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Analysis

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Melville Monument Liability: Some Doubtful Dicta

Unlike other legal systems, Scots law has a fairly narrow and underdeveloped concept of pre-contractual liability. This reflects the fact that, traditionally, a “bright line” approach has been taken to the question of liability in contract, the bright line lying at the moment of contract formation. Before that point, the parties are deemed to be at arms’ length, and there is said to be no possibility of either party incurring duties in contract to the other; after contract formation, the duties imposed under the contract can give rise to liability in appropriate circumstances. The only recognised exception to this bright-line approach (setting aside possible liabilities in delict or unjustified enrichment between negotiating parties) has been the availability of a limited remedy for wasted pre-contractual expenditure based upon the line of cases beginning with *Walker v Milne*,¹ and dubbed “Melville Monument liability” as a result of the subject-matter of the not-quite-contract in that case. That limited remedy, so it was said by Lord Cullen in the Outer House in *Dawson International plc v Coats Paton*,² arises when one of the parties has acted in reliance on an implied assurance by the other that a binding contract exists between them, when in fact there is no more than an agreement falling short of a binding contract. Furthermore, before the remedy can be claimed, no other remedy (such as a claim for misrepresentation) must be available to the pursuer.³ While the type of liability established in *Walker v Milne* is clearly of very limited scope, it has not hitherto been judicially suggested that it may no longer exist. Such a suggestion was however made by an Extra Division of the Court of Session in *Khaliq v Londis*.⁴

1 (1823) 2 S 379.

2 1988 SLT 854.

3 Or so it is suggested in *Bank of Scotland v 3i plc* 1990 SC 215. The concept of subsidiarity upon which this is based is however a slippery one at best, based on a distinction between legal and equitable remedies which is itself based upon a misunderstanding of the relationship of law and equity in Scotland. Space does not allow development of this point here, but see H L MacQueen, “Unjustified enrichment, subsidiarity and contract”, in V V Palmer and E C Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009) 322 at 339-341, 343-345 and 350-353.

4 [2010] CSIH 13, 2010 GWD 13-237.

A. THE DECISION IN *KHALIQ v LONDIS*

The facts of the case concerned the negotiation of an intended contractual relationship between the pursuer, a shopkeeper, and the defender, a commercial enterprise, under which the pursuer was to be granted a franchise to operate a Londis branded grocery store. Mr Khaliq owned two neighbouring shops in Glasgow, from one of which (Unit 1) he operated a fast-food outlet, the other of which (Unit 2) he had leased to a third party, though the lease was about to come to an end. Mr Khaliq obtained information from Londis about its franchising operation, including an application form to become a member of the Londis trading group. Thereafter the local Londis representative visited Mr Khaliq and advised him to switch the fast-food outlet to Unit 2 and to refurbish Unit 1 in order that he could operate a Londis store from it. He was advised to use a shop refitting company (Swallow) recommended by Londis. Mr Khaliq signed and submitted a Londis membership application form, together with a cheque for the Londis membership fee. Londis cashed the cheque and subsequently approved Mr Khaliq's application for membership, a fact of which Mr Khaliq was made aware. Londis prepared a store development plan for Unit 1, and Mr Khaliq instructed Swallow to proceed with the refitting works. Swallow's existing workload meant they could not start the refurbishment work immediately, but in the meantime Mr Khaliq began to switch the fast-food outlet to Unit 2. He contracted with a shop-fitter to refit that unit at a cost of £20,000, and he had a structural beam inserted in that unit and other associated works carried out for the further sum of just under £5,000. All of this work occurred with the knowledge of Londis. A year or so after submitting his application, Mr Khaliq was advised by Londis that his membership application would not be proceeding. Nonetheless Mr Khaliq decided the refurbishment of Unit 1 should go ahead, and it was carried out by Swallow at a cost of about £35,000.

Mr Khaliq sued the defender for approximately £60,000, this representing the costs of the work undertaken at both units. His claim was not based on breach of contract, as it was accepted by Mr Khaliq that no contract had been concluded between the parties, but was rather based (in *Walker v Milne* terms) upon the pre-contractual expenditure which he had undertaken, expenditure he alleged had been undertaken in reliance on the implied assurances given by Londis that a contract existed between the parties. At first instance the pursuer's claim was rejected by the sheriff; he appealed to the Inner House.

The Inner House upheld the sheriff's findings. Lord Osborne noted that the expenditure undertaken by Mr Khaliq was not made in reliance on any duty which he believed he was under in terms of a supposed contract between the parties, but was taken on the recommendation of the defender's representative. Furthermore, the pursuer, having had the units refitted, was continuing to derive a benefit from the refitting of Unit 2, from which he continued to trade, so that it would be inequitable to allow recovery of his refurbishment costs from the defender (the point being that the *Walker v Milne* remedy is said to be an equitable remedy).⁵

⁵ The comment made at n 3 above is again applicable.

B. CRITIQUE

These conclusions are doubtful, at least in part. All that the *Walker v Milne* line of cases suggests about wasted pre-contractual expenditure is that it must have been undertaken in reliance on the supposed existence of a contract, in other words that the belief of the pursuer in the existence of such a contract caused the expenditure. The authorities do not suggest that the expenditure must have been undertaken in performance of duties believed to be imposed under the supposed contract. Given this, it seems that while the claim for the £35,000 which Mr Khaliq spent refurbishing Unit 1 was properly rejected by the court, given that he knew at the time it was incurred that the franchising agreement was not going ahead, the outright rejection of the claim for the other £20,000 was questionable. That sum was spent *before* Mr Khaliq was informed that the deal was not to proceed. This is not conclusive proof that it was incurred in reliance on an implied assurance of a contract being in place: Mr Khaliq would still have to show that such an implied assurance was given to him. In this respect however, it seems he had a fairly strong case. The local Londis representative had shown Mr Khaliq an email from Londis Head Office stating “Please be advised that Mr Khaliq has now been passed for membership”; his membership cheque had been cashed; and the wording of the Store Development Plan which he was asked to sign stated “Whereas the Retailer is a Member of the Londis Group...”. All of this seems supportive of the idea that Mr Khaliq had indeed been given an implied assurance that he was in a contractual relationship with Londis, even if that assurance was false given that Londis had never formally accepted Mr Khaliq’s application for membership of the group. This suggests that the claim for the £20,000 should not have been rejected by the court so hastily, though perhaps the point that it was not wasted expenditure (given the use to which he was putting it) might still have proved fatal to its recovery. Even then, however, Mr Khaliq might conceivably have tried to argue that, having spent the money on premises owned by him, he could do no other than derive some use from it, though not the use he had intended when he carried out the expenditure.

For these reasons, the decision is questionable, at least in part. More worrying however are dicta from two of the judges casting doubt on the continued existence of the remedy for wasted pre-contractual expenditure. In his judgment, Lord Osborne remarked that section 1 of the Civil Evidence (Scotland) Act 1988,⁶ sections 1 and 2 of the Requirements of Writing (Scotland) Act 1995,⁷ and changes in the law relating to negligent misrepresentation, had each contributed to development of the law since *Walker v Milne*, such that “in an appropriate case, there may be justification for reconsideration of the *raison d’être*, or at least the scope, of Melville Monument liability”, though adding that “in the particular circumstances of this case, I do not find it necessary to undertake such a reconsideration”.⁸ This view was reiterated by Lord Marnoch, who commented, again in *obiter* remarks, that “I am inclined to agree

6 Which abolished the rule requiring corroboration in civil proceedings.

7 Which reformed the rules on the form required validly to constitute certain types of contract.

8 *Khaliq* at para 26.

with counsel for the respondent that this whole line of authority, such as it is, has now been superseded by the legislation to which your Lordship in the Chair has referred and perhaps, also, by what are relatively recent developments in the common law of delict”.⁹ Lord Marnoch went on to suggest, in effect, that Lord Cullen had mis-stated the law: “It follows that, albeit with respect to Lord Cullen, as he then was, I, for my part, wish most distinctly to reserve my opinion on the correctness of the dicta or, it may be, the decision in *Dawson International plc v Coats Patons plc* insofar as relevant to this branch of the law.”¹⁰

These comments seem highly questionable. The facts of the *Khaliq* case demonstrate precisely why the various enactments and common law developments referred to judicially have *not* removed the *raison d'être* of *Walker v Milne*. Mr Khaliq was *not* arguing that a failure to meet requirements of formal writing should be remedied by statutory personal bar; he was *not* arguing that he lacked corroborative evidence for his claim; and he was *not* arguing that the defender had at any point made a statement that could be classed as an actionable misrepresentation. On the contrary, his claim would have been unlikely to have been made under or even with reference to any of these rules, a fact which surely underlies the continuing need for the *Walker v Milne* remedy, even given the developments in the other areas of law referred to by the court. Scots law still needs a common law remedy designed to deal with cases, not otherwise remediable in law, where a party has been strung along into believing that a contract exists when it does not, and on the faith of the assurances given has undertaken expenditure in good faith which turns out to be wasted. Such a remedy has long been thought equitable, and there is no reason to suggest that the equities in such cases have recently been shifted by, as it were, legislative side-winds or even developments in other parts of the common law.¹¹

C. CONCLUSION

If anything, this area of law may need opening up rather than restriction or removal from the books. English and Irish law always apart, modern legal systems in Europe support the availability of a damages remedy in certain cases of *culpa in contrahendo* where a negotiating party's pre-contractual expenditure is wasted when the other party breaks off the negotiations contrary to requirements of good faith.¹² Such claims are not limited to cases of assurances that there *is* a contract, but extend to situations where the party now seeking recovery reasonably believed that there *would* be a contract. Even US Common Law has recognised the inequity of allowing those who have undertaken expenditure on the faith of a promised contract to go

9 Para 37.

10 Para 38.

11 The continued existence of the liability has been fairly recently accepted without question in W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) paras 2.34, 5.60; H L MacQueen and J Thomson, *Contract Law in Scotland*, 2nd edn (2007) paras 2.91-2.96; M Hogg, *Obligations*, 2nd edn (2006) paras 3.36, 5.13-5.20; E C Reid and J W G Blackie, *Personal Bar* (2006) para 5.23 n 82.

12 See J Cartwright and M Hesselink (eds), *Precontractual Liability in European Private Law* (2008) (reviewed at 526 below).

uncompensated, as may be seen from the decision in *Hoffman v Red Owl Stores*,¹³ on facts involving an abortive franchising agreement very similar to those in *Khaliq*. The classic fact scenario, not unknown in recent Scottish case law,¹⁴ is given in the Draft Common Frame of Reference for European Private Law: a party who enters into or continues negotiations for a contract without any real intention of reaching an agreement with the other is liable for any loss caused to that other by the non-completion of the contract.¹⁵ It is to be hoped that the strongly-stated dicta in *Khaliq* do not stultify development of Melville Monument liability and leave Scots law on pre-contractual liability in a dark alleyway from which most of the rest of Europe escaped a long time ago; but it is to be feared they will have just that effect, given that this is a Division criticising an Outer House judgment, albeit one handed down by one of the most distinguished of modern Scottish judges.

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Property Issues in Lien

Lien is a complex type of security right. It can be viewed from the perspective of contract law, as it arises typically in the context of reciprocal obligations. Equally, it can be seen as part of property law because it is a right relating to a thing which is effective in insolvency. As with many other areas of private law, there is a relatively large nineteenth-century case law, but little in modern times.¹ Two recent cases, however, raise important issues in relation to the property aspects of lien.

¹³ *Hoffman v Red Owl Stores, Inc*, 26 Wis.2d 683 (1965). An interesting article on the case, based partly upon recent interviews conducted with Mr Hoffmann (whose name, it transpires, was wrongly spelt with only one 'n' in the court proceedings), is W Whitford and S Macaulay, "*Hoffman v Red Owl Stores: the rest of the story*" (2010) 61 Hastings LJ 801. An Australian court pushed the boundaries of recovery in cases of failed negotiations even further in *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] NSWLR 880, when the New South Wales Supreme Court awarded damages against a party simply for having unilaterally broken off negotiations. That conclusion, though followed in subsequent Australian cases, goes beyond what would be considered acceptable recovery in some jurisdictions, including Scotland, but not in others, the Netherlands being a good example of the latter.

¹⁴ *W S Karoulias SA v The Drambuie Liqueur Co Ltd* 2005 SLT 813. See further G Black, "*W S Karoulias SA v The Drambuie Liqueur Co Ltd*" (2006) 10 EdinLR 132 at 137-140.

¹⁵ C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (2009), art III.-3:301.

¹ But see most recently, *Air and General Finance Ltd v RYB Marine Ltd* [2007] CSOH 177, discussed in A J M Steven, "Missing the boat: lien for damages" (2008) 12 EdinLR 270, and *Onyx Ltd v Endpoint Research (UK) Ltd* [2007] CSOH 211, discussed in A J M Steven, "Lien as an excludable and equitable right" (2008) 12 EdinLR 280.

A. THE NEED FOR PROPERTY

In *Pattullo v Accountant in Bankruptcy*² the appellant had been appointed as trustee under a trust deed for creditors. When the debtor was sequestrated, the appellant submitted a claim in the sequestration for £25,909.42 for fees and outlays incurred as trustee. The agent for the Accountant in Bankruptcy adjudicated upon the claim and gave it an ordinary ranking in the sequestration. The appellant argued before the sheriff that the claim should have a preferential ranking. The sheriff³ held that the appeal was time-barred, but nevertheless gave his opinion on the substantive issue of ranking.

The starting point is section 31(1) of the Bankruptcy (Scotland) Act 1985, which provides that the whole estate of the debtor vests in the trustee in sequestration as at the date of sequestration. This is qualified by section 33(3) which provides that the vesting is without prejudice to the right of any secured creditor which is preferable to the rights of the trustee. For this purpose, “secured creditor” includes the holder of a lien.⁴ In terms of section 38(4) of the same Act, the trustee can require delivery to him of any title deed or other document even if a right of lien is being claimed over it, but this does not prejudice the preference of the lien-holder.⁵ The appellant, who referred to a number of cases involving lien and insolvency,⁶ argued that he had a “quasi lien” for fees and outlays. He was thus entitled to a preferential ranking. The argument is not easy to follow. While the term “lien” is a familiar one, “quasi lien” is not. In the words of the sheriff: “The appellant’s pleadings refer to a ‘quasi-lien’. Just what a ‘quasi-lien’ is and what, if any, difference there is between a quasi-lien and a lien was not explained to me. For present purposes I assume there is no difference.”⁷ He proceeded to review the case law which had been cited to him and distinguished it, before setting out the fatal flaw in the appellant’s argument:⁸

[A] lien is a right of possession . . . The difficulty is that there is nothing in the material before me which discloses that there were any documents or title deeds over which a lien was asserted.

The appeal was refused and rightly so. It is an essential aspect of lien that the right is exercised in relation to some type of property. No property means no lien. The law is clear on the matter, but the case shows a lack of understanding of it.

B. LIEN AND HERITABLE PROPERTY

What is less clear is the type of property over which a lien may be asserted. The usual subject matter is corporeal moveables, including documents. *McGraddie*

² Case no SQ110/05, Edinburgh Sheriff Court, 12 Apr 2010, noted at 2010 GWD 18-360.

