Northern Ireland Legal Quarterly

Volume 66 Number 4

EDITOR
PROFESSOR SALLY WHEELER

Queen's University Belfast
School of Law

Contents

NILQ 66(4): 297–319

A pension for injured victims of the Troubles: reparations or reifying victim hierarchy?

LUKE MOFFETT

*Queen's University Belfast**

Abstract

Reparations have been often-used victim-centred measures to redress both private harm and gross violations of human rights. However, with the increasing occurrence of internal armed conflict and political violence, identities of victims and perpetrators in protracted conflicts can become blurred for some individuals. In countries like Peru and Northern Ireland that have suffered protracted violence, victimhood has been contested around which individuals are seen as innocent and deserving in order to exclude any members of non-state armed groups from claiming reparations. This article explores the issue of a proposed Bill on a pension for injured victims of the Troubles in Northern Ireland. It identifies that there is no consistent state practice or human rights jurisprudence in this area, but instead offers a more complex approach through four models that can grapple with the seeming diametrically opposed victimhood and responsibility, by including victimised perpetrators in reparations programmes such as that proposed for a pension for seriously injured victims in Northern Ireland.

Introduction

Dealing with the past in the aftermath of protracted violence or conflict is never easy, but defining who is a victim and who deserves reparations is a recurring challenge. The past three decades have seen a global proliferation of transitional justice mechanisms, including truth commissions, amnesties and reparations. Such mechanisms have not yet taken root in Northern Ireland and were noticeably inconspicuous in the 1998 Good Friday Agreement – more a peace agreement than a transitional justice roadmap for dealing with the consequences of the past. Although many victim and civil society groups in Northern Ireland have advocated for truth and justice,[1] such efforts have only crystallised after successive judgments at the European Court of Human Rights (ECtHR), in particular for contentious deaths involving state forces under Article 2 of the European Convention on Human Rights on the right to life. As a result, institutions such as the Historical Enquiries Team were created and ordinary mechanisms like the coronial courts were reformed, but these were subsequently found to be inadequate in terms of both promptness and

* Many thanks to Anna Bryson and Kieran McEvoy for their very helpful comments on this article.

1 One particularly effective victim group has been for those whose family members were disappeared by republican paramilitaries resulting in the establishment of the Independent Commission for the Location of Victims' Remains. See Lauren Dempster, 'The Republican Movement, "Disappearing", and Framing the Past in Northern Ireland' (forthcoming) International Journal of Transitional Justice.

independence. Recent negotiations and agreements such as the 2014 Stormont House Agreement have reinforced the attention to truth and justice for those who were killed during the Troubles, but with little attention to reparations.

The focus on Article 2 compliance has ensured that discussions on the past have focused on deaths. This arguably narrows attention paid to victims of other crimes, such as sexual violence, physical assault and torture. Indeed, a significant constituency left out of the equation on the past are the 40,000 individuals who were injured during the Troubles, many of them seriously. The suffering of those seriously injured is worsening as they are getting older, requiring carers and mobility assistance, being unable to work and build up a pension, and thus being dependent on state benefits or the support of friends and families. The passage of time has compounded their problems because many suffer increasing physical distress as a result of deteriorating health and chronic pain. Discussion of reparations has become a particularly controversial subject in Northern Ireland, going to the heart of narratives of the past of who is a victim and who is responsible for their harm. This has seen protests in the past, with compensation for killed paramilitaries labelled as 'blood money' or the 'wages of murder'.[2] The Democratic Unionist Party (DUP) has stated that, based on its consultation, the opinion of the 'vast majority of innocent victims is that they would rather there be no pension provision than for perpetrators to benefit'.[3] The 2014 Stormont House Agreement rather blandly stated that further work will be 'undertaken to seek an acceptable way forward on the proposal for a pension for severely physically injured victims in Northern Ireland'.[4] Given the ongoing impasse on the broader issues related to truth and justice, the pension is now the only new process moving forward with DUP MLA Brenda Hale introducing a Private Members' Bill on the issue, perhaps as a cynical attempt to be 'seen' to do something about the past.

This article examines the role of a proposed pension Bill for seriously injured victims as a form of reparations. In particular it tries to unpack some of the contentious elements of victimhood and responsibility around who should be eligible for such a pension. It begins by briefly outlining the purpose of reparations in international law before discussing in more depth the controversy around contested identities and how other states have addressed the issue of victimised perpetrators and the difficulties this has created in regional human rights courts. In particular this first section explores the private law basis of reparations in international law, legal provisions in states dealing with victimised perpetrators and the jurisprudence of human rights courts in reconciling principles of non-discrimination and remedy with responsibility of victimised perpetrators. The second section discusses the Northern Ireland experience with financial reparations, noting the shortcomings in past compensation arrangements and the current prevailing service-based approach, before briefly outlining the proposed pension for seriously injured victims. The final section explores possible avenues and definitions that may help to traverse the difficult political landscape of victimised perpetrators' eligibility for a pension.

2 Owen Bowcott, 'Protests Disrupt Launch of Northern Ireland Troubles Payout Proposals' *The Guardian* (London, 28 January 2009).

3 DUP, 'We'd Rather Sink Pensions Scheme than See Terrorists Get Cash' *Newsletter* (20 March 2015).

4 Para 28.

Reparations in international law

Reparations in international law are based in private law principles of seeking to return the victim to the *status quo ante* (original position) through *restitutio in integrum* (returning to the victim all they have lost), echoing equity and tort principles in domestic jurisdictions.[5] This is a form of rectificatory or corrective justice that attempts to restore the equality between the injured and responsible party, through imposing a proportional penalty on the perpetrator commensurate to the harm caused so as to benefit the injured party.[6] In international law the underlying principle for reparations is to 'as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.[7] Reparations, at least in human rights law, are intended to acknowledge the harm suffered by victims and to induce those responsible to provide appropriate remedies.

In the face of collective violence it is, of course, almost impossible to devise legal mechanisms that can deal fully with the consequence of such acts and hold all responsible to account. Moreover, returning a victim to their original position may put them back to a marginalised position, without tackling the causes of victimisation.[8] Instead, the purpose of reparations involves focusing upon attempting to improve life opportunities and quality of life for victims in ways that privilege their agency and choice through compensation and rehabilitation.[9] In addition, preventing the recurrence of violations is, of course, a key concern of international law. Such preventative measures involve 'making real' the guarantees of non-repetition which are a cornerstone of international human rights law. In practice, this may entail a range of measures, including institutional reform and redressing the structural causes of victimisation, as well as measures of satisfaction which publicly acknowledge and memorialise the victims' suffering, such as apologies, memorials and truth recovery processes, so that they can 'awaken . . . public awareness to avoid repetition' and 'maintain remembrance of the victim'.[10] In light of these limits, human rights law has over the past few decades developed five types of reparations to effectively remedy gross violations of human rights: restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-repetition.[11]

A further difficulty with reparations in international law and more political constructions in transitional justice is that they reflect a state-centric approach based on

5 *Velásquez Rodríguez v Honduras*, Judgment of 21 July 1989 (Reparations and Costs), paras 25–26; and *Papamichalopoulos and Others v Greece,* Application No 14556/89) ECtHR Judgment of 31 October 1995, para 34. Dinah Shelton, *Remedies in International Human Rights Law* (OUP 2005) 9 and 65.

6 Aristotle, *Nicomechean Ethics*, Book V; and William T Blackstone, 'Reverse Discrimination and Compensatory Justice' (1975) 3(3) Social Theory and Practice 253–88.

7 *Germany v Poland, The Factory at Chorzow* (Claim for Indemnity) (The Merits), Permanent Court of International Justice, File E c XIII, Docket XIV:I Judgment No 13, 13 September 1928, para 125.

8 Heidi Rombouts and Stephan Parmentier, 'The International Criminal Court and its Trust Fund are Coming of Age: Towards a Process Approach for the Reparation of Victims' (2009) 16 International Review of Victimology 149–82.

9 Such as the *proyecto de vida* (life project) reasoning recognised for a time by the Inter-American Court of Human Rights in *Loayza Tamayo v Peru*, Reparations and Costs, Judgment of 27 November 1998, Series C No 42, paras 147–48.

10 Principle 22, UNBPG; 19 *Tradesmen v Colombia*, Merits, Reparations and Costs, Series C No 109 (Inter-American Court of Human Rights, 5 July 2004), paras 272–73; *Myrna Mack-Chang v Guatemala*, Merits, Reparations and Costs, Series C No 101 (Inter-American Court of Human Rights, 25 November 2003), para 286.

11 See UNBPG on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005, A/RES/60/147.

the state both as the main violator and as the entity with the greatest responsibility for reparations. This is problematic for Northern Ireland, given that 'perpetrators' include both non-state and state actors and, leaving aside the issue of state collusion, the non-state actors were responsible for approximately 90 per cent of all fatalities.[12] Moreover, it means that members of non-state armed groups, such as the Irish Republican Army (IRA), Ulster Defence Association and Ulster Volunteer Force, were victimised by other groups, but also subject to torture, inhuman and degrading treatment as well as extra-judicial killings (the so-called 'shoot to kill' policy), both directly and through state collusion with paramilitary organisations.[13] This complex reality of violence and human rights abuses speaks directly to the limitations of what McEvoy and McConnachie have described as 'monochromatic distinctions between universally innocent victims and guilty perpetrators'.[14] As reparations programmes seek to demarcate and quantify forms of harms and victims as deserving of redress through definitions, such programmes become enmeshed in the political contests surrounding victimhood.

Victim hierarchies in conflict and transition

Victimhood can be fiercely disputed in times of conflict and transition to peace. Combatants in armed conflicts can often portray themselves as collective victims and the 'good guys', innocent of any crime and deserving of sympathy and support.[15] This is apparent in the Israeli/Palestinian conflict.[16] The use of 'innocent' or 'real' identification of victims within conflicts and post-conflict societies perpetuates very powerful moral conceptions of victimhood.[17] Given that collective violence is prolonged and multifaceted, simplistic black and white understandings of perpetrators and victims rarely neatly map onto the real world of conflicted and transitional societies.[18] Instead, the 'messy' reality of these conflicts can mean that there are complex identities of victimised perpetrators, such as child soldiers.[19] It is only through understanding this 'thicker' multi-perspective of victimisation for collective violence that we can begin to develop the law to effectively redress such harms.[20]

Reparations represent both a symbolic acknowledgment of an individual's victimhood and some form of remedial benefit. The remedial nature of reparations can come into

12 Malcolm Sutton, *Bear in Mind these Dead . . . An Index of Deaths from the Conflict in Ireland 1969–1993* (Beyond the Pale Publications 1994); and David McKittrick, Seamus Kelters, Chris Thornton, Brian Feeney and David McVea, *Lost Lives: The Stories of the Men, Women and Children Who Died as a Result of the Northern Ireland Troubles* (Mainstream Publishing 2004).

13 See Anne Cadwallader, *Lethal Allies: British Collusion in Ireland* (Mercier Press, 2013); Sir Desmond de Silva QC, *Report of the Patrick Finucane Review* (TSO December 2012); and Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (OUP 2010) 167.

14 Kieran McEvoy and Kirsten McConnachie, 'Victimology in Transitional Justice: Victimhood, Innocence and Hierarchy' (2012) 9(5) European Journal of Criminology, 527–38, 534.

15 Mike Morrissey and Marie Smith, *Northern Ireland after the Good Friday Agreement: Victims, Grievance and Blame* (Pluto Press 2002) 5; and Luc Huyse, 'Victims' in D Bloomfiled, T Barnes and L Huyse (eds), *Reconciliation after Violent Conflict: A Handbook* (IDEA 2002) 54–65, 62.

16 See David Bar-Tal, Lily Chernyak-Hai, Noas Schori and Ayelet Gundar, 'A Sense of Self-Perceived Collective Victimhood in Intractable Conflicts' (June 2009) 91 (874) International Review of the Red Cross 229–58.

17 Erica Bouris, *Complex Political Victims* (Kumarian 2007); and Morrissey and Smith (n 15).

18 Collective violence is used here to cover gross violations of human rights, crimes against humanity and genocide.

19 Kieran McEvoy and Kirsten McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame' (2014) 22(4) Social and Legal Studies 489–513, 494.

20 Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) Journal of Law and Society 411–40.

immediate conflict with the definition of victims/perpetrators and the associated political discourses concerning who is seen as deserving. This can threaten to unsettle fragile and long-term peace processes, such as in Peru and Northern Ireland, where provisions for victimised perpetrators to receive reparations have been met with protests and condemnation. As a result a 'hierarchy of victims' can arise, in which 'innocent' or 'real' victims are prioritised to facilitate the appropriation of blame and innocence in political narratives of past conflict.[21] Such moral gradation can feed competition for recognition amongst victims, influence decisions regarding material resources or symbolic gestures, such as monuments, and can potentially exclude less deserving individuals like victimised perpetrators.[22] As McEvoy and McConnachie argue, 'the innocent' victim is placed at the 'apex of a hierarchy of victimhood and becomes a symbol around which contested notions of past violence and suffering are constructed and reproduced'.[23]

Victims who are responsible for their own suffering or that of others have been a concern of victimology since its earliest iterations in positivist criminology through accounts which emphasised the victim's actions, characteristics, or circumstances that precipitated or *provoked* the perpetrator to commit an offence.[24] Predictably, such 'victim blaming' caused a significant backlash amongst critical and feminist criminologists. For example, Christie's memorable description of the 'ideal victim' as 'an innocent, vulnerable, good citizen, who has been attacked by a big, bad offender' has had a long-standing resonance in domestic and international victimology.[25] This construction of the 'innocent victim' serves to contrast the 'wicked' perpetrator or terrorist who deserves punishment.[26] More critical accounts of victimhood examine the 'role of the law and the state in the victimisation process as well as the potential for human actors both to sustain and to change the conditions under which they act'.[27] A critical understanding of victimhood exhibits the socio-political context whereby, in the real world, individuals are not always recognised as victims, owing to prevailing political or moral 'labelling' of who a victim should be and who deserves recognition.[28] Through this perspective the concern for recognition and fair treatment of victims better reflects the relational or 'lived reality' of individuals and groups that suffer as a result of a crime, but it perhaps neglects the responsibility of some victims' in their own harm and that of others.[29]

In relation to victimised perpetrators, McAlinden has identified a 'continuum of offending' where victims are coerced or cooperate to facilitate perpetrator violence to avoid further suffering themselves and/or to survive.[30] Making victims complicit or collaborators in the victimisation process can have the effect of further dehumanising them. A pertinent example is provided by those Jews who were used as 'special squads'

21 See Bouris (n 17); and McEvoy and McConnachie (n 14) 532.

22 Huyse (n 15) 64.

23 McEvoy and McConnachie (n14) 532.

24 See Hans Von Hentig, *The Criminal and his Victim: Studies in the Socio-Biology of Crime* (Archon 1967); and Martin F Wolfgang, 'Victim Precipitated Criminal Homicide' (1957) 48(1) Journal of Criminal Law and Criminology 1–11.

25 See Nils Christie, 'Conflicts as Property' (1977) 17(1) British Journal of Criminology 1–15, 19.

26 David Becker, Elizabeth Lira, María Isabel Castillo, Elena Gómez and Juana Kovalskys, 'Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation' (1990) 46 (3) Journal of Social Issues 133–49, 135.

27 Rob Mawby and Sandra Walklate, *Critical Victimology: International Perspectives* (Sage 1994) 177.

28 Richard Quinney, 'Who is the Victim?' (1972) 10 Criminology 314–23, 321.

29 McEvoy and McConnachie (n 14) 530.

30 Anne-Marie McAlinden, 'Deconstructing Victim and Offender Identities in Discourses on Child Sexual Abuse: Hierarchies, Blame and the Good/Evil Dialectic' 54(2) British Journal of Criminology 180–98, 186.

in Auschwitz to burn the bodies of those who were killed in the gas chambers before later suffering the same fate themselves. In the context of Northern Ireland, most paramilitaries were volunteers and were not coerced, in comparison to those who are forced to commit atrocities, such as child soldiers or special squads. This 'grey zone' of identities counters the simplicity of perpetrators and victims as always being in two distinct blocs.[31] Such binary construction of victimisation can gloss over issues of responsibility, such as with child soldiers who are forced to commit atrocities, but who may not fit into such a neat category of 'innocent' when they become adults and rise to a position of command.[32]

The focus of this article is on members of armed, paramilitary or terrorist groups, or state forces, who have committed political violence but who have been victimised through identifiable gross violations of human rights law or international crimes, such as disappearances, extrajudicial killings, sexual violence, torture, serious injury, or ill-treatment caused by other actors. These crimes are distinguished due to their *jus cogens* nature as they are considered objectively illegal and can never be justified in their commission in international customary law, no matter the background or association of an individual.[33] It notably excludes those who have self-inflicted injuries, breaking the causal link of unlawful harmed caused by others. Nonetheless, this article takes a critical victimological approach by recognising that such individuals are victims to avoid acknowledgment becoming a source of victimisation, but also appreciates their responsibility. As such, the law should not exclude those who have been seriously victimised because of their association or past actions, but should adopt a 'thicker' understanding to take into account their role in victimising others and determine what reparations are appropriate for such individuals. Accordingly, while those members of state or non-state armed groups who were seriously victimised should be eligible for reparations, it should also be acknowledged that they were responsible for victimising others and so should be made to contribute to reparations for their victims or have their own forms of reparations limited. The final section of this article discusses the pros and cons of related models. Before advancing to this discussion, it is worth considering the relevant state practice and jurisprudence of regional human rights courts on these issues.

Tackling victimised perpetrators in domestic reparation programmes

The question of whether victimised perpetrators should be eligible for reparations is not unique to Northern Ireland. In Latin America, countries like Colombia and Peru have suffered from protracted internal armed conflict with violence committed by state and non-state armed groups. In both contexts, victimised perpetrators are ineligible for reparations. In Colombia, the 2011 restitution of land law stipulates that members of illegal armed groups are not considered victims, except for children or adolescents demobilised when they were under 18.[34] Interestingly, family members of individuals in non-state armed groups are recognised as victims where the person is killed, but not if they are injured. In the case of Peru, the truth commission recognised the harm

31 Primo Levi, *The Drowned and the Saved* (Abacus 1989) ch 2.

32 McEvoy and McConnachie (n 14) 533. See Erin K Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen' (2009) 47(2) Journal of Modern African Studies 163–91.

33 M Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 Law and Contemporary Problems 63–74.

34 Article 3(2), 2011 Ley de Víctimas y Restitución de Tierras en Colombia en Contexto. See Cristián Correa, *From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia* (International Center for Transitional Justice, October 2015).

suffered by members of non-state armed groups, such as the Shining Path (Sendero Luminoso) or Túpac Amaru Revolutionary Army (MRTA), but held that they were 'victims, but not beneficiaries' of reparations.[35] Similarly, the Peruvian reparations law explicitly excludes members of 'subversive groups' from reparations.[36] However, in both countries, state forces are eligible for reparations, despite being implicated in atrocities.[37] Similarly, Iraq's 2009 compensation law excluded only those individuals convicted of terrorism offences.[38] In Spain, members of terrorist groups are excluded from reparations.[39] Yet, in Basque and Navarre, reparations laws do not explicitly exclude members of terrorist groups.[40]

Other countries have included victimised perpetrators in reparation programmes, including those members of non-state armed groups who have been injured, such as in Sierra Leone or Timor Leste.[41] In Kosovo, the reparations law includes veterans, martyrs, members of the Kosovo Liberation Army and civilians as being eligible for reparations.[42] This law is similar to that in Tunisia, reflecting the victory of one side in overthrowing the old regime benefiting their own veterans or 'martyrs' as victims.[43]

In South Africa, the promotion of reconciliation and the end of apartheid defined victims broadly to include those who suffered harm from gross violations of human rights or an act associated with a political objective for which an amnesty was granted.[44] As noted above, Borer and others have highlighted that this dichotomy did not capture the composite grey zone of identities nor 'perpetrators [who] are simultaneously victims'.[45] Despite the broad definition of victimisation, numerous victims were excluded from reparations, in particular, those who were victimised by other violations not falling within the defined gross violations of human rights, through harm suffered as a result of acts committed by perpetrators not given an amnesty or that did not amount to a 'political

35 Comisión de la Verdad y Reconciliación (CVR) Report, vol IX, 149, 153. See Rebecca K Root, *Transitional Justice in Peru* (Palgrave Macmillan 2012) 131.

36 Article 4, Ley que crea el Plan Integral de Reparaciones (PIR), Ley No 28592 2006.

37 See Luke Moffett, 'Reparations for "Guilty Victims": Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms' (forthcoming 2016) International Journal of Transitional Justice.

38 Article 17, 2009 Compensation for those Affected by Military Operations, Military Mistakes and Terrorist Actions, Law No 20.

39 Article 4(3), Law 2/2003.

40 In the Basque country, Decree 107/2012 of 12 June 2012, declaration and reparation for victims of unjust suffering as a result of the violation of their human rights, produced between 1960 and 1978 in the context of politically motivated violence lived in the Community Autonomous Basque (this has been successfully challenged by the Spanish government); and, in Navarre, Regional Law 16/2015 of 10 April 2015, recognition and reparation for victims of politically motivated acts caused by far-right groups or officials.

41 *Sierra Leone Truth and Reconciliation Commission Final Report* vol II (2004) ch 4, paras 69–70; Timor-Leste Commission for Reception, Truth and Reconciliation, *Chega!* (2006); *Final Report of the Truth, Justice and Reconciliation Commission of Kenya* vol IV (2013).

42 2011 Law No 03/L-054 on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims and their Families.

43 See Tunisia's 2011 Decree Law No 97 on reparation for the families of the 'martyrs' and wounded persons of the revolution.

44 Truth and Reconciliation Commission Report, vol 1, 86. Promotion of National Unity and Reconciliation Act 34 of 1995, s 1.

45 Tshepo Madlingozi, 'Good Victim, Bad Victim: Apartheid's Beneficiaries, Victims and the Struggle for Social Justice' in W Le Roux (ed), *Law, Memory and the Legacy of Apartheid: Ten Years After AZAPO v President of South Africa* (Pretoria University Law Press 2007) 107–26, 114, citing Don Foster, Paul Haupt, Marésa de Beer, *The Theatre of Violence: Narratives of Protagonists in the South African Conflict* (HSRC Press 2005) 4; and Tristan Anne Borer, 'A Taxonomy of Victims and Perpetrators: Human Rights and Reconciliation in South Africa' (2003) 25(4) Human Rights Quarterly 1088–116.

objective'.[46] Nevertheless, a number of victimised-perpetrators were recommended by the Truth and Reconciliation Commission for reparations. By way of example, in the case of the three Afrikaner Resistance Movement[47] members who were murdered by a police officer (who received an amnesty) in Mafikeng in March 1994, the family members of the deceased were recognised as victims and referred to the Reparations and Rehabilitation Committee for consideration.[48] The picture of victimisation is further clouded by the exclusion of innocent individuals who were wrongly convicted under the apartheid legal system, but who were deemed ineligible for amnesty or reparations.[49]

As such, there remains no consistent state practice on whether victimised perpetrators should be eligible for reparations. Instead eligibility is determined depending on the prevailing political context as to whether reparations can be inclusive, as measures of reconciliation, or exclusive, as measures of justice.

Regional human rights courts and victimised perpetrators

Regional human rights courts are not immune from the challenge of adjudicating on victimised perpetrators who claim reparations. While the victimised-perpetrator principle of non-discrimination is espoused in human rights treaties and the UN Basic Principles and Guidelines (BPG) on the Right to Remedy and Reparations, the issue of victimised perpetrators has proved more divisive in the jurisprudence of regional human rights courts.[50] The ECtHR case of *McCann v UK*, which concerned the shooting dead of three members of the IRA by British special forces in Gibraltar as they were planning to bomb a military parade, provides an interesting example. Although the court ruled that their deaths were a result of unlawful use of force and a violation of Article 2 on the right to life, compensation for families of those killed was deemed inappropriate as, 'the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar'.[51]

Pellonpää suggests that a better interpretation of the court's decision in *McCann* is based on legal principles, such as contributory fault (or assumption of risk) that the victims' own acts contributed to their loss.[52] This could be the application of the equitable doctrine of 'clean hands', which has at times been used by the ECtHR in other cases as a mitigating factor in determining compensation, due to the victim's responsibility or contribution in aggravating their own harm.[53] Yet, given the serious

46 Mahmood Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)' (2002) 32(3–4) Diacritics 33–59.

47 Afrikaner Weerstandsbeweging, a far right paramilitary Afrikaner group.

48 Application in Terms of s 18 of the Promotion of National Unity and Reconciliation Act No 34 of 1995. *Ontlametse Bernstein Menyatsoe Applicant* (AM 7498/97), 5 August 1999, involving the deaths of Jacobus Stephanus Uys, Alwyn Wolfaardt and Nicolaas Cornelius Fourie. Borer also gives the example of Winnie Mandela (n 45) 1098–99.

49 Louise Mallinder, *Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa*, Working Paper No 2 (From Beyond Legalism: Amnesties, Transition and Conflict Transformation 2009) 97–98.

50 Article 14, European Convention on Human Rights; Article 2(3), International Covenant on Civil and Political Rights; Article 25, American Convention on Human Rights; and Principle 25, 2005 UNBPG on the Right to Remedy and Reparations.

51 *McCann v UK*, Application No 18984/91, ECtHR Judgment of 27 September 1995, para 219.

52 Matti Pellonpää, 'Individual Reparation Claims under the European Convention on Human Rights' in A Randelshofer and C Tomuchat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (Martin Nijhoff 1999), 109–24, 112.

53 Heidy Rombouts, Pierto Sardaro, and Stef Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights' in K Feyter, S Parmentier, M Bossuyt and P Lemmens, *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 345-503, 386. For instance, in *Beyler v Italy*, Application No 33202/96, 28 May 2002.

nature of violations such as the right to life, the application of contributory fault or the clean hands doctrine is a misapplication of private law principles and undermines the equal protection of individuals under the law.

Since the *McCann* case, the ECtHR has limited its examination to the state's compliance with procedural obligations, i.e. to effectively investigate such allegations of gross violations, paying less attention to the factual circumstances of the substantive violation of the right to life. This is apparent in the *Kelly and Other v UK* case where, in facts similar to *McCann*, eight members of the IRA (and one civilian bystander) were shot by the Special Air Service (SAS) while driving a bomb into a police station in Loughgall.[54] In the *Kelly* case, the court did not examine the substantive violation of life, citing ongoing domestic proceedings, and instead found a violation of the procedural obligation to carry out an effective investigation. On this basis, the court awarded compensation to the victims' families due to them suffering 'feelings of frustration, distress and anxiety'. Notably, in contrast to the *McCann* decision, the court did not engage in determination of the moral worth of those who died by distinguishing terrorists from the civilian bystander.[55] This is consistent with the ECtHR's proclivity in cases of grave and multiple violations of rights to award compensation due to the serious harm caused to the victims, reflecting private law notions of remedying suffering, rather than moral distinctions.[56] This can be seen in a more recent statement by the Grand Chamber of the court on the purpose of compensation awards that:

> . . . it [is not] the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.[57]

However, in subsequent cases involving detention of terrorist members, such as in *Del Río Prada v Spain*, the court awarded compensation to a convicted member of the terrorist group ETA for unlawful detention.[58] A distinction could be perhaps drawn between this case and *McCann*, with the latter involving members of a terrorist organisation in an active operation to carry out a bombing, whereas *Del Rio Prada* concerned the custody of the state.

In contrast, the Inter-American Court of Human Rights, which has been dealing with decades of state violence, has until very recently generally recognised members of non-state armed groups as victims eligible for reparations. In one notable case, that of *Miguel Castro Castro v Peru*, state forces stormed a high security prison which contained a number of members of the rebel group, the Shining Path, resulting in the deaths of 41 female inmates and the injury of 175 others. Added to this, the state subsequently failed to properly investigate claims of extrajudicial executions and ill-treatment. Although the state admitted its partial responsibility for those killed and injured, it was reluctant to

54 *Kelly and Others v UK*, Application No 30054/96, 4 May 2001.

55 Ibid para 162.

56 See *Erdoğan and Others v Turkey*, Application No 19807/92, 25 April 2006, para 109; and *Yandiyev and Others v Russia*, Applications Nos 34541/06, 43811/06 and 1578/07, 10 October 2013.

57 *Varnava and Others v Turkey*, Applications Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, para 224; and *Al-Skeini and Others v UK*, Application No 55721/07, 7 July 2011, para 182.

58 Cf. Joint Partly Dissenting Opinion of Judges Villiger, Steiner, Power-Forde, Lemmens and Griţco in *Del Río Prada v Spain*, Application No 42750/09, 21 October 2013.

acknowledge them as victims who could claim reparations. The Peruvian government instead directed the court to place such violations in the 'context' of an 'extremely serious situation of internal conflict', with reparations to be determined in line with domestic policies.[59] The Inter-American Court rejected the state's claims, awarding substantial compensation to victims and their next of kin, as well as ordering the state to effectively investigate the violations, provide medical and psychological assistance, publicly acknowledge the state's responsibility through a public ceremony broadcast by the media, include the names of those killed in the prison on the 'Eye that Cries' memorial, and educate state forces on human rights norms to prevent future violations.[60]

In subsequent proceedings, the Peruvian government sought clarification of this decision on the grounds that the victims, as members of the Shining Path, were responsible for committing serious violations of the human rights of other Peruvians and the court therefore needed to respect the memory of those they had victimised. Moreover, the Peruvian government argued that the provision of substantial compensation to members of the Shining Path as victims by the court could allow them to continue their 'subversive' campaign through new violent acts. Instead, the Peruvian government sought the court's approval to offset the victims' compensation as part of their debt to those they had victimised as identified in their criminal convictions.[61] This stance of the Peruvian government reflected both the need to acknowledge such violations and 'innocent' victims' suffering, as well as to provide a more contextual understanding that those before the court were members of an armed group who were responsible for committing numerous atrocities.[62]

In response, the Inter-American Court refused to mitigate or bar such compensation to the victims on the grounds that, as a human rights court, it lacked the power to determine the nature and aggravating circumstances of the criminal acts of the victims, distinguishing it from a criminal court and determinations of individual criminal responsibility.[63] Rather, the jurisdiction of the court was to examine the international responsibility of the Peruvian state in fulfilling its obligations under the American Convention, which could not be mitigated by the actions of the victims, owing to the serious nature of the violations. By acknowledging members of Shining Path as victims and deserving of reparations, the court refuted the Peruvian government's suggestions that these victims as terrorists were outside the protection of the law, as well as affirming the serious wrongdoing by the state against these individuals.

Since 2014 the Inter-American Court has taken a more conservative view, limiting or excluding victimised members of non-state armed groups from certain forms of reparations. In the *Palace of Justice v Colombia* case, the Colombian government disappeared a number of suspects after the terrorist group M-19 attacked the highest court in Bogotá to destroy evidence against narco-traffickers.[64] At least 94 people were killed, including 11 Supreme Court judges, along with 11 further suspected members of M-19, mostly

59 *Miguel Castro Castro Prison v Peru*, Merits, Reparations and Costs, Judgment 25 November 2006, Series C No160, paras 135 and 142.

60 $60,000 for those 41 individuals killed, and $22,000–$45,000 for those survivors who were injured. Ibid paras 410–69.

61 *Miguel Castro Castro Prison v Peru*, Interpretation of the Judgment on Merits, Reparations and Costs, Judgment 2 August 2008, Series C No 181, paras 29–30.

62 See Root (n 35).

63 *Castro Castro Prison* (n 59) para.40.

64 *Case of Rodríguez Vera et al (The Disappeared from the Palace of Justice) v Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 14 November 2014.

cafeteria workers, disappeared by the Colombian army, including Irma Franco Pineda, a law student and member of M-19. The Colombian government argued that Irma should be ineligible for reparations and would be barred from any compensation in domestic law.[65] However, the court ruled that the family of Irma should receive $5000 for pecuniary damage, but no compensation for the moral harm caused. In comparison, other victims not affiliated with M-19 received $35,000–$48,000 pecuniary compensation and $70,000–$100,000 for moral harm.[66]

Similarly, in the case of *Cruz Sanchez and Others v Peru*, another hostage crisis by the terrorist group MRTA ended with a raid by Peruvian special forces where 14 died, including 11 of the MRTA hostage-takers.[67] The Inter-American Court found that the Peruvian commandos had extrajudicially executed at least three members of MRTA who had surrendered, including Eduardo Cruz Sanchez. The families of those killed did not ask for pecuniary damages, but did seek moral damages. The court held that it was inappropriate to order compensation in this case and that rehabilitation and publication of the judgment against Peru would be sufficient.[68] Judge Pérez, partially dissenting, believed that the family of Eduardo should have been eligible for compensation, given the serious harm caused to the family.[69] Judge Mac-Gregor Poisot, concurring with the judgment, held that the exclusion of the family members of MRTA from compensation could be discriminatory, but did not go as far as to say that monetary awards should be made for Eduardo.[70] These decisions can be read in light of the political context of the Inter-American Court finds itself, were decisions like *Miguel Castro Castro* caused uproar and protest in Peru, with the Peruvian government threatening to leave the court's jurisdiction. Moreover, unlike earlier cases, the Inter-American Court failed to provide any reasons for these distinctions.

It is apparent that the issue of reparation for victimised members of terrorist groups remains highly controversial even with international human rights courts, which are premised on redress for violations and non-discrimination. In most cases, victimised perpetrators are excluded or have their reparations limited, due to the unlawful nature of their organisations and actions. This article argues that members of paramilitary or terrorist groups who have been unlawfully killed or seriously injured should be eligible for some form of reparations. Part of the rationale for this is that, by excluding such individuals from reparations we may create three inter-related problems: (1) contribute to narratives that victim-perpetrators deserved such suffering, or such violence was justified, and deny redress for serious violations; (2) prevent the application of reparations to vulnerable or marginalised groups, who resort to violence against the more powerful state, weakening the purpose of reparations to effectively remedy harm; and (3) undermine long-term prospects of peace by leaving certain categories of suffering unaccounted for and unresolved, risking the recurrence of such violence in the future.[71] It is worth now turning to discuss the Northern Ireland experience of tackling this issue and current proposals in the pension Bill for seriously injured victims.

65 Judgment of the Council of State of 11 September 1997, in the proceedings instituted by the next of kin of Irma Franco Pineda. *Rodríguez Vera* (n 64) paras 587 and 594.

66 *Rodríguez Vera* (n 64) paras 591–604.

67 *Cruz Sánchez et al (Japanese Embassy Siege) v Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 17 April 2015, Series C No 292.

68 Ibid para 483–85.

69 Ibid partially dissenting opinion of Judge Alberto Pérez Pérez, para 4.

70 Ibid concurring opinion, para 23.

71 Bouris (n 17) 75. *Report on Reparations by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, Pablo de Greiff, A/69/518, 8 October 2014, para 20.

The Northern Ireland experience with reparations

Different forms of reparations have been used to address some of the harm caused by the Troubles in and around Northern Ireland.[72] However, as mentioned at the beginning of this article, these measures have been somewhat inconspicuous given their piecemeal or inadequate effect in remedying victims' harm. Successes have included the recovery of the remains of individuals disappeared by republican groups.[73] Yet, most victims have had to rely on claiming compensation through the courts or compensation agencies, or are dependent on services which have inadequately redressed their suffering. It is useful to first briefly outline some of these financial provisions to victims, before discussing in more depth the proposed pension for seriously injured victims.

Past and current financial support to victims

Some victims have been able to obtain compensation through the courts and the Criminal Injuries Compensation Scheme, which as an administration programme provided monetary awards to victims based on common law equity principles determined by the courts.[74] However, this scheme did not acknowledge victims' pain or loss or bereavement and court orders were only accessible to those who could afford a lawyer.[75] Only in 1988 did a bereavement payment become available to spouses and parents of those killed.[76] It was replaced in 2002 by a tariff scheme, where the Compensation Agency would determine the amount of compensation on a statutory basis, removing the discretion of the court, and allowing appeals of compensation awards by an independent panel.[77] In addition, the 2002 tariff scheme also included that compensation was to be calculated 'to acknowledge the grief and sorrow caused by the death of that person and the loss of that person's care, guidance and society'.[78] Bloomfield reports that from 1969 until 31 March 1998 the Compensation Agency had paid out some £186m to victims of terrorist violence in Northern Ireland, with £26m paid to relatives of those killed, and £160m to those injured.[79] Although this is a substantial amount of money, as there were over 3600 people killed and over 40,000 injured, these amounts would be inadequate in the long term averaging a few thousand to each victim. Compensation amounts awarded under these schemes or awarded by the court were often seen as insufficient as they were based on income rather than need, i.e. relatives of those killed in the 1970s were only awarded a few hundred pounds.[80]

The compensation schemes have been more substantively criticised. Families of those paramilitaries killed during the conflict have been denied compensation due to their relative's membership of an unlawful organisation or engagement in terrorist activities at

72 See Patricia MacBride, *Reparations in Northern Ireland: A Duty to Victims?* (CVS 2011).

73 See Kieran McEvoy and Heather Conway, 'The Dead, the Law, and the Politics of the Past' (2004) 31(4) Journal of Law and Society 539–62.

74 See Criminal Injuries (Compensation) (Northern Ireland) Order 1977.

75 MacBride (n 72) 4.

76 Criminal Injuries (Compensation) (Northern Ireland) Order 1988, s 9.

77 Criminal Injuries Compensation (Northern Ireland) Order 2002.

78 Ibid s 4(2)(d).

79 Sir Kenneth Bloomfield, *We Will Remember Them: Report of the Northern Ireland Victims Commissioner* (TSO Northern Ireland 1998) para 5.6.

80 Report of the Consultative Group on the Past (CPG 2009) 91; and Marie Breen-Smyth, *The Needs of Individuals and their Families Injured as a Result of the Troubles in Northern Ireland* (WAVE 2012) 10.

any time in the past or present.[81] This exclusion also denied compensation to the relatives of those paramilitaries who had served their sentences and were subsequently killed on release.[82] This is further complicated by numerous other individuals who were never convicted being able to claim compensation. Victims who were injured also faced their compensation being cut after 16 years, despite their deteriorating health and increasing dependency as they become older.[83] In addition, victims' life expectancy was underestimated and, as they were unable to work as result of their injuries, the compensation awarded affected their subsequent state benefit allowances.[84] On a more theoretical level, compensation schemes are not purely reparations as they equate violence during the conflict with ordinary crime, rather than awarding further damages for the sectarian motivation behind the crime. Furthermore, compensation schemes are based on 'social solidarity' that acknowledges that the harm victims suffered was morally wrong, but without any judgment on responsibility (whether provided independently or by those responsible).[85]

The Bloomfield report on victims of the conflict identified a number of problems with the compensation available and recommended that funding be secured for victims and survivors. The Northern Ireland Memorial Fund (NIMF) was subsequently established in 2001. The NIMF provided financial assistance to victims and survivors who had lost a spouse or partner, were seriously injured or were primary carers, through eight grants covering short breaks, chronic pain management, disability allowance, education and training, and other allowances.[86] The NIMF was originally established as a benevolent fund, but in 2010 it changed to a conditional means-tested scheme due to financial constraints. In 2012/2013 the budget of the NIMF was £3,304,250 for 2869 potential applicants.[87] From 2001–2012 some 11,000 victims and survivors availed themselves of the fund and were awarded some £17m.[88] Considering the number of victims of the conflict, the fund only helped a fraction of those affected. Yet, the NIMF was an important source of funding for those who did avail themselves of it, considering their financial and social hardship. In April 2012, as part of the Stormont executive's ten-year Strategy on Victims and Survivors, the NIMF[89] was subsumed within the newly created Victims and Survivors Service (VSS), with an allocated £36m annual budget, which is intended to coordinate and fund the provision of services to victims, including counselling, befriending, respite breaks, chronic pain management and retraining

81 Criminal Injuries (Compensation) (Northern Ireland) Order 1977, s 6(3); and Criminal Injuries (Compensation) (Northern Ireland) Order 1988, s 5(9). MacBride (n 72) 4. This has been only recently changed in 2009 under the New Criminal Injuries Compensation Scheme, which allows the Secretary of State to reduce or refuse any award based on the actions of the claimant (para 14).

82 MacBride (n 72) 4.

83 Ibid; and Breen-Smyth (n 80) 9.

84 MacBride (n 72) and Breen-Smyth (n 80).

85 Katherina Buck, 'State Compensation to Crime Victims and the Principle of Social Solidarity: Can Theoretical Analysis Contribute to a Future European Framework' (2005) 13(2) European Journal of Crime, Criminal Law and Criminal Justice 148–78.

86 MacBride (n 72).

87 CVS, *Comprehensive Needs Assessment* (CVS 2012) 18.

88 Ibid 60. Similarly, in the Republic of Ireland, the Remembrance Commission between 2003 and 2008 provided €3.9m to victims and survivors as well as over €2m for support services to victims within the country; see MacBride (n 72) 4.

89 Along with the Trauma Advisory Panels and the Community Relations Council Victims Unit.

schemes. The VSS, since its establishment in 2013, has been criticised for its intrusive individual needs assessments and delays in funding to groups.[90]

Currently, a service-based approach dominates provision for victims' and survivors' needs. As a result of the Good Friday Agreement and subsequent reports into assistance for victims, funds were established to support victims through numerous groups, representing different areas, constituents and political opinion.[91] Beneficiaries of such schemes are based on the broad definition of the Victims and Survivors (Northern Ireland) Order 2006 of a victim as: 'someone who is or has been physically or psychologically injured, [provides a substantial amount of care for such a person, or bereaved] as a result of or in consequence of a conflict-related incident'.[92]

The inclusive nature of the definition was intentional to avoid contention over eligibility for service provision, reflecting more humanitarian concerns over addressing harm than accountability.[93] As such, victimised perpetrators can and do access services through the VSS and the Commission for Victims and Survivors (CVS) can advocate on their behalf as victims. However, the future of such support to victims is dependent on budgetary allocations by the Office of the First and Deputy First Minister, making such provision discretionary without any long-term commitment.[94] In terms of accountability, such measures do not publicly acknowledge individuals as victims, as service provision loses the recognition, entitlement and responsibility aspects associated with reparations through their delivery by groups. In terms of remedy, services provided have been criticised for their access issues, location, standard of provision and ability to respond to victims' needs.[95]

In 2009 the Consultative Group on the Past (CGP) came closer to providing more inclusive reparations that acknowledged victims' harm and offered something close to an appropriate amount of compensation to those families bereaved.[96] Basing its conclusions on the operation of a similarly inclusive scheme in the Republic of Ireland, the CGP recognised the shortcomings of compensation for the harm caused by the conflict and recommended that a 'one-off ex-gratia recognition payment' of £12,000 be paid to the relatives of those killed during the conflict, to acknowledge the loss they have endured.[97] The language of *ex gratia* is important as it implies that such a payment is charitable, rather than based on any legal obligation, identifiable responsible actor or entitlement for such victims to a remedy. Nonetheless, this one recommendation proved politically controversial, as family members of terrorists who were killed would also receive money, arguably equating their suffering with those of 'innocent' civilian victims. Moreover, an overlooked issue was that this payment excluded those who had been seriously injured. As a result of the recognition payment recommendation, the whole report was rejected,

90 See WKM Solutions, *The Victims and Survivors Service: An Independent Assessment* (WKM 2014); and Chartered Institute of Public Finance and Accountancy (CIPFA) (CIPFA 2014) 9.

91 Principle 12, Part 6, Rights, Safeguards and Equality of Opportunity, Good Friday/Belfast Agreement 1998. See Bloomfield (n 79).

92 Victims and Survivors (Northern Ireland) Order 2006, s 3.

93 *Services for Victims and Survivors* (Northern Ireland Office 2005) 6.

94 Recent reviews initiated by the CVS have found more systemic problems with the funding and assessments carried out by the VSS. See WKM Solutions (n 90) and CIPFA (n 90).

95 See Interim Victims Commissioner, *Services for Victims and Survivors: Addressing the Human Legacy* (2007); and CVS reports WKM Solutions (n 90) and CIPFA (n 90).

96 See Cheryl Lawther, T*ruth, Denial and Transition: Northern Ireland and the Contested Past* (Routledge 2014).

97 CPG (n 80) 92. A similar payment was made by the Irish government through its Remembrance Commission's Acknowledgement Payment.

despite its comprehensive proposals on addressing truth and justice. Discussions on the past since 2009 have been muted on reparations, with only the issue of the pension for seriously injured victims gaining traction since 2014.

A PENSION FOR SERIOUSLY INJURED VICTIMS

The most recent proposal on providing some form of reparations has come in the form of a pension for seriously injured victims. It is based on the research of Breen-Smyth that identified the needs of those seriously injured and their lack of a pension, through being unable to work.[98] As a result, WAVE and its associated injured victims group have advocated for a pension,[99] which position has been endorsed by the CVS.[100] The proposed pension for those seriously injured serves to acknowledge the harm endured and alleviate their daily suffering by providing them financial security in the old age. The number of those eligible is likely to be less than 500 with most averaging a 50 per cent rate of pension based on the level of their disablement, in turn based on data collected by WAVE from the NIMF and payments made through the VSS.

Other countries have adopted similar pensions, such as Spain which has a comparatively generous scheme for those victimised by terrorism – a monthly payment of approximately €1600 per month – but excludes members of terrorist organisations.[101] Similarly, in Chile, monthly pensions, access to specialist healthcare and educational scholarships have been provided to survivors of torture and political imprisonment.[102] WAVE recommends that the pension should be based on the following principles: non-contributory; non-means-tested; completely disregarded for the purposes of calculating entitlement to means-tested benefits; with the level of payments graded to reflect the differing levels of disablement that those injured in the Troubles experience; and should continue beyond state retirement age.[103] These measures are meant to ensure the pension is easy to administer, as there is no need to develop rules around contribution conditions or to assess the applicant's wealth.[104]

To reflect reparation principles in human rights law and the recent report by the UN Special Rapporteur (UNSR) on the promotion of truth, justice, reparation and guarantees of non-recurrence, The UNSR Pablo de Greiff, noted that the pension should also have a dedicated budget line.[105] A pension by itself is not enough and UNSR Greiff stipulated that such measures need to be accompanied by other measures, such as rehabilitation, measures of satisfaction and guarantees of non-repetition. The Inter-American Court of Human Rights and the UNBPG on the Right to Remedy and Reparations support this on the grounds that compensation by itself cannot redress the public and moral harm

98 Breen-Smyth (n 80).

99 Wave Trauma Centre is a cross-community organisation formed in 1991 to support those bereaved, injured or traumatised during the Troubles.

100 CVS, *A Pension for People Severely Injured in the Troubles, Commission Advice Paper* (CVS 11 June 2014.

101 Stuart Magee, *Exploring Models for the Proposal of Special Pension Provision for those Injured in the Northern Ireland 'Troubles'* (WAVE Trauma Centre 2013) 5. Based on Law 21/1986, 23 December 1986. The more recent law would exclude members of state assassination squads such as Grupos Antiterroristas de Liberación, Article 4(3), Law 2/2003 of 12 March 2003, amending Law 32/1999 of 8 October 1999 of solidarity with the victims of terrorism.

102 'Valech Reparations': Law 19.992 of 24 December 2004.

103 Magee (n 101) 2–3.

104 Ibid 3.

105 de Greiff (n 71) para 56.

suffered by victims.[106] The comprehensiveness of any proposed pension will inevitably confront the challenge of determining the eligibility of victims. The experience of the CGP's recognition payment suggests that any sort of payment based on harm suffered during the Troubles is likely to be polemic. Even before the draft legislation has been introduced to the Northern Ireland Assembly, headlines in the local newspapers have read 'Disabled ex-terrorists may get £150-a-week pension'[107] (with a picture of a man in a balaclava with a rifle) and 'Pensions for IRA – but not for IRA's victims'.[108] The following section proposes a number of avenues to navigate the difficulties of eligibility and of defining who is a victim for the purposes of the proposed pension.

Finding a way forward on victim eligibility in Northern Ireland

This section identifies three avenues: a non-discriminatory approach; a review panel; and a private trust fund. It also suggests ways of defining who is eligible with some clarity and some remaining challenges for such a pension scheme.[109]

1 A NON-DISCRIMINATORY APPROACH

The current service provision to victims and survivors makes no distinction between civilians, members of the security forces or paramilitaries who seek to access services and secure individual assistance payments. This non-discriminatory approach is consistent with human rights law that everyone should have access to effective remedy for serious injury or death. As discussed above, even regional human rights courts do not have consistent jurisprudence on the eligibility of claimants for reparations who are members of non-state armed or terrorist groups. The Victims and Survivors (NI) Order 2006 definition of victims and survivors is quite broad and inclusive. However, this definition is inapplicable for constructing a pension programme for seriously injured victims in Northern Ireland as it is specifically stipulated to be construed in terms of the work of the CVS in advocating for victims' interests. In more practical terms, in order for reparations to be feasible and include a meaningful amount, it is necessary to consider those who suffer the most and continue to feel harmful effects, such as injured victims. Such a wide definition under the 2006 Order would make a large victim population eligible, diluting the amount and proportion available for those who suffer

106 *Blake v Guatemala*, Reparations, Series C No 48, 22 January 1999, para 42; and Principle 18, UNBPG on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 16 December 2005.

107 *Belfast Telegraph* (Belfast, 19 March 2015).

108 *Belfast Telegraph* (Belfast, 15 June 2015).

109 These models have been developed following a process of sustained engagement with victim groups, government officials and other key stakeholders on appropriate responses to deal with victimised-perpetrators on the issue of a pension for seriously injured victims. That process of engagement involved me writing a number of blogs, a policy paper and briefings for political parties, government officials and the Victims Forum around the Haass–O'Sullivan talks in 2013 and the Stormont House Agreement talks in 2014. This was facilitated through my role as a Research Fellow on the Arts and Humanities Research Council (AHRC) funded project 'Amnesties, Prosecutions and the Public Interest in the Northern Ireland Transition' led by Professor Kieran McEvoy (AH/J013897/1). Although the project focused on truth and justice, drawing from my own research it became apparent that the issue of reparations was being neglected and under the guidance of Professor McEvoy I began to explore how this could be approached through the networks built up through the AHRC project. The project also funded a conference on reparations with keynote speaker Judge Cançado Trindade, former Presiding Judge of the Inter-American Court of Human Rights. See Luke Moffett, *Report on the Remedying the Past, Healing for the Future Conference Report* (CVS November 2014); Luke Moffett, 'Time for a Pension for those Seriously Injured during the Troubles' (Slugger O'Toole, 3 December 2014); and Luke Moffett, 'A Pension for those Seriously Injured: Reparations for Dealing with the Past in Northern Ireland?' (Rights NI, 1 and 2 June 2015).

the most. That said, if the Victims and Survivors (NI) Order 2006 were adopted for seriously injured victims based on those who suffer disablement, it would provide a non-discriminatory approach.

Similarly, in private law, which provides the basis for reparations in international law, there are a number of principles for dealing with claims on the part of those who have both been responsible for inflicting harm and victims of harm. In equity the 'clean hands' doctrine, *volenti non fit injuria*, prevents an individual from deriving a profit from their own wrong.[110] The rationale for this doctrine is to ensure in the public interest that 'no polluted hand shall touch the pure foundations of justice' by excluding from claiming redress those who have committed wrongs.[111] As such, responsibility for the harm is supposed to be balanced between the parties in determining liability and causation of the injury.[112]

Perhaps more applicable is torts law, in particular trespasses against the person (such as battery), with the two principles of illegality and contributory negligence which place limits on individuals' ability to claim damages where they are responsible for their own or others' suffering. For the first of these, illegality is based on the defensive principle of *ex turpi causa non oritur actio* that no action can arise for an individual who engages in an immoral or illegal act. This rule is again based on public policy to prevent a person from profiting from their wrongdoing.[113] Nonetheless, the defence of illegality has been held inapplicable to claims of trespass against the person.[114] This exception is on the grounds that individuals should not be excluded from the protection of the law, as to do otherwise would undermine the integrity of the legal system and access to redress for serious harm.[115] However, the courts will take into account the claimant's illegal conduct in his or her own suffering that is so 'inextricably linked' with that claimant's own 'criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct'; in other words, an individual cannot claim redress if they have suffered from their own hand, reflecting a distinction between internal and external causation of harm.[116] That said, the courts do take a more pragmatic approach based on the facts of the case and public policy, moving away from moral responsibility in terms of the historical immorality or 'public consciousness test'.[117]

In light of the pragmatic approach to illegality in this context, the courts' ability to determine the responsibility or fault of a claimant turns more on their contributory negligence. This rule distinguishes between a claimant's right to claim a remedy, if they suffer damage both as a result of their own fault and the fault of another person, but it does not debar them from claiming damages. However, it does allow a defendant a defence to reduce the damages available on 'just and equitable' terms on the basis of the

110 *Nullus commodum capere potest de sua injuria propria*, 'he who has committed iniquity shall not have equity', *Tinsley v Milligan* [1993] UKHL 3, 12.

111 *Collins v Blantern* (1767) 2 KB 347, 350.

112 Lisa J Laplante, 'The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparation Policies in Peru's Political Transition' (2007) 23(1) American University International Law Review 51–90, 60.

113 See *Standard Chartered Bank v Pakistan National Shipping Corporation* [2000] 1 Lloyd's Rep 218, [232]; and James Goudkamp, '*Ex turpi causa* and immoral behaviour in the tort context' (2011) 127(July) Law Quarterly Review 354–58.

114 Law Reform Commission (LRC), *The Illegality Defence: A Consultative Report* CP No 189 (LRC 2009) 128–30

115 *Revill v Newbery* [1996] QB 567. See Rick Glofcheski, 'Plaintiff's Illegality as a Bar to Recovery of Personal Injury Damages' (1999) 19(1) Legal Studies 6–23, 20.

116 *Cross v Kirkby*, *The Times* (London 5 April 2000); affirmed in *Gray v Thames Trains Ltd and Network Rail Infrastructure Ltd* [2008] EWCA Civ 713, see Lord Hoffman [29].

117 As per LJ Bingham, *Saunders v Edwards* [1987] 1 WLR 1116, 1134. See LRC (n 114) 140–42.

claimant's share of their responsibility in the damage.[118] At least in the UK, contributory negligence is not applicable to trespasses against the person, on the basis that such harm is criminalised on public policy grounds, as according to Glanville Williams, it is a 'penal provision aimed at repressing conduct flagrantly wrongful' as well as being the 'result of the ordinary human feeling that the defendant's wrongful intention so outweighs the [claimant's] wrongful negligence as to efface it altogether'.[119] Accordingly, when it comes to trespasses against the person, the courts are very reluctant to prevent individuals from being able to seek damages as a remedy for serious harm in the form of personal injury, regardless of their background or past conduct. This is apparent in the case of Aidan McKeever, a getaway driver in an IRA attack on the police station in Coalisland in 1992. He was successful in suing the Ministry of Defence for injuries suffered in the course of an ambush by the SAS which killed four other IRA members. The High Court found that the SAS was not justified in shooting him and upheld the award of £75,000.[120] The Ministry of Defence raised the defences of *volenti non fit injuria*, *ex turpi causa non oritur actio* and contributory negligence, but these were all rejected by the court. This decision may not vindicate a non-discriminatory approach, but rather the failure of the Ministry of Defence to satisfy the evidential burden in proving the defences. As such, private law, human rights courts (to some extent) and the Victims and Survivors (NI) Order 2006 all recognise a non-discriminatory approach for defining victims and, with the former two, for compensation.

2 A REVIEW PANEL

An alternative approach to ensure the expediency of claims of civilians who were seriously injured would involve provision for a review panel. This could be built into the pension legislation to determine whether victimised perpetrators should be eligible based on their circumstances. Such a review panel is provided for under the Civil Service (Special Advisers) Act (Northern Ireland) 2013, which was a Private Members' Bill brought forward to exclude convicted members of paramilitary groups from being employed as special advisors to Northern Ireland government ministers. The 2013 Act review panel can determine whether those convicted of a 'serious criminal conviction'[121] can be eligible for a special adviser position taking into account:

> (a) whether the person has shown contrition for the offence to which the serious criminal conviction relates,
>
> (b) whether the person has taken all reasonable steps to assist in the investigation and prosecution of all other persons connected with the commission of the offence,
>
> (c) the views of any victim of the offence, or where a victim has died, the views of any close family member of the victim.[122]

For the purposes of the pension Bill, the panel could take into account the time victimised perpetrators served in prison, the gravity of their offence(s), their disability and the impact of their serious injury on daily life. There should also be provision for appeal to a High Court judge if an individual is unhappy with the outcome of the review

118 Law Reform (Contributory Negligence) Act 1945, 1(1).

119 Glanville L Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-law Dominions* (Wildy 1951) 197–98; and *Co-operative Group (CWS) Ltd v Pritchard* [2011] EWCA Civ 329, para 37.

120 *Aidan McKeever v Ministry of Defence* [2011] NIQB 87.

121 Article 5. Generally a sentence of over five years.

122 Article 3(5), Civil Service (Special Advisers) Act (Northern Ireland) 2013.

panel.[123] Alternatively, an appeals process could be built into legislation to avoid costly litigation and to provide prompt hearings before a single sitting judge.

Another option would be for a review panel that could assess the extent of the person's harm against their responsibility. Individuals who were victimised members of non-state armed groups could be included in the pension scheme, but their payments could be reduced by a proportionate amount to reflect their past responsibility in victimising others. In some domestic criminal injury compensation schemes individuals can be barred or limited to claiming certain amounts of compensation, as can their family members, based on the direct victim's background, association or past conduct.[124] Given their moral basis, criminal injury compensation schemes generally award compensation to 'good citizens', i.e. 'ideal' victims.[125] By way of example, in Northern Ireland the amount of compensation can be reduced or withheld based on: the individual's conduct before, during or after the incident; the individual's failure to inform or cooperate with the police; their 'character' based on their criminal convictions; or the minister's discretion that such an award would be inappropriate.[126] The basis of excluding or limiting compensation to victimised perpetrators is to reflect the belief that such persons who have committed offences in the past have:

> . . . probably caused distress and loss and injury to other persons, and [have] certainly caused considerable expense to society by reason of court appearances and the cost of supervising sentences, even when they have been non-custodial, and the victims may themselves have sought compensation, which is another charge on society. Even though a victim may be blameless in the incident in which the injury was sustained . . .[127]

Accordingly, victimised perpetrators are not automatically excluded from claiming compensation. However, their amount of compensation can be reduced through a series of penalty points depending on the length of their conviction and the time since their release; as well as the gravity of the claim in relation to the claimant's criminal background.[128] Thus, mitigating a victimised perpetrator's claim for compensation, or more broadly reparations, could reflect their responsibility, both internally in the harm they caused themselves and externally through harm caused to others. The scaled system of reducing their compensation could evince retribution through ensuring that their responsibility is proportionally reflected in their final award. Yet, allowing them access to reparation acknowledges their suffering and that they deserve some form of remedy, meaning that their past actions should not bar them from the protection of the law. In Northern Ireland at least, this compensation was restructured in part for this purpose, due to previous schemes denying compensation to the families of those paramilitaries

123 As in the Civil Service (Special Advisers) Act (Northern Ireland) 2013, Article 4.

124 Articles 8 and 9(4), Convention on the Compensation of Victims of Violent Crimes, 24 November 1983.

125 David Miers, 'Compensating Deserving Victims of Violence Crime: The Criminal Injuries Compensation Scheme 2012' (2014) 34(2) Legal Studies 242–78, 251 and 258.

126 Paras 14(1) and 16 (for those killed). An award can be inappropriate and withheld if it is likely that the assailant would benefit, para 17(a).

127 Compensation Services, *Guide to the Northern Ireland Criminal Injuries Compensation Scheme* (Department of Justice 2009) para 8.15.

128 By way of example, if an individual was convicted of murder more than 10 years ago, their claim for compensation for contemporary injury would be reduced by 25 per cent. See Compensation Services (n 127) 21.

unlawfully killed by private or state actors.[129] This approach reflects that such individuals are both responsible in victimising others, but, due to the seriousness of their suffering, they should have some form of remedy.

3 Private trust fund

To avoid the pension Bill handing a 'terrorist' a monthly government cheque, a private trust fund could be established as part of the pension Bill for those seriously injured individuals who were members of paramilitary groups. Those 'innocent' victims who suffered serious injuries would automatically receive their pension from the government. However, those victimised perpetrators would receive a comparable amount through the private trust fund, allowing them access to a pension as a victim without attaching government money to it. Such funds could come from private charitable donors, international organisations, or even prisoner groups to ensure that they 'look after their own'.

In South Africa a separate pension fund was set up for members of former state and non-state armed groups, such as the African National Congress military wing (MK), on the basis of the sacrifices such forces made in the establishment of democracy.[130] The pension board in determining awards could take into account the individual's role and motive in a political offence and its nature and gravity with regard to state and non-state actors.[131] The International Criminal Court has a Trust Fund for Victims (TFV) which has two mandates: to provide assistance to victims; and to act as a financial repository and provider of reparations where perpetrators are indigent.[132] Although the TFV is not set up to avoid difficult issues of victimised perpetrators, it is providing reparations to child soldiers in the *Lubanga* case, as the convicted person is indigent. In the Northern Ireland context, it may be difficult for such groups to fund-raise such money and may not be palatable to victimised perpetrators as it concedes that there is a hierarchy of victims. Thus, the first two models seem more viable. Beyond these avenues to craft an equitable solution for victimised perpetrators and 'innocent victims', defining who is eligible will be key.

Defining who is eligible

The definition of which victims are eligible for the pension has to be carefully crafted so as to be clear and to achieve a reasonably equitable solution for all affected victims. There are four possible grounds for defining eligibility: inclusive; unlawful harm; serious criminal convictions/scheduled offences; and qualified. With the first of these, WAVE and the CVS have suggested an inclusive approach in their guidance on the pension as:

129 Kenneth Bloomfield, *Report of the Review of Criminal Injuries Compensation in Northern Ireland* (TSO 1999). The report recognises that 'individuals may reform over time and dissociate themselves from their previous way of life' reflecting that their agency and responsibility for past conduct should not deny recognition of their victimisation.

130 Including the South African Defence Forces, Umkhonoto we Sizwe and the Azanian People's Liberation Army, recognising that members did not join liberation movements for financial compensation, but that they were prevented from accumulating a work pension. Some members of MK believed that victims who 'did not fight' did not deserve compensation. Lovell Fernandez, 'Reparations Policy in South Africa for the Victims of Apartheid' (1999) 3(2) Law, Democracy and Development 209–22, 214. S 189(1) of the Interim South African Constitution (No 200 of 1993); s 1, Government Employees Pension Law 1996 (No 21 of 1996); and Special Pensions Act 1996 (No 69 of 1996).

131 Special Pensions Act 1996, s 1(2).

132 Article 79. See Luke Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' (2013) 17(3) International Journal of Human Rights 368–90.

a) The claimant suffered physical injury(s) as a result of Troubles related incident(s);

b) the injury(s) has resulted in disablement.[133]

This inclusive approach reflects that anyone who suffered serious violations should have access to a remedy, compliant with the non-discrimination principle in human rights law, no matter their background. It also reflects the broad definition under the Victims and Survivors (NI) Order 2006. Moreover, this inclusive definition does not tackle the issue of ex-combatants who were responsible for victimising others but ended up themselves suffering serious injuries. There are perhaps other ways of crafting a legal definition to address these individuals.

The second option of unlawful suffering is to define eligibility as:

a) The claimant suffered physical injury(s) as a result of Troubles related incident(s), which was unlawfully caused by another person or organisation;

b) the injury(s) has resulted in disablement.

This would allow a broad category of individuals to be eligible for the pension, but would implicitly exclude those who injured themselves (such as bomb-makers) or were lawfully shot by the security forces. This is compliant with the judgment in the aforementioned *Aidan McKeever v Ministry of Defence* where the claimant (an unarmed getaway driver for the IRA) was unlawfully shot and injured (four other IRA members being killed) by the British army in February 1992.[134] Accordingly, this approach reflects a basic tenet of the rule of law and human rights law that everyone who suffers unlawful intentional harm should have access to a remedy.

The third option is an explicit exclusion of convicted ex-combatants as:

a) The claimant suffered physical injury(s) as a result of Troubles related incident(s);

b) the injury(s) has resulted in disablement;

c) this excludes any person who has been convicted for a serious criminal conviction or scheduled offence.

The definition of serious criminal conviction would follow that used in the Civil Service (Special Advisers) Act (NI) 2013 of a crime that resulted in a conviction with imprisonment of five years or more, which would include most scheduled offences, such as membership of a proscribed organisation. This is consistent with the Rehabilitation of Offenders (NI) Order 1978, where those convicted of offences with imprisonment ordered over five years or life cannot have their sentence rehabilitated or their conviction spent.[135] However, the difficulty with this exclusion is that not every ex-combatant was convicted and it thus would not exclude every single victimised perpetrator. Moreover, the Criminal Case Review Commission, which examines wrongful convictions, has over 300 appeals pending, most of which are overturning convictions based on improperly obtained confessions. The Iraqi compensation law for those injured during military operations or terrorist offences excludes anyone convicted under the Iraqi terrorism act, 'until proven innocent', which is perhaps a workaround for this issue.[136]

133 Magee (n 101) 3; CVS, *A Pension for People Severely Injured in the Troubles* Commission Advice Paper (CVS, 11 September 2013) 6.

134 *Aidan McKeever v Ministry of Defence* [2011] NIQB 87.

135 Article 6.

136 Article 17, 2009 Compensation for those Affected by Military Operations, Military Mistakes and Terrorist Actions, Law No 20.

The fourth option is a qualified definition of:

a) The claimant suffered physical injury(s) as a result of Troubles related incident(s);
b) the injury(s) has resulted in disablement;
c) any person convicted for a serious criminal conviction or scheduled offence their eligibility will be dealt with through the review panel/their amount will be determined through the tariff system.

This would allow ex-combatants to be distinguished from civilians as responsible actors who were involved in causing suffering to others, but, given the seriousness of their own individual harm caused by others, deserve some form of redress. The benefit with this definition is that it neutralises the issue of eligibility from obstructing the ability of 'innocent' seriously injured victims from obtaining their compensation, as those victimised perpetrators go through the panel or a specialised committee to decide such cases on the basis of a tariff. The experience of Peru is apt, where victimised perpetrators were excluded and checks had to be made with every application whether the person was a member of an insurgent group, which had the effect of delaying for years reparations to all victims.[137]

Remaining challenges for a scheme

The definition is likely to be the most contentious part of the pension Bill, but there remain other challenges for such a programme. Although the pension law focuses, deservedly so, on those who are seriously injured, other victims who are bereaved or who have suffered sexual violence should have access to some form of reparation, whether compensation or more symbolic measures. While other contexts, such as Sierra Leone, Timor Leste and Kenya, have recommended that reparations be prioritised for victims who are seriously injured and bereaved, such programmes have included tens of thousands of victims and a wide range of violations in order to fully remedy the past rather than particular harms. In the Northern Ireland context, there are also considerations of s 75 of the Northern Ireland Act 1998 on obligations on public authorities to ensure due regard to equality of opportunity to disabled persons. Those victims excluded from the pension, such as those bereaved, may seek to be included through litigation, which may increase the cost and size of the programme if they are successful.

Difficulties will also arise for those injured victims who are required to evidence that their harm was brought about by a Troubles-related incident. Some are likely to have medical evidence, but not all. WAVE proposes receipt of the money for injuries from the NIMF or VSS as one possibility. Alternative arrangements of evidence should be put in place for the CVS to assist victims in evidence collection through public records to ensure greater inclusion of those who are eligible. A further evidential problem, but also important for the focus of redressing which harm, is whether or not those who suffered from psychological trauma as a result of a Troubles-related incident should be eligible. Including those with psychological injuries is likely to increase the number of eligible persons by thousands and reduce the amount of money available to those who suffer from debilitating physical injuries. The Northern Ireland Court of Appeal has held that, in relation to the Criminal Injuries Compensation Scheme, psychological injuries should be included for such a scheme where they are disabling.[138] However, as there is no

137 Root (n 35) 134.

138 *An Application by Florence Hoy for Judicial Review* [2009] NICA 7.

requirement in international law to include psychologically injured victims in pension or reparation laws, such individuals are perhaps better dealt with through the proposed Mental Trauma Service.

Conclusion

Reparations, while a worthy aspiration in redressing harm, often get bogged down in defining who is eligible and deserving of remedies. This article has attempted to provide some paths across the quagmire of contention around victimised perpetrators. It is important to distinguish reparations from services that are currently used in Northern Ireland, with the former being based on right or legal entitlement, acknowledging the wrongful act of the violence committed against the victim and vindicating their moral worth; whereas services are discretionary, making victims dependents rather than agents. This has important connotations for the framing of the pension Bill for seriously injured victims because work by WAVE and the CVS, which have been pushing the pension, has drawn from the experience of the Employment and Support Allowance Regulations (NI) 2008 or industrial accidents for extent of disablement. Such comparators should be useful in finding an appropriate amount, but this approach was rejected in Argentina where compensation for victims was based on the pay of the highest ranked civil servant rather than the industrial accidents tariff, as such harm, particularly during the Troubles in Northern Ireland, was not accidental, but rather arose from intentional political violence that should carry more serious connotations and more adequate reparations.[139] Although reparations are usually based on responsibility in international law, it may cause some controversy to base the pension for injured victims in Northern Ireland on such a premise, given that the majority of violence was carried out by paramilitaries. That said, reparations are adopted in many countries with multiple responsible actors where the state takes on the responsibility to make reparations on the ground of social solidarity, with provisions that money paid out to victims is treated as an indemnity against any perpetrators who are later convicted. More problematic is the crafting of a pension law in light of a wider transitional justice programme, including truth recovery and justice mechanisms. But without such complementary accountability mechanisms, such money can be perceived as 'blood money' to pay off certain victim constituents and to give a good news story for politicians coming up to a Northern Ireland Assembly election. As UNSR Pablo de Greiff recently stated:

> [in] order for something to count as reparation, as a justice measure, it has to be accompanied by an acknowledgment of responsibility and it has to be linked, precisely, with truth, justice, and guarantees of non-recurrence. Second, and as a consequence, recognizing the distinctive contribution that reparations can make to victims does not justify, either legally or morally, asking them – or anyone else – to trade off amongst the different justice initiatives.[140]

A pension for seriously injured victims has been a long time coming, but resolution of this issue is not only a long overdue opportunity to alleviate the suffering of several thousand victims, it is also an opportunity to acknowledge and unpack the complexity of political violence and associated victimisation.

139 José María Guembe, 'Economic Reparations for Grave Human Rights Violations: The Argentinean Experience' in Pablo de Greiff (ed), *The Handbook for Reparations* (OUP 2006) 21–54, 30.

140 de Greiff (n 71) para 12.

NILQ 66(4): 321–41

Disturbing corporate personality to remedy a fraudulent incorporation: an analysis of the piercing principle

STEPHEN GRIFFIN

Emeritus Professor of Corporate Law, University of Wolverhampton

Abstract

Following two recent decisions of the Supreme Court it has been confirmed that the ability to disturb corporate personality by piercing the corporate veil is as an established principle but one that should be used only as a tool of last resort. In practice the deployment of this 'piercing principle' will be a rarity to the point of near extinction. This paper will contend, however, that the Supreme Court's endorsement of a limited piercing principle does not address fully the commercial necessity of disturbing the corporate personality of companies incorporated to pursue a fraudulent activity; further, that this lacuna could have been averted had the Supreme Court identified a related but broader 'piercing concept' which is established impliedly in the case law.

Introduction

A fundamental principle of corporate law, established as the *Salomon* principle,[1] provides that from the date of a company's incorporation, the company is to be regarded as a distinct legal entity; a 'body corporate', possessing legal rights and responsibilities in a manner akin to a natural person.[2] The independent legal status of the corporate entity is said to cast a 'veil' between the company and its members, to the extent that any liability attached to a limited company by way of share capital[3] will fall ordinarily on the body corporate and not on the company's members.[4]

At common law, but in exceptional circumstances, it may be possible to pierce the protective veil of incorporation to expose the company's controller (ordinarily the controlling shareholder) to a liability or responsibility that would otherwise have fallen exclusively on the corporate entity. The liability of the company's controller may be a joint

1 The principle is derived from the decision of the House of Lords in *Salomon v A Salomon & Co Ltd* [1897] AC 22.

2 Incorporated into the companies legislation as Companies Act (CA) 2006, s 16.

3 A member of a company with fully paid-up shares will cease to incur any liability to contribute to the debts of the company, see CA 2006, s 3(2).

4 Alternatively, a limited liability company may be incorporated by guarantee, see CA 2006, s 3(3). In such a case and following the company's winding-up, a member's liability will be determined by the sum of the guarantee.

liability with the company or, in some instances, the corporate veil may be ignored in its entirety to impose an absolute liability against the controller.[5]

The exact scope of the 'piercing doctrine' is, however, confused and to a significant extent.[6] The purpose of this paper is to ultimately explore, analyse and comment on this confusion to a conclusion that in one instance 'veil piercing' may properly be regarded as an established principle. This established principle arises in a situation where a company was incorporated to the objective of evading a pre-existing legal obligation of its controller (hereafter referred to in this paper as the 'evasion principle').[7] This paper will contend that this established piercing concept is, however, but a constituent part of a wider piercing concept (hereafter referred to in this paper as the 'fraudulent incorporation concept') which, it is asserted, is rooted in the *Salomon* judgment.[8] In this respect and as a matter of methodology, the paper will analyse the development, deployment and current status of the piercing doctrine, a journey which will culminate in two recent decisions of the Supreme Court.[9] As a starting point for this journey, it is imperative to consider first the judgment of the House of Lords in *Salomon v A Salomon & Co Ltd.*[10]

The *Salomon* principle

In *Salomon v A Salomon & Co Ltd*, the fundamental issue before the House of Lords was whether a company, dominated and controlled by one person (a company commonly referred to as a 'one-man-type company') was legally incorporated in accordance with the terms of the then governing companies legislation, namely the Companies Act 1862.[11] If, in accordance with the terms of the Act, the company was incorporated legitimately, the responsibility for discharging corporate debts and liabilities rested solely with the company in its guise as a distinct legal entity.[12] Section 6 of the Companies Act 1862, specified that a company had to be incorporated for a lawful purpose and that as a minimum requirement should have seven members. A Salomon & Co Ltd complied with

5 The court will ordinarily impose an absolute liability or responsibility on the person who controls the company in circumstances where the company is devoid of any assets.

6 There are numerous academic articles in which these contentious issues have been considered, see generally e.g. S Ottolengui, 'From Peeping behind the Corporate Veil to Ignoring It Completely' (1990)53 MLR 338; J H Farrar, 'Fraud, Fairness and Piercing the Corporate Veil' (1990) 16 Canadian Business Law Journal 474; C Mitchell 'Lifting the Corporate Veil in the English Courts: An Empirical Study' (1999) 3 Company Financial and Insolvency Law Review 15; D Michael 'To Know a Veil' (2000) 26 Journal of Corporation Law 41; M Moore 'A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of *Salomon v. Salomon*' (2006) Journal of Business Law 478; C H Tham, 'Piercing the Corporate Veil: Searching for an Appropriate Choice of Law Rules' [2007] Lloyd's Maritime and Commercial Law Quarterly 22.

7 The term 'evasion principle' was first used by Lord Sumption in *Prest v Petrodel Resources Ltd* [2013] UKSC 34; [2013] 2 AC 415.

8 The vast majority of legal systems recognise that a company's distinct legal status may be subject to exceptions. In civil law jurisdictions, the juridical basis of the exceptions is generally the concept of an abuse of rights, see e.g. the decision of the International Court of Justice in *Barcelona Traction, Light and Power Co Ltd* (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3. Here, a limited principle was advanced to permit the piercing of the corporate veil in cases of misuse, fraud, malfeasance or evasion of legal obligations.

9 *VTB Capital plc v Nutritek* [2013] UKSC 5; [2013] 2 AC 337 and *Prest* (n 7).

10 *Salomon* (n 1).

11 CA 1862, s 6.

12 For case examples relating to the acceptance of the incorporation of a 'one-dominated business' pre-*Salomon*, see e.g. *Re George Newman & Co* [1895] 1 Ch 674 and *Farrar v Farrar* (1889) 40 Ch D 395.

the latter requirement,[13] having also appeared, prima facie, to have complied with the former requirement.[14]

Within a year of its incorporation, A Salomon & Co Ltd fell into an insolvent state, a dire position from which it would not escape.[15] Following the company's subsequent liquidation, the realisation of its assets was insufficient to satisfy the totality of its unsecured debts. The company's liquidator sought to hold the company's controlling shareholder, Mr Salomon, personally liable for the debts, arguing that the company's incorporation fell outside the true spirit and intent of the Companies Act 1862. In the ensuing litigation in both the High Court[16] and the Court of Appeal,[17] it was accepted that the company was a distinct legal entity; the company having been formally registered in compliance with the 1862 Act. Nevertheless, both the High Court and Court of Appeal considered that A Salomon & Co Ltd had not met the intent of the 1862 Act's requirement that a company should be incorporated by seven persons 'associated for a lawful purpose'. The lower courts interpreted this requirement to mean that all seven persons who became members of the company should have a bona fide intention of participating in the trading venture. Although, prior to its incorporation Mr Salomon's business had been profitable, in effect, the lower courts viewed its transformation into a limited liability company and its perilous and rapid decline to be no more than a scandalous device to defraud creditors.[18] To this end the lower courts disturbed the corporate status of A Salomon & Co Ltd to make Mr Salomon personally liable for the company's debts.

In the High Court, Vaughan Williams J concluded that the relationship between Mr Salomon and the company was one of agency, Mr Salomon having exerted absolute control over the company. As the principal in the agency relationship, Mr Salomon was held to be personally liable to repay the unsecured debts.[19] In the matter of Salomon's personal liability, the Court of Appeal concurred with the decision of the High Court, although declaring that the legal relationship between Mr Salomon and the company was

13 The company acquired Mr Salomon's business at a price of approximately £39,000. In consideration for its acquisition of the business the company issued 20,006 £1 shares, of which 20,000 were allotted to Mr Salomon, with one share each allotted to his wife and five children. In addition, Mr Salomon was issued with debentures (secured against the assets of the company by way of a floating charge) to the value of £10,000. Mr Salomon took the remainder of the sale price in cash.

14 The business was owned previously by Mr Salomon and was incorporated to continue a pre-existing and successful business enterprise. The incorporated company was purportedly to operate as a family business, but under the dominant control of Mr Salomon. In effect, the six other shareholders were to play no significant role in the running and organisation of the business affairs of the company.

15 The company's failure resulted from unforeseen circumstances falling outside the contemplation of Mr Salomon, namely a depression in the market coupled with adverse trade union activity in the industry; both factors caused significant disruption to the company's business operations.

16 *Broderip v Salomon* [1895] 2 Ch 323.

17 Ibid.

18 In the Court of Appeal, Lopes LJ remarked: 'If we were to permit it to succeed, we should be authorising a perversion of the Joint Stock Companies Act. We should give vitality to that which is a myth and a fiction . . . To legalise such a transaction would be a scandal.' (n 16) 341.

19 An agency relationship recognises the existence of two distinct legal entities (the principal and the agent). The principal is responsible and liable for the acts of its agent. Agency may be tentatively defined as a relationship which is based upon the express or implied consent of both the agent and the principal, whereby the agent is made subject to the principal's absolute control and will, to the extent that the agent conducts its business affairs without independence and does so to the ultimate benefit of its principal (see e.g. *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] AC 1130,1137).

not one of agency but rather one governed by the law of trusts.[20] Accordingly, Mr Salomon was liable as the beneficiary in the trust relationship.

On appeal to the House of Lords, the House unanimously refuted the assertions of the lower courts. The House recognised that the High Court's finding of an agency relationship in a one-man-type company would be to defeat the very objective of incorporating this type of company. There could be no agency relationship. As Lord Herschell explained:

> In a popular sense, a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs.[21]

In relation to the Court of Appeal's assertion that there had been a trust relationship, Lord Davey remarked:

> There was certainly no express trust for the appellant; and an implied or constructive trust can only be raised by virtue of some equity. I took the liberty of asking the learned counsel what the equity was, but got no answer.[22]

Applying a literal interpretation of the 1862 Act, the House held that a company could be incorporated providing it had at least seven members, irrespective of whether or not all seven members made a noteworthy financial and/or working contribution to the company. As the incorporation of A Salomon & Co Ltd complied fully with the registration procedures and intent of the 1862 Act, the company was a legitimate entity and therefore responsible for the repayment of its own debts.[23] Nevertheless, implicit from the obiter comments of their Lordships was the inference that, had the company been incorporated to pursue an illegitimate purpose, namely of a fraudulent, dishonest or mythical design, then the otherwise legitimate incorporation of the company could be disturbed.[24] For example, Lord Halsbury observed :

> If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of . . .[25]

Commenting on the judgment of the Court of Appeal, Lord Macnaughten stated:

> If, however, the declaration of the Court of Appeal means that Mr. Salomon acted fraudulently or dishonestly, I must say I can find nothing in the evidence to support such an imputation.[26]

With the benefit of hindsight, it was most unfortunate that neither Lord Halsbury or Lord Macnaughten sought to explain the type and nature of the impropriety that would justify a finding of an illegitimate incorporation. For example, in establishing a fraud, was it necessary to establish that a controlling shareholder subjectively or objectively intended to exploit the incorporation process to deceive an innocent third party? Or, alternatively, could the term fraud be equated with an equitable fraud, objectively identifiable by the unconscionable behaviour of the individual who controlled the company? As, however,

20 It is unclear, however, what type of trust the Court of Appeal had in mind.

21 *Salomon* (n 1) 43.

22 Ibid 56.

23 Ibid, see e.g. the judgment of Lord Macnaughten, 46.

24 See, C M Schmitthoff, 'Salomon in the Shadow' (1976) Journal of Business Law 305.

25 *Salomon* (n 1) 33.

26 Ibid 52.

the *Salomon* case provided no real evidence of a fraud[27] or illegitimate purpose,[28] such questions were extraneous to its outcome.[29] Accordingly, the precise subjective or objectively perceived motive for incorporation[30] became irrelevant.[31]

Of the six members of the House who heard the case, only Lord Davey sought to allude to the consequences which, in his Lordship's opinion, should be attached to an illegitimate incorporation. Lord Davey's suggested remedy was not that an illegitimate incorporation should result in a disturbance of the company's corporate veil but rather that the company's incorporation and existence should be nullified.[32] Other than in one specific instance,[33] Lord Davey's suggestion was never adopted, which is understandable given that the consequences of treating a company as a nullity would be that any of its outstanding contractual obligations would be deemed void.[34]

Piercing the corporate veil: the justice argument

In case law subsequent to *Salomon*, it is feasible to suggest that by applying a flexible, but nonetheless viable, interpretation of the obiter comments of both Lord Macnaughten and Lord Halsbury (previously alluded to above), a strict alignment to the *Salomon* principle could be disturbed in circumstances where a company was incorporated to pursue an unjust business activity of a type analogous to an equitable fraud. An equitable fraud would be expected ordinarily to embrace a wide range of misconduct to include instances of unfair conduct, undue influence, abuse of confidence and unconscionable bargains.[35]

27 It was alleged that Mr Salomon committed a fraud by overvaluing his business and because the company did not have a properly constituted board of directors. The House of Lords concluded that the substance of these allegations did not amount to fraud, see e.g. the comments of Lord Davey in *Salomon* (n 1) 57.

28 A further blemish on Mr Salomon's potential credibility was that, at the time of the company's incorporation, he was issued with a £10,000 debenture. The debenture was secured against the company's assets giving him a repayment priority on the company's insolvency. The debenture transaction was, however, legally registered and therefore afforded notice of its existence to the company's other creditors. The fact that the debenture was subsequently sold to a Mr Broderip (for only £5000) and the sale funds ploughed back into the company provided cogent evidence that Mr Salomon's desire was to rescue, as opposed to exploit, the company's fortunes.

29 As Lord Halsbury observed, Mr Salomon was 'not shown to have done or to have intended to do anything dishonest or untrustworthy, but to have suffered a great misfortune without any fault of his own . . .' (n 1) 34.

30 In *Salomon*, the motive for incorporation was probably to create a formal family business with the added benefit of a limited liability status.

31 See the comments of Lord Halsbury: *Salomon* (n 1) 30.

32 Ibid 56–57.

33 The Crown is given a limited power to declare that a company is a nullity in circumstances where the company was formed for an unlawful purpose, see *R v Registrar of Companies* [1991] BCLC 476.

34 If a company is deemed to be a nullity it logically follows that it could never have legitimately entered the process of being formed (incorporated) and therefore its controller could never be made personally liable on an alleged pre-incorporation contract. Pre-incorporation contracts are governed by CA 2006, s 51. The provision is interpreted strictly, See e.g. *Oshkosh B'Gosh Inc v Dan Marbel Ltd* [1989] BCLC 507.

35 See e.g. the comments of Lord Selborne LC in Earl of *Aylesford v Morris* (1873) LR 8 Ch App 484, 490–91, and those of Viscount Haldane LC in *Nocton v Lord Ashburton* [1914] AC 932. More recently, see the comments of Patten LJ in *De Bruyne v De Bruyne* [2010] EWCA Civ 519, para 51.

A justice criterion for piercing the corporate veil was accepted by Lord Denning in both *Littlewoods Mail Order Stores Ltd v IRC*[36] and *Wallensteiner v Moir*,[37] and by Cumming Bruce LJ, in *Re a Company*.[38] Yet, by its very nature the ambit of a justice criterion lacked precision, flawed by the potential uncertainty and inconsistency that would inevitably be attached to its universal application.[39] While any decision to pierce the corporate veil would be touched naturally by the justice of the particular case, as a precise piercing principle, the justice criterion was far too vague and imprecise.[40] In matters governing the sanctity of the corporate veil, the commercial world required a more rigid adherence to the *Salomon* principle and greater certainty and clarity in relation to when that principle could be disturbed.

The judicial condemnation of the use of a justice criterion was implicit in the decision of the House of Lords in *Woolfson v Strathclyde Regional Council*,[41] a condemnation emphasised by the subsequent judgment of the Court of Appeal in *Adams v Cape Industries*.[42] Following *Adams*, an ability to pierce the corporate veil was made subject to precise and strict guidelines. The guidelines provided that the corporate veil should only be pierced in a situation where 'special circumstances exist indicating that the company is a mere façade concealing the true facts'.[43] In *Adams*, the Court of Appeal provided two scenarios in which a façade could be established, namely, where a company was deemed to be the agent of its controlling shareholder[44] or, alternatively, in a situation (now referred to as the 'evasion principle') where the individual who controlled the company sought to evade a pre-existing legal obligation by hiding it behind the protective 'corporate shield' of a registered company.[45] In relation to the agency category and following on from the reasoning in *Salomon*, it is probable that the Court of Appeal considered that the agency form of façade should only be made applicable in cases involving a group of companies.[46]

In addition to curtailing a justice criterion in the context of veil-piercing, the decision in *Adams* also refuted the practice of piercing the corporate veil on the ground that a group of companies constituted a single 'economic entity'. Prior to *Adams*, it had been

36 [1969] 1 WLR 1241. At 1254, Lord Denning observed: 'The doctrine laid down in *Salomon*'s case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can and often do pull off the mask and look to see what really lies behind.'

37 [1974] 1 WLR 991.

38 (1985) 1 BCC 99, 421. Cumming Bruce LJ delivered the judgment of the Court of Appeal.

39 The justice criterion was also applied in *Creasey v Breachwood Motors Ltd* [1993] BCLC 480 and in *The Tjaskemolen* [1997] CLC 521. In obiter comments in *Prest* (n 7) 507, Baroness Hale (with whom Lord Wilson agreed) considered that successful instances of piercing the corporate veil should be viewed more simply as examples of a much broader principle based upon unconscionable advantage. This view did not, however, represent the majority opinion of the Supreme Court (discussed further in the text below).

40 See, B Maughan and S Copp, 'Piercing the Corporate Veil' (1998) New Law Journal 938 and A Walters, 'The Corporate Veil' (1998) 19 Company Law. 226.

41 *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90.

42 [1990] Ch 433.

43 Words taken from the judgment of Lord Keith in *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90, 96.

44 See n 19 above. To establish an agency relationship it is necessary to prove that the holding company exerted absolute control over the affairs of its subsidiary, see S Griffin, 'The Corporate Veil (Holding Companies and Subsidiaries)' (1991) 12 Company Law 16.

45 See the judgment of Slade LJ (n 42) 542–48

46 An ability to establish an agency relationship would make it unnecessary to pierce the corporate veil of the subsidiary. The agency relationship would deem, as of legal right, that the conduct of the subsidiary's affairs was the responsibility of its holding company.

possible to establish an 'economic entity' relationship in circumstances where a holding company controlled the corporate policy of its subsidiary(ies).[47] It is to be observed that an ability to pierce the corporate veil based on the economic entity argument fell short of the requirements necessary to establish a full agency relationship.

In commercial law cases subsequent to *Adams*, the evasion principle became the norm for determining whether the corporate veil could be pierced. In matrimonial cases, however, and to an objective of achieving a just and fair settlement in disputes involving the division of corporate property, the family law courts created a 'diversion' away from the evasion principle.[48] This diversion empowered a spouse (ordinarily the wife) to claim that in circumstances where her husband exercised exclusive control over a company, property registered in the company's name should be construed to be the husband's property, to a conclusion that the property was matrimonial property, to which the wife could lay claim.[49] The validity of the diversion was often accepted by the family courts notwithstanding that in a technical sense its application contradicted the terms of the governing legislation, namely, the Matrimonial Causes Act 1973, s 24(1)(a).[50] In practice, however, the 'matrimonial law diversion' was applied sparingly because either the majority shareholder (husband) lacked effective control over the company or, alternatively, the corporate property in question was made subject to adverse third-party interests, for example, the claims of minority shareholders or corporate creditors.[51] Nevertheless, it is evident that the diversion's more elastic approach, which was exemplified by the judgment of Connell J in *Green v Green*,[52] was generally supported as a viable option for the Family Division.[53]

Following, however, the recent decision of the Supreme Court in *Prest v Petrodel Resources Ltd*,[54] the acceptable method for determining a division of corporate property in matrimonial cases by means of piercing the corporate veil is now settled in favour of the commercial law approach. In *Prest*, the Supreme Court held that an order under the Matrimonial Causes Act 1973, s 24(1)(a), should not be made in relation to a division of corporate property other than where there were legitimate grounds to pierce the company's corporate veil by way of the evasion principle; or, alternatively, in circumstances where a trust had been created over the relevant property in favour of the company's controller.[55] On the facts of the case, the Supreme Court found that a resulting trust had been created in favour of the controlling shareholder.

47 See e.g. *Holdsworth & Co v Caddies* [1955] 1 WLR 352; *Scottish Wholesale Co-op Society v Meyer* [1959] AC 324; *DHN Food Distributors Ltd v Tower Hamlets* [1976] 1 WLR 852.

48 A number of matrimonial cases did, however, favour the evasion principle approach, see e.g. *Wicks v Wicks* [1999] Fam 65 and *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam); [2009] 1 FLR 115.

49 The diversion takes its remit and authority from the obiter comments of the Court of Appeal in *Nicholas v Nicholas* [1984] FLR 285, In *Nicholas* the corporate veil was not pierced because the husband lacked majority voting control, see the comments of Cumming-Bruce LJ, 287. It would appear that the diversion was successfully applied in only one reported case, namely *Green v Green* [1993] 1 FLR 326.

50 The provision provides that a wife (or husband, as the case may be) may only lay claim to her (his) spouse's property in circumstances which establish that the spouse was entitled, either in possession or reversion to the said property. If property is therefore owned and registered in a company's name the spouse will ordinarily have no entitlement to the property.

51 See e.g. *Mubarak v Mubarak* [2001] 1 FLR 673.

52 See n 50 above.

53 See e.g. the comments of Mostyn J in *Kremen v Agrest* [2010] EWHC 3091(Fam), para 44.

54 [2013] UKSC 34; [2013] 2 AC 415.

55 See e.g. *M v M* [2013] EWHC 2534 (Fam).

Piercing the corporate veil: the origin and development of the evasion principle

The origin of the evasion principle is derived from the decision of the Court of Appeal in *Gilford Motor Co v Horne*.[56] In this case, a Mr Horne, previously employed as the managing director of Gilford Motor Co (G), left his employment (by mutual consent) to form a new company. This new company pursued a similar type of business to G and, although its shareholders were nominees of Horne, the company was under Horne's dominant control. In effect, Horne's position in the new company was that of a shadow director.[57] Horne's intention in forming and structuring the new company through nominees was to escape a restrictive covenant within the terms of his employment contract with G. The restrictive covenant prohibited Horne from soliciting, interfering, or endeavouring to entice away from G, any person, firm or company which at any time during or at the date of the termination of his employment was a customer of or in the habit of dealing with the G.

At first instance, Farwell J found that the new company had been used as 'the channel through which the defendant, Horne, was carrying on his business'.[58] The case was dismissed, however, because the restrictive covenant was considered to be void. On appeal, the decision of Farwell J was reversed and the validity of the restrictive covenant was upheld. The Court of Appeal deemed the company to have been no more than an alias of Horne. The court concluded that, as a matter of equity, the corporate veil of the company should be pierced. The restrictive covenant was enforced by means of an equitable remedy, namely, an injunction against both Horne and the company.

In *Gilford*, the company formed by Horne was described by Lord Hanworth MR to be no more than a 'sham, an agent' of its controller.[59] Although the company was recognised as a distinct legal entity, its corporate veil was pierced to expose Horne's culpability for breaching the terms of the restrictive covenant. Horne had fraudulently sought to hide the impropriety (the breach of the restrictive covenant) behind the sham company. In *Gilford*, a judicial explanation of the legal relationship between Horne and the sham company, as one constituting an agency relationship, would have presented an obvious conflict with the reasoning adopted by the House of Lords in Salomon. By applying an equitable piercing principle (the evasion principle) the court neatly, although perhaps unwittingly,[60] escaped any potential conflict with the approach adopted in *Salomon*.

The factual circumstances in *Gilford* that gave rise to the ultimate decision of the Court of Appeal would become the subsequent benchmark and key to unlocking the nature of a 'sham company type' scenario, a situation in which an equitable piercing of the corporate veil would be justified. Yet, following the decision in Gilford and for the next 30 years, there were no reported cases in which the evasion principle was successfully

56 [1933] Ch 935. The Court of Appeal (see the judgment of Lord Hanworth, 961) adopted the reasoning applied in *Smith v Hancock* [1894] 2 Ch 377. The exact principle enunciated in *Smith* was that if a valid restrictive covenant prevented the vendor of a business from setting up a competing business, then it would also be valid to prevent the vendor retaining an interest in a competing business operated by his wife, a close relative or associate.

57 See, CA 2006, s 251. A shadow director may be defined as a person who often operates outside the internal management structures of a company but who is, nevertheless, able to exert significant influence over a part or whole of the company's affairs. The advice and instructions of this person are usually followed by the company's board of directors. See *Secretary of State v Deverell* [2001] Ch 340.

58 See *Gilford* (n 56) 943.

59 See the judgment of Lord Hanworth MR, ibid 961–62.

60 The decision of the House of Lords in *Salomon* (n 1) was not considered in the judgment at first instance, or in the judgment of the Court of Appeal.

applied. The first case after *Gilford* to apply the evasion principle was *Jones v Lipman*.[61] Here, a Mr Lipman sought to escape specific performance of a contract for the sale of land. Lipman attempted to evade the contract by transferring the land in question to a company which he had recently acquired.[62] Russell J held that the company was used as a device to evade Lipman's contractual responsibility; specific performance for the sale of the land was granted against both Lipman and the company. By seeking to evade the purchase contract Lipman had sought to evade an existing legal obligation, an impropriety that he had then attempted to hide behind the corporate veil of a newly acquired company to an objective of frustrating the contract of sale. The evasion principle was applied and the company's corporate veil was pierced to expose Lipman's personal culpability. Russell J commented that:

> The defendant company is the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.[63]

Subsequent to the decision in *Jones v Lipman*, cases portraying factual circumstances to justify the application of the evasion principle were a great rarity. Indeed, the correct usage of the evasion principle would be applied successfully in but one instance, namely the decision of Foster J in *Locke (Albert) (1940) v Winsford Urban DC*.[64] Although both *Gencor ACP Ltd v Dalby*[65] and *Trustor AB v Smallbone (No2)*[66] would provide linkage to the evasion principle, in so far as both cases purported to adopt and apply the principle, in reality, the exact and precise elements that properly identify the evasion principle were absent in both cases. In both *Gencor* and *Trustor* the controller of a company committed an impropriety by breaching a fiduciary duty to a third party,[67] but, contrary to a strict adherence to the evasion principle, the said impropriety was not hidden behind the corporate veil of the sham company. The breach of duty to the third party and the consequences attached to the breach existed quite independently of the involvement of

61 [1962] 1 WLR 832. The decision did not incorporate any form of agency analogy.

62 This was an 'off the shelf' company which had a legal existence at the date of the sale contract, i.e. technically, the company had not been incorporated with a specific intention of impugning the sale contract. Nevertheless, following its creation, the company's first commercial use was as a fraudulent device.

63 See Lipman (n 61) 836.

64 (1973) 71 LGR 308. Here, the corporate veil of a newly incorporated company was pierced to prevent its shareholders from using the company as a means to breach the terms of a restrictive covenant. The shareholders had entered into the restrictive covenant prior to the incorporation of the company.

65 [2000] 2 BCLC 734 In *Gencor*, D, the former managing director of a group of companies (G), acted in breach of his fiduciary duty by dishonestly diverting assets and business opportunities away from G to a recently incorporated company which was under D's control. The company had been incorporated with no independent business activity save as to function as D's offshore bank account. Rimer J held that the corporate veil of this company should be pierced and its assets treated as if they were personally held by D. D was held liable to account to G.

66 [2001] 1 WLR 1177. In *Trustor*, S, the former managing director of a company (T), in breach of his fiduciary duty to T, procured large sums of its money and paid the same to a company (I) over which S exerted control. At an earlier stage of the litigation, T obtained summary judgment on claims against I on the ground that it had acted as a constructive trustee in the knowing receipt of the unauthorised payments. Thereafter, T made a subsequent application for summary judgment against S personally, on the ground that he was also liable to account as a constructive trustee. To establish S's liability, the court pierced the corporate veil of I, to a conclusion that I's knowledge could be attributed to S, therefore establishing S's personal receipt of the money as a constructive trustee.

67 In *Trustor*, ibid, the company (I) had not been incorporated with a specific intention of hiding the impropriety, i.e. the company was already in existence at the time the impropriety was committed. The incorporation of I appeared, however, to serve no legitimate business purpose.

the respective sham companies.[68] In reality, in both *Trustor* and *Gencor*, the corporate veil of the respective sham companies was pierced to ensure that a third party's claim for the sum of misappropriated funds was enforceable. In the context of the relevant improprieties in both Gencor and Trustor, the scope of the evasion principle was extended to cover a monetary loss, traceable directly to the actual impropriety (the breach of duty), a monetary sum that was subsequently hidden behind the corporate veil. In common, however, with the cases of both *Gilford* and *Jones*, the respective companies in *Trustor* and *Gencor* were both incorporated to an ultimate objective of pursuing an illegitimate purpose to the benefit of their respective controllers.

The relevance of the evasion principle in a holding company–subsidiary relationship

In the context of a holding company–subsidiary relationship, there is, to date, no case example which portrays the correct application of the evasion principle. The decision of the Court of Appeal in *Coles v Samuel Smith Old Brewery (Tadcaster)*[69] may, however, represent an implied, albeit technically incorrect application of the evasion principle. In *Coles*, the Court of Appeal held that a landlord of leasehold property could not avoid the right of the tenants of that property to exercise an option to purchase the property (the pre-existing obligation). The landlord sought to avoid its obligation by selling and transferring the property to its subsidiary company for value (although at a much-discounted price). While the subsidiary company was not legally bound by the option (the option had not been registered), nevertheless, the Court of Appeal ordered specific performance against the original landlord; in so far as the landlord, as the controller of the subsidiary company, had the power to compel the subsidiary to abide by the order for specific performance. Here, it would be an exaggeration to suggest that the court applied the evasion principle in strict accordance with its accepted definition. Indeed, in *Coles*, the court considered that the subsidiary company was not a sham because its incorporation had not been designed to impugn an existing legal obligation of its controller (the holding company).

In all other corporate group cases in which the courts have considered disturbing corporate personality, the courts' common conclusion has been that the evasion principle could not be applied. For example, in *Ord v Bellhaven Public Houses Ltd*,[70] the plaintiff acquired a 20-year lease for a public house from the defendant company; the defendant was one of a number of subsidiaries of a holding company. The lease was taken in reliance of the defendant's alleged misrepresentation relating to the turnover and profitability of the public house. Prior to the trial of the proceedings, the defendant's assets were transferred to other companies within its corporate group. The holding company contended that the transfer of the funds was essential to the restructuring of the group. The plaintiff sought to pierce the corporate veil of the defendant on the basis that it and the other companies in the group were controlled by its holding company in the manner of a single economic entity. In respect of the single economic entity argument and following its own decision in *Adams v Cape Industries*, the Court of Appeal refused to disturb the corporate veil of the defendant. The court further held that the evasion principle could not be applied because the defendant company had not been incorporated to impugn a pre-existing duty or obligation of its controlling shareholder (the holding

68 This point is advanced in the judgment of Lord Sumption in *Prest* (n 7) 485–86 (discussed in the text below).

69 [2008] 2 EGLR 159.

70 [1998] 2 BCLC 477.

company). The pre-existing obligation properly belonged to the defendant company and not its holding company.

The decision of the Court of Appeal in *Yukong Lines Ltd of Korea v Rendsburg Investments*[71] also highlights the fact that the evasion principle cannot be applied even to a situation where a holding company (or, as in *Yukong*, an individual in control of a group of companies) intentionally manipulates a group structure with the specific and dominant intention of avoiding an existing obligation of a company within that group. In *Yukong*, the defendant company (D) transferred a majority of its funds to another company within its group structure, leaving D with insufficient assets to compensate a third party for the repudiation of charter party contract, a contract which had been repudiated on the very day when the funds had been transferred to the other company. Toulson J held that the corporate veil of D could not be pierced by applying the evasion principle in so far as the contract had not been entered into by D with a view to defeating any pre-existing obligation of its controlling shareholder. While the controller of D used another company within the group of companies under his control to, in effect, escape D's contractual obligation, the pre-existing obligation properly belonged to D and not its controller.

Piercing the corporate veil outside the evasion principle: the fraudulent incorporation concept

In some commercial judgments, both pre- and post-*Adams*, a deviation away from the strict confines of the evasion principle is evident in the form of an implied acceptance of the fraudulent incorporation concept.[72] Although the courts have never sought to expressly identify or define this concept, it is suggested that relevant case law (discussed below) may be interpreted to formalise its definition. The concept may be explained in the following manner, namely that the corporate veil may be pierced in a situation where a company was incorporated by its controller with the specific and dominant intention of pursuing a fraudulent business purpose. In such cases, an intention to defraud may be established in circumstances where the company's controller was aware, or by the notions of ordinary decent business people should have been aware, that the company's incorporation was not to a dominant purpose of pursuing a bona fide commercial activity but rather that its incorporation sought to abuse the incorporation process to the financial advantage of its controller and to the detriment of a third party(ies).

Indeed, the factual circumstances of the very cases which form the basis of the evasion principle, namely *Gilford* and *Lipman*, fall within the fraudulent incorporation concept. In both *Gilford* and *Lipman*, the company subject to the veil-piercing was created with the specific intention of fraudulently exploiting the incorporation process to the financial advantage of its controller and, on the basis of this explanation, the cases of *Gencor ACP Ltd v Dalby*[73] and *Trustor AB v Smallbone (No 2)*[74] also fall within the fraudulent

71 [1998] BCC 870.

72 In *Creasey v Breachwood Motors Ltd* [1993] BCLC 480, in the context of a group of companies, Richard Southwell QC, sitting as a deputy High Court judge, deviated away from a strict adherence to the evasion principle not by applying the fraudulent incorporation concept, but instead by resting his decision on the justice of the particular case. The spirit of this 'justice deviation' was followed by Clarke J in *The Tjaskemolen* (n 39). *Creasey* was subsequently distinguished in *Yukong Lines Ltd of Korea v Rendsburg Investments* [1998] BCC 870, on the basis that the 'justice approach' was inconsistent with the reasoning advanced in *Adams v Cape Industries*. *Creasey* was overruled subsequently by the Court of Appeal in *Ord v Bellhaven* [1998] 2 BCLC 477.

73 [2000] 2 BCLC 734.

74 *Trustor* (n 66).

incorporation concept. The fraudulent incorporation concept would also apply in a corporate group situation where, for example, the controller of a group of companies incorporated an additional company within the group to the specific objective of transferring an existing liability from one of the existing companies within the group to the newly incorporated company. In corporate group cases of a type similar to *Ord v Bellhaven Public Houses Ltd*[75] and *Yukong Lines Ltd of Korea v Rendsburg Investments*,[76] it would not, however, be possible to apply the fraudulent incorporation concept given that in such cases the relevant subsidiary company would have been initially incorporated to pursue a legitimate business purpose. Here, an ability to pierce the corporate veil of the relevant subsidiary company would be dependent upon extending the fraudulent incorporation concept. The concept would have to be extended so that it applied in circumstances where, following its incorporation and initial use as a legitimate enterprise, the relevant subsidiary company was intentionally used for a fraudulent purpose in abuse of its limited liability status.

Applying the fraudulent incorporation concept

The fraudulent incorporation concept does not operate within the strict confines of the evasion principle and, crucially, may be invoked to pierce the corporate veil without the necessity of establishing that the controller of a company used that company for the specific purpose of evading a pre-existing legal obligation. Interestingly, the implied application of the fraudulent incorporation concept actually preceded the courts' acceptance of the evasion principle. The fraudulent incorporation concept was impliedly invoked in *Re Darby ex parte Brougham*.[77] In *Re Darby*, Phillimore J had to determine whether either the City of London Investment Corporation (C) or the actual controllers of C undertook the fraudulent promotion of a company, Welsh Slate Quarries Ltd (W). On the facts of the case, Phillimore J held that C was no more than an alias of its two controllers, a Mr Darby and a Mr Gyde. The intention of Darby and Gyde had been to incorporate C to exploit and abuse the incorporation process to their financial advantage, an intention enacted through C's fraudulent promotion of W.[78] The learned judge concluded that the responsibility for the fraudulent promotion of W properly rested with Darby and Gyde. Based on this intentional fraud, the corporate veil of C was lifted in its entirety to the extent that Darby was made personally liable in damages.[79] In *Darby*, the *Salomon* case was cited, but correctly distinguished on its facts because in *Salomon* the company had not been incorporated with the intention of perpetrating a fraud. In *Darby*, the evidence was conclusive to the contrary. The controllers of C incorporated the company with the sole intention of committing a fraud, a fraud which materialised in the promotion of W.

Notwithstanding an obvious logic and desire to combat the fraudulent exploitation of the corporate form, the fraudulent incorporation concept has never been formally recognised by the courts. In case law subsequent to *Re Darby*, the concept has been surpassed, in the alternative, by a rigid acceptance of the correctness of the evasion principle. Nevertheless, in a limited number of subsequent cases (discussed below) in which the corporate veil was pierced, the technical requirements of the evasion principle were never met. In such cases, it is contended that a piercing of the corporate veil may be better explained by the application of the fraudulent incorporation concept. For

75 See *Ord v Bellhaven* (n 70) .

76 See ibid.

77 [1911] 1 KB 95.

78 C was incorporated in October 1903. The fraudulent promotion of W occurred in November 1904.

79 At the time of the proceedings, Mr Gyde had been declared bankrupt.

example, an implied application of the fraudulent incorporation concept was implicit in the decision of the High Court of Justiciary (Sc) in *Drew v HM Advocate*.[80] Here, a Mr Drew formed a company for the sole purpose of fraudulently obtaining credit to the benefit of himself. In piercing the company's corporate veil, the court held that the company was a mere device to conceal the true state of affairs. Drew was deemed liable for the fraudulent acts carried out in the company's name. In reaching its decision, the court purported to apply the evasion principle. In reality, however, Drew never sought to hide a pre-existing obligation behind the corporate veil of the sham company. Accordingly, a specific requirement of the evasion principle was never met.

A further example of an affirmative, albeit implied application of the fraudulent incorporation concept is found in *Kensington International Ltd v Republic of Congo and Others*.[81] Here the claimant, a judgment creditor, obtained four judgments against the Republic of the Congo in relation to sums due under various loan and credit agreements. The claimant obtained interim third-party debt orders in each of the four actions in which judgment had been obtained together with supporting injunctions relating to the monies due in respect of two consignments of Congolese oil which had been purchased by a third party from a company controlled by the Republic of Congo. Cooke J held that the third party's debt to the company for its purchase of the consignments of oil should be viewed as a debt owed to the Republic of Congo and therefore should be treated as part of the Republic of Congo's debt to the claimant. Here, the corporate veil of the company under the control of the Republic of Congo was pierced, lifted in its entirety on the premise that the company's incorporation had been dishonestly procured with the intention and sole purpose of permitting the Republic of Congo to escape its creditors. As in *Drew*, in *Kensington International*, the evasion principle could not have been applied; the Republic of Congo had never sought to hide a pre-existing obligation to K behind the corporate veil of the sham company.

Further examples of an implied use of the fraudulent incorporation concept are most apparent in cases of a similar type to *Gencor ACP Ltd v Dalby*,[82] namely cases in which the corporate veil was pierced in circumstances involving a fiduciary's breach of the conflict of interest duty.[83] As a result of breaching the conflict of interest duty, a fiduciary is ordinarily liable to return to the victim company any profit he or she personally made as a consequence of the breach.[84] Where, however, the fiduciary exploits the conflict of interest through a sham company, the fiduciary will, in a technical sense, attain no personal benefit from the breach. By adhering strictly to the *Salomon* principle, the 'fruits' of the breach will properly belong to the sham company. In such circumstances, the sham company, as a constructive trustee, will be accountable to the victim company for the return of any profit made. If, however, the sham company cannot discharge its liability, the victim company's ability to recover the fruits of the breach will be dependent on

80 1995 SCCR 647; 1996 SLT 1062.

81 [2005] EWHC 2684 (Comm); [2006] 2 BCLC 296.

82 See *Gencor* (n 65)

83 See e.g. *Shell International Trading v Tikhonov* [2010] EWHC 1399 (Ch); *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704.

84 The conflict of interest duty is now governed by CA 2006, ss 175–77. Prior to the codification of directors' duties by the CA 2006, transactions involving a conflict of interest were regulated as a rule of equity, see e.g. *Regal Hastings Ltd v Gulliver* [1967] 2 AC 134. This equitable rule was applied strictly and its strict interpretation is incorporated into the terms of CA 2006, ss 175–77, see e.g. *Towers v Premier Waste Management Ltd* [2012] BCC 72. In its simplest form the conflict of interest duty may be described as a duty of loyalty and fidelity which prohibits a director of a company from exploiting a corporate opportunity, corporate property, corporate information or his/her own corporate position, to his/her own potential advantage.

overturning the *Salomon* principle – namely the victim company will require judgment against the fiduciary. In such circumstances the fiduciary cannot hide the breach of duty (an existing legal obligation) behind the corporate veil of the sham company.[85] The ability to pierce the corporate veil cannot be explained by the evasion principle. Accordingly, it is submitted that in such cases the ability to pierce the corporate veil of the sham company can only be explained by accepting that the piercing was achieved impliedly through the fraudulent incorporation concept.

An example, significant to the implied use of the fraudulent incorporation concept in circumstances where a fiduciary acted in breach of the conflict of interest duty, is found in the judgment of Burton J in *Antonio Gramsci Shipping Corporation v Stepanovs*.[86] In *Gramsci v Stepanovs*, the claimant ship owners (C) held shares in a company (LSC) which had been incorporated to enter into shipping contracts for the benefit of C. S, a senior executive of LSC (together with other executive members of LSC),[87] subsequently incorporated distinct sham companies with the sole and dishonest objective of diverting corporate opportunities (shipping contracts) away from LSC. S, acting in breach of the conflict of interest duty to LSC, achieved this objective by chartering a number of vessels to the sham companies on charter parties at less than the market rate and then subsequently sub-chartering the vessels through the sham companies to third parties at the market rate; thereby depriving LSC (ultimately C) of the difference between the market rate and the charter rates achieved by LSC. In effect, the sham companies creamed off a substantial amount of the profits which should have been destined for LSC. Burton J pierced the corporate veils of the sham companies[88] to a conclusion that both they and their controlling shareholder (S) were liable to LSC in damages. In determining the issue, Burton J relied heavily on the judgment of Sir Andrew Morritt VC in *Trustor v AB Smallbone (No 2)*.[89] Yet, as previously contended in this paper, the reasoning of Morritt VC did not follow a strict allegiance to the evasion principle,[90] but rather, it is submitted, should be better regarded as an example of piercing the corporate veil by way of the fraudulent incorporation concept.

Indeed, in piercing the corporate veils of the sham companies, Burton J refused expressly to be shackled by the technical constraints of the evasion principle.[91] The

85 See *Prest* (n 7).

86 [2011] EWHC 333 (Comm); [2012] 1 All ER 293. The case determined whether a claimant could establish jurisdiction in the English courts by virtue of a jurisdictional clause. Burton J answered the question in the affirmative and as such issues relating to the court's ability to pierce the corporate veil became relevant. The findings of Burton J on the jurisdiction point were subsequently reversed, see *Antonio Gramsci Shipping Corporation and Others v Aivars Lembergs* [2013] EWCA Civ 730; [2014] 1 BCLC 581.

87 C was not obliged to show that S was in sole control of the sham companies in so far as there were a number of wrongdoers, all who shared a common purpose of exploiting LSC.

88 The sham companies were the contracting parties that entered into the fraudulent scheme, technically the impropriety did not belong to S and, to follow the strict and arbitrary requirements of the evasion principle, the corporate veils of the sham companies should have remained intact, see e.g. *Aerostar Maintenance International Ltd v Wilson* [2010] EWCH 2032.

89 *Trustor* (n 66) 1185. Morritt VC purported to apply the evasion principle. The VC stated: 'In my judgment the court is entitled to pierce the corporate veil and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or façade to conceal the true facts, thereby avoiding or concealing any liability of those individuals.'

90 In a technical sense the impropriety in question (breach of duty) was not hidden behind the corporate veils of the sham companies.

91 [2011] EWHC 333 (Comm); [2012] 1 All ER 293, 303–06.

learned judge also sought to distinguish the decisions of both Warren J in *Dadourian Group International Inc v Simms*[92] and Flaux J in *Lindsay v O'Loughnane*[93] where, in both cases, it was held that that a controlling shareholder of a company could never be found liable for a breach of contract in circumstances where the offending contract was entered into by the company as a distinct legal person. In analysing the judgments in both *Dadourian* and *Lindsay*, Burton J considered that it had not been appropriate for either court to establish the controlling shareholder's liability as a breach of contract because in both cases the controlling shareholder had already been found personally liable in tort.[94]

The reasoning and decision of Burton J in respect of both the corporate veil point and the breach of contract issue was, however, to be subsequently overruled by the Court of Appeal in *VTB Capital plc v Nutritek*.[95] A further decision of Burton J in *Alliance Bank JSC v Aquanta Corporation*,[96] in which Burton J relied upon the accuracy of his own analysis in *Gramsci v Stepanovs*, was also overruled. The decision to overrule Burton J may be explained on the basis that the court accepted the absolute and perceived correctness of the evasion principle.

The evasion principle in absolute ascendancy

The ascendancy, authority and judicially perceived correctness of the evasion principle was confirmed by two recent decisions of the Supreme Court, namely *VTB Capital plc v Nutritek*[97] and *Prest v Petrodel Resources Ltd.*[98] In the former case, two specific issues had to be determined. The first and central issue concerned one of jurisdiction, namely whether the trial of the issues should be held in Russia or England.[99] The Supreme Court (Lord Clarke and Lord Reed JJSC dissenting) concluded that the trial should proceed in Russia. The second issue, namely whether the claimant should be allowed to raise an additional claim involving issues relevant to a piercing of the corporate veil, was superseded by the outcome of the first claim. The Supreme Court sought, however, to consider the significance of the piercing claim.

In relation to the factual circumstances surrounding the piercing issue, the claimant bank, VTB Capital (VTB) entered into a loan agreement with a Russian company (C). C defaulted on the loan agreement and VTB sought to pierce the corporate veil of C to make C's controlling shareholder (D4) liable for the default. The significance of the loan agreement was that it had allowed C to fund acquisitions from a company (D1) which was

92 [2009] EWCA Civ 1327.

93 [2010] EWHC 529 (QB).

94 *Trustor* (n 66) 302–04. In both *Dadourian* and *Lindsay*, the courts explained, however, that the correct basis upon which to pierce the corporate veil was in a situation where the company was used by its controller in an attempt to immunise a liability for a wrongdoing existing entirely *dehors* the company. In *Gramsci*, the wrongdoing was not *dehors* the sham companies in so far as it had been perpetrated in the name of the sham companies.

95 [2012] EWCA Civ 808; [2012] 2 BCLC 437, a decision affirmed by the Supreme Court in *VTB Capital v Nutritek* [2013] UKSC 5, [2013] 2 AC 337.

96 [2011] EWHC (Comm) 3281.

97 See *VTB Capital* (n 95).

98 *Prest* (n 7).

99 The central question for the Supreme Court was one of jurisdiction. While the law governing the alleged torts was English law, that factor had less force because the issues were factual rather than legal. As the fundamental factual focus was on Russia and the Russian witnesses, the Russian connection was of such strength that the Supreme Court held (Lord Clarke and Lord Reed JJSC dissenting) that the claimant could not discharge the onus of establishing that England was the appropriate forum for trial. For an interesting critique of this outcome see, A Briggs, 'The Subtle Variety of Jurisdiction Agreements' (2012) Lloyd's Maritime and Commercial Law Quarterly 364.

a part of the same corporate group as C. C obtained the loan agreement by way of a fraudulent misrepresentation by D1. While D1 was not a party to the contract with VTB, it was alleged by VTB that C had been used as a device to conceal the true facts, namely that C and D1 were members of a related group of companies which were all under the control of D4. VTB asserted that the corporate veil of C should be pierced to establish that D4 had the ultimate responsibility for the breach of the loan agreement. To support the piercing argument, counsel for the claimant relied specifically on the decisions of Burton J in *Gramsci v Stepanovs*[100] and Cooke J in *Kensington International Ltd v Republic of the Congo*.[101] To counter the claimant's argument, defence counsel sought to deny the very legitimacy of a piercing principle maintaining that, at common law, there was no juridical basis for a freestanding principle of lifting (piercing) the corporate veil and that such a principle ran contrary to the decision of the House of Lords in *Salomon*.[102]

In judgment, the Supreme Court found that, had it been necessary to decide the 'piercing issue', it would have concluded that the corporate veil of C should not have been pierced. Indeed, Lord Neuberger, giving the leading judgment on the corporate veil point, conveyed some sympathy with defence counsel's argument for denying the legitimacy of a 'piercing principle'.[103] On the facts of the case, however, Lord Neuberger considered it unnecessary and inappropriate to resolve the issue. His Lordship considered more generally that it was correct for the law to permit the corporate veil to be pierced to an objective of defeating a well-versed form of injustice, a fraud which was of the type and nature associated with the application of the evasion principle. It is to be observed that, had the Supreme Court deemed it necessary to apply the evasion principle to the factual circumstances of the case, the principle would not have applied because, although D4 controlled C, C had not been used by D4 to the specific purpose of evading a pre-existing obligation/duty of D4. In law, the obligation/duty belonged properly to C. Further, Lord Neuberger found that, even if the corporate veil could have been pierced, D4 could not have been sued on a contract to which he was not a party.[104] In criticising the decision in *Gramsci*, Lord Neuberger stated that:

> I doubt that the decision in *Gramsci* can be justified, at least on the basis of piercing the corporate veil. In agreement with the Court of Appeal and Arnold J, I think that the reasoning in that case involved a misinterpretation of the basis of the decisions in *Gilford* and *Jones*. It seems to me that the conclusion in *Gramsci* was driven by an understandable desire to ensure that an individual who appears to have been the moving spirit behind a dishonourable (or worse) transaction, action, or receipt, should not be able to avoid liability by relying on

100 [2011] EWHC 333 (Comm); [2012] 1 All ER 293.

101 [2009] AC 1391.

102 Defence counsel submitted that where an actual piercing principle had been applied, it was either accepted erroneously as common ground that the principle actually existed and/or the result achieved by piercing the veil of incorporation could have been achieved by a less controversial route – for instance, through the law of agency, through statutory interpretation, or on the basis that money due to an individual which he then directs to his company is to be treated as received by him personally. Of the minority of cases supporting the existence of a piercing principle that are without any tangible link to a relevant rule of law, counsel suggested that these cases were not based soundly in authority.

103 *VTB Capital* (n 95) 382–85. Lord Wilson (391) considered that the defence counsel's submission was 'highly ambitious'.

104 Ibid 382–85. The claimants contended that the claim in contract was analogous to the position of the controlling shareholder being treated as an undisclosed principal. Yet an undisclosed principal cannot sue nor be sued unless the agent entered into the contract on the undisclosed principal's behalf and did so with his or her authority. In *VTB Capital*, there was never any suggestion that the controlling shareholder had authorised the company to enter into contracts on his behalf.

> the fact that the transaction, action, or receipt was effected through the medium (but not the agency) of a company. But that is not, on any view, enough to justify piercing the corporate veil for the purpose of holding the individual liable for the transaction, action, or receipt, especially where the action is entering into a contract.[105]

In relation to the facts found in *VTB Capital* and in the context of following a strict interpretation of the evasion principle, the correctness attached to the commentary of Lord Neuberger is beyond doubt. Nevertheless, an obvious and significant difference between *Gramsci* and *VTB Capital* was that the former case met the fundamental requirement of the fraudulent incorporation concept, namely the company had been incorporated specifically to the object of committing a fraud. Indeed, prior to the Supreme Court's decision in *VTB Capital*, the decision in *Gramsci* had been distinguished (but not disputed) by Flaux J in *Lisen International Ltd v Humpuss Sea Transport Ltd.*[106] As in *VTB Capital*, in *Lisen*, the company in question had not been incorporated with the specific intention of committing a fraud.[107] Further, it is poignant to observe that in *VTB Capital*, Lord Clarke portrayed some reluctance in accepting that the outcome reached in *Gramsci* had been in error. Lord Clarke stated:

> I agree with Lord Neuberger that this is not a case in which it would be appropriate to pierce the corporate veil on the facts. I would however wish to reserve for future decision the question what is the true scope of the circumstances in which it is permissible to pierce the corporate veil. That includes the question whether *Antonio Gramsci Shipping Corpn v. Stepanovs* [2011] EWHC 333 (Comm) was correctly decided.[108]

It is suggested that the justification for Lord Clarke's observation and implied acceptance of an ability to pierce the corporate veil outside the strict confines of the evasion principle, namely in circumstances where a company was incorporated by its controller to an objective of committing a fraud, supports the very basis of a fraudulent incorporation concept.

It is submitted that more crucial to the observations of the Supreme Court in *VTB Capital* was the finding that a remedy in contractual damages could not be sustained against a non-contracting party. Yet, the ability to disturb corporate personality in accordance with the fraudulent incorporation concept would overturn the privity point. In piercing the corporate veil by applying the fraudulent incorporation concept, the controller of the sham company, as opposed to the company itself, would be deemed to have been personally responsible for entering into a contract. For example, had the facts in *Salomon* established an intentional fraud akin to that found in the fraudulent incorporation cases, then it is most probable that a majority of the House of Lords would have followed the lead of the lower courts to disturb the corporate veil of A Salomon & Co Ltd. As such, Mr Salomon would have been held personally liable for the non-payment of sums due on the contractual debts of the company's unsecured creditors, notwithstanding that the contracts creating such debts were formally entered into in the company's name.

105 *VTB Capital* (n 95) 387.

106 [2011] EWCH 2339.

107 In *Lisen* (ibid para 18), Flaux J suggested that, if the purpose behind the corporate structure had been to perpetrate a fraud, then, in such circumstances, it should not have been necessary to establish the wrongdoing as *dehors* the company.

108 *VTB Capital* (n 95) 413.

The 'concealment' and 'evasion' labels

In *Prest v Petrodel Resources Ltd*,[109] the Supreme Court was again called upon to consider issues relevant to an ability to pierce the corporate veil. As in *VTB Capital*, the Supreme Court's analysis of the corporate veil point did not form part of the *ratio* of its decision.[110] In *Prest*, however, the theoretical analysis of the 'veil point' was most significant and in a substantial part contentious. The individual judgments, analysis and reasoning of the Supreme Court were, in part, diverse in respect of defining the exact scope of an acceptable piercing principle. With the exception of Lord Walker, the court accepted, however, that it was possible, as a last resort, to pierce the corporate veil in circumstances justifying the application of the evasion principle.[111] For his part, Lord Walker was steadfast to the conclusion that piercing the corporate veil was not a doctrine or coherent principle or rule of law, but simply a label which had often been used indiscriminately to describe the disparate occasions on which some rule of law produced an apparent exception to the *Salomon* principle.[112]

Lord Neuberger and Lord Sumption delivered the most extensive judgments on the corporate veil point, identifying two distinct categories of 'piercing cases', namely 'concealment cases' and 'evasion cases'. A concealment case involved the application of conventional legal principles, the effect of which would override an arrangement whereby a company had been interposed for the benefit of an individual, to an objective of disguising the true nature of that arrangement.[113] The application of the relevant legal principle culminated in the conclusion that the arrangement should have been construed as one made with the individual and not the company. In contrast, an evasion case invoked a 'true' and distinct 'piercing principle'. In construing this latter principle, Lord Neuberger accepted Lord Sumption's definition of an evasion case, namely an evasion case would exist in circumstances where:

> . . . a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control.[114]

Although Lord Neuberger accepted the evasion principle with some reluctance, his Lordship considered that it should be retained as a limited form of judicial tool, to be used sparingly as a last resort, to undo wrongdoing in a situation where no other legal

109 *Prest* (n 7).

110 The issue in *Prest* (n 7) related to the potential division and ownership of seven properties. Although the properties in question were held by distinct companies, all of which were under the control of the husband, the wife contended that the properties should be treated as matrimonial assets. The Supreme Court was required to consider whether it was possible to pierce the corporate veils of the companies under the husband's control. The court held in favour of the wife but did so other than by applying a piercing principle (previously discussed in this paper in the context of n 54). As the evidence presented in the case was not conclusive to the finding of a valid legal transfer of the properties from the husband to the companies under his control, the court held that no evidence had been adduced to rebut a presumption that the companies took the properties as a resulting trustee for the husband. The husband was ordered to convey the disputed properties to his wife on the basis that they belonged to him beneficially by way of a resulting trust.

111 This followed the opinion expressed by Munby J in *Ben Hashem v Al Shayif* [2009] 1 FLR 115, i.e. the court only has power to pierce the corporate veil when all other more conventional legal remedies have proved to be of no assistance.

112 *Prest* (n 7) 508.

113 The concealment principle was subsequently and expressly applied by Havelock-Allan J in *Airbus Operations Ltd v Withey* [2014] EWHC 1126 (QB). From the judgment in this case it is unclear, however, whether the concealment principle was invoked on the basis of either agency or trust law principles.

114 *Prest* (n 7) 487.

principle could be applied to remedy the situation. Lord Neuberger concluded that cases in which the evasion principle had previously been applied were, however, either wrongly decided or could and should have been explained as concealment cases.[115] For example, Lord Neuberger explained that the outcome in the *Gilford* case should have been decided by solely applying agency law principles. In relation to *Jones v Lipman*, Lord Neuberger found that it had been unnecessary for Russell J to invoke a piercing doctrine because an order for specific performance made specifically against Mr Lipman would have sufficed. Lipman was in a position to have compelled the company to convey the property to the plaintiffs and would have been bound to do everything that was reasonably within his power to ensure that the property was conveyed.[116]

While Lord Neuberger declined to accept that the evasion principle had been established by previous case law, Lord Sumption considered that the 'principle', although lacking any general doctrine, was well established in English case law.[117] Nevertheless, Lord Sumption conceded that the outcome of previous piercing cases could often have been achieved by applying the concealment principle.[118] In relation to the cases of *Gencor* and *Trustor*, Lord Sumption considered that these cases should be viewed as concealment cases. Lord Sumption contended that, in both *Gencor* and *Trustor*, the evasion principle had not been properly engaged and could not have been engaged on the case facts because in both cases a company's separate legal personality had not been used to evade an existing liability of its controller. The controllers of the respective companies were therefore liable to account only if the true facts were that the company had received the money as their agent or nominee. That was proved in both cases for, if it had been otherwise, there would have been no receipt, knowing or otherwise, and therefore no claim to be evaded.[119]

Although the introduction of the concealment and evasion labels was a novel development in the classification of the piercing-type cases, it is submitted, however, that the classification cannot be considered as conclusive. The labels fail to explain properly those cases in which the corporate veil was pierced by another means, namely by impliedly invoking the fraudulent incorporation concept. Further, while it may have been plausible in part for Lord Sumption and Lord Neuberger to suggest that in previous piercing cases the courts should, in the alternative, have applied a relevant legal principle to disturb corporate personality, the implied or express refusal to adopt this course of action may be explained other than by a failure on the part of the respective courts to identify or apply the relevant legal principle in question. Other than the legal principle alluded to by Lord Neuberger in *Lipman*,[120] the predominant relevant legal principle advanced as an alternative to the evasion principle was one of agency or trust law, the application of such principles having been denied unequivocally by the House of Lords in *Salomon*.

In the context of applying agency principles to justify the concealment principle and other than in a holding company–subsidiary company relationship, it is submitted that the

115 *Prest* (n 7) 511–03.

116 Ibid.

117 Ibid 484. Lord Clarke agreed with Lord Sumption on this point, at 507.

118 Ibid 485–86.

119 Ibid 487.

120 In relation to the *Lipman* case (n 61), while Mr Lipman as the controlling shareholder of the company had a power to compel the company to abide by the terms of the order for specific performance, as a matter of pure legal certainty and to eliminate any future defect in the use of Mr Lipman's power, it is nevertheless contended that the decision to pierce the corporate veil and subject the company to the grant of specific performance was the preferred and correct course of action.

ability to label a company as the agent of its controlling shareholder would open the floodgates to challenge the very purpose behind incorporating small one-man-type concerns. This type of company benefits from the business incentives provided by the separation of identity and responsibility between the controlling shareholder and corporate entity. Further, such incentives are not only beneficial to the controlling shareholder as they may also confer a potential future benefit to the economy and general public interest in the expectation of a company's future growth and expansion. The argument that a small one-man-type company should not be considered as the agent of its controlling shareholder follows the judgment in *Salomon* and also the lead of Rimmer LJ who, in the Court of Appeal judgment in *Prest*, stated:

> It is heretical to suggest that the total control that a single individual is (and will always be) entitled to exercise over the affairs of his one man company is a feature resulting in the company's assets becoming assets to which he is entitled and therefore to which the company is not entitled.[121]

In relation to applying a legal principle based on trust law to justify the concealment principle, it may be plausible, in circumstances similar to *Prest*, to establish a resulting trust relationship between a company and its controlling shareholder. This approach will require, however, cogent evidence to displace the company's separate legal personality.[122] Further, in appropriate circumstances, namely, where corporate property was acquired by a sham company following a breach of a fiduciary duty to a victim company by the controller of the sham company, it is not inconceivable that trust law may provide an alternative solution to piercing the corporate veil. For example, in such cases the sham company could be deemed liable to account as a constructive trustee for knowing receipt and the company's directing mind (usually the company's controlling shareholder) be found liable to account as a constructive trustee by way of dishonest assistance.[123] The acceptance of such a scenario will depend, however, on whether the directing mind can, in effect, be 'double counted' to establish the culpability of the individual in control of the sham company.[124]

Contrary to the opinions expressed by Lord Sumption and Lord Neuberger, Baroness Hale[125] doubted the ability to classify previous piercing cases as either concealment or evasion cases.[126] Instead, Baroness Hale believed that successful instances of piercing the corporate veil should be viewed more simply as examples of a much broader principle, namely that:

> . . . the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business.[127]

It is respectfully suggested, however, that while 'unconscionable advantage' is a recognisable characteristic in all successful piercing cases, it is in reality only a characteristic of the piercing cases as opposed to a universally applied piercing principle.

121 *Prest* (n 7) 445–56.

122 See e.g. *Anglo German Breweries (in liq) v Chelsea Corporation Inc* [2012] EWHC 1481 (Ch); [2012] 2 BCLC 632.

123 See the comments of Scott VC in *Trustor AB v Smallbone (No 3)* OT CA (Civ Div); 9 May 2000, para 61. Indeed, it is suggested that the ability to double count the directing mind in the case of *Trustor* affords a more appropriate explanation of the outcome of the case.

124 For an interesting but perhaps an ambitious use of the ability to double count the intention of the directing mind, see, C Witting, 'Intra-corporate Conspiracy: An Intriguing Prospect' (2013) 72(1) Cambridge Law Journal 178.

125 Lord Wilson expressed his agreement with the judgment of Baroness Hale.

126 *Prest* (n 7) 506. Without further and more detailed argument on the point, Lord Clarke also expressed reservations about the ability to classify the 'piercing cases' into concealment and evasion categories (508).

127 Ibid.

Simply put, if the unconscionable advantage principle was apposite to properly explain and justify a piercing of the corporate veil, many more examples of veil-piercing by way of unconscionable advantage would already exist. The characteristics attached to unconscionable advantage ordinarily embrace a far wider range of misconduct which is more in line with the character of a 'pure' equitable fraud. In reality, equitable principles have not ordinarily been used in potential veil-piercing cases to a primary objective of establishing a fair and just view, or to sanction an enquiry into the reality of the situation, or to an overwhelming objective of delivering justice.

Of the remaining judgments, in *Prest*, and significant to the piercing issue, Lord Mance accepted the classification of cases into concealment and evasion cases,[128] but, in unison with the views expressed by Lord Clarke,[129] did not wish to foreclose all possible future situations in which a court would be justified in piercing the corporate veil. Both their Lordships accepted, however, that such situations were likely to be novel and very rare. Here, with some disappointment, Lord Clarke did not elaborate on the views which he had previously expressed in *VTB Capital*,[130] namely his Lordship's doubt about the correctness of overturning the decision to pierce the corporate veil in *Gramsci*.

Conclusion

Following the opinions advanced by the Justices of the Supreme Court in both *VTB Capital* and *Prest*, it is most likely that in future an ability to pierce the corporate veil will be limited to a point of near extinction. In all probability, a piercing of the corporate veil will be invoked only as a last resort in accordance with the evasion principle and will be completely unnecessary where, in the preferred alternative of a majority of the Supreme Court, the circumstances of a case justify the application of the concealment principle. In the context of a one-man-type company, however, applying the concealment principle by invoking agency principles would, it is respectfully suggested, appear to run contrary to the reasoning applied in *Salomon v A Salomon & Co Ltd*.

To conclude, in its present form the evasion principle is comprised of a technical and arbitrary set of rules derived from a specific factual situation found in *Gilford Motor Co v Horne*.[131] While the rarity of its application facilitates a protective climate of legal certainty in the promotion and acceptance of the incorporation process, as a cost, its inflexibility expedites fraud. Here, it is possible to describe the rigid interpretation of the *Salomon* principle and the inelasticity of the evasion principle as 'calamitous'.[132] The evasion principle is, in truth, artificial and its acceptance limits the spirit of the House of Lords' judgment in *Salomon*, in which the House conveyed a more extensive acceptance of an ability to disturb a company's distinct legal status in circumstances where the incorporation process served an illegitimate and fraudulent end. It is submitted, therefore, that the correct and true piercing principle, which was advocated by a majority of the Supreme Court as the evasion principle, could and should in the future be expanded to embrace the fraudulent incorporation concept. While remaining subservient to the *Salomon* principle, the fraudulent incorporation concept would extend the current evasion principle to the just objective of remedying fraudulent conduct beyond the type of fraud which the evasion principle now seeks to preclude. To this end, it is submitted that this extension would be more in line with the true spirit of the *Salomon* judgment.

128 *Prest* (n 7) 507.

129 Ibid.

130 *VTB Capital* (n 95).

131 [1933] Ch 935.

132 See, O Kahn-Freund, 'Some Reflections on Company Law Reform' (1944) 7 Modern Law Review 54.

NILQ 66(4): 343–65

Mortgages, fixtures, fittings and security over personal property

DR SEAN THOMAS

*Senior Lecturer in Law, Durham Law School, Durham University**

1 Introduction

A mortgage is merely a disposition of an interest in property as security for a loan.[1] This creates a deceptively simple problem: where should the line be drawn between providing protection for mortgagees and mortgagors of residential property?[2] In the event of a breach of the mortgage agreement (usually due to default in repayment), the remedies of repossession and sale will likely be most significant for residential mortgagors. Although subject to cogent criticism,[3] this right to repossess exists independently of statutory powers[4] and is often (though not necessarily) the precursor to the right of sale.[5] The power of sale can be based on the mortgage agreement, or implied by statute and, notably, it can be exercised regardless of the mortgagor's wishes.[6] As such, residential mortgagors are 'especially vulnerable [in] that they have put the homes of

* An early version of this article was presented at the Socio-Legal Studies Association Conference, De Montford University, April 2012, and the author wishes to thank the participants for their useful comments. Particular thanks also go to Professor Adam Cygan and Barbara Bogusz for their help. Thanks also to the anonymous reviewers for their comments. The author is a member of the Secured Transactions Law Reform Project <http://securedtransactionslawreformproject.org> and agrees with its aims and objectives, but this article represents the author's personal view and is not necessarily representative of the project's position on the matters discussed herein.

1 *Santley v Wilde* [1899] 2 Ch 474, 474 (Lindley LJ); LPA, ss 87, 88, 91.

2 See e.g. P Omar, 'Recovery of Secured Property by Mortgagees: The Balance of Interests' (2005) 16 International Company and Commercial Law Review 445.

3 See e.g. M Dixon, 'Editor's Notebook' [2008] Conveyancer and Property Lawyer 474.

4 *Four Maids Ltd v Dudley Marshall Ltd* [1957] Ch 317, 320 (Harman J); *Ropaigealach v Barclays Bank plc* [2000] 1 QB 263; *Horsham Properties Group Ltd v Clark* [2008] EWHC 2327; [2009] 1 WLR 1255 (Ch).

5 LPA, s 91(2).

6 LPA, ss 101–03; *Palk v Mortgage Services Funding plc* [1993] Ch 330; *Polonski v Lloyds Bank Mortgages Ltd* (1998) 31 HLR 721. See also Trusts of Land and Trustees Act 1996, s 14(1). Cf. Financial Services Authority, *Mortgages and Home Finance: Conduct of Business Sourcebook* <http://www.fsa.gov.uk/pubs/hb-releases/rel112/rel112_MCOB.pdf> (accessed 17 December 2015) suggesting a minimum of two months' arrears before bringing proceedings.

themselves and their families at risk by entering into the mortgage',[7] which is problematic as the law generally favours mortgagees.[8]

As goods may be attached to land, along a spectrum of affixation,[9] there is a complex sub-problem: if a mortgagee can sell mortgaged property, to what extent does that power extend to goods associated with the property? Although mortgages of realty need to be in writing and registered,[10] the details of the mortgage agreement will not be registered even though such details may seemingly give the mortgagee such a power to control, acquire or sell goods associated with the realty. Ascertaining such details requires direct enquiry of the lender or (possibly) the borrower.[11] However, 'mortgages have always pretended to a greater or less degree to be something they are not'.[12]

Consider the HSBC Bank plc Mortgage Deed Conditions (2006 edition).[13] In the definition section, condition 1(e) defines 'Property' as 'the whole or any part of the Property described in the Mortgage (including all buildings, fixtures and fittings on the Property now, or at any time after the date of the Mortgage)'. Condition 1(f) defines 'Assets' as 'anything and everything charged, assigned or transferred by the Mortgage'. In the section entitled 'Looking after the Property', condition 5(c) states that the mortgagor must not, without the bank's written consent '(i) . . . remove or detach any fixture or fitting; or (ii) remove or detach any plant or machinery which belongs to, or is used by, you (except for replacement or repair)'. Condition 5(d) states that: 'If you, or anyone else, removes or detaches any fixture, fitting, plant or machinery or, if any is destroyed or damaged, you must immediately replace or repair it with one of the same or better quality.' In the section entitled 'Safeguarding the Bank's Security', condition 9(d) states that the mortgagor 'must not, without the Bank's written consent, at any time create or allow any other mortgage, charge or burden in relation to the Assets'. In the event of the appointment of a receiver, the mortgage deed states in condition 13(a) that the receiver has the power 'to sell, exchange, lease or in any other way dispose of the Assets in the manner and generally on terms the receiver thinks fit in your name and on your behalf' and, under 13(b), the power 'to do anything an absolute owner could do with the Assets'.

7 Law Commission, *Transfer of Land: Land Mortgages* Law Com No 204 (1991) [4.5].

8 C Davis, 'Giving with One Hand and Taking Away with the Other: How Far Can a Mortgagor Insist on Selling his Property?' (1998) 1 Journal of Housing Law 56; M Dixon, 'Combating the Mortgagee's Right to Possession: New Hope for the Mortgagor in Chains?' (1998) 18 Legal Studies 279; M Davey, 'Insolvency and the Family Home' [2000] Insolvency Lawyer 2; L Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007) ch 1; S Bright, 'Dispossession for Arrears: The Weight of Home in English Law' in L Fox O'Mahony and J A Sweeney (eds), *The Idea of Home in Law: Displacement and Dispossession* (Ashgate 2011) ch 2. Cf. F O Adeoye, 'The Anglo-American Law of Mortgagees: A Quagmire for Creditors' [1993] Journal of Business Law 544, arguing that the law has shifted too far in restricting mortgagees.

9 See e.g. *Elitestone Ltd v Morris* [1997] 1 WLR 687; cf. P Luther, 'The Foundations of *Elitestone*' (2008) 28 Legal Studies 574.

10 Law of Property (Miscellaneous Provisions) Act 1989, s 2; Land Registration Act 2002, ss 27–30.

11 There is a lack of clarity as to obligation on mortgagees or mortgagors vis-à-vis registration of the mortgage. The Land Registration Rules 2003, r 9, states, inter alia, that: 'The charges register of a registered estate must contain, where appropriate (a) details of . . . charges, and any other interests which adversely affect the registered estate subsisting at the time of first registration of the estate or created thereafter, (b) any dealings with the interests referred to in paragraph (a), or affecting their priority, which are capable of being noted on the register, (c) sufficient details to enable any registered charge to be identified'.

12 A W B Simpson, *A History of the Land Law* 2nd edn (OUP 1986), 242. F W Maitland, *Equity* 2nd rev edn (CUP 1936) 182: the mortgage deed is 'one long *suppression veri* and *suggestion falsi*'.

13 This was supplied to the author in pursuance of an application for mortgaged financing for the purchase of a residential property. Copy on file with the author.

There is also a section entitled 'Items left at the Property', in which condition 22 states:

> (a) At any time after the Mortgage has become enforceable, the Bank or any receiver may (but having no duty or liability to you to do so) as your agent and at your expense, remove, store, preserve, sell or otherwise deal with any furniture, goods, vehicles, plant or machinery or other chattels or produce, crops or animals which you fail or refuse to remove from the Property. (b) Neither the Bank nor any receiver will be liable for any resulting loss or damage. (c) So far as may be lawful, the Bank may set-off any sums realised on any sale against the [mortgage] Debt.

In essence, this deed provides that, in the event of default and repossession, HSBC is entitled to such effective control of all goods on or in the land that they might as well be considered as claiming ownership of the goods.[14] The underlying purpose of the mortgage agreement's extension into personal property may just be to enable effective control of the real property in the event of default.[15] However, the legal effect of this approach gives rise to a problematic question: who truly owns goods in residential properties, where the goods are acquired after a purchase-price mortgage is granted?

At first sight, the answer is obvious. Subject to an expressed contrary intention,[16] a conveyance 'shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all . . . fixtures'.[17] Leading texts follow this by noting that fixtures are goods which, according to the degree and purpose of their annexation to the land, lose their identity as goods and become part of the land.[18] Immediately after making this point, one such text noted that, '[r]ights of foreclosure, possession and statutory rights of sale extend to the interest in any fixtures or personal chattels affected by the mortgage'.[19] The distinction between fixtures and goods 'affected by the mortgage' is unclear. For example, in *Whitley v Challis*, concerning a claim that certain words in a conveyance brought goodwill (i.e. personal property) within the scope of mortgage of realty, Lindley LJ said such words 'cannot have the effect of bringing in property which the mortgagor had not agreed to mortgage . . . [for otherwise is to allow a claim] . . . to obtain an enlargement of that security, and to get a benefit to which [the mortgagee] is not entitled'.[20] Therefore, one security interest (a mortgage over land) cannot beget another security interest (over goods held by the residential mortgagor).

The Law Commission has consistently failed to examine this issue,[21] even though it has recognised that the 'contact and overlap' between systems for mortgages over land and systems covering other property meant that 'conflicting or inconvenient results' need

14 Other lenders are more explicit. The Halifax Mortgage Conditions 2011, at page 38 states: 'How we can deal with things left in your property[:] If we take possession of your property, we may remove, store, sell or dispose of anything you leave at your property (including animals). We will do this as your "agent". You will have to pay our costs of doing this.'

15 See n 94 and accompanying text.

16 LPA, s 62(4). A conveyance includes a mortgage: LPA, s 205(1)(ii).

17 LPA, s 62(1). This may be an example of how principles of accession reduced transaction costs in the transfer of property: T W Merrill, 'Accession and Original Ownership' (2009) 1 Journal of Legal Analysis 459, 485–86.

18 See e.g. E F Cousins and I Clarke, *Cousins on the Law of Mortgages* (Sweet & Maxwell 2010) [15-01]; C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* 7th edn (Sweet & Maxwell 2008) [23-002]–[23-003].

19 Cousins and Clarke (n 18) [15-01], citing the LPA, s 88(4), s 89(4); *Cross v Barnes* (1877) 36 LT 693; and *Re Rogerstone Brick and Stone Co Ltd* [1919] 1 Ch 110.

20 [1892] 1 Ch 64, 69.

21 Law Commission (n 7); Law Commission, *Company Security Interests* Law Com No 296 (2005) xiv.

to be avoided.[22] There was also no consideration of this point in the recent Ministry of Justice consultation paper, *Mortgages: Powers of Sale and Residential Property*.[23] Likewise, this issue is not considered in the very recent Law Commission consultation paper on reforming the law on bills of sale.[24] To avoid perpetuating misunderstanding,[25] the extent to which a mortgage over realty can capture or control personal property needs deeper exploration.[26] It is on the one hand an issue of principle,[27] but it may also be an issue of money, as certain goods that occupy the 'twilight zone'[28] between fixtures and fittings may be highly valuable (such as a range-style cooker/heater like an Aga, or a fish tank and assorted accoutrements). Further complexities may arise regarding the status of new technologies and their place within the home.[29] It should also be noted that the HSBC deed also covered animals, and there have recently been complicated disputes concerning the rights of mortgagees to deal with animals held both commercially,[30] and domestically.[31]

This article will demonstrate how the doctrine on fixtures and fittings was developed to avoid difficulties with the bills of sale regime in the context of non-residential commercial mortgage transactions. As a result, mortgagees of realty were able to exert ownership-like control over personal property. The shift in focus in the bills of sale regime from creditor to debtor protection had no impact on this use of the fixtures doctrine, thus rendering the overwhelmingly commercial nature of the law on fixtures and fittings inappropriate for residential consumer purchase-money mortgages.[32] As such, merely resting our understanding of the relationship between goods and land on a doctrine that goods affixed to land lose their status as goods and become part of the land

22 In Law Commission, *Land Mortgages* Law Com Working Paper 99 (1986) [1.4]. The non-coverage of personal property security interests by the Law Commission in 1986 was due to the concurrent work by Professor Diamond: A Diamond, *A Review of Security Interests in Property* (HMSO 1989).

23 Consultation Paper CP55/09, 29 December 2009.

24 Law Commission, *Bills of Sale: A Consultation Paper* Law Com CP 225 (2015); see also n 193 and following text.

25 Cf. G Watt, 'The Lie of the Land: Mortgage Law as Legal Fiction' in E Cooke (ed), *Modern Studies in Property Law* vol 4 (Hart 2007) ch 4.

26 As to the importance of control over property, see generally P DiCola, 'Valuing Control' (2015) 113 Michigan Law Review 663.

27 D L Carey Miller, 'Fixtures and Auxiliary Items: Are Recent Decisions Blurring Real and Personal Rights?' (1984) 101 South African Law Journal 205, 207. For a recent comparative analysis, see L P W van Vliet, 'Accession of Movables to Land: I' (2002) 6 Edinburgh Law Review 67; 'Accession of Movables to Land: II' (2002) 6 Edinburgh Law Review 199. However, for both Carey Miller and van Vliet, the focus of their work was clearly on commercial issues, with little concentrated focus on the issues concerning residential purchase-money mortgages. Moreover, a common law perspective may result in different analysis.

28 Cf. M R Friedman, 'The Scope of Mortgage Liens on Fixtures and Personal Property in New York' (1938) 7 Fordham Law Review 331, 331: 'Occupying a twilight zone between real and personal property the area of fixtures is one which defies precise metes and bounds.'

29 This is further complicated by the potential of an internet of things, and the problems in the current law on sale of goods: see e.g. S Thomas, 'Goods with Embedded Software: Obligations under Section 12 of the Sale of Goods Act 1979' (2012) 26 International Review of Law, Computers and Technology 165.

30 *National Westminster Bank v Hunter* [2011] EWHC 3170 (Ch), discussed at n 75.

31 *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081 (Ch) (power to remove animals held at an informal sanctuary).

32 The term 'consumer' here means 'persons who borrow for private purposes not related at all to their business, trade or profession', following the approach in Law Commission, *Registration of Security Interests: Company Charges and Property Other than Land* Law Com CP 164 (2002) [8.4]. See also Ministry of Justice, *Mortgages: Powers of Sale and Residential Property* Consultation Paper CP55/09 (29 December 2009) [22]. This article will not consider the special position of agricultural land and fixtures thereto, for which see e.g. Agricultural Holdings Act 1986, s 10; Agricultural Tenancies Act 1995, s 8.

is insufficient to explain and continually justify the potential power mortgagees appear to have acquired. This article will argue for a narrower construction of mortgagees' powers of control over goods.

2 Mortgages of land and fixtures

Although 'determining when an object which was formerly a chattel has become part of land, is recognised to be complex and confusing', there are basic principles.[33] In the leading case *Holland v Hodgson*, Blackburn J said that the general principle *quicquid planatur solo, solo cedit* (whatever is attached to land becomes part of the land itself) was 'the general maxim of the law',[34] and it remains 'the foundation of the modern law of fixtures'.[35] This principle obviously affects the mortgage relationship,[36] as well as third-party rights: if fixtures pass to the mortgagee, a trustee in bankruptcy of the mortgagor is not entitled to those 'goods'.[37] However, as Cousins and Clarke recognise, this principle merely 'provides a good starting point for the consideration of the relationship between fixtures and mortgages of the land to which they are affixed'.[38] It is suggested that this claim of a general principle masks a historical pattern of doctrinal development focused on non-residential commercial mortgages and ignores the impact of the bills of sale regime. The law is incoherent and uncertain, 'unduly cumbersome' and relies on 'anachronistic rules and case-law'.[39] This makes attempts to simply apply the doctrine to residential mortgagors highly problematic.

2.1 The leading cases on fixtures

From the sixteenth century, English law distinguished between owners in fee simple and tenants with regard to fixtures: tenants were able to remove items (during the term) which had been affixed to the land.[40] The status of 'trade fixtures . . . remained in doubt until the 17th century', though by the eighteenth century tenants could remove them for the benefit of trade and commerce:[41] around the same time the tenant's right to remove ornamental and domestic fixtures developed.[42] The extension of this exception (for trade

33 P Luther, 'Fixtures and Chattels: A Question of More or Less' (2004) 24 Oxford Journal of Legal Studies 597, 597. On the difficulty of reconciling the case law on fixtures, see also *Reynolds v Ashby* [1904] AC 466, 473–74 (Lord Lindley).

34 *Holland v Hodgson* (1872) LR 7 CP 328. For the history of the use of this maxim in English law, see Luther (n 33) 598–601.

35 M Haley, 'Case Comment: The Law of Fixtures: An Unprincipled Metamorphosis?' [1998] Conveyancer and Property Lawyer 137, 137.

36 Cousins and Clarke (n 18) [15-01]: 'The rule applies to all fixtures which are the subject matter of legal or an equitable mortgages [citing *Re Lusty* (1889) 60 LT 160] of freehold or leasehold land [citing *Meux v Jacobs* (1875) LR 7 App Cas 481; *Southport and West Lancashire Banking Co v Thompson* (1887) 37 Ch D 64, approved in *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431]'.

37 *Clark v Crownshaw* (1832) 3 B & Ad 804; 110 ER 295 (not entitled to the fixtures, but entitled to the otherwise movable goods); *Ashton v Blackshaw* (1869–70) LR 9 Eq 510 (assignment of furniture within the scope of the Bills of Sale Acts and, thus, as an unregistered bill of sale the assignment was void, otherwise the goods would be secured for the plaintiff's use).

38 Cf. Cousins and Clarke (n 18) [15-01].

39 Haley (n 35) 144.

40 Luther (n 33) 601–02. See also Sir John Baker, *The Oxford History of the Laws of England: volume VI 1483–1558* (OUP 2003) 735–38; Simpson (n 12) 242–43. The nature of actions as to personal or real property must have played a role: Simpson (n 12) chs X and XI and Baker, ch 39. Economy unfortunately prevents a full examination of this history.

41 Luther (n 33) 602.

42 Ibid 606.

fixtures) to heirs did not have solid foundations[43] and for well into the nineteenth century the key determining factor for fixtures held by someone other than a tenant was the degree of annexation rather than any particular right.[44] Yet, whilst the distinction between tenants and mortgagors as to their rights over fixtures was clearly evident in *Holland v Hodgson* in 1872,[45] by 1887 it had more or less dissipated.[46]

In *Holland v Hodgson* the object (or purpose) of the annexation test, as central to determining whether goods became affixed to land, was crystallised.[47] Luther correctly argues that this test was actually a novel combination of different tests,[48] but its effect was to distinguish between the extent to which assets could be removed (which depended on the object of annexation) and whether the assets attached to the land in the first place (which turned on the degree of annexation), which in turn focused judicial attention on the commercial importance of security for mortgagees of industrial property.[49] Such creditors were more interested in the extent to which they could protect and enhance their interest by acquiring, if necessary, the annexed asset. However, a close reading of *Holland* reveals it actually had little to do with settling a coherent test for fixtures and fittings.[50] Moreover, although there were clear references by Blackburn J as to the importance of party intention,[51] intention became secondary to the test of the manner by which goods were attached.[52] At the turn of the nineteenth century, the irrelevance of intention became apparent in the Court of Appeal decision *Hobson v Gorringe*,[53] and the House of Lords case *Reynolds v Ashby*.[54] At the end of the twentieth century, the House of Lords, in *Melluish v BMI (No 3) Ltd*[55] and *Elitestone Ltd v Morris*,[56] reiterated that approach. These four leading cases indicate that the key test to determine the extent of a mortgagee's rights is simply whether the goods have become fixtures. Party intention vis-à-vis ownership of the goods is essentially irrelevant even where the ownership of the goods resides with a third party. However, the authority of these decisions in non-commercial situations is dubious at best.

In *Gough v Wood & Co*,[57] the defendants agreed to supply a tenant with a boiler for the purposes of the tenant's business, with the property in the boiler remaining with the defendants until all instalments were paid and with a right of removal in the event of default. The tenant mortgaged his interest in the land to the plaintiff, who did not know of the prior transaction. Following this, the boiler was affixed to the land. Upon default the defendants removed the boiler. It was held that the mortgagee must have acquiesced in the mortgagor fixing and removing fixtures for the purpose of trade. The importance

43 Luther (n 33) 603–04.

44 Ibid 605.

45 *Holland v Hodgson* (1872) LR 7 CP 328, 333. See also e.g. *Ex parte Dalglish* (1872–73) LR 8 Ch App 1072.

46 *Southport and West Lancashire Banking Co v Thompson* (1887) LR 37 ChD 64. See also *Reynolds v Ashby* [1904] AC 466, 473 (Lord Lindley).

47 (1872) LR 7 CP 328, 334–35 (Blackburn J).

48 Luther (n 33) 601–05. See also *Hellawell v Eastwood* (1851) 6 Ex 295, 312–313; 155 ER 554, 561 (Parke B).

49 Luther (n 33) 612–14.

50 See text following n 93.

51 (1872) LR 7 CP 328, 335: 'if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v Gregory* [(1866) LR 3 Eq 382].'

52 Luther (n 33) 615–18.

53 [1897] 1 Ch 182.

54 [1904] AC 466.

55 [1996] AC 454.

56 [1997] 1 WLR 687.

57 [1894] 1 QB 713.

of this implied acquiescence to mortgagors acting in the course of business is clear in 'the principal case':[58] *Hobson v Gorringe*.[59]

In *Hobson* the mortgagor acquired a gas engine under a hire-purchase scheme, prior to the mortgage. The engine was attached to freehold land by bolts and screws (to prevent it moving during use) and was used by the mortgagor for the purposes of his trade. The mortgagee had no knowledge of the hire-purchase. Upon default, the mortgagee took possession whilst the engine was still on the land. A L Smith LJ said:

> [If the machine] always remained a chattel, [it would have] consequently never passed to Gorringe as mortgagee of the land. It obviously did not pass to him as a chattel under the mortgage to him of 'fixed machinery,' for, if a chattel, it ever remained Hobson's [the seller], and never was the property of King [the mortgagor/hirer]; and unless Mr. Gorringe takes the engine as part of the land mortgaged to him he does not take it at all.[60]

As the engine was attached to the land, the mortgagee had priority. The intention, evidenced in the hire-purchase agreement, that the engine would remain goods could not override the affixation of the goods. This was partly because Hobson's right to remove the engine on default was not of the nature of legal or equitable rights *in land* that could take priority over a third party.[61] The other aspect of the decision was:

> That a person can agree to affix a chattel to the soil of another so that it becomes part of that other's freehold upon the terms that the one shall be at liberty in certain events to retake possession we do not doubt, but how a de facto fixture becomes not a fixture or is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers we do not understand, nor has any authority to support this contention been adduced.[62]

The fact that Hobson had failed to remove the engine prior to the mortgagee's claim was enough to dispose of the case. The court did not explain what distinguished the insufficiency of the agreement between the vendor and vendee (on the grounds its content was unknown to the mortgagee) and the sufficiency of the agreement between mortgagor and mortgagee (even though its contents were equally unknown as to the vendor).

The Court of Appeal would face similar issues three years later in *Monti v Barnes*.[63] Unusually, this case concerned a residential mortgage. The owner of a residential house mortgaged the property in 1890, the mortgage being transferred to the defendant in 1893. Later in 1893 the owner sold the equity of redemption in the mortgage, and also the furniture, fittings and effects therein, to the plaintiff. In 1898 the defendant foreclosed the mortgage and became owner in fee of the house. The original mortgagor had removed certain grates (used to hold solid fuel) and replaced them with 'dog grates', a particularly heavy type. The plaintiff-mortgagor had removed the dog grates; the defendant-mortgagee claimed this was a wrongful detention. If these dog grates were fixtures, they would pass to the mortgagee.

A L Smith MR focused on the weight of the grates and also 'the intention with which the mortgagor placed the dog grates in the house, [for] it is obvious that he could not

58 *Reynolds v Ashby* [1904] AC 466, 471 (Lord James).

59 [1897] Ch 182.

60 Ibid 189.

61 Ibid 192 (A L Smith LJ).

62 Ibid 195 (A L Smith LJ).

63 [1901] 1 QB 205.

have intended that the house should be without grates; and I have no doubt that the dog grates were put in to fill the place of the old fixed grates, which he took out, and to pass with the inheritance'.[64] Collins LJ recognised that this dispute 'differs widely from that of landlord and tenant'.[65] As such a 'mortgagor [who brought] an article on to the mortgaged premises, although it may be after the mortgage, would generally not regard the premises as belonging to any one but himself, and would therefore be the more likely to intend the article to be for the improvement of the property from which he does not contemplate being ousted'.[66] Stirling LJ thought that:

> it is most material to observe that [the dog grates] were placed there by the mortgagor after the mortgage, and in the place of the old fixed grates which existed at the time of the mortgage. It seems to me that, if the mortgagor had removed the old grates without substituting any grates for them, he would have been guilty of waste, such as would call for the interference of the Court at the instance of the mortgagee.[67]

Although *Monti* appears very similar to the residential mortgage situation at the heart of this article, it cannot support the broader claim that all goods which attach to the realty must pass to the mortgagee as it was accepted that dog grates were an improvement of the realty. It is this which explains the references to intention in *Monti*. However, it was the mortgagor's intentions alone which the court took into account, not the intention of all relevant parties. Furthermore, it was the mortgagor's intention in his capacity as mortgagor of realty, and not as owner of personality, that was taken as relevant. Moreover, the reference to waste by Stirling LJ and the distinction drawn with a tenancy by Collins LJ suggests *Monti* was the last convulsion of the freehold/leasehold distinction that had previously dominated these sorts of disputes. At this point it is necessary to return to the development of fixtures law per se and the important decision in *Reynolds v Ashby*.[68]

In *Reynolds* the House of Lords held that where a machine, acquired by hire-purchase, had been attached to land by means of nuts and bolts, the mortgagee took priority over the seller of the machine when the hirer defaulted, as the machine had become part of the land. The fact that hire-purchase meant the appellant retained title to the goods could not override the fact that 'machines were sold by the appellant for the purpose of being used in the manner in which they were used. In order so to use them it was necessary that they should be fixed, and so become part of the building.'[69] As Lord Lindley put it: '[i]t is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as movable chattels'.[70]

For Lord Lindley, the best approach for dealing with fixtures was to pay attention 'not only to the nature of the thing and to the mode of attachment, but to the circumstances under which it was attached, the purpose to be served, and last but not least to the position of the rival claimants to the things in dispute'.[71] This final element is important:

64 *Monti* (n 63) 207.
65 Ibid 208.
66 *Hobson v Gorringe* [1897] Ch 182 208.
67 Ibid 209.
68 [1904] AC 466.
69 Ibid 472 (Lord James).
70 Ibid.
71 Ibid 474.

assessing the relative priority of the parties to the dispute, which could be undertaken in an objective fashion, is substantially different to assessing subjective intentions and opens a gap for policy-based analysis premised on the importance of smoothing the free flow of credit. However, Lord Lindley was content to hold that the vendor of the goods knew of the mortgage and knew of the risks involved and so could be held to run the risk that the machine sold would become a fixture. Either the vendor effectively authorised the conversion of the goods into fixtures, or he had lost the right to repossess the goods by failing to exercise the right prior to the mortgagee taking possession.[72]

The shift in the focus of judicial analysis, from attachment per se to the purpose and use of the goods,[73] enables a more contextual approach, but it still does not mean that intention is relevant, as the purpose and use of goods can be ascertained objectively.[74] Furthermore, the importance of the disponer's failure to re-acquire the goods prior to the mortgagee taking possession of the realty (regardless of any contractual intention otherwise) remained significant. This much can be seen from the important duo of cases in the House of Lords in the 1990s. In *Melluish v BMI (No 3) Ltd*,[75] leasing companies claimed a tax reduction based on their retention of ownership of boilers that had been installed, under lease arrangements with local authorities, in local authority housing. The agreement between the parties as to the ownership of the boilers could not override the principle effect of annexation, i.e. the necessary extinction of their status as goods,[76] even if the lease agreements provided the lease companies with a right to retake possession in the event of default. Lord Browne-Wilkinson said:

> The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil . . . The terms of such agreement will regulate the contractual rights to sever the chattel from the land as between the parties to that contract and, where an equitable right is conferred by the contract, as against certain third parties. But such agreement cannot prevent the chattel, once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed.[77]

The following year saw *Elitestone Ltd v Morris*,[78] concerning a wooden chalet which rested on concrete pillars attached to the ground such that it could only be removed from the land by demolition. The claimant owned the freehold; the defendant occupied the chalet under a purported licence. The claimant brought proceedings to obtain possession of the land. The defendant claimed he was a protected tenant under the Rent Act 1977, s 1. The House of Lords held that the chalet's construction was such that an objective assessment

72 *Reynolds* (n 68) 475.

73 The question of attachment per se could still be relevant though: see e.g. *Hulme v Brigham* [1943] 1 KB 152.

74 Thus, the different results in *Lyon & Co v London City and Midland Bank* [1903] 2 KB 135 (treated as *sui generis* in *Reynolds v Ashby* [1904] AC 466, 474 (Lord Lindley)) and *Vaudeville Electric Cinema v Muriset* [1923] 2 Ch 74 (where Sargant J (at 87) distinguished *Lyon & Co*).

75 [1996] 1 AC 454.

76 Ibid 473 (Lord Browne-Wilkinson).

77 Ibid. See also e.g. Cousins and Clarke (n 18) [15-02]: 'If chattels which are bailed under a hire or hire-purchase agreement, or are agreed to be sold under a conditional sale agreement, become fixtures (other than trade fixtures) they become subject to the mortgage even if affixed after it was created.' The reference supporting this statement (fn 12) merely states: 'As to whether a chattel has become a fixture, see *Holland v Hodgson* (1872) LR 7 CP 328; *Crossley Bros v Lee* [1908] 1 KB 86 [a gas engine let out on hire, affixed to the floor of business premises by bolts and screws, was held to be a fixture].'

78 [1997] 1 WLR 687.

would indicate that it could not have remained a chattel, but must have been intended (regardless of the common assumption of both parties that the chalet was Morris's personal property) to form part of the realty. This meant that Morris succeeded, as the chalet was held to be part of the land and thus the Rent Act 1977 applied.

This conclusion was reached by virtue of application of the two-part test expressed by Blackburn J, i.e. it depended on the degree and object of annexation to the land.[79] Lord Lloyd followed Lord Browne-Wilkinson's speech in *Melluish* and said '[i]f an express agreement cannot prevent a chattel from becoming part of the land, so long as it is fixed to the land, it is obvious that a common assumption cannot have that effect'.[80] Similarly, Lord Clyde held that:

> . . . [i]t is the purpose which the object is serving which has to be regarded, not the purpose of the person who put it there. The question is whether the object is designed for the use or enjoyment of the land or for the more complete or convenient use or enjoyment of the thing itself.[81]

Thus, the purpose goods serve determines whether they become part of the realty, and any prior contract between the disponer of goods and a disponee will be insufficient to negate the effect of that purpose. All we really know from *Melluish* and *Elitestone* is that the disponer of goods has to remove the goods prior to the land being repossessed to avoid losing any pre-existing interest in the asset, which repeats the analysis in *Hobson and Reynolds*.[82] However, neither decision engaged with Lord Lindley's analysis in *Reynolds v Ashby*, specifically the third limb: 'the position of the rival claimants to the things in dispute'.[83] In *Melluish*, Lord Browne-Wilkinson appeared to rely entirely on *Hobson v Gorringe* and only referred to *Reynolds* to note that it approved *Hobson*,[84] which was replicated in *Elitestone*.[85] The position of the residential mortgagor cannot be accurately ascertained. Neither *Melluish* nor *Elitestone* involved a residential consumer purchase-money mortgage (or indeed even a mortgage at all), and *Gough* and *Hobson* concerned situations where goods were acquired and attached (whether sufficient to qualify as a fixture or not) prior to the mortgage. *Reynolds* did involve a post-mortgage acquisition of goods, but it too was in a commercial context. The only non-commercial case, *Monti*, is best treated as an anachronistic outlier.

2.2 Application in recent case law

The lack of direction from the leading cases as to the extent of a mortgagee's powers of control over goods in consumer cases may explain the nature of the reasoning in two cases which were much more relevant for the problem at hand and which were decided in between the House of Lords decisions in *Melluish and Elitestone*.[86]

79 There is a different aspect to *Elitestone*, concerning the application of a three-fold approach to goods, fixtures and things that are part and parcel of the land itself, for which see P Luther, 'The Foundations of *Elitestone*' (2008) 28 Legal Studies 574. For recent application of *Elitestone* in a dispute concerning a Henry Moore sculpture, see *Tower Hamlets LBC v Bromley LBC* [2015] EWHC 1954 (Ch)

80 [1997] 1 WLR 687, 690.

81 Ibid 698.

82 Arguably, it also replicated an implicit consequence of the decision in *Monti*: had the mortgagee there removed the dog grates before the mortgagor the case would not have arisen.

83 [1904] AC 466, 474.

84 [1996] 1 AC 454, 473–75.

85 [1997] 1 WLR 687, 693 (Lord Lloyd), 698 (Lord Clyde).

86 The order of hearings was *Melluish*, *Botham*, *Deutsche Genossenchafts Hypothekenbank*, then *Elitestone*.

In *Deutsche Genossenchafts Hypothekenbank v Amstad*,[87] the claimant bank lent money to Amstad on terms described as 'a legal mortgage on the pledged property'.[88] The loan concerned a mortgage over land and not a charge over personal property.[89] Following default, the claimant appeared to appoint a receiver. Harman J stated that, whilst this is perfectly acceptable under the Law of Property Act 1925 (LPA) with regard to mortgaged real property:

> there is no doubt that chattels in the freehold property do not pass to the mortgagee under his legal charge. He has no rights over chattels, and the Receiver is not entitled to take into his possession any chattels there may be. In a normal private mortgage of a house to a lender, whether a bank or a building society or a private individual—it matters not—for which a normal legal charge such as this is given, there has never been any suggestion that the curtains, carpets, beds, sofas, chairs, china, cutlery and other chattels in any normal home would pass under the legal mortgage or would be available to the Law of Property Act Receivers appointed in respect of such a mortgage.[90]

Thus, the receiver had no right to take possession of the goods.[91] Harman J refused to declare such goods were part of the charge, because they were not fixtures,[92] and the agreement between the bank and Amstad did not meet the 'normal requirements' of a floating charge or provide for a fixed charge.[93]

Around the same time, the Court of Appeal was considering similar issues in *Botham v TSB Bank*.[94] Botham owned a flat subject to a mortgage in favour of the TSB Bank. Upon default the bank repossessed and eventually sold the flat, but there remained a shortfall of some £170,000. Botham and the bank disputed the status of goods in the flat. It was agreed the 109 separate goods could be classified in the following manner: 'fitted carpets; light fittings; gas fires; curtains and blinds; fittings on sanitary ware; bathroom accessories; mirrors and marble panels; kitchen units, work surfaces and sink; and major kitchen appliances (so called "white goods").'[95] At first instance these goods were found to be fixtures and part of the land (apart from a wall-mounted electric razor), on the basis of the degree and purpose of annexation (with the modern emphasis being on the purpose of annexation). Nevertheless, a close examination of what the judges actually said raises various intriguing questions.

Sir Richard Scott VC 'recognised the danger in applying too literally tests formed in old cases dealing with machinery in factories to cases regarding articles in residences'. He was also wary of 'applying tests formulated for the purpose of decisions relating to ornamental items to cases relating to articles of utility'.[96] He also noted that the intrinsic value of the goods, and their aesthetic value, would be of at most minimal significance.

87 Ch D, 22 January 1997. This case is cited as authority for the statement that 'a mortgage of realty normally obtains no security over chattels (e.g. furniture) in or on the mortgaged property' in K Gray and S F Gray, *Elements of Land Law* 5th edn (OUP 2009) [1.2.47], fn 2.

88 Ch D, 22 January 1997, 1.

89 Ibid 2.

90 Ibid 3.

91 The point of this action seemed to be that the receiver was attempting to claim an interest in goods which Amstad had actually sold to and leased back from a Mr Stone.

92 Ch D, 22 January 1997, 4.

93 Ibid 5.

94 (1997) 73 P & CR D1 (CA).

95 Ibid D1-D2.

96 Ibid D2.

Roch LJ took the approach that goods necessary for the function of a room, such as lavatory in a bathroom or a sink in a kitchen, would constitute fixtures.[97] However, those goods which were connected to the house merely by their connection to a utility supply (such as a light fitting, or a washing machine) could not evidence an intention to effect an improvement to the property, as well as being only partially attached to the property, and thus they remained goods.[98] In the transcript of the decision, Roch LJ is recorded saying that 'items installed by a builder, e.g. the wall tiles will probably be fixtures, whereas items installed by e.g. a carpet contractor or curtain supplier or by the occupier of the building himself or herself may well not be'.[99] This aspect is likely to turn on the facts of the particular case: for Haley 'this distinction seems both unhelpful and untenable'.[100] On the former point, Roch LJ merely said that:

> . . . [i]t must be remembered that in many cases the item being considered may be one that has been bought by the mortgagor on hire purchase, where the ownership of the item remains in the supplier until the instalments have been paid . . . [and finding such goods to be fixtures] should only be made where the intent to effect a permanent improvement in the building is incontrovertible.[101]

For Haley, whilst the court took a 'common sense stance which was aimed, in the good common law tradition, to promote practical solutions to practical problems',[102] Roch LJ's focus on the ownership status of the goods 'represents some departure from the traditional approach which largely ignored third party rights over the items'.[103] Indeed, like the vice chancellor's approach, this seems unsupportable in light of the decisions in *Melluish* and *Elitestone*. Arguably, a distinction can be drawn on the basis that *Botham* concerned a residential mortgage, as opposed to the very different situations in *Melluish* and *Elitestone*. However, regardless of whether the Court of Appeal succeeded in its 'attempt to rationalise the law and to adapt long established wisdom and understandings to the realities of contemporary living',[104] the problem of whether it is actually valid for a lender to extend its security, nominally focused on the land, to personal property, remains unresolved. It remains unclear whether the mortgagee can extend its security beyond the residential property to the goods therein. More recent decisions touching on this issue, though only from the commercial direction, clearly show the courts relying more on assertion than analysis.

In the 2011 case *National Westminster Bank v Hunter*,[105] Morgan J was faced with a mortgagee's attempt to realise its security over farmland, against a background of complex and opaque negotiations between the mortgagor, the mortgagee and third parties (with various actual, alleged and potential interests in the land). Morgan J refused to grant Hunter an order directing a sale of the land under the Law of Property Act 1925, s 91 (from Hunter to a company run by his wife), as it would have necessarily involved a breach of a contract Hunter had with one Taylor by virtue of an auction by a receiver.[106] There was a second application, from the mortgagee, with regard to cattle that Hunter

97 Ibid D3.

98 Ibid D4.

99 *Botham v TSB Bank* (CA 30 July 1996) transcript 4–5.

100 Haley (n 35) 141.

101 *Botham v TSB Bank* (CA 30 July 1996) transcript 4.

102 Haley (n 35) 138.

103 Ibid 141.

104 Ibid 138.

105 [2011] EWHC 3170 (Ch). I am grateful to Professor Alison Clarke for alerting me to this case.

106 [2011] EWHC 3170 (Ch) [58]–[81].

was keeping on the pertinent land. The mortgagee sought an order under the Torts (Interference with Goods) Act 1977, s 13, which provides that, pursuant to s 12, the bailee can require that the bailor takes delivery of goods (Hunter was already subject to a County Court order to remove the cattle).[107] Hunter argued that the s 12 requirement that the goods be 'in the possession or under the control of a bailee' prevented the granting of the order as he, Hunter, and not the mortgagee, was in possession and had control of the goods. Morgan J said that, whilst:

> Hunter owns the cattle, the bank does not own the cattle and does not have a security interest in the cattle. At any rate, I proceed on that basis for today's purposes. But possession and control do not turn upon ownership, one man can be the owner and another can be in possession and a third can have control.[108]

As such Hunter's argument failed.

The reference to the mortgagee not having a security interest is interesting. The bank did not claim a security interest in the cattle; the action solely concerned the acquisition of possession of the realty. The nature of agricultural financing (and the lack of evidence of the content of the mortgage agreement) probably renders this decision *sui generis*. However, this decision suggests the possibility that mortgagees introduce terms into mortgages that provide them with powers over goods held on the realty, in order to protect themselves in the event that defaulting mortgagors fail to remove goods from the realty.[109] Yet issues of control (i.e. the power to ensure vacant possession by the removal of goods) and ownership (i.e. whether the mortgagee of realty has a security interest in goods on the realty) are distinct issues which deserve different treatment.[110]

In *Peel Land and Property (Ports No 3) Ltd v T S Sheerness Steel (Ports No 3) Ltd*,[111] the defendants had obtained a lease under which the original tenant covenanted to build a new steel-manufacturing facility. The claimants obtained the reversion of the lease and brought proceedings to prevent the defendants from disposing of plant and machinery on the site. The Court of Appeal allowed the claimant's appeal, on the grounds that at common law a tenant can remove any tenant's fixture, but that such a right depends on the terms of the lease (and determining the extent of the contractual terms is a process of ordinary contractual interpretation; no special words are required). Here the contract was sufficiently clear as to cover goods that became part of the demised property. Allowing the tenant to dispose of such goods would contradict the commercial obligation at the heart of the agreement (i.e. to build the new steel factory).[112]

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107 Ibid [82], [89].

108 Ibid [85].

109 See e.g. *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264; *Norwich Union Life Insurance Society v Preston* [1957] 1 WLR 813; *Scotland v Solomon* [2002] EWHC 1886 (Ch); and below n 111.

110 The anonymous reviewer usefully pointed out that the mortgagee's power of disposal comes from their possessory interest over the land, which is not necessarily inconsistent with any ownership rights over the goods. This would mean the attempts by mortgagees to give themselves powers by the mortgage agreement are best characterised as exclusion clauses for tortious liability. The author acknowledges the strength of this argument, but this approach would seem to only operate in a mortgagee–mortgagor conflict, whereas a large volume of the case law has included a third-party owner of the goods, which necessitates focus on the ownership issue as well.

111 [2014] EWCA Civ 100; [2014] 2 P & CR 8.

112 Three cases following *Peel Land* further emphasised that the alleged power of disposition in favour of mortgagees exists to enable efficient clearing or land or disposition of waste: *Da Rocha-Afodu v Mortgage Express Ltd* [2014] EWCA Civ 454; [2014] 2 P & CR DG 10; *Campbell v Redstone Mortgages Ltd* [2014] EWHC 3081 (Ch); *Mandalia v Beaufort Dedicated No 2 Ltd* [2014] EWHC 4039 (QB).

The importance of the degree of annexation to the land is further illustrated by the decision of the High Court in *Lictor Anstalt v Mir Steel UK Ltd and Libala Ltd.*[113] There, the claimant had purchased equipment necessary to set up a steel mill and allowed a steel company P to assemble the equipment and use it to make steel products on land owned by P. The claimants and P later entered an agreement purporting to regulate P's use of the mill, which included a right for the claimant to remove the mill upon giving notice. P's administrators sold the land and the mill to the defendant. Asplin J held that the test for annexation from *Holland* and *Elitestone* would be used, making it difficult to conclude anything other than that the equipment was intended to be at least semi-permanent.[114] As the agreement between the claimant and P was intended to create contractual and equitable rights and obligations, they had done so and, thus, even though the mill had become part of the land, the agreement would still regulate the claimant's rights over the mill.[115]

3 The effect of the bills of sale regime

Individuals wanting to charge their goods must comply with the bills of sale legislation,[116] which sets out certain requirements for this type of security:[117] 'Speaking broadly [they] (1) avoid certain written instruments, (2) so far as they purport to create a security on personal chattels for the payment of money, unless (3) they comply with the conditions imposed by the Acts.'[118] The bill of sale, which has to be for more than £30,[119] must have an attached schedule of the personal property covered by the bill, without which the bill will be void against third parties.[120] However, these requirements do not cover growing crops,[121] or '[a]ny fixtures separately assigned or charged' or any 'plant, or trade machinery' used in substitution for similar things that are covered in the bill of sale.[122]

113 [2014] EWHC 3316 (Ch).

114 Ibid [163]–[192].

115 Ibid [240]–[242]. At [293] Asplin J also held that the registration provisions of the Land Registration Act 2002, s 29(1), did not mean that the claimant's failure to register its interest was fatal: the claimant's rights were in the form of personal rights based on an economic tort. See also n 78 and accompanying text.

116 If the chargor is a company, then there are requirements concerning registration of the 'company charge' under the Companies Act 2006, s 860. A bill of sale can be an outright transfer or a bill by way of security: see e.g. G S McBain, 'Repealing the Bills of Sale Acts' [2011] Journal of Business Law 475, 480–81.

117 Bills of Sale Act 1854, amended in 1866, and repealed by the Bills of Sale Act 1878, to which see further the Bills of Sale Act (1878) Amendment Act 1882 and the Bills of Sale Acts 1890 and 1891. The 1878 and 1882 Acts are to be read as if one statute, but to the extent that the 1878 Act is inconsistent with the later Act its provisions are repealed: Bills of Sale Act (1878) Amendment Act 1882, s 15. See also A Underhill and A Cole, *Fisher's Law of Mortgage and Other Securities upon Property* 6th edn (Butterworths 1910) 48: 'The Act of 1878 is usually called the principal Act, but the Act of 1882 . . . so completely revolutionized the law of mortgage of personal chattels that . . . it is really more important than the Act of 1878. The Act of 1890, as amended by the Act of 1891, merely exempted certain commercial hypothecations from the operation of the Acts altogether.'

118 Underhill and Cole (n 117) 48. For a valuable recent overview of bills of sale, see Law Commission, *Bills of Sale: A Consultation Document* Law Com CP 225 (2015).

119 Bills of Sale Act (1878) Amendment Act 1882, s 12. Inflation has rendered this minimum value functionally meaningless, but it indicates that the original aim was to cover goods of some considerable value. Cf. McBain (n 116) 504, fn 233, and arguing for a minimum starting value of £2000 if there is reform.

120 Bills of Sale Act (1878) Amendment Act 1882, s 4. The Bills of Sale Act 1878, if not adhered too, will make the bill of sale void but only as against the debtor and creditor, whereas failure to adhere to the 1882 Act makes the bill of sale void as against third parties. This difference in effect is correlative with the different underlying purposes of the different Acts: see text accompanying nn 19 and 20.

121 Bills of Sale Act (1878) Amendment Act 1882, s 6(1).

122 Ibid s 6(2).

The bill of sale must be 'duly attested' and registered under the provisions of the Bills of Sale Act 1878 within seven days of execution of the bill of sale;[123] attestation requiring one or more witnesses not a party to the bill itself.[124] Failure to register the bill (and, indeed, to continue to update the bill every five years) renders it void.[125] The bills must be in a prescribed form[126] set out in a schedule to the 1878 Act,[127] which is an essential aspect of a regime focused on documentation rather than transactions. Oral agreements for charges over personal property are outside this regime.[128]

The bills of sale legislation essentially prevents individuals granting effective floating charges over goods,[129] not least because the requirement for a schedule of goods restricts bills of sale to already owned goods,[130] but also because a charge *simpliciter* is not an assurance as required by the regime.[131] So, whilst there may not be conceptual problems with individuals charging goods,[132] the formal impossibility remains. Nevertheless, it remains peculiarly unclear as to whether future goods can be captured by the bills of sale regime. Future goods cannot be specified, and thus the formality requirements cannot be met, and so a bill over future goods is void.[133] On the other hand, it has recently been held that equitable rights over future property are within the scope of the bills of sale regime, provided such rights are described with sufficient formality[134] and substitutions of identified goods for improvement or maintenance of the security are allowed.[135] Gullifer and Hurst describe the substitution exception as 'very limited',[136] but, as the HSBC mortgage deed set out above indicates, the issue of substitutions may actually be of greater importance.

Whilst the ambit of the bills of sale regime in the modern era is extremely limited,[137] the interaction between that regime and the law on fixtures was significant.[138] The Bills

123 Bills of Sale Act (1878) Amendment Act 1882, s 8.

124 Ibid s 10.

125 See e.g. *Halberstam v Gladstar Ltd* [2015] EWHC 179 (QB).

126 Ibid s 9.

127 As to the importance of form, see e.g. *Charlesworth v Mills* [1892] AC 231; *Chapman v Wilson* [2010] EWHC 1746 (Ch) (a document drawn by a solicitor failed to meet the formality requirements); L Gullifer and S Hurst, 'Bills of Sale Acts: Ripe for Reform?' (2013) 28(11) Journal of International Banking and Financial Law 685, 685: the 'stringent formal requirements . . . are extremely onerous'.

128 Law Commission (n 32) [8.7]; L Gullifer, *Goode on Legal Problems of Credit and Security* 5th edn (Sweet & Maxwell 2013) [1–13], citing *Reeves v Capper* (1838) 5 Bing NC 136, 139; 132 ER 1057, 1058 (Tindal CJ); *Flory v Denny* (1852) 7 Ex 581, 585; 155 ER 1080, 1082 (Pollock CB); *Newlove v Shrewsbury* (1888) 21 QBD 41 (CA).

129 See e.g. P Giddins, 'Floating Mortgages by Individuals: Are They Conceptually Possible?' (2011) 3 Journal of International Banking and Finance Law 125; D Sheehan, 'The Abolition of Bills of Sale in Consumer Lending' (2010) 126 Law Quarterly Review 356.

130 Bills of Sale Act (1878) Amendment Act 1882, s 5.

131 E I Sykes, 'Suppressio Veri and Suggestio Falsi' (1957) 1 Melbourne University Law Review 80, 83: 'the mere charge over chattels is not a registerable bill of sale . . . because it is not an assurance of chattels', citing *Brown v Bateman* (1866–67) LR 2 CP 272; Re Slee (1872–73) LR 15 Eq 69.

132 This is Giddins' conclusion (n 129), following *Tailby v Official Receiver* (1888) LR 13 App Cas 523, 541 (Lord Macnaghten).

133 *Thomas v Kelly and Baker* (1888) LR 13 App Cas 506.

134 *Welsh Development Agency v Export Agency* [1991] BCLC 936 (HL) 956–957 (Sir N Browne-Wilkinson VC); *Chapman v Wilson* [2010] EWHC 1746 (Ch) [95] (Vos J).

135 *Seed v Bradley* [1894] 1 KB 319; *Coates v Moore* [1903] 2 KB 140.

136 Gullifer and Hurst, 'Bills of Sale Acts' (n 127) 688, fn 8.

137 McBain (n 116) 477–79.

138 Arguably, for more so than what may be gleaned from the brief outline in e.g. McBain (n 116) 497.

of Sale Acts from 1854 were aimed at preventing creditors from being defrauded by debtors remaining in possession of encumbered goods,[139] but the policy shifted rapidly with the Bills of Sale Act (1878) Amendment Act 1882 preventing consumers from signing complicated documentation and, thus, unwittingly charging their personal property.[140] This early form of 'consumer protection' was inappropriate for 'non-consumer', i.e. commercial, borrowers,[141] but judicial manipulation of the law on fixtures in order to take certain goods and transactions out of the aegis of the bills of sale regime had already been underway throughout the nineteenth century.[142]

Analysis of the case law leading up to *Holland v Hodgson*[143] shows that the underlying purpose of that decision (and those that followed it) was resolution of the relationship between the bills of sale regime and the law on mortgages for commercial debtors and creditors. In 1859 in *Walmsley v Milne*,[144] the land owner mortgaged land prior to installation of equipment to enhance his business as a brewer. By permanently attaching the goods to the realty, in order to enhance the realty, the goods had become part of the realty and could be taken by the mortgagee. The same result occurred in 1866 in *Cullwick v Swindell*.[145] In 1868 came *Climie v Wood*,[146] a decision taken to be definitive in *Holland v Hodgson*,[147] where Kelly CB in the Court of Exchequer stated that, whilst there were exceptions to the *principle quicquid planatur solo, solo cedit* for (inter alia) tenants and landlords:

> no authority has been cited to shew that a mortgagor is entitled to remove such trade fixtures. There have been several cases where the courts have decided that, upon the true construction of the mortgage deeds, trade fixtures were removable by the mortgagor, but not one to shew that such right exists without a special provision. A mortgage is a security or pledge for a debt, and it is not unreasonable if a fixture be annexed to land at the time of a mortgage, or if the mortgagor in possession afterward annexes a fixture to it, that the fixtures shall be deemed an additional security for the debt whether it be a trade fixture or a fixture of any other kind.[148]

The importance of the nature of the agreement between the mortgagor and mortgagee is clear, as is the possibility of a mortgagor charging after-acquired personal property. In *Longbottom v Berry*,[149] in 1869, the mortgagor acquired goods which were attached to the land for the purposes of improving the land's role in his business, after the land had been mortgaged to the defendant bank. Following this, the mortgagor assigned to the plaintiff his goods, under a duly registered bill of sale. After the mortgagor became bankrupt, the plaintiff took possession of the goods. The plaintiff and defendant agreed the goods should be sold; the court would determine entitlement to the fund. The Court of Queen's Bench held the goods that had been attached to the land (the overwhelming majority of

139 *Cookson v Swire and Lees* (1884) LR 9 App Cas 653, 664–66 (Lord Blackburn).

140 *Thomas v Kelly and Baker* (1888) LR 13 App Cas 506, 514 (Lord Fitzgerald); *The Manchester, Sheffield, and Lincolnshire Railway v North Central Wagon Company* (1888) LR 13 App Cas 554, 560 (Lord Herschell); *Charlesworth v Mills* [1892] AC 231, 235 (Lord Halsbury LC). See also McBain (n 116) 482–85.

141 This remains problematic: Sheehan (n 129) 359; Gullifer and Hurst (n 127) 686. See also Companies Act 2006 (Amendment of Part 25) Regulations 2013 (SI 2013/600); *Online Catering Ltd v Acton* [2010] EWCA Civ 58.

142 M G Bridge, *Personal Property Law* 3rd edn (OUP 2002) 20. See e.g. *In re Burdett* (1888) 20 QBD 310 (CA).

143 (1872) LR 7 CP 328.

144 (1859) 7 CB NS 115; 141 ER 759.

145 (1866) LR 3 Eq 249 (approving *Walmsley v Milne*).

146 (1867–68) LR 3 Ex 257; (1868–69) LR 4 Ex 328.

147 (1872) LR 7 CP 328, 333.

148 (1867–68) LR 3 Ex 257, 260. See also (1868–69) LR 4 Ex 328, 330 (Willes J).

149 (1869) LR 5 QB 123.

the enumerated chattels) passed to the mortgagee, following the approach set out in *Walmsely* and *Cullwick*.[150] As to those goods not affixed to the land, they would pass to the plaintiff holder of the bill of sale. However, no separate justification for this was given; the clear implication was that the nature of the affixation was determinative. This approach, following the approval of *Longbottom* in *Holland*, would come to dominate thinking in this area.

In *Holland v Hodgson*, the owner had mortgaged his real property to the plaintiff. Following this was an assignment of the owner's property to the defendants (who had taken as trustees for the benefit of the owner's creditors). The assignment was not registered as a bill of sale under the Bills of Sale Act 1854 and, thus, by s 1 it was void as against the defendants 'so far as it was a transfer of "personal chattels" within the