) 3 Giff 592 (willed land); *Dillwyn v Llewelyn* (1862) 4 De GF&J 517 (farm land parcels); and *Willmott v Barber* (1880) 15 ChD 96 (leasehold interest sale); *Maddison v Alderson* (1883) 8 App Cas 467 (farming succession).
[6] *Hughes v Pritchard* [2023] EWHC 1382 (Ch); *Morton and another v Morton (deceased)* [2023] EWCA Civ 700; *Michael John Spencer v Estate of John Mitchell Spencer and others* [2023] EWHC 2050 (Ch); *Winter and another v Philip Winter (Deceased) and others* [2023] EWHC 2393 (Ch); *Cleave and another v Cleave* [2024] EWHC 2492 (Ch).
[7] Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000), p. 42.
[8] (n 2), at [101].
[9] (n 7), p.127.

branding of a farm shop). The court has explicitly accepted this outside of farming in *Re Basham*; A promised B land *and* non-land rights, and resiled with B suffering detriment.[10] However, this essay asks a discrete question: can proprietary estoppel be claimed without land *entirely*?

There is wide judicial endorsement of non-land property being subject to a proprietary estoppel action.[11] But there is no authority for solely chattels being claimed. There is academic acceptance for the extension of the doctrine to chattels in the family context.[12] Outside this context there is academic endorsement for singularly chattels.[13] Yet there are only two successful reported non-land claims: life assurance policies[14] and intellectual property.[15]

Strover: the judgment is unusual because proprietary estoppel was not initially submitted by counsel. But, Hart J on retiring once finding facts considered the doctrine raised on assurance policies as property between partnership members.[16] The court raised no questions of viability within this non-land setting; and there was unconscionability present which must be corrected.[17]

Fisher: the appeal considers co-authorship and therefore joint copyright of a song. The House of Lords held despite the contract there was a 40% entitlement. Although factually unique, the pertinent detail is neither the High Court[18] nor the House of Lords raised any disagreement with the extension of the doctrine to non-land.

From case law and academic sources, the doctrine may be held where: the promise was solely land; mixed land and other property (including tangible property, e.g. chattels); intangible property (i.e. copyrights and assurance policies); and within the family setting chattels. Outside the family setting there is no direct authority but there is ample fodder for submissions that pure chattels could be estopped.

Part II – Implications of Landlessness

Non-land claims under the doctrine would increase the volume of litigation. If pleading landless proprietary estoppel was commonplace it would apply to a vast number of cases – it is difficult to think of an example where a resiled promise would be unactionable if landless claims were accepted wholesale. An already overstretched court system with finite resources would be further pressed. Another implication is it creates a contract-lite: giving a cause of action where there is an absence of contracts. Which would lead to uncertainty in both private and commercial contexts.

---

[10] [1986] 1WLR 1498.
[11] Mark Pawlowski and James Brown, 'Proprietary Estoppel: widening the net', [2021] Family Law, 206, p. 37-8.
[12] Ibid., p. 37; (n 7), p.53.
[13] (n 11), p. 37; Christopher Knowles & Mischa Balen, 'What's Special about Land?' (2013) 24 KLJ, p. 116.
[14] (n 4).
[15] (n 3); *Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch) at [60-61] *obiter*: proprietary estoppel could apply to publishing intellectual property copyrights.
[16] (n 4) at [23].
[17] (n 4) at [49]; Ben McFarlane, The Law of Proprietary Estoppel (2nd ed, OUP 2020), p.31.
[18] [2006] EWHC 3239 (Comm).

One disagrees with both implications preventing landless claims. The promise A makes still has to be reasonably certain, B must act in reliance *and* to their detriment. This gives an equitable cause of action where B ought to have one. *Per* the *Earl of Oxford's case*: man's actions (promises) are so diverse (landless or otherwise) statute cannot cover all possibilities therefore Chancery and equity correct A's conscience,[19] equally all the maxim of equity would apply. With stretched resources or in the absence of a contract, equity must still fix the unconscionability B suffers.

Two areas where the landless doctrine could be claimed:

i. *Chattels*: if A promised B (the two being unrelated) the Stubbs portrait of a horse, without additionally promising land, B could plead proprietary estoppel to prevent A resiling. However, the nature of chattels would create a higher bar to establishing the equity; preventing the floodgates of claims (*contra* above implications). The promise of a chattel would be straightforwardly established: 'one day the Stubbs will be yours'. But, the detriment is harder to establish in this context: if B leaves the chimney breast without any picture or mirror awaiting the Stubbs, this would *not* be sufficiently detrimental that equity needs to intervene to prevent unconscionability. Alternatively, detrimental reliance *would be* established where B expected the Stubbs in return for decades of residential elderly care for A – thus a causal link and sufficient detriment. The satisfaction of the equity here is simple: *per Guest* to prevent the unconscionability, B is entitled to A's Stubbs.[20]

   Equally, whether under *Re Basham* or purely chattels, a landless promise could be claimed under the Impact of the Inheritance (Provision for Family and Dependants Act 1975.[21]

ii. *Novel situations*: if the absence of land or intangible property (*supra Stover* and *Fisher*) was no bar, proprietary estoppel could be claimed many situations. For example, the removal of any fiduciary duty holder from their position who receives payment for services but is not under a contract. Specifically, a Court of Protection claim for a financial deputy's removal by a child protected person ("P")'s next of kin; pursuant to the jurisdictional element of s.18(3) Mental Capacity Act 2005. P is A and the deputy is B. There is currently a difficult defence for the deputy in submissions of the court's inherent jurisdiction. However, the deputy has a non-contractual fiduciary duty with promise of fees for managing P's money and would suffer detriment (i.e. loss of fees until P at least attains 18 years old). If the novel election of remedy was extended to landless claims then P, via new representative(s), would select between continuance of the deputyship or early payment of fees payable from now until P reached 18 with account for early receipt.

[19] (1615) 21 ER 485.
[20] (n 2) at [10], [13].
[21] A 1975 Act claim is currently possible where land forms part of the promise *per* Ben McFarlane (n 17), p.558-560.

Conclusion

Currently proprietary estoppel is held in claims of: solely land; mixed land and other property; intangible property; and within the family context property that is land as well as probably chattels. This essay advocates all property should be amenable to being estopped under the doctrine no matter its form, and there is ample scope for application to novel situations.