³ Sheriff William Holligan.

⁴ Bankruptcy (Scotland) Act 1985 s 73.

⁵ See also Bankruptcy (Scotland) Act 1985 s 51(6)(b). The preference extends over the whole estate and the inter-relationship with other preferential debts is uncertain. See A J M Steven, *Pledge and Lien* (2008) para 15-10.

⁶ Notably *Miln’s JF v Spence’s Trs* 1927 SLT 425.

⁷ Sheriff’s note at para 21.

⁸ Para 22.

v McGraddie,⁹ a recent Outer House case, is the first modern authority on the question of whether it is competent to have a lien over land. Here, following a proof, Lord Brodie found that the pursuer had made two payments to the first defender to enable him to buy a flat in Glasgow and a house in Stewarton on the pursuer's behalf. The purchases were duly made, but instead of following the instructions of the pursuer, the first defender took title to the flat in his own name and title to the house *pro indiviso* with the second defender. The first payment made by the pursuer covered the price and all other expenses in relation to the flat purchase. The second payment, however, fell short by £5,738.39 of the equivalent cost for the purchase of the house. Lord Brodie proposed that the parties should be given time to resolve matters among themselves following his findings. When no common position was reached, the case came before him again to consider appropriate remedies.

The pursuer sought orders for the properties to be conveyed to him. The first defender resisted this on various grounds, one of which is discussed here. In relation to the purchase of the house, he had been found to be the agent of the pursuer. There was, however, the shortfall of £5,738.39. Since there was no evidence that the pursuer had offered to pay this, the first defender argued that no order to convey could be made. The case of *Glendinning v Hope & Co*¹⁰ was submitted in support. Lord Brodie noted, before ruling on the submission made on the first defender's behalf, that it seemed to be "born of desperation rather than a proper analysis of the authorities".¹¹ He referred to the fact that *Glendinning* was a case of general lien. For a lien to be asserted, the other party to the contract must be refusing to perform his obligations. Lien arises out of the principle of mutuality.¹² Lord Brodie stated that the pursuer had not refused to perform. Rather, it was the first defender who was in breach of the contract and who remained "obstinately so".¹³ He continued: "There is no reason why the first defender should not be required to perform what he must be taken as having obliged himself to perform."

Lord Brodie noted also that a right of lien is subject to equitable control. Moreover, "it does not apply to heritage".¹⁴ His authority is Gloag on *Contract*.¹⁵ The statement may be regarded as *obiter*, and presumably Gloag was the only authority cited to the court on the point. Whether it is correct is questionable. First, the case law to which Gloag refers is not convincing.¹⁶ Secondly, a number of modern authorities, including Professor McBryde,¹⁷ Professors MacQueen and Thomson,¹⁸ and

9 [2010] CSOH 60.

10 1911 SC (HL) 73 at 78 per Lord Kinnear.

11 Para 8.

12 Although mutuality is more readily understood in relation to special rather than general lien: see Steven, *Pledge and Lien* (n 5) para 17-07.

13 Para 8.

14 Para 8.

15 W M Gloag, *The Law of Contract*, 2nd edn (1929) 639.

16 *Turner v Turner* (1811) Hume 854; *Castle-Douglas and Dumfries Railway Co v Lee* (1859) 22 D 18. For contrasting criticism, see W W McBryde, *The Law of Contract in Scotland*, 3rd edn (2007) paras 20-82-20-84 and Steven, *Pledge and Lien* (n 5) para 12-04.

17 McBryde, *Contract* para 20-85.

Professor Paisley¹⁹ all suggest that it is competent to have a lien over land. Thirdly, there is elderly case authority to this effect, albeit in the context of unjustified enrichment.²⁰ Fourthly, other countries recognise such liens.²¹ It might be objected that rights relating to land should require to be registered whereas a lien does not. But there are many rights affecting land which do not appear on the face of the register and this is merely a further example.²² The publicity principle of property law is also met by the necessity for the lien-holder to be in possession. Clearly, there was no lien on the facts of the case, but it is to be hoped that if an appropriate opportunity presents itself in the future a court might take a different approach.

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Crofting, Nominee Sales and the Separation of Powers

Crofting is a system of landholding peculiar to parts of the Highlands and Islands of Scotland. Its legal framework goes back some one hundred years, when the UK Parliament, in the face of unrest in the Gaeldom, fortified by statute the rather precarious rights of the non-landowner inhabitants of Scotland's fringe land. "Crofters", being those people who worked certain areas of land at the time the Crofters Holdings (Scotland) Act 1886 was passed, were given a number of key protections.¹ These included the right to a fair rent, the right to be compensated for any permanent improvements made to land and, perhaps most importantly, a right to security of tenure, which is best viewed as a safeguard against eviction unless a

18 H L MacQueen and J Thomson, *Contract Law in Scotland*, 2nd edn (2007) para 5.16.

19 R Paisley, *Land Law* (2000) para 11.2 n 4.

20 In particular *Binning v Brotherstones* (1676) Mor 13401. See Steven, *Pledge and Lien* (n 5) paras 11-19-11-22.

21 For example, South Africa. See the recent case of *Wightman t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371.

22 See Scottish Law Commission, Report on *Land Registration* (Scot Law Com No 222, 2010) vol 1 paras 7.1-7.15.

1 Although the legal framework that established crofters as the creatures of statute begins with the 1886 legislation, crofting's story goes much further back. The starting point for any study is J Hunter's seminal *The Making of the Crofting Community* (1976, revised 2000). A brief history is offered in M M Combe, "Parts 2 and 3 of the Land Reform (Scotland) Act 2003: a definitive answer to the Scottish land question?" 2006 JR 195 at 197-200.

proper process is followed.² The importance of these reforms in keeping the fabric of this part of Scotland's society together cannot be overstated. The people who succeeded the original crofters continue to enjoy such protections,³ together with further innovations on the 1886 legislation to allow for matters like common grazings⁴ and, notably for the purposes of this article, a "right to buy".

A. THE CROFTER'S RIGHT TO BUY

The right of a crofter to acquire ownership of croft land compulsorily was introduced in 1976.⁵ It is a powerful tool. It allows a tenant to convert his lease of land into outright ownership on payment of a small sum to his landlord.

In general terms, property law affords an owner a large degree of autonomy to do, or not do, what he wishes with anything he owns. This would normally include a freedom to choose whether to sell property. If a sale is opted for, the identity of the buyer and the acceptability of the price would also normally be within the gift of the owner. Not so with the crofter's absolute right to buy. It falls within a limited category of devices that deprive a private individual of his usual autonomy.⁶ As such, there are certain aspects built into the legislative scheme which seek to treat the crofting landlord fairly. The landlord does have two limited grounds for objection to the acquisition, namely that forced sale would cause "a substantial degree of hardship" or would be "substantially detrimental to the interests of sound management", but these are not often successfully pled.⁷ Therefore, absent an agreement between crofter and landlord and absent the existence of a valid objection, the Scottish Land Court on application must make an order:⁸

authorising the crofter to acquire such croft land as may be specified in the order, subject to such terms and conditions as, failing agreement with the landlord, may be so specified, and requiring the landlord to convey the land to the crofter or his nominee in accordance with such terms and conditions.

Another feature that aims to treat landlords fairly is a right to share in the gain a crofter may receive in the event that the land is sold on shortly after the right to

2 Although dated, the coverage in chapters 4 and 5 of D J MacCuish and D Flyn, *Crofting Law* (1990) elaborates these protections in detail.

3 As a simplification, it can be seen that a crofter is a highly regulated form of tenant, while a crofting landowner is a fettered landlord. Based on considerations like a crofter's right to share in development value of any land resumed by the landlord (Crofters (Scotland) Act 1993 s 21), MacCuish and Flyn went so far to describe a crofter as "part-owner of his subjects" (*Crofting Law* (n 2) para 9.01). While conceptually this may not sit well with Scots law's unititular nature, the rights held by a crofter are not what would normally be expected of a non-owner.

4 The Crofters Common Grazings Regulation Act 1891 addressed the omission of common grazings from the Crofters Holdings (Scotland) Act 1886.

5 By the Crofting Reform (Scotland) Act 1976.

6 Other such devices would include the crofting community right to buy contained in part 3 of the Land Reform (Scotland) Act 2003, and powers of compulsory purchase which exist under planning law.

7 For discussion, see MacCuish and Flyn, *Crofting Law* (n 2) para 9.09 and C Agnew, *Crofting Law* (2000) 83.

8 Crofters (Scotland) Act 1993 s 13(1).

buy has been exercised. The relevant provision applies where the former crofter disposes of the land or any part of it “to anyone who is not a member of the former crofter’s family, by any means other than by a lease for crofting or agricultural purposes, forthwith or at any time within five years of the date of its acquisition by the former crofter”.⁹ Similar clawback rules exist for residential tenants who exercise their right to buy under a Scottish secure tenancy,¹⁰ so the control is by no means restricted to crofting law. The rules serve to limit speculation and are an attempt to ensure a crofter cannot make a fast buck by quickly selling on newly acquired land.

But that is not quite the end of the matter. In terms of the legislation the landlord can be compelled to transfer land to a nominee. This allows the land to go to someone else in a crofter’s family, which hardly seems objectionable. Perhaps more controversially, a nomination can also be made of a sub-purchaser, who may have nothing more than a commercial connection with the crofter exercising the right to buy. That sub-purchaser could well be a developer. There is every chance that the sub-purchaser will pay more than the land’s crofting value, thus giving the crofter a very fast buck indeed.

B. THE NOMINEE SALE LOOPHOLE

So why does the ability of the crofter to select a nominee matter? Intuitively, the situation of a developer sub-purchaser seems exactly the kind of situation that the landlord’s clawback was introduced for. But that is not the view the courts have come to. Owing to the ambiguous wording in the legislation, the sale to the nominee is treated as the initial sale. The nominee is “the former crofter”, as defined in the legislation.¹¹ And as clawback only claws at a sale made after the initial sale, this classification allows the clawback rule to be bypassed. This is what the Scottish Land Court decided in 1991 in *Macdonald v Whitbread*.¹² The competing interpretation, that the nominee sale be immediately classed as a further sale, was rejected. The result was that the landlord was only entitled to a payment of £15 (being the annual rent for that area of land multiplied by fifteen, calculated in line with the statutory scheme). This figure contrasted with the assessment of the land’s market value by a factor of one thousand, giving a difference of £14,985 between the crofting value and the market value. Feeling that he was being deprived of his chance to share in this uplift, the landlord appealed to the Court of Session. The appeal was refused. While accepting that neither of the competing interpretations of the legislation could be regarded as ideal, the Court of Session preferred the analysis of the Scottish Land Court.¹³ And as if losing the case was not punishment enough, legal posterity

9 Crofters (Scotland) Act 1993 s 14(3). Disposals by members of the former crofter’s family may also be caught.

10 Housing (Scotland) Act 1987 s 73 (as amended). The clawback period here is three years, with the clawback decreasing year on year.

11 Now 1993 Act s 14(3).

12 1992 SLT (Land Ct) 36.

13 *Whitbread v Macdonald* 1992 SC 479.

then inflicted the ultimate ignominy of linking the landlord's surname with sale to a nominee – the *Whitbread* loophole was born.¹⁴

The decision has been criticised. Although Highland landlords are not often portrayed as victims, critics of the sale by nominee exception are not restricted to the landed class. Bodies that could be expected to be at loggerheads with each other, such as the Scottish Rural Property and Business Association, traditionally viewed as a landlords' interest group, and the Scottish Crofting Federation, a crofters' interest group, are found to be sharing a hymn sheet. Whilst at first blush the avoidance of the clawback seems only to hit former landlords, there has been a perception that the *Whitbread* loophole opens up land to speculation by developers, bringing collateral damage to crofting communities. Apart from those who benefit directly from the sale by nominee exception, it is difficult to find any unequivocal supporters of the decision.

If the policy critique of *Whitbread* is unsurprising, the decision can also be criticised from the (perhaps unexpected) standpoint of constitutional law. Why so? Parliament enacted the right to buy and judges, who are rightly independent of Parliament, interpreted what had been enacted. The twist with *Whitbread* is that comments made in Parliament by a government minister in 1976, at the time of the introduction of the right to buy, suggested that legislators wanted the opposite result from that which was reached in *Whitbread*.

In the Scottish Grand Committee it was stated that it was in Parliament's contemplation that disposal to a nominee sub-purchaser would require the crofter to render a second payment to the landlord (over and above the valuation of the land based on the crofting rent). The nominee wording was introduced to allow a crofter to nominate a family member, a lending institution who would require title to the land as security, or a developer or some other person outwith the crofter's family. In the first two categories, there would be no clawback, but with the third, it was thought that the Bill before the House of Commons imposed "a liability on the crofter to make a second payment to the landlord if he disposes of the land forthwith or within five years of acquisition. Disposal forthwith covers a conveyance to a nominee in this category".¹⁵ This chimes with the facts in *Whitbread* but, unfortunately for Mr Whitbread, at the time when the Court of Session heard his appeal, judges were not allowed to refer to parliamentary materials when interpreting legislation.

Shortly after *Whitbread*, the House of Lords decided the case of *Pepper (Inspector of Taxes) v Hart*.¹⁶ This removed the restriction on a judge's ability to refer to parliamentary materials, subject to certain controls. Although *Pepper v Hart* has been narrowly applied in recent years,¹⁷ the clear statement by a minister in Parliament on

14 See B Inkster, "Is the future of crofting law bright?", *Firm Magazine* 27 Jan 2010, available at http://www.firmmagazine.com/features/672/Online_Exclusive:_Is_the_Future_of_Crofting_Law.html. The loophole has also been referred to as the Cunningham loophole, which led to some interesting exchanges in a committee of the Scottish Parliament: see *Official Report*, Rural Affairs and Environment Committee, cols 2767-2769 (2 June 2010).

15 Scottish Grand Committee, 10 Feb 1976, cols 65-68 (Hugh D Brown).

16 [1993] AC 593.

17 For a recent Scottish consideration, with reference to the relevant authorities, see *Scottish Widows plc v The Commissioners for Her Majesty's Revenue and Customs* [2010] CSIH 47 at para 40, with reference to Lord Steyn's extra-judicial critique, "*Pepper v Hart*: a re-examination" (2001) 21 OJLS 59.

how clawback was intended to operate bolsters the argument that *Whitbread* was wrong and needed to be revisited.

C. COMMENTARY

Readers of this note, even if they find it interesting, may legitimately wonder why an obscure decision from the early nineties is worth noting in 2010. The current resonance comes from the Scottish Parliament's latest tinker with the crofting regime. For something of a niche area, crofting has attracted a lot of legislative attention. It has been often stated, but remains apposite, that a croft is defined as "a small area of land surrounded by a sea of legislation".¹⁸

Legislative attention continues to be present. With the Crofting Reform (Scotland) Bill recently passed by the Scottish Parliament, the sea of legislation is becoming ever more oceanic. In the midst of this process the opportunity has been taken to close the *Whitbread* loophole. Had this not been done, a tenuous argument that has been run in favour of the loophole would have gained further strength. The argument goes that, in the past, Parliament has had the chance to remove the nominee exception but has chosen not to. In a somewhat backhanded fashion, this seems to state that our legislators have sanctioned the *Whitbread* loophole. The new Bill does no such thing. It provides that only a member of the crofter's family¹⁹ may be the crofter's nominee for the purposes of the right to buy,²⁰ and as such any sale taking the land out of the crofter's family will be subject to the usual clawback regime.

Coupled with the doubling of the clawback period, the new provision places tighter controls on the crofter's right to buy. Many consultees who commented on the latest reforms hope this will put an end to, or at least limit, speculation in the crofting counties.²¹ This is an important change. Yet the right to buy remains controversial. The expansion of the crofting areas to cover Moray, Arran, and the Cumbraes and Bute²² faced opposition based primarily on the basis of the potential extension of this right.²³ Exercisable as it is by individuals, the right can also be criticised as not sitting comfortably with the crofting community right to buy created by the Land Reform (Scotland) Act 2003.²⁴ While this may be so, there can be little

18 In keeping with the region's oral tradition, the writer first heard this description from a family member who has a croft on the Isle of Lewis, but Agnew's textbook (*Crofting Law* (n 7)) captured this in print in its preface.

19 "Family" in the sense of section 61(2) of the Crofters (Scotland) Act 1993.

20 Crofting Reform (Scotland) Bill s 24A inserting s 13(1A) into the 1993 Act.

21 As noted, the Scottish Rural Property and Business Association and the Scottish Crofting Federation were both in favour of closing the *Whitbread* loophole, as were other disparate entities including a number of individual lawyers, a local authority and a community landlord: see <http://www.scottish.parliament.uk/s3/committees/rae/bills/Crofting%20Reform%20Bill/CroftingBillwrittenevidence.htm>.

22 The Crofting (Designation of Areas) (Scotland) Order 2010, SSI 2010/29.

23 Consultation responses to the Scottish Government's proposals can be found at <http://www.scotland.gov.uk/Topics/farmingrural/Rural/crofting-policy/new-crofting-areas>.

24 Combe (n 1) at 222.

argument that Scotland's parliamentarians have decided that the individual right to buy should remain. And what remains might just be in line with what Westminster parliamentarians intended all those years ago.

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Validity of Freedom of Information Requests: *Glasgow City Council v Scottish Information Commissioner*

Historically, the United Kingdom might have been characterised as a state with a “culture of secrecy” in which citizens had no general legal right to access information held by public bodies.¹ In the twentieth century, discontent with this culture grew, and in 1997 the Blair Government brought forward a white paper that was ultimately to become, in a diluted form, the Freedom of Information Act 2000.² In Scotland a slightly different approach to freedom of information was adopted by virtue of the Scottish Parliament's enactment of the Freedom of Information (Scotland) Act 2002 (FOISA). The intention of FOISA, manifested in section 1, was to provide citizens with a legally enforceable right to access information held by Scottish public authorities. However, the right was tempered by the designation of certain types of information as exempt.³ It is now over five years since the substantive elements of FOISA came into force,⁴ and there has been a steady trickle of reported cases interpreting the Act. To that steady trickle one may now add the decision of the Inner House in *Glasgow City Council v Scottish Information Commissioner*.⁵

A. THE COMMISSIONER'S DECISION

In *Glasgow City Council* a firm of solicitors, acting on behalf of an unnamed client, made a series of requests by e-mail seeking copies of certain documents held by Glasgow City Council. Due to a clerical error, the Council made no response to these requests, nor did they respond to subsequent requests for a review of the Council's

1 D Vincent, *The Culture of Secrecy: Britain 1832-1998* (1998).

2 See J Macdonald, R Crail and C H Jones, *The Law of Freedom of Information*, 2nd edn (2009) ch 3.

3 Freedom of Information (Scotland) Act 2002 s 2.

4 Freedom of Information (Scotland) Act 2002 (Commencement No 3) Order 2004, SSI 2004/203.

5 [2009] CSIH 73, 2010 SC 125.

decision.⁶ The solicitors then applied to the Scottish Information Commissioner for a decision relating to their requests for a review.⁷ The Commissioner's office contacted the Council in relation to the applications and sought the Council's comments.⁸ After reviewing the requests, the Council replied to the Commissioner's office intimating that they would not provide copies of the documents sought. The Council did not hold some of the documents and in any event considered the information to be subject to section 25 whereby information is exempt if it is accessible by other means—in this case through the availability of Property Enquiry Certificates (PECs), albeit at a fee, as part of the Council's statutory publication scheme approved by the Commissioner.⁹ Further, the information was also exempt by virtue of section 33, which applies if disclosure would prejudice substantially the commercial interests of any person (including a public authority). Disclosure of the information, it was argued, would fatally undermine the market for PECs which contributed approximately £287,680 per annum to council funds.¹⁰ Finally, the Council argued it did not need to comply with the request as compliance costs would be in excess of the prescribed amount under section 12.¹¹

The Commissioner's office sought further information in relation to the calculation of the cost of responding to the requests, and in relation to the potential commercial prejudice the Council might suffer. In respect of the latter, the Commissioner's office noted that during its investigation it had been "revealed" that 17 of the 26 local authorities in Scotland made information of the sort requested available under the freedom of information legislation, and that only two charged a fee.¹² The Council was invited to review any aspect of its submissions relating to commercial prejudice but the Council declined to do so. The Commissioner then issued his decision ordering disclosure.¹³ On the section 25 point (information available elsewhere), the Commissioner drew attention to the fact that copies of documentation were requested that would not be contained within a PEC, and that, in any event, accessing the information would require purchasing a PEC for every property in Glasgow, at considerable expense. In relation to commercial prejudice the Commissioner made reference to the submissions from the solicitors in relation to the availability of information from other councils, and the contact which his office had established with other councils, before concluding that Glasgow City Council was unlikely to experience commercial prejudice. The Council appealed to the Court of Session, where the appeal was heard by an Extra Division.

6 FOISA s 20.

7 FOISA s 47.

8 FOISA s 49(3)(a).

9 See s 23.

10 *Glasgow City Council* at para 18.

11 The current prescribed amount is £600: Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004, SSI 2004/467, reg 5.

12 *Glasgow City Council* at para 15.

13 Decision 112/2007: *MacRoberts Solicitors and Glasgow City Council*, available at <http://www.itspublicknowledge.info/UploadedFiles/Decision112-2007.pdf>.

B. THE INNER HOUSE DECISION

The Extra Division allowed the appeals against the Commissioner's decision.¹⁴ The Opinion of the Court was wide-ranging in its interpretation of FOISA as a whole, going beyond the narrower grounds of the Commissioner's decision in relation to exempt information and costs of compliance. In the first place the court subjected the meaning of "information" to sustained analysis, noting FOISA confers a right to information and not to the record in which information is contained.¹⁵ In the present case, copies of documents had been requested, not the information itself.¹⁶ Therefore, despite argument from counsel for a liberal construction of the legislation, the court held that such requests were not valid and therefore that section 1 of FOISA was not engaged. This fundamental conclusion proved fatal to the remainder of the Commissioner's case. Accordingly, there was no case in relation to an exemption under section 25 because there was no valid freedom of information request.¹⁷ Further, recourse to section 11, which allows an applicant to express a preference for the medium in which information will be communicated, was similarly futile because in order to express a preference there must be an antecedent request for information.¹⁸ Finally, even if there had been a valid request for information, the effective invocation of section 25, or indeed any exemption, has the effect of taking the information outwith the right established by section 1 thereby rendering section 11 inapplicable. One cannot express a preference for communication of information as a result of the right established by section 1 if that information is not the subject of section 1.

The finding that there had been no valid request for information was accordingly decisive. However, the court made a number of further observations. In the first place, the court did not accept that section 11 gave an applicant an ability to request a copy of a particular document. Instead, the section was concerned with expressing a preference for the medium in which the requested information would be communicated.¹⁹ Further, information available under an authority's approved publication scheme is reasonably obtainable, thereby triggering the exemption in section 25(3). The practicality or cost of accessing such information is not relevant, such safeguards as being necessary in that context having been satisfied by the need for approval by the Commissioner.²⁰ Essentially, the Commissioner cannot approve a publication scheme and then subsequently suggest that information is not reasonably obtainable under that scheme for the purposes of section 25, even if the scheme was designed in such a way that it is less helpful to some users than to others.²¹

14 *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73, 2010 SC 125. The Opinion of the Court was delivered by Lord Reed.

15 *Glasgow City Council* at para 43.

16 Para 44.

17 Para 52.

18 Para 54.

19 Para 57.

20 Para 59.

21 Paras 60-61.

More broadly, the court also observed that the identity of the applicant was material in determining whether an applicant could access information for the purposes of section 25. In particular, the Commissioner should have taken into account that the firm's clients were a professional search company, with an attendant ability to access such information. If a request is made by an agent then the applicant is held to be the principal. Thus, in the present case, the solicitors' failure to name the client meant that the formalities required by section 8 were not complied with, rendering the requests invalid.

C. ANALYSIS

The insistence of the court upon a right to information rather than a right to documents should not surprise, but the interpretation of that right may be unexpected. It appears that those responsible for the Scottish Act assumed that, by creating a right to information, applicants would be excused the trouble of identifying an exact document. The same may be said of the United Kingdom statute:²²

The right is to obtain access to the information itself and not to the document or record that contains it. This has the advantage that a public authority must provide access (subject to the Act's exemptions) to all records containing the information requested. It cannot restrict access to a particular document referred to in the request.

If *Glasgow City Council* is correct, this statement from the leading practitioners' text may require modification. Although the first sentence mirrors the reasoning of the court, the subsequent sentence encapsulates what may be said to have been the received wisdom on the point: the public authority must provide access "to all records containing the information requested". It seems from the *Glasgow City Council* decision that an applicant could not insist on seeing records, meaning that a public authority could perhaps refuse a request altogether if it was couched in terms of a particular document.²³

Alert to this danger, the Commissioner issued guidance in light of *Glasgow City Council*,²⁴ fastening upon the court's suggestion that if a request "does not describe the information requested . . . but refers to a document which may contain the relevant information, it may nonetheless be reasonably clear in the circumstances that it is the information recorded in the document that is relevant".²⁵ In other words, a request will succeed if it is in substance one for information notwithstanding the fact that particular documents are referred to. The Commissioner's guidance

²² Macdonald, Crail & Jones, *The Law of Freedom of Information* (n 2) para 4.74.

²³ One way of avoiding this conclusion would be to point out that what was requested from Glasgow City Council was not documents but only copies. On the narrowest of views, the decision might only apply where copies were requested.

²⁴ Scottish Information Commissioner, *Guidance on Validity of Requests Following Court of Session Opinion on 30th September 2009* (2010, available at <http://www.itspublicknowledge.info/uploadedfiles/CourtofSessionGuidanceonValidity.pdf>) paras 3.1-3.7.

²⁵ *Glasgow City Council* at para 45.

attempts to rationalise the decision in a reasonably broad manner, but it remains to be seen whether subsequent case law will interpret *Glasgow City Council* narrowly or in the spirit of the Commissioner's advice.²⁶ Arguably a narrower interpretation is technically correct, though functionally unpalatable. It seems likely that this issue will be revisited in the Supreme Court at some point in the not too distant future.

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How Do You Solve a Problem Like Entrapment? *Jones and Doyle v HM Advocate*

The issue of how a claim of entrapment should be dealt with by the criminal courts has divided the international legal community, with different jurisdictions regarding it as a substantive defence,¹ a matter that should lead to a stay in proceedings² or a matter that should lead to the exclusion of the evidence obtained.³ Traditionally, Scots law has dealt with the issue as one of exclusion of evidence⁴ but in *Brown v HM Advocate*, decided in 2002,⁵ it was suggested that the correct approach was to stay proceedings to preserve the moral integrity of the court system.⁶ The comments made in that case were *obiter*, as there was no evidence from which entrapment could properly have been inferred.⁷ In *Jones and Doyle v HM Advocate*,⁸ however, the issue arose squarely for decision and a majority of the appeal court held that a stay in proceedings is the preferable approach, notwithstanding a strongly argued dissent from Lord Carloway, who considered that precedent prevented any approach other than the exclusion of evidence.

²⁶ There is evidence that the Scottish Government considered the decision a justification to resist multiple disclosures: Scottish Information Commissioner, *Freedom of Information Annual Report 2009* (2010) 2.

¹ As in the federal jurisdiction of the US (*Sorrells v United States* 287 US 435 (1932)).

² As in England and Wales (*R v Looseley* [2001] UKHL 53, [2001] 1 WLR 2060) and Canada (*R v Mack* [1988] 2 SCR 903).

³ As in Australia (*Ridgeway v The Queen* (1995) 184 CLR 19), New Zealand (*Police v Lavalle* [1979] 1 NZLR 45) and Singapore (*Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207).

⁴ *Marsh v Johnston* 1959 SLT (Notes) 28; *Cook v Skinner*, *MacDonald v Skinner* 1977 JC 9; *Weir v Jessop* 1991 JC 146.

⁵ 2002 SLT 809.

⁶ This rationale is most clearly visible in *Brown* at para 2 per Lord Clarke.

⁷ *Brown* at para 8 per Lord Marnoch.

⁸ [2009] HCJAC 86, 2010 GWD 20-391.

A. FACTS AND OUTCOME

Jones and Doyle arose out of the theft of Da Vinci's *Madonna of the Yarnwinder*. Various people (including the appellants) were alleged to have entered into a conspiracy in 2007 to extort money for the safe return of the painting. After the conspirators had aroused suspicion, undercover police officers became involved and – so the appellants claimed – “actively encouraged”⁹ them to partake in a subsequent offence of reset. The appellants cited entrapment in relation to the reset charges and asked for proceedings to be stayed on the ground of oppression. The trial judge refused this motion. On appeal, it was held unanimously that entrapment had not been established and the appellants’ motion for a stay of proceedings was thus denied. In the event, when the case went to trial, none of the accused was convicted. The case is of considerable importance, however, because the court took the opportunity to discuss various elements of the plea of entrapment, most importantly the procedure by which claims of entrapment should be determined.

B. THE MAJORITY'S APPROACH: STAYING PROCEEDINGS

Lords Reed and Menzies agreed that the appropriate response to entrapment is a stay of proceedings. There remained the question of the means by which this ought to be accomplished. In *Brown*, Lord Marnoch thought that entrapment should stay proceedings because it was a form of oppression (but admitted that it could also be seen as an abuse of process),¹⁰ whilst Lords Philip¹¹ and Clarke¹² viewed it as an abuse of process. As Lord Reed pointed out in *Jones and Doyle*, this distinction matters little in practice¹³ because the result is the same – i.e. the ending of the proceedings. Nevertheless, his Lordship and Lord Menzies sought to resolve the uncertainty.

Both judges thought that entrapment should afford a plea in bar of trial based on oppression. This was because the term “abuse of process” tends to connote that the courts are being utilised by a litigant in a way for which they were not designed.¹⁴ An entrapped accused is brought to trial in order for the Crown to prove that she (voluntarily) committed the *actus reus* with the requisite *mens rea* and this is – according to Lord Reed¹⁵ – the proper purpose for the courts. It would therefore be a misnomer to refer to the prosecution of an entrapped accused as an “abuse of process”.¹⁶ Their Lordships preferred to rely on the plea in bar of trial based on oppression as it is “sufficiently wide and flexible”¹⁷ so as to encompass entrapment.

9 *Jones and Doyle* at para 51.

10 *Brown* at para 12.

11 Para 14.

12 Paras 2-3.

13 *Jones and Doyle* at para 34.

14 Para 35 per Lord Reed. For discussion of abuse of process in Scots law, see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) ch 19.

15 Para 36.

16 Para 86.

17 Para 37 per Lord Reed.

There are two main problems with this approach, one legal and one concerned with the understanding of oppression in everyday speech. The legal difficulty is that oppression has usually relied on the concept of prejudice *at trial*, and yet entrapment cases might, procedurally, be adjudicated in an impeccably fair way. Indeed, the leading case on oppression, *Stuurman v HM Advocate*¹⁸ (which involved pre-trial publicity), might be thought to limit oppression to cases of prejudice, given the headnote in the *Justiciary Cases* report of the case.¹⁹ This, however, is inaccurate:²⁰ the operative part of the *Stuurman* test is whether “having regard to the principles of substantial justice and of fair trial, to require an accused to face trial would be oppressive”.²¹ In *Jones and Doyle*, Lord Reed interpreted this as requiring prosecutions to conform to “accepted standards of justice” and held that “[a] trial based on entrapment would not conform to those standards”.²²

The second difficulty follows from Lord Reed’s argument that the trial of an entrapped accused is “plainly oppressive as a matter of ordinary language”.²³ Consider the definitions given in the Oxford English Dictionary: abuse “is the improper use of something”; to oppress is to “keep in subjection or hardship” or to “cause to feel distressed or anxious”. Neither term seems to capture the vice of entrapment exactly, namely that the state has manufactured a case for the purposes of (mis)using the court’s powers to convict a citizen who would not otherwise have committed an offence. This seems to be both oppressive *and* an abuse of the court system. It is oppressive because the accused is essentially being used by the state as a means to an end (conviction). It is an abuse because the purpose of the criminal trial can be seen as more than simply determining whether the accused committed an *actus reus* with the appropriate *mens rea*. That is merely its instrumental role. It also fulfils a more normative, communicative role,²⁴ through establishing whether the accused acted in such a way that her conduct deserves to be authoritatively disavowed by society.²⁵ This communicative element can only be present in regard to those who have not been induced into committing an offence in order for the state to prosecute them. It is, therefore, misusing the court process to try an entrapped accused.

C. LORD CARLOWAY’S DISSENT: EXCLUDING EVIDENCE

Lord Carloway shared the other judges’ concerns about the abuse of executive power, but disagreed about how to deal with it. In the authorities prior to *Brown*,

18 1980 JC 111.

19 Which states (at 112) that the court held that “oppression occurs only when the risk of prejudice to the accused is so grave that no direction of the trial Judge could reasonably be expected to remove it”.

20 Chalmers & Leverick, *Criminal Defences* (n 14) para 19.02.

21 *Stuurman* at 122 per the Lord Justice-General (Emslie). Cf *Mitchell v HM Advocate* 2003 JC 89.

22 Para 37. See also para 96 per Lord Menzies.

23 Para 37.

24 This thesis has been developed most fully by Antony Duff (see, for instance, R A Duff, *Punishment, Crime and Community* (2000)) and forms the backbone of R A Duff et al, *The Trial on Trial: Volume 3 – Towards a Normative Theory of the Criminal Trial* (2007).

25 Cf *Jones and Doyle* at para 36 per Lord Reed, para 86 per Lord Carloway.

entrapment was dealt with by excluding evidence.²⁶ It is these cases on which Lord Carloway premised his argument against a plea in bar of trial. His Lordship contended that:²⁷

[N]either the speeches in *R v Looseley* ... however persuasive or illuminating, nor the *obiter dicta* in *Brown v HM Advocate* ... can overturn established Scottish precedent. The Court ought to have firmly in mind its own principle of *stare decisis*. In deciding a particular case, the Court ought not to introduce new laws or procedures, where these are in conflict with existing law and procedure, even if it considers that, from a theoretical perspective, they constitute an improvement on the established situation.

Thus the appropriate procedure, in Lord Carloway's view, was to raise an objection to the relevant evidence.²⁸

This is a remarkable *volte face* from the position adopted by the court in *Brown* and, with respect, Lord Carloway's own opinion in the case of *HM Advocate v Bowie*.²⁹ Furthermore, the other judges in *Jones and Doyle* were correct in their observations that nothing in the earlier decisions to which Lord Carloway referred *precludes* a stay of proceedings being the appropriate remedy for entrapment.³⁰ As Lord Menzies pointed out, the focus on irregularly obtained evidence arose largely because of the way that those cases were argued before the court.³¹

Furthermore, Lord Carloway seems to accept, in the quote above, that a stay of proceedings *is* the more theoretically viable approach to entrapment. The reason for this is that an exclusionary rule misses the point of why entrapment is troubling. In irregularly-obtained evidence cases, the objection is to the means by which some or all of the evidence was obtained. To admit this evidence would offend the community's sense of fairness and damage the reputation of the criminal justice system.³² But *other* evidence of the accused's wrongdoing, which the state has obtained in a procedurally correct manner, is not liable to endanger public confidence in the moral legitimacy of the courts' decision-making. Ending the proceedings altogether in such circumstances would be wholly inappropriate and just as likely to damage confidence in the administration of criminal justice as convicting the accused on the basis of, for example, evidence from a warrantless search conducted in the absence of urgency. By contrast, in entrapment cases, it is not the *way* in which the state seeks to call the accused to answer to the courts which is of concern.³³ Rather it is the very fact of the

26 See the cases cited at n 4 above.

27 Para 75.

28 Para 84.

29 2004 SCCR 105 at 110.

30 Para 33 per Lord Reed, para 95 per Lord Menzies.

31 Para 95.

32 For an argument to this effect, see P Duff, "Admissibility of improperly obtained physical evidence in the Scottish criminal trial: the search for principle" (2004) 8 EdinLR 152 at 171-176.

33 For a view that criminal responsibility is a form of answerability, see R A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) 15.

accused being called to account at all.³⁴ In order to avoid lending the court's "stamp of approval", a stay of proceedings is thus necessitated.³⁵

Furthermore, there is a danger that – if other evidence is available – the accused might ultimately be convicted of an offence that (but for the state's involvement) she would never have committed. A stay of proceedings avoids the possibility that she is convicted in circumstances which would offend the sensibilities of the community in whose name criminal convictions are imposed.

D. THE TEST TO BE APPLIED

Despite the differences of opinion in relation to procedure, the court was in agreement on the appropriate test to be applied in determining whether or not entrapment has taken place. As Lord Carloway put it, "[w]hat the Court is looking to see . . . is simply whether or not an unfair trick was played upon the particular accused whereby he was deceived, pressured, encouraged or induced into committing an offence which he would never otherwise have committed".³⁶ In applying this test, the court should look to the guidance given by the House of Lords in *R v Looseley* and by the Canadian Supreme Court in *R v Mack*.³⁷ As such, two factors must be considered. First, consideration should be given to whether the police caused or induced the offence or merely provided an "unexceptional opportunity".³⁸ Second, it is relevant whether or not the police operation was conducted "in good faith".³⁹ This can be established either by a reasonable suspicion that the particular accused was likely to commit the offence in question (or one similar in nature)⁴⁰ or by a finding that the police were "acting in the course of a bona fide investigation of offences similar to that with which the accused has been charged".⁴¹

E. WHERE NOW?

Jones and Doyle provides answers to a number of important questions, both in relation to entrapment and to pleas in bar of trial more generally. First, it can now be stated with far more certainty than previously that entrapment is a plea in bar of trial and not a matter relating to the exclusion of evidence. In this, the court is surely correct. A claim of entrapment is not merely a claim that evidence has been gathered

34 Para 10 per Lord Reed. See also paras 14 and 31 and similarly, Duff, *Answering for Crime* (n 33) 190.

35 Lord Reed accepted the reasoning of Lamer J in *R v Mack* [1988] 2 SCR 903 at para 81.

36 Para 88. See also Lord Reed at paras 41, 48.

37 Para 38 per Lord Reed, citing *Looseley* (n 2) and *Mack* (n 2).

38 *Looseley* at para 23 per Lord Nicholls. See also para 50 per Lord Hoffmann, and *Mack* at para 130.

39 *Looseley* at para 27 per Lord Nicholls.

40 *Mack* at para 130.

41 *Looseley* at para 100 per Lord Hutton (citing *Ridgeway* (n 3) at 92 per McHugh J). See also *Mack* at para 130. For further discussion of these two factors and the guidance in *Looseley* and *Mack* more generally, see Chalmers & Leverick, *Criminal Defences* (n 14) paras 20.18-20.22.

inappropriately; it is a claim that the moral integrity of the criminal justice process would be compromised if the prosecution went ahead because the state effectively created the crime in order to prosecute it.

Secondly, while it was held that treating entrapment as a plea in bar of trial is the preferable approach, it appears that the exclusionary approach is still competent.⁴² This conclusion is disappointing. As the majority argued, treating entrapment as an issue of exclusion of evidence is “inherently unsatisfactory”⁴³ for the reasons discussed above. Equally, it is unhelpful and potentially inefficient, because it allows the accused to argue the same point in two different ways and, conceivably, at two different points during the same proceedings.

Thirdly, the test to be applied in determining whether or not entrapment has occurred is whether or not the accused was induced to commit an offence he would not otherwise have committed.

Fourthly, pleas of private entrapment – in other words, entrapment by someone, such as an investigative journalist, who is not a police officer or state official – will not be entertained. Given that entrapment was viewed by the majority as a plea in bar of trial based on improper state conduct (“the essential vice of entrapment is the creation of crime by the state for the purpose of prosecuting it”)⁴⁴, it is clear that only state entrapment can act as such.⁴⁵ Here, the court is again surely correct. Absent state involvement, the fact that individuals are persuaded (rather than coerced) to engage in criminal activity by another is not a good reason to absolve them of responsibility.⁴⁶

Finally, as a more general point, it now seems that a plea in bar of trial based on oppression can be successful even if there is no possibility that the accused will suffer prejudice at trial. The plea of oppression is not restricted to matters which would render the trial unfair, such as prejudicial publicity or delay. As such, it serves a similar function in Scots law to the plea of abuse of process in English law, in that it extends to all cases in which it would offend against the legitimacy of the judicial process to hold a trial at all.⁴⁷ This, it would seem, leaves little room for a separate claim of abuse of process.

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42 See *Jones and Doyle* at para 33 per Lord Reed, para 95 per Lord Menzies.

43 Para 31 per Lord Reed.

44 Para 30 per Lord Reed.

45 See para 12 per Lord Reed. For further discussion of private entrapment, see Chalmers & Leverick, *Criminal Defences* (n 14) paras 20.27-20.29; K Hofmeyr, “The problem of private entrapment” [2006] Crim LR 319.

46 On this, see A Ashworth, “Re-drawing the boundaries of entrapment” [2002] Crim LR 161 at 176.

47 With the exception of breach of a promise not to prosecute, which is dealt with as an abuse of process in English law but which is recognised in its own right as a plea in bar of trial in Scotland: see Chalmers & Leverick, *Criminal Defences* (n 14) ch 17.

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Sentencing Murder: *Boyle v HM Advocate*

It is common knowledge that the sentence for murder is life.¹ But while the symbolism—of a life confined for a life destroyed—is strong, convicted murderers do not necessarily remain in prison for the whole of their natural lives.² The advent of the “punishment part” or (in England) “tariff”, constituting the minimum period of detention necessary to represent retribution and deterrence, while intended to express punitive principles, also affirms that release prior to death is always considered, even if the period actually spent in prison appears to be increasing.³ The punitive nature of the punishment part is particularly well illustrated by the tariff’s history in England and Wales.⁴ The power to set the tariff initially constituted an encroachment on the judicial function by the Home Secretary,⁵ raising justified fears that tariffs were being set for political purposes.⁶ Tariffs have not become any less punitive but they must now be determined by the judiciary.⁷

A. THE PUNISHMENT PART

There are undoubted advantages to the punishment part requirement. It allows a broadly nuanced approach to murder cases so that some gradation is possible, while the convicted murderer is given certainty as to the minimum period of detention. Nonetheless, the sentence imposed is still life and, even if release takes place at the end of the punishment part (which depends on risk),⁸ such release is only on licence. The life licensee is, therefore, labelled a murderer and subjected to oversight by the state for the rest of his or her life. The legislation specifically authorises the imposition, if warranted, of a punishment part which is likely to exceed the period of his or her natural life.⁹

1 Criminal Procedure (Scotland) Act 1995 s 205.

2 See A Samuels, “Why not abolish prisoner early release or at least substantially reduce its incidence?” (2007) 169 *Criminal Lawyer* 5 esp at 5.

3 D J C Thomson, “Case comment: *HM Advocate v Boyle, Maddock and Kelly*” 2010 *SLT (News)* 7.

4 Though this is not an exact reflection of the evolution of the Scottish punishment part.

5 See C McDiarmid, “Children who murder: what is Her Majesty’s pleasure?” [2000] *Crim LR* 547 at 551-552.

6 On the article 6(1) implications see e.g. *T v United Kingdom; V v United Kingdom* (2000) 30 *EHRR* 121 at para 114.

7 Prisoners and Criminal Proceedings (Scotland) Act 1993 s 2(2), as amended by the Convention Rights (Compliance) (Scotland) Act 2001 s 1(3).

8 Prisoners and Criminal Proceedings (Scotland) Act 1993 s 2(5)(b).

9 1993 Act s 2(3A)(b).

Accordingly, the length of the punishment part matters, and this is the primary issue which *Boyle v HM Advocate*¹⁰ addresses, with a court of five judges being convened for the purpose. The Lord Advocate had appealed, on the grounds of undue leniency,¹¹ sentences in two separate cases of murder which were conjoined. In terms of the legislative framework, the High Court, in determining certain types of appeal, is specifically empowered to give its opinion on the appropriate sentence in any similar case.¹² This allows it to set down sentencing guidelines which it did, expressly, in this case.¹³ A punishment part specifically “constitute[s] part of a person’s sentence . . . for the purposes of any appeal or review”.¹⁴

On the one hand, guidelines are welcome in the attempt to promote some uniformity and, therefore, fairness in sentencing for murder. On the other, the variety of ways in which life can be destroyed is inordinate and it might be thought to be an impossible task to categorise these in terms of seriousness. What *Boyle* does not do then, because it cannot and should not, is to set down general principles for setting the punishment part which could be applied, mathematically, in all subsequent cases.¹⁵ The facts of the two cases which it conjoined illustrate the difficulty of balancing seriousness. How does premeditated strangulation for the purposes of robbery compare with building a funeral pyre and setting fire to a living human being, doused in lighter fluid?

B. THE APPROACH IN *BOYLE*

Boyle finally puts to rest the idea that punishment parts should broadly equate to half the determinate sentence which would otherwise be imposed.¹⁶ The fact that this was unworkable had already been recognised in relation to *discretionary* life sentencing, because determinate sentences take account of risk,¹⁷ whereas punishment parts explicitly do not.¹⁸ Strictly, it could never have worked in the murder context anyway because the (indeterminate) life sentence is mandatory and there is no scope to consider a determinate sentence. *Boyle*’s additional point is that, in any event, lengthy determinate sentences generally collapse into discretionary life, in that the courts are more likely to impose the latter than a determinate sentence of, say, 60 years. Thus, 30-year punishment parts *are* 60-year sentences: the latter exist only in the form of the former. Sentencers, then, cannot derive guidance from determinate sentencing practice. How does *Boyle* assist them?

10 [2009] HCJAC 89, 2010 SLT 29. The Opinion of the Court was delivered by the Lord Justice General (Hamilton).

11 Criminal Procedure (Scotland) Act 1995 s 108(1)(a), (2)(b)(i).

12 Criminal Procedure (Scotland) Act 1995 ss 118(7), 189(7).

13 *Boyle* at para 22, invoking section 197 of the Criminal Procedure (Scotland) Act 1995.

14 Prisoners and Criminal Proceedings (Scotland) Act 1993 s 2(3).

15 *Boyle* at para 17.

16 Para 12.

17 See J Chalmers, “Punishment parts and discretionary life sentences” 2003 SLT (News) 199 at 203.

18 Prisoners and Criminal Proceedings (Scotland) Act 1993 s 2(2).

C. MAXIMUM AND MINIMUM PUNISHMENT PARTS

First, *Boyle* expressly disapproves the suggestion, which arose from the previous cases of *Walker v HM Advocate*¹⁹ and *HM Advocate v Al Megrahi*,²⁰ that “30 years is a virtual maximum punishment part”.²¹ It offers “mass murders by terrorist action” as an example of a case in which more than 30 years might be indicated. It also overrules the previously accepted minimum punishment part (which appears to have been at least implied in *Walker*)²² of 12 years, stating that it “would not regard [this] as an appropriate ‘starting point’ for ‘most cases of murder’”.²³ A 12-year punishment part itself should only be imposed where “strong mitigatory circumstances” exist, with less than 12 years requiring “exceptional circumstances” such as a child perpetrator. In neither instance – maximum or minimum – does the court substitute any other period, so that, effectively, it restores an unfettered discretion in the sentencer in both the most and the least serious cases. While *Boyle* strongly hints that 12 years is too lenient, it does not preclude a punishment part of that length (or even shorter) and it leaves the setting of the lengthiest punishment parts completely open.

D. MURDER THROUGH KNIFE CRIME

The most innovative element of *Boyle* is its consideration of the punishment part for murders effected by articles with a blade or point, such as knives and swords,²⁴ with which the killer had previously armed him- or herself.²⁵ Here, the High Court expressly seeks to address, through deterrence, the prevalence of knife crime in Scotland. On this basis, an appropriate starting point for a murder involving the use of such a weapon is stated to be 16 years²⁶ although, again, there is some leeway.

The efficacy of general deterrence in all contexts is a matter of debate. “Deterrence” is, however, a defining purpose (along with “retribution”) of the punishment part.²⁷ Since knife crime is a continuing concern, it is legitimate for the High Court to address it, prospectively, in this way. Nonetheless, an effective deterrent requires a particularly nuanced knowledge of sentencing law on the part of those who carry knives – something which Douglas Thomson has suggested, anecdotally, is unlikely to be found widely.²⁸ It is well-known that murder incurs a life sentence. Does a 16-year punishment part add significantly to the deterrent effect overall?

19 2003 SLT 130.

20 High Court of Justiciary, 24 Nov 2003, unreported.

21 *Boyle* at para 13.

22 *Walker* at 132 per the Lord Justice General (Cullen).

23 *Boyle* at para 14.

24 Paras 15, 16.

25 This was of relevance here because the first respondent had stabbed the victim in the leg as part of a vicious assault (in which the second respondent had taken no part) prior to setting him alight. The second respondent had taken an equal part in this second element of the crime. See para 4.

26 Para 16.

27 Prisoners and Criminal Proceedings (Scotland) Act 1993 s 2(2).

28 Thomson (n 3) at 8.

E. 20-YEAR PUNISHMENT PARTS

Walker had specified a punishment part “in the region of 20 years”²⁹ for murders which might broadly be grouped together as demonstrating some element of aggravation, such as a child victim or the killing of a police officer on duty or killing with a firearm.³⁰ *Boyle* endorses this approach. The aggravations in these examples are self-evident but it is not entirely clear how to extrapolate from them to completely different factual scenarios. In all murder cases, a judgment has already been made that the killing is so serious that it ought not to be classified as culpable homicide. The endorsement of this 20-year category seems to indicate only that there must be some further aggravating factor. Such a punishment part was deemed appropriate for all three respondents in *Boyle* itself (20 years and 18 years in relation to the burning;³¹ 19 years for the premeditated strangulation). Lord Hamilton commented (on the burning alive) that it was “difficult to envisage more cruel or sadistic treatment of another human being”.³² Thus, even very serious cases of murder merit this 20-year punishment part.

In passing, it is worth noting the rather convoluted position on retrospectivity demonstrated in *Boyle* and deriving from *Locke v HM Advocate*.³³ Despite *Boyle*'s *raison d'être* being the provision of guidelines on punishment part-setting, by accepting a defence submission that the case should be decided on the basis of the law in force at the date of the original sentence,³⁴ the court was unable to apply its new framework in the case before it. In the event, this was irrelevant, since the law on 20-year punishment parts did not change, but, generally, there is perhaps something a little illogical about expressly using a case to set down guidelines on sentencing and then not applying those guidelines to that case.

F. DISCOUNTING FOR GUILTY PLEAS

Finally, *Boyle* addresses the issue of discounting for a guilty plea. Advocates of due process dislike such discounts, taking the view that the state should be required to prove its case beyond reasonable doubt no matter the circumstances. Crime control models, on the other hand, require incentives to speed the accused through the criminal process. Regardless of the position adopted, such discounts have, for some time, formed a part of the Scottish legal landscape. The only part of a life sentence to which they can be applied is, obviously, the punishment part. Here, the court stated that “murder is a special case and a strictly mathematical approach may be inappropriate”.³⁵ That said, it then ruled, quite prescriptively, that “the maximum discount should be about one sixth, reducing in some cases to nil”³⁶ and

²⁹ *Boyle* at para 13.

³⁰ Para 8, quoting *Walker* at 132.

³¹ Reflecting the fact that the second respondent had not participated in the initial assault. See n 25 above.

³² Para 26.

³³ 2008 SLT 159.

³⁴ *Boyle* at para 23.

³⁵ Para 21.

³⁶ Para 21.

that there should be a numerical maximum of five years, regardless of the length of the punishment part.

G. CONCLUSION

Boyle will undoubtedly be a point of reference for any judge required to set a punishment part in a murder case. It recognises the complexity and the inherent variety in the ways in which life can be taken and treads the fine line between unlimited discretion, which this diversity might indicate, and the need for some kind of framework, albeit a highly flexible one. It may not provide cast-iron certainty or mathematical formulae but these would be misplaced in any event. The case appears to be attempting to speak to two, entirely disparate, audiences: other High Court judges, since murder is within that court's privative jurisdiction, and members of the public who habitually arm themselves with knives. *Boyle's* non-prescriptive guidance is entirely appropriate for the former group. It remains to be seen how loudly the latter hears its deterrent message.

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Revisiting the Rule of Law under the ECHR: *Gillan and Quinton v United Kingdom*

The UK's terrorist legislation has been produced at a frenetic pace over the past decade. Almost equally as frenetic have been challenges taken against anti-terror measures on a variety of grounds, none more so than for violating the European Convention on Human Rights, reflecting the ambivalent attitude to human rights of the past Labour government. The cornerstone of the anti-terrorism regime, the Terrorism Act 2000, has proved particularly controversial, especially its capacious definition of certain offences.¹

Among the many provisions of the 2000 Act are sweeping police powers of stop and search. These entail three distinct stages. First, under section 44, the powers themselves are created by specific authorisation by an officer of no lower than the rank of assistant chief inspector for a fixed period of time not exceeding 28 days and

¹ For discussion, see H Fenwick, *Civil Liberties and Human Rights*, 4th edn (2007) ch 14.

limited to a specific geographic area.² The effect of these limitations is somewhat weakened by the fact that the threshold for the invocation of the powers is set rather low, requiring that such powers be considered merely “expedient”³ rather than “necessary” for the prevention of acts of terrorism. Once the powers have been specifically authorised, they are subject to confirmation by the Secretary of State.⁴ If the Secretary of State does not confirm the powers then they automatically expire within 48 hours.⁵

The final stage relates to the execution of the stop-and-search powers at the “coal face”, that is, their exercise by individual officers. Section 44 permits a constable in uniform to stop and search any vehicle, driver or pedestrian whatsoever within a designated area and period for the purposes of searching for articles of a kind which could be connected with terrorism.⁶ Moreover, and most controversially, there is no requirement that the constable have a reasonable suspicion that the individual being searched is actually carrying any such prohibited article.⁷ A failure to stop and search when requested, or the wilful obstruction of an officer undertaking a search, incurs a potential fine and imprisonment.⁸ In England Wales, the conditions of the exercise of stop-and-search powers are supplemented by the guidelines in the Police and Criminal Evidence Act 1984 Code A.⁹

A. THE FACTS

In August 2003, the Assistant Commissioner of the Metropolitan Police created stop-and-search powers with a section 44 authorisation to apply to the entire Metropolitan Police District for the maximum period possible under the 2000 Act (28 days), and these powers were duly confirmed by the Secretary of State.¹⁰ It was pursuant to this authorisation that Gillan and Quinton were stopped and searched on 9 September 2003. Mr Gillan, a PhD student, was riding a bicycle on his way to a protest against an arms fair. He was stopped by two police officers who searched his person and his rucksack before sending him on his way. He was detained for approximately 20 minutes. Ms Quinton was a freelance journalist who was in the vicinity of the protest in order to produce a documentary. She was stopped and searched by a police officer notwithstanding her explanation of her presence in the area and the

2 Terrorism Act 2000 s 44(4)(a). The authorisation must specify the area to which the powers apply and cannot exceed a period of 28 days.

3 2000 Act s 44(3).

4 2000 Act s 46(3).

5 2000 Act s 46(4).

6 2000 Act s 44(1), (2).

7 2000 Act s 45(1)(b).

8 2000 Act s 47(1).

9 Code A paras 1.2, 1.3, 2.19-2.23. The PACE codes are available at <http://www.homeoffice.gov.uk/police/powers/pace-codes/>.

10 As the European Court noted in *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45 at para 34, the purportedly exceptional stop-and-search powers have become a permanent feature of the policing of the London area given that the authorisations have been made on a continuous “rolling” basis since ss 44-47 of the 2000 Act came into force on 19 Feb 2001.

production of her press pass. The entire ordeal lasted no longer than 30 minutes. Seven years after these brief and relatively modest intrusions into the daily lives of these individuals, and after a unanimous dismissal of their claim at three instances in the UK—before the Divisional Court,¹¹ the Court of Appeal¹² and the House of Lords¹³—the European Court of Human Rights, in *Gillan and Quinton v United Kingdom*,¹⁴ declared the powers according to which they were exercised to constitute a violation of the European Convention on Human Rights.

B. THE DECISION

The European Court, having extensively reviewed the legislation and judgments prior to the hearing as well as considering Lord Carlile's mounting exasperation with the exercise of the powers in practice in his annual reports,¹⁵ first considered the question of whether the powers could be considered to be a deprivation of liberty under article 5 of the ECHR, something which was dismissed by the Lords on the grounds of the brevity of the search and that fact that it took place *in situ*.¹⁶ The question of what precisely constitutes a deprivation of liberty, as opposed to a restriction on the freedom of movement or a restriction of liberty, is a complex one, exacerbated by the fact that its determination tends to be very case-sensitive. The Court took an expansive view of article 5's application. Relying, somewhat surprisingly, on an earlier case where the facts were arguably radically different,¹⁷ the Court found that the element of compulsion implicit in the stop-and-search powers was central to the question of whether a deprivation had occurred, and entertained the possibility that powers under sections 44 and 45 of the 2000 Act *could* engage Article 5.¹⁸ However, it found that it did not have to settle that question definitively in the light of its findings of a violation of article 8, the right to privacy.

On the question of whether the applicants' right to privacy had been infringed, the Court resolved the ambiguity which influenced the Lords' determination of the issue by finding that a search of the type envisaged by the Act and procured by coercive powers was, notwithstanding its brevity, a *prima facie* violation of the right to privacy which required justification.¹⁹ The Court was unconvinced by the Lords' analogy

11 *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2003] EWHC 2545 (Admin).

12 *R (on the application of Gillan) v Commissioner of Police for the Metropolis* [2004] EWCA Civ 1067, [2005] QB 388.

13 *R (Gillan and another) v Commissioner of Police for the Metropolis* [2006] UKHL 12, [2006] 2 AC 307. Not one judge dissented in any of the domestic decisions.

14 *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45.

15 See *Gillan and Quinton* at para 43. Lord Carlile was appointed as an independent reviewer to monitor the exercise of powers under the 2009 Act: para 72.

16 See in particular, Lord Bingham of Cornhill for the majority: *Gillan* [2006] UKHL 12 at paras 25, 28.

17 App No 28940/95 *Foka v Turkey* 24 Jun 2008. The circumstances of this case involved the apprehension and detention in police custody of a Greek Cypriot by the Turkish Cypriot authorities at a border crossing on the island and included allegations of mistreatment and police brutality.

18 *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45 at para 57.

19 Paras 61 and 63.

with searches at airports and upon entering buildings, highlighting the consensual element of the latter and the fact that, under the 2000 Act, “[t]he individual can be stopped anywhere and at any time, without notice and without any choice as to whether or not to submit to a search”.²⁰ In the Court’s view, the restrictions on privacy implicit in the statutory powers could not be justified as being “in accordance with the law” as required by article 8(2). The stop-and-search regime contained inadequate safeguards against the arbitrary exercise of the powers. Two aspects in particular concerned the Court. First, the ground of “expediency in the fight against terrorism” was insufficient justification for the creation of these draconian powers as “expediency” was not of the same magnitude as “necessity” and thus a decision to create the powers lacked any consideration of the proportionality of the authorisation.²¹ Secondly, and crucially, there were inadequate legal safeguards against abuse of the powers by individual officers, something which was mainly attributable to the absence of a reasonable suspicion requirement.²² Thus, the Court concluded, the provisions violated article 8(2) as not being “in accordance with the law”.

C. ANALYSIS

The central issue was the interpretation of the requirements of the rule of law with respect to the restriction of rights under the Convention. The ECHR permits restrictions on several of the rights protected on grounds of public policy provided such measures satisfy the requirements of legality and proportionality,²³ the failure to satisfy the former being the cause of the violation in *Gillan*. The Court has, over the years, developed the conditions of legality under the Convention based on the ideal of non-arbitrariness in the exercise of public powers.²⁴ What is clear from *Gillan* is that the legality requirement contains both a formal and a substantive aspect. The formal aspect, which was widely considered by the Lords, requires that the rights-restricting measure be framed in terms which are sufficiently clear and precise to “enable the citizen to regulate his conduct... to foresee, to a degree that is reasonable in the circumstances, the consequences which a give action may entail”,²⁵ a classic formal conception of the rule of law.²⁶ Thus, to ensure certainty in the conduct of public authorities, where domestic law confers discretion on the executive, it must “indicate the scope of any such discretion... and the manner of its exercise with sufficient clarity”.²⁷

However, in *Gillan* the Court made clear that the requirements of legality under the Convention also entailed a substantive element, relating to the *effective* fettering of public power. In this regard, even precise and clear measures which regulate

20 Para 64.

21 Para 80.

22 This is clearly stipulated in s 45(1)(b) of the 2000 Act.

23 See articles 2 and 5-11 of the ECHR.

24 *Malone v United Kingdom* (1985) 7 EHRR 14 at para 67.

25 *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para 49.

26 See B Tamanaha, *On the Rule of Law: History, Politics, Theory* (2005) ch 7.

27 *Malone* at para 68.

executive discretion will not satisfy the requirements of legality where such discretion is not sufficiently limited in practice.²⁸ With regard to the stop-and-search powers under the 2000 Act, it was the absence of a need for reasonable suspicion on the part of the police officer that a driver or pedestrian was harbouring prohibited articles which failed the substantive legality requirement.²⁹

The requirement that an officer have a reasonable suspicion that an offence is being committed is an important safeguard in police powers of arrest. As Lord Diplock noted in the English case of *Mohammed-Holgate v Duke*, it reflects a compromise between the rival public goods of individual liberty and the effective investigation and prosecution of crime.³⁰ Its importance in providing a substantive curb on police discretion was highlighted in a leading decision on arrest, *O'Hara v Chief Constable of the RUC*.³¹ In this case, Lord Steyn emphasised the role of the reasonable-suspicion requirement in holding individual officers to account by requiring a justification of the exercise of their powers in any individual case—an important fetter of police discretion which resonates beyond the law of arrest. Thus:³²

[T]he arrest can only be justified if the constable arresting the alleged suspect has reasonable grounds to suspect him to be guilty of an arrestable offence. The arresting officer is held accountable. That is the compromise between the values of individual liberty and public order.

Justification and accountability are important substantive safeguards against arbitrariness because they require both that an officer actually entertained a suspicion and also that such a suspicion can be objectively justified.³³ The former ensures that powers are exercised for the purpose for which they were created and not any other, whereas the latter upholds the accountability of individual officers by ensuring an *ex post* review of their actions on objectively justifiable grounds.

Even though these cases relate to police powers of arrest, the principle of non-arbitrariness applies to police powers generally. Notwithstanding that the stop-and-search powers in the 2000 Act contain limitations, such as that the search must be effected with the exclusive purpose of ascertaining whether an individual is carrying prohibited items,³⁴ and the Code A Guidance in England and Wales, what the House of Lords failed to appreciate was that, in the absence of any accountability mechanism such as the reasonable-suspicion requirement, such safeguards are completely ineffective. The effect of the provision is that every single search undertaken by an officer in an authorised area, whether actually taken for the purposes of

28 *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45 at para 87.

29 Para 83.

30 [1984] AC 437.

31 *O'Hara v Chief Constable of the RUC* [1997] AC 286. This decision was challenged, unsuccessfully, before the European Court: *O'Hara v United Kingdom* (2002) 24 EHRR 812.

32 *O'Hara* at 291 per Lord Steyn.

33 *O'Hara* at 298 per Lord Hope of Craighead.

34 Terrorism Act 2000 s 45(1)(a). These requirements are elaborated in para 3.8 of PACE Code A. Lord Bingham enumerated eleven safeguards in the stop-and-search regime which, the Appellate Committee concluded, were a sufficient curb on the powers: *Gillan* [2006] UKHL 12 at para 14.

section 45(1)(a) or not, is *ipso facto* lawful given that the decision as to whether a search should be effected and for the correct purpose is completely subjective, the officer both making the decision to search and reviewing it in his or her own mind. This, as the European Court noted, leaves an unacceptably high level of discretion to individual officers which offends the substantive requirements of the rule of law.

The Lords, in this case, showed an alarming willingness to uphold the legality of the stop-and-search measures at all costs. Although the requirements of legality under the Convention were clearly articulated by the House in both formal and substantive terms, they were not followed through to their logical conclusion. Moreover, the Lords endorsed the sacrifice of human rights at the altar of security by emphasising the difficulties the police face in fighting terrorism, thereby skewing the delicate balance between liberty and security, carefully calibrated over the years through the reasonable-suspicion requirement, in favour of enhanced police discretion.³⁵ Moreover, the Lords' confidence in the ability of individual officers to exercise their powers flawlessly presupposes a police force packed with the policing equivalent of Dworkin's mythical judge Hercules.³⁶ Even accepting the competence and commitment of the security forces, one must also accept that they are only human that they may, at times, act out of boredom, stupidity or even more sinister motives including bigotry and racism,³⁷ which could not be controlled or scrutinised under the 2000 Act's stop-and-search regime.

This judicial deference in terrorism issues is becoming something of a habit since the high water mark of judicial independence in *Belmarsh*³⁸ and must be reversed if one of the central objectives of the Human Rights Act, the resolution of human rights infringements "at home" rather than in Strasbourg,³⁹ is to be achieved: something which clearly failed in the *Gillan* case. Otherwise, Ewing's thesis of the futility of the Human Rights Act seems an increasingly attractive proposition.⁴⁰

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35 For example, Lord Bingham found that the lack of reasonable-suspicion requirements was "to ensure that a constable is not deterred from stopping and searching a person whom he does suspect as a potential terrorist by the fear that he could not show reasonable grounds for this suspicion", regardless, it seems, of how civil liberties or individual rights are affected (para 35). Perhaps more worryingly, having summarised the serious problems with the lack of any objective criteria to justify the exercise of the powers as argued by Rabinder Singh for the applicants, Lord Brown (at para 76) explicitly acknowledged and endorsed the arbitrary nature of the powers by highlighting the deterrent effect the random deployment of the powers would have on potential terrorists.

36 Dworkin's device of the "ideal type" judge, Hercules, to illustrate his theory of law as integrity is well-known. Hercules is an "imaginary judge of superhuman intellectual power and patience": R Dworkin, *Law's Empire* (1986) 239.

37 The issue of the potential for the abuse of these powers against ethnic minorities, particularly of Asian extraction, was broadly considered by Lord Brown. However, he concluded that the question of discrimination was not relevant to the circumstances: *Gillan* [2006] UKHL 12 at para 92.

38 *A and others v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68. See K D Ewing and J-C Tham, "The continuing futility of the Human Rights Act" [2008] PL 668.

39 *Rights Brought Home: The Human Rights Bill* (Cm 3782: 1997) para 1.14.

40 K D Ewing, "The futility of the Human Rights Act" [2004] PL 829; Ewing & Tham (n 38).

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Disclosure Appeals: *McInnes v HM Advocate*

The Supreme Court's decision in *McInnes v HM Advocate*¹ settles an issue which has been troubling Scots law since the ground-breaking decisions in the conjoined cases of *Holland* and *Sinclair*,² namely, what is the appropriate test to be used in disclosure appeals? Put simply, where the Crown has been in breach of its duty to disclose all material information to the defence prior to trial, what yardstick should the appeal court use in determining whether to grant the appeal? Additionally, the decision in *McInnes* represents explicit recognition by the Supreme Court that Scots criminal law and practice is a matter for the High Court of Justiciary and that the Supreme Court's role is restricted to determining devolution issues.

A. BACKGROUND – TWO POSSIBLE TESTS

I have discussed elsewhere two potential tests identified by the courts in disclosure appeals.³ One involves granting the appeal unless the Crown can demonstrate that the undisclosed information could not possibly have led the jury to reach a different verdict. This was broadly speaking the approach favoured by the Judicial Committee of the Privy Council in *Holland* and *Sinclair*. In *Holland*, Lord Rodger cited *Hogg v Clark* (where a sheriff had wrongly excluded evidence) and granted the appeal because “the possibility” that the undisclosed information might have affected the jury's verdict “cannot be excluded”.⁴ Similarly, in *Sinclair*, Lord Hope (in upholding the appeal) observed that it was “impossible . . . to say that the appellant's defence was not prejudiced” by the Crown's breach of its duty of disclosure.⁵ The implication of these *dicta* was that the threshold for a disclosure appeal to succeed was fairly low. Once the appellant had shown that material information had not been disclosed to the defence prior to trial, the onus was on the Crown to demonstrate that the undisclosed information could not possibly have led to the jury coming to a different verdict.⁶ This appeared to be the approach adopted by the appeal court in *Gair v HM Advocate*.⁷

In contrast, the other possible test involves granting the appeal only if it can be shown by the appellant that there was a reasonable possibility that the undisclosed

1 [2010] UKSC 7, 2010 SLT 266.

2 *Holland v HM Advocate* [2005] UKPC D1, 2005 SC (PC) 3; *Sinclair v HM Advocate* [2005] UKPC D2, 2005 SC (PC) 28.

3 P Duff, “Disclosure appeals: a plea for principle”, in J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010) 264.

4 Para 82, citing *Hogg v Clark* 1959 JC 7.

5 Para 35.

6 See Gerald Gordon's commentary on *Holland* at 2005 SCCR 444.

7 2006 SCCR 419 at paras 38-39 per Lord Abernethy.

information might have led to a different verdict. Broadly speaking, this is the approach adopted by the appeal court in fresh evidence cases, often referred to as the “Cameron test”,⁸ approved and restated in *Al Megrahi v HM Advocate*.⁹ There is an obvious parallel between fresh evidence and disclosure appeals because in both instances, the appeal court is considering the possible impact upon the verdict of evidence that was not heard by the jury. On the other hand, there is a difference because it is the Crown’s fault that undisclosed information was not available whereas no blame attaches to the Crown in a fresh evidence case. Thus, it might be argued that it is justifiable to adopt a lower threshold for success in disclosure appeals.¹⁰ In any event, the fresh evidence test clearly puts the onus on the appellant to demonstrate that the undisclosed information would have been likely to have made a difference to the jury’s verdict. The appeal court favoured this more robust test in *Kelly v HM Advocate*,¹¹ *Coubrough v HM Advocate* (a fresh evidence appeal where the court suggested that the Privy Council set the bar too low in *Holland* and *Sinclair*),¹² and *Fraser v HM Advocate*.¹³

Thus, when the appeal court came to determine *McInnes*¹⁴ there was clearly some confusion over the test to be applied in disclosure appeals: the lower threshold of *Hogg v Clark* or the higher threshold of *Cameron*. The appellant argued, not surprisingly, that the test was whether disclosure “could have made a difference” to the outcome rather than “would have made a difference” (my emphasis), citing *inter alia* *Hogg v Clark* and Lord Rodger’s comments in *Holland*. The Crown disagreed, claiming that this formula would mean that the “slightest” matter would lead to the quashing of the verdict, and argued that the correct test was that used in *Kelly*, also citing *Fraser* and *dicta* from *Sinclair*.¹⁵ Lord Justice General Hamilton, in giving the court’s opinion, observed that it was not “straightforward or easy” to determine whether undisclosed information might have affected the verdict but emphasised that the court should not “in effect avoid this task” by adopting the *Hogg v Clark* test.¹⁶ He further noted that it was not clear that the appropriate criterion had been a matter for argument in *Holland* and *Sinclair* and went on to observe that Lord Rodger’s comments had been “used (or abused)” in Scotland to suggest that “the threshold for reversing the verdict of a jury” in disclosure cases was “low”. In Lord Hamilton’s view, a “robust test” was required and that was provided by requiring “a real risk of prejudice to the defence” the test applied in *Kelly*. In the circumstances of the case, there had been no such prejudice and, thus, the appeal was refused but the appellant was granted leave to appeal to the Judicial Committee.

8 *Cameron v HM Advocate* 1991 JC 251.

9 2002 JC 99. See also *Fraser v HM Advocate* 2008 SCCR 407 at paras 204-206 per Lord Osborne.

10 Gerald Gordon’s commentary on *Fraser* at 2008 SCCR 468. See Duff (n 3) and F Stark, “Moral legitimacy and disclosure appeals” (2010) 14 EdinLR 205 for expansion of this “moral legitimacy” argument.

11 2006 SCCR 9 at paras 30-33 per Lady Cosgrove.

12 2008 SCCR 317 at paras 93-96 per Lord Osborne.

13 *Fraser* at paras 191-195 per the Lord Justice Clerk (Gill) and paras 219-224 per Lord Osborne.

14 *McInnes v HM Advocate* [2008] HCJAC 53, 2008 SLT 941.

15 Paras 15-16.

16 Para 20.

B. *McINNES* – DETERMINING THE APPROPRIATE TEST

In the leading judgment in the Supreme Court (which had assumed the Judicial Committee's jurisdiction in respect of devolution issues by the time the appeal was heard),¹⁷ Lord Hope stated that the question for the court was “the correct test . . . for the determination of the appeal”.¹⁸ He observed that Lord Rodger's comments in *Holland* had sometimes been interpreted to mean that “it is for the Crown to show that non-disclosure could not possibly have affected the jury's verdict” and that this would set a “relatively low threshold”.¹⁹ Lord Hope then spared Lord Rodger's blushes by claiming that the latter's observations in *Holland* did not relate to the overall fairness of the trial (despite them appearing in a section headed “Did the appellant have a fair trial in terms of Article 6(1)?”)²⁰ and reinterpreted them as being addressed to the prior question of the materiality of the undisclosed information.²¹ Thus, Lord Hope was able to “endorse” Lord Hamilton's comments to the effect that it would be a “misreading” of Lord Rodger's words to conclude that the “threshold” for a successful appeal in a non-disclosure case is “low”.²² Lord Hope went on to observe that Lord Hamilton had said that a “robust test” was required, namely “whether there was a real risk of prejudice to the defence”.²³ In his view, this criterion needed to be expressed more precisely and his formulation was that the appeal should be granted if, having taken account of all the circumstances of the trial, “there was a real possibility of a different outcome – if the jury might reasonably have come to a different view on the issue to which it directed its verdict if the withheld evidence had been disclosed to the defence”.²⁴ While Lord Hamilton's description was “incomplete”, it was clear that the appeal court had applied the correct test in the earlier hearing and thus the appeal was dismissed.

Lord Rodger stated that in a disclosure appeal an appellate court will always have to assess how the Crown's failure “actually affected the trial”.²⁵ He went on to observe that it is easy for an appellant to claim that if his counsel had been armed with the undisclosed information, “it is *possible* that he could have persuaded the jury to come to a different conclusion. But the law deals in real, not in merely fanciful, possibilities”.²⁶ Consequently, Lord Rodger agreed with Lord Hope, and Lord Hamilton, that in disclosure appeals, an appellate court should quash the conviction only where there is a “real possibility” that if disclosure had occurred “a jury might reasonably have come to a different verdict”. He did not allude to his

17 Constitutional Reform Act 2005 s 40 and Sch 9.

18 *McInnes* [2010] UKSC 7 at para 18.

19 Para 21.

20 *Holland* at para 77. The crucial comments and reference to *Hogg v Clark* appear in para 82.

21 *McInnes* at para 22. In fairness, it should be said that Lord Rodger did elide the two questions in the relevant section of his judgement in *Holland* at paras 77-86, and thus Lord Hope's rescue mission had some justification.

22 Para 23.

23 Para 24.

24 Para 24.

25 Para 30.

26 Para 30 (emphasis in original).

earlier observations in *Holland*. Lord Brown agreed, noting that this was the position in English law²⁷ and observing that there is a “critical difference” between asking whether disclosure might possibly have led the jury to acquit and whether that was a “real possibility”.²⁸ In his view, Lord Hamilton was correct in rejecting the former test as too low and preferring the latter, more “robust” approach.²⁹ Thus, it is now clear that in determining disclosure appeals, the *Hogg v Clark* test is inappropriate and that it must be demonstrated, necessarily by the appellant, that if the relevant information had been in the hands of the defence prior to trial, there was a real possibility that the appellant would not have been convicted.

C. *McINNES* – THE CONSTITUTIONAL PROVISION

One further interesting feature of *McInnes* is Lord Hope’s comments about the respective functions of the High Court and the Supreme Court. An analysis of the disclosure cases following *Holland* and *Sinclair* reveals some resentment on the part of the appeal court over the Judicial Committee’s intrusion into Scots criminal law and practice.³⁰ Lord Hope was at pains to defuse this issue, observing that the Supreme Court “must be careful to bear in mind that the High Court of Justiciary is the court of last resort in all criminal matters in Scotland”.³¹ Thus, he emphasised that the Supreme Court should not comment on the test used in fresh evidence appeals, because these do not involve a devolution issue, and, where the matter is one of disclosure, the role of the Supreme Court is, in essence, restricted to determining whether the accused’s right to a fair trial under article 6 ECHR has been violated. Put another way, as long as the test used by the High Court does not violate the accused’s human rights, it is for the High Court, and not the Supreme Court, to determine the test. Just because the lower threshold of *Hogg v Clark* would also secure a fair trial does not mean to say that the appeal court is not free to adopt a more robust approach, as long as that does not violate the accused’s right to a fair trial.³²

D. CONCLUSION

It is now clear that the test in non-disclosure appeals is whether there is a “real possibility” that the outcome of the trial might have been different if the defence had been supplied with the information prior to trial. The onus is on the appellant to satisfy this test. The lower threshold of *Hogg v Clark* has been emphatically rejected, bringing to an end the confusion of the last few years over the appropriate criterion for determining disclosure appeals. It remains to be seen, however, whether the test

²⁷ Para 36.

²⁸ Para 38.

²⁹ The other two (English) judges simply concurred.

³⁰ See Duff (n 3).

³¹ *McInnes* at para 5.

³² The word “trial” is construed broadly in the European jurisprudence to cover the entire criminal proceedings. Thus a breach of the accused’s rights at trial, narrowly construed, may be remedied through the appellate proceedings.

in fresh evidence and non-disclosure appeals is precisely the same or whether subtle differences in approach will yet emerge.

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Nothing Special About That? *Martin v HM Advocate* in the Supreme Court

In *Martin v HM Advocate*¹ the ground of appeal against a prison sentence for driving while disqualified was that an increase in the sentencing power of the summary sheriff by section 45 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 (the “2007 Act”) was beyond the legislative competence of the Scottish Parliament. By a majority of three to two, the Supreme Court rejected this contention. While good news for the Scottish Parliament, this decision is bad news – and a very great disappointment – for more distant bystanders. Difficult issues which would have benefited from judicial illumination have become immersed in a judicial cloud of confusion.

A. THE ISSUES AND THE DECISION

Section 45 of the 2007 Act sought to raise the maximum term of imprisonment, for offences capable of being tried either summarily or on indictment, from any shorter prescribed term up to 12 months. This provision was intended to apply generally and without regard to whether the offence affected a “reserved matter” under the devolution settlement.² One enactment purportedly amended by the 2007 Act was the Road Traffic Offenders Act 1988 (the “1988 Act”), which provided³ that the offence of driving while disqualified⁴ was punishable by up to six months’ imprisonment on summary prosecution or 12 months on indictment. As the Road Traffic Acts are a reserved matter,⁵ there is clearly a question about whether this provision was within the Parliament’s legislative competence. The Supreme Court was in agreement that the answer to the question of competence lay in the interpretation of, first, section 29(3) of the Scotland Act 1998; secondly, section 29(4); and thirdly, paragraph 2(3) of Schedule 4 to the Act. There was almost total agreement in the

1 *Martin v HM Advocate; Miller v HM Advocate* [2010] UKSC 10, 2010 SLT 412.

2 Scotland Act 1998 Sch 5.

3 In s 33 and Part I of Sch 2.

4 Under s 103(1)(b) of the Road Traffic Act 1988.

5 Scotland Act 1998 Sch 5 Part II S E1.

Supreme Court as to the answers to the first two points but the Court divided sharply on the answer to the third.

Section 28(1) of the Scotland Act states that “[s]ubject to section 29, the Parliament may make laws to be known as Acts of the Scottish Parliament”, and section 29(1) that “[a]n Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament”. Section 29(2)(b), (c) defines a provision as outside competence if, *inter alia*, “it relates to reserved matters”⁶ and “it is in breach of the restrictions in Schedule 4”. And here we reach the first issue and section 29(3) which states that “[f]or the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances”. All members of the Supreme Court were agreed that, judged by its purpose, section 45 of the 2007 Act did not relate to a reserved matter.⁷ Its purpose was to implement a reform proposed by the Summary Justice Review Committee which had reported in 2004.⁸ Reform of the summary justice system is not a reserved matter.

The second issue requires scrutiny of section 29(4) of the Scotland Act. This states that a provision which would otherwise not relate to reserved matters, but makes modifications of Scots private law, or Scots criminal law (defined as including procedure and penalties),⁹ as it applies to reserved matters, is to be treated as relating to reserved matters unless the purpose of the provision is to make the law in question apply consistently to reserved matters and otherwise. As explained by Lord Hope,¹⁰ this takes account of the fact that Scots private law and Scots criminal law are likely to be involved in the regulation of both devolved and reserved matters. Such is the case with section 45 of the 2007 Act. Judged under the terms of section 29(3), it does not *otherwise* relate to reserved matters.¹¹ On the other hand it does make modifications to Scots criminal law – the provisions of the 1988 Act – as it applies to reserved matters and would therefore be treated as relating to reserved matters. However, section 45 is saved once again by the purpose test of section 29(4) because, in the view of the Court, its purpose was indeed to apply consistently to reserved matters and otherwise.¹²

So far, so good. The application of subsections (3) and (4) of section 29 evinced a high degree of unity in the Court and, on the basis of those provisions alone, the competence of section 45 of the 2007 Act would have been upheld by all judges. The difficulties arose, however, in the application of Schedule 4. As applied by section 29(2)(c), that schedule imposes a second test of competence by reference, in the heading of the schedule, to “Enactments etc. Protected from Modification”.

6 Defined by s 30(1) and Sch 5.

7 See, in particular, Lord Hope at paras 25-31 and Lord Rodger at paras 113-119.

8 *The Summary Justice Review Committee: Report to Ministers* (2004, available at <http://www.scotland.gov.uk/Publications/2004/03/19042/34176>).

9 Scotland Act 1998 s 126(4).

10 Para 19.

11 But see Lord Rodger’s doubts about the relevance of subsection (4) at para 116.

12 See e.g. Lord Hope at paras 32-33, Lord Rodger at paras 117-118.

Thus, with certain exceptions, an Act of the Scottish Parliament cannot modify the Scotland Act itself¹³ or other named pieces of legislation.¹⁴ And then, paragraph 2(1) of the schedule proscribes the modification of “the law on reserved matters”. It might be thought, at first blush, that this is something that, in its own way, section 29(2), (3), (4) had already done. But no: the target of schedule 4 is different. Section 29(2)(b) renders incompetent a provision which relates to reserved matters, as defined by the purpose tests in subsections (3) and (4). Schedule 4, on the other hand, simply prevents the modification of the law on reserved matters. Clearly the two competence hurdles are somewhat related. What divided the Court was how far the principles according to which the section 29 tests are applied may or may not inform the interpretation of Schedule 4.

More must be said about Schedule 4 itself. First, paragraph 2(2) defines “the law on reserved matters” as any enactment the subject matter of which is a reserved matter or a non-statutory rule with the same subject matter. Secondly, paragraph 2(3) adjusts the initial proscription of modification. If the modification is of a rule of Scots criminal law (all members of the Court were indeed of the view that the relevant provisions of the 1998 Act were such rules) then the ban on modification applies “only to the extent that the rule in question is special to a reserved matter” or the subject matter of the rule is one of a specified list. Thirdly, paragraph 3 of Schedule 4 provides that the whole of the proscription in paragraph 2 does not apply to “modifications which (a) are incidental to, or consequential on, provision made . . . which does not relate to reserved matters, and (b) do not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision”. It was on the basis of this exception that the High Court, in reliance on *Logan v Harrower*,¹⁵ had upheld the competence of section 45 of the 2007 Act. However, only one member of the Supreme Court (Lord Brown)¹⁶ would have been prepared to defend section 45 on this ground. All others took the view that the modifications could not be regarded as merely incidental to or consequential on other provision made.

Thus, the Court’s decision turned instead on whether, in modifying, for Scotland, the effect of the 1988 Act, the Scottish Parliament should be regarded as modifying a rule which was *special* to a reserved matter. Lord Hope, joined by Lords Walker and Brown, considered the rules in the 1988 Act to be not special. Lord Rodger, with Lord Kerr, considered that the rule fixing the maximum sentence on summary conviction must indeed be special to the reserved matter of road transport and, therefore, that its purported amendment by an Act of the Scottish Parliament must inevitably be incompetent.

For Lord Hope, it was permissible, in the interpretation of Schedule 4, to derive assistance from the purpose tests of section 29. This led him to draw a distinction between the status of the two rules in the 1988 Act. The first imposed the overall maximum period of imprisonment, which must necessarily be regarded as special.

13 Sch 4 para 4.

14 Sch 4 para 1.

15 2008 SLT 1049.

16 Para 65.

But, he said, the second rule (fixing the maximum penalty to be imposed in summary procedure) was a rule about Scots criminal jurisdiction and procedure, which was not reserved. It was a rule which determined the procedure under which the maximum sentence might be imposed, not a rule as to the maximum overall sentence.¹⁷

For Lord Rodger, the purpose of a purported amendment to a rule could not be used to identify the rule itself as special or otherwise. For this reason, one could not distinguish between the rule in the 1988 Act defining the maximum punishment on indictment and the rule defining the maximum following summary prosecution. Both should be treated as special to the reserved matter. It could not be said that a maximum sentence rule was general simply because examples of it could be found in the devolved areas.¹⁸ “In my view”, he said, “a statutory rule of law is ‘special to a reserved matter’ if it has been specially, specifically, enacted to apply to the reserved matter in question – as opposed to being a general rule of Scots private or criminal law which applies to, inter alia, a reserved matter”.¹⁹

B. REFLECTIONS

Lord Rodger’s minority view did not, of course, prevail. Beyond that, the case leaves much unclear. Lord Rodger expressed himself vividly:²⁰

Until now, judges, lawyers and law students have had to try to work out what Parliament meant by a rule of Scots criminal law that is “special to a reserved matter”. That is, on any view, a difficult enough problem. Now, however, they must also try to work out what the Supreme Court means by these words. It is a new and intriguing mystery.

As to what “special to a reserved matter” meant prior to *Martin*, it is certainly true that the terms of Schedule 4 presented a difficulty for those who felt compelled to scrutinise them. They were confusing when they were first introduced as a cluster of amendments (including the adjusted terms of what is now section 29) at the House of Lords committee stage on the Scotland Bill. After Lord Sewel, as the junior Scottish Office minister, had explained the purpose of the amendments,²¹ Lord Mackie of Benshie intervened mischievously to hope that the minister understood his speech as well as those who wrote it.²² Lord Clyde declared that it was essential that the limitations on the powers of the Scottish Parliament were precisely and simply expressed,²³ but then encountered difficulties over the relationship between section 29 and Schedules 4 and 5.²⁴ Lord Mackay of Drumadoon also insisted on the need for simplicity and suggested that “members of the public, and indeed members of the Parliament, in the first few years will have regular recourse to the provisions of the Act to see what their legislative powers are. If they experience as much

¹⁷ Para 37.

¹⁸ Paras 133-134.

¹⁹ Para 139.

²⁰ Para 149.

²¹ HL Deb 21 Jul 1998, cols 818-822.

²² Col 822.

²³ Col 822.

²⁴ Cols 822-825.

difficulty in understanding the provisions... as the noble and learned Lord, Lord Clyde, also seems to do, it can be anticipated that problems may lie ahead".²⁵ Lord Hope intervened in the debate only briefly to support the points made by Lords Clyde and Mackay.²⁶

As things have turned out, of course, there has been little of the debate about the definition of competences, in public at least, that was anticipated.²⁷ Now, following *Martin*, there is, as Lord Rodger says, continuing confusion. There was a failure by the two factions on the Court in this trailblazing case adequately to engage on the issues which divided them. In the judgments of those in the majority there is express acknowledgement that, on the crucial question, Lord Rodger will disagree with them.²⁸ But despite that anticipated disagreement, there is no adequate response to the question of how the *purpose* of a particular amendment can be relevant to defining the special character of a rule itself. There is no explanation of why the rule defining the maximum penalty after summary trial is less special than the maximum penalty on indictment. And how far could such the distinction be carried? The 2007 Act was held to be *intra vires* in doubling the summary maximum from six months to the maximum on indictment of 12 months. But would the same freedom have been available to multiply, by many times more, the summary maxima under the Misuse of Drugs Act 1971 in the direction of life imprisonment, also the maximum on indictment? We do need – and the Supreme Court will need in future – *much* clearer guidance on what defines a special rule within the area of maximum sentences, as well as guidance on the criteria of “specialness” more broadly.

It is evident that the conditions for measured engagement with the issues were simply not present in *Martin*. Lord Rodger pulled no punches. In his references to the mere “assertions” and “unstated reasons” offered by Lord Hope, his tone is scathing.²⁹ Of Lord Walker’s argument, he writes of “eagerly waiting” for the conclusion. “But”, he says, “you wait in vain”.³⁰ He writes of Lord Brown’s having bowed politely in the general direction of the argument but then resting his conclusion on “simple assertion”.³¹

If the reasoning in *Martin* is dominated by Lord Rodger’s unfraternal observations, other comments may also be made. They relate to the general style of approach to be taken by our top court when it confronts constitutional questions in the form of legislative competence issues.³² Four questions may be briefly posed:

- (1) Do the “normal” principles of statutory construction – such as the principle that penal statutes should be construed strictly against the Crown – apply?

²⁵ Col 826.

²⁶ Col 827.

²⁷ As noted by Lord Hope in *Martin* at para 4.

²⁸ See e.g. paras 39, 42, 51-60 and 65.

²⁹ Paras 144 and 146.

³⁰ Para 147.

³¹ Para 148.

³² These were earlier reflected in cases such as *Whaley v Watson* 2000 SC 125, *Adams v Scottish Ministers* 2004 SC 665, and *AXA General Insurance Ltd Pts* 2010 SLT 179. For discussion, see C M G Himsworth and C M O’Neill, *Scotland’s Constitution*, 2nd edn (2009) 402-409.

- (2) Rather differently, is there room, in the interpretation of the powers of a Parliament, for a starting generosity of approach to those powers?³³
- (3) What should be made of the injunction – derived from the jurisprudence of the Judicial Committee of the Privy Council in cases on the British North America Act 1867,³⁴ its deployment by the House of Lords in *Gallagher v Lynn*,³⁵ and the explicit reference to it in the speech of Lord Sewel in the House of Lords already mentioned³⁶ – to take account of the “pith and substance” of the legislative measure under review? Lord Hope pays a degree of respect to the idea in *Martin*,³⁷ before doubting its relevance.³⁸ Lord Walker is much more sceptical.³⁹ Despite the constitutional pedigree of “pith and substance”, it does seem preferable, in the interpretation of the Scotland Act, to start instead from that Act’s own architecture and terms.
- (4) How far is it relevant to the assessment of the competence of an Act of the Scottish Parliament to take account of the decision-making process which may have taken place within and between the Scottish and UK governments, and the availability of alternative lawmaking procedures if those governments had doubts on the question of legislative competence? These are issues on which Lord Rodger, perhaps surprisingly, expands at some length.⁴⁰

The account of interdepartmental relationships given by Lord Rodger raises certain questions. We must assume, given his governmental experience, that he reports accurately on interdepartmental negotiations prior to devolution, but those relationships have surely altered since 1999. Most importantly, we may also wonder about how the process of negotiation – the “hammering out”⁴¹ between departments – is relevant to the question of whether section 45 of the 2007 Act is or is not competent. No real explanation is offered: it might even be said that we waited in vain for the answer.

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33 There is a passing reference by Lord Hope to this point at para 38 but it is not discussed further.

34 See e.g. *Russell v The Queen* (1881-82) LR 7 App Cas 829.

35 [1937] AC 863.

36 HL Deb 21 Jul 1998, col 819.

37 Paras 11-14.

38 Para 15.

39 Para 44-45.

40 Paras 68-93. Space precludes further discussion here, save to note that Lord Rodger expressed enthusiasm for orders under s 104 of the Scotland Act 1998, whereby the Scottish Parliament may legislate on the devolved side of the line and then an order may be made by the UK government to supplement that provision in the reserved areas. In respect of the 2007 Act, a section 104 order was made to expand the powers of the District and JP Courts, which does tend to suggest that it must have been the view of both governments that section 45, on the other hand, was within the competence of the Scottish Parliament.

41 Para 85.

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Assistance in Dying or Euthanasia? Comments on the End of Life Assistance (Scotland) Bill

Attempts to introduce legislation to facilitate the termination of human life are not new in the United Kingdom.¹ None has succeeded and the chances of a new Bill faring better would seem to be slim – that is, unless it has something different to offer. Margo MacDonald’s recent submission to the Scottish Parliament in the form of the End of Life Assistance (Scotland) Bill – an “Act . . . to permit assistance to be given to persons who wish their lives to be ended”² – certainly satisfies this requirement both as to its wide concepts and administrative detail. The purpose of this note is to draw attention to these innovations and to consider whether they are likely to promote or further obstruct the Bill’s passage to the statute books. We are not here concerned with the broader question of whether such an Act is necessary or desirable.

A. THE CONCEPTUAL LEVEL

Perhaps the main surprise – indeed, the “sink or swim” condition – of the Bill lies in its first line³ where, subject to the necessary provisions of the remainder of the Bill, section 1(1)(a) absolves “a person” who provides assistance in ending the life of another from committing a criminal offence or delict. The Benelux countries apart, no Western jurisdiction has legislated to permit any legal acceleration of death beyond the concept of physician-assisted suicide (PAS), nor has any such extension been mooted in any of the previous United Kingdom proposals. It is generally agreed that the opposition to legalising any form of hastening death has centred on the risks to those most vulnerable to its improper use. Impropriety has been, hopefully, controlled by conferring immunity from prosecution – albeit strictly limited – on the medical profession alone. The Scottish Bill is unique in that it would confer this privilege broadly, on “a person”, and we discuss the implications of this below.

Margo MacDonald’s Bill appears, in general, to be somewhat ambivalent as to the role of the medical profession. On the one hand, the integral involvement of

1 Such as Lord Joffe’s Assisted Dying for the Terminally Ill Bill 2003 and, in Scotland, Jeremy Purvis’ abortive draft Right To Die for the Terminally Ill Bill 2005.

2 From the preamble to the Bill. The Bill was introduced to the Scottish Parliament on 20 January 2010. For the text and for details of the Bill’s legislative progress, see <http://www.scottish.parliament.uk/s3/bills/38-EndLifeAssist/index.htm>.

3 Ignoring the anomaly in the title itself – “end of life assistance” is a fair definition of palliative care, the direct opposite of the Bill’s purpose.

the doctor is retained in section 2, which stipulates the essential prerequisites to the proposed lawful assistance in dying as being two formal requests for assistance separated by not less than 15 and not more than 30 days.⁴ These requests must be addressed to, and approved by, a registered medical practitioner who must be satisfied that the requirements as to eligibility for assistance (see below) are satisfied, that the request is being made voluntarily, that the requesting person is not subject to any undue influence and that a psychiatrist has provided a positive report in respect, particularly, of the requesting person's mental capacity to make the relevant formal request.⁵ Beyond this, there is no further requirement laid on the designated practitioner other than to ensure that the eligibility criteria still apply – and that he or she is present – when the assistance in ending life is provided.⁶ We have become aware of considerable opposition amongst commentators to the restriction of the designated practitioner to membership of the medical profession. The post, it is argued, could be equally, or better, filled by any number of professionals, and medicalisation of what is essentially a social matter is to be deprecated. The alternative view, which we support, is that the failure to lay down the limits as to who is empowered to end a person's life – or, indeed to define the methods used – is at best a dangerous precedent that should not be accepted.

Which brings us, quite naturally, to the third major conceptual innovation in the Bill which, at section 1(2), defines end of life assistance as including “the provision *or administration* of appropriate means, to enable a person to die with dignity...”. Thus, at one fell swoop, it places assisted suicide on a par with outsider-accomplished suicide, the latter being indistinguishable from what is commonly known as active voluntary euthanasia. The avowed intent of all previous United Kingdom proposals has been to limit legalised assistance in ending life prematurely to physician-assisted suicide.⁷ We find it hard to believe that the Scottish public would accept this extension⁸ and suggest that section 1(2) constitutes a fatal flaw in the Bill which would have to be corrected in any resulting statute.

The major difficulty, however, lies in the humane management of sufferers from progressive neuromuscular disease of the types recently highlighted by the cases of Mrs Pretty and Ms Purdy.⁹ The common factor that distinguishes such cases in the present context is that the patient will ultimately be unable to commit suicide at a time when he or she feels the greatest need. Common sense says that some form of disability discrimination is involved if such persons are denied active assistance in choosing their moment of death and this, we assume, is the mischief that section 1(2)

4 End of Life Assistance (Scotland) Bill ss 6, 8.

5 Bill s 9.

6 Bill s 11.

7 For commentary on European jurisdictions, see the various articles published in vol 12(1) of the *European Journal of Health Law* (2005).

8 The most thorough, albeit slightly dated, attempt to assess Scottish attitudes to assisted dying appears to support this view: see S A M McLean and A Britton, *Sometimes a Small Victory* (1996).

9 For a brief analysis of the two cases, see J K Mason, “Unalike as two peas: *R (on the application of Purdy) v DPP*” (2009) 13 *EdinLR* 298. The ongoing “locked-in syndrome” case of Mr Nicklinson in England (see e.g. *The Times* 20 July 2010) extends the problem from assisted suicide to voluntary euthanasia.

is designed to redress. However, if we are to avoid what seems to be the very evident possibility of legitimising “mercy killing”, this should be spelled out specifically. We propose the following definition:¹⁰

In this Act, end of life assistance includes –

- (a) the provision of appropriate means; or
- (b) in the event of the requesting person being physically unable to utilise such means, the administration of appropriate means

to enable a person to die with dignity and a minimum of distress.

Paragraph (b) would, in effect, would kill two birds with one stone. It would close the door to assisted suicide by way of mercy killing and, at the same time, open the door to a category of persons who are in special need.

In summary, the Bill appears to us to strike a “double whammy” at currently informed medical jurisprudence in that it not only stands to eliminate the physician from the actual ending of life but it also admits frank euthanasia as a lawful activity. Indeed, we would suggest that, in referring to “a person” as the final operative, section 11(4) actually promotes the possibility of a trade of euthanasist – although, insofar as it would free the medical profession of a duty that was contrary to their ethical principles, this might be no bad thing and perhaps even welcomed by doctors.¹¹

B. ADMINISTRATIVE ASPECTS OF THE BILL

Having dealt with the culture shocks inherent in the Bill, we turn to consider those aspects which define how these should be delivered. Our selective choice is determined by the imperative that any consequent Act must protect the interests of those most vulnerable to radically new statutory powers over death and the dying.

(1) Eligibility for assistance

Who might avail themselves of assistance under a new law? The question of determining mental competence aside, the Bill provides that “a person may make a formal request if . . . the person is 16 years of age or over . . .”.¹² Such an attempt to draw a clear bright line in terms of age is problematic in a number of respects. Scots law has a tradition of protecting children up to and beyond the age of 16 from decisions that are manifestly against their interests, for example in respect of contracts and medical treatment. On this basis, we suggest that there are strong reasons to argue that the Bill should only apply to those aged 18 and over.¹³ If, however, we were

¹⁰ Although for convenience we give the full text of s 1(2), as altered by our suggested amendment, we should not be taken to endorse the use of the expression “die with dignity”. In our view the expression is ambiguous and should be avoided. It has, however, come into use as a popular catchphrase that is open to wide interpretation.

¹¹ See the trend apparent in McLean and Britton, *Sometimes a Small Victory* (n 8).

¹² Bill s 4(1)(a).

¹³ When adulthood is attained: Age of Majority (Scotland) Act 1969 s 1(1).

to deviate from this threshold then it would be more consistent to reflect the concept of *understanding* as in the Age of Legal Capacity (Scotland) Act 1991.¹⁴ Moreover, if this recommendation were followed, it might be prudent also to incorporate a protective *minimum* age, perhaps 14.

(2) Qualifying criteria

The Bill provides that a requesting person can only seek assistance if he or she “(a) has been diagnosed as terminally ill and finds life intolerable; or (b) is permanently physically incapacitated to such an extent as not to be able to live independently and finds life intolerable”.¹⁵ Section 4(4) defines “terminal” as a case in which death can reasonably be expected within six months. On this, we suggest that “unbearable suffering” should replace “intolerability” on the grounds that something that is intolerable cannot, by definition, be tolerated whereas “unbearable suffering” more accurately reflects the subjective experience of the patient.¹⁶ Second, we question the inclusion of a restricted six-month window of opportunity before death if the test is indeed to be intolerability. The real concern must be for those who are suffering over the longer term and who wish to end their pain or other measure of intolerability.¹⁷

(3) Limitations as to time

Under the Bill’s provisions, assistance in dying must be provided within 28 days from the notification of the approval of a second request. In the first instance, this period begins to run from the date of approval by the registered medical practitioner.¹⁸ The Bill is silent as to whether the practitioner must act with alacrity with respect to the requests themselves, and this raises questions over the validity of those requests as advance decisions, the force of which is diminished over time. A further issue relating to this 28-day time factor is the question of the need for a cooling-off period. A patient who changes his or her mind at the last minute must then begin the process all over again. Could not the law allow an extension of this period? Such a provision could help to avoid charges of coercion. Equally, returning to our earlier point, this period should not be too long lest it undermine the original decision. We propose that a provision for a one-off extension of 28 days, overseen by the designated practitioner and the psychiatrist, should be included.

14 1969 Act s 2(4) of that Act. At the same time, we wonder if it is *ever* possible to *understand* death.

15 Bill s 4(2).

16 The antipathy of the English appellate courts to the concept of “intolerability” is noteworthy: see e.g. *Portsmouth NHS Trust v Wyatt* [2005] 1 WLR 3995.

17 If the concern is to build in some form of protection mechanism to avoid abuse or expanded use of end of life assistance, then we would point to s 9(2) which requires that full discussions be undertaken about alternative options including palliative care.

18 Bill s 11(2).

(4) The personnel involved

We reiterate that we do not subscribe to the view that matters such as the selection of those eligible for assistance in dying should be demedicalised. Indeed, we believe that the Bill underestimates the importance of the medical input and does so, particularly, in failing to correlate responsibility with necessary experience. Thus, while section 2(2) dictates that the designated practitioner, who is, effectively, responsible for processing the request for assistance, shall be a registered medical practitioner, it goes no further in definition – it fails, for example, to distinguish the expertise of a newly qualified house officer from that of a consultant geriatrician. We suggest that, in view of the extensive requirements placed on the designated practitioner by sections 7, 8, 10 and 11(3), he or she should, at least, be required to be of five or more years' standing as to full registration and to hold a current licence to practise.¹⁹

(5) Disposal of the dead

Finally, we suggest that it would be helpful, if only for the avoidance of doubt, to insert a section which dictates that deaths under the Act should be routinely reported to the Procurator Fiscal. Such deaths are, by definition, unnatural. We are, however, more concerned to satisfy what must be a nagging doubt in the public mind – are there still grounds for fear that the Act might be misused? There can be few circumstances in which a check on a single doctor's certificate as to the cause of the patient's death was more urgently required than one in which the profession itself might well have been intimately associated with causing that death.

C. CONCLUSION

While, as originally stated, we are not concerned here with the fundamental needs for an Act of this type, we would, in any case, conclude that the Bill as it stands crosses so many untested bridges as to constitute what is, in effect, a leap into the unknown. Our ultimate position is, therefore, that, should popular opinion justify the enactment of the End of Life Assistance (Scotland) Bill, it should not do so without the inclusion of a section that dictates a full review of the operation and social effects of the Act, say, five years from its coming into force. The implications in the Bill are too great for it to go forward without some such assurance.

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¹⁹ Assuming that the provisions of Part IIIA of the Medical Act 1983, inserted by the Medical Act 1983 (Amendment) Order 2002, SI 2002/3135, are in force. We also believe that the psychiatrists involved should be specifically approved by the Scottish Ministers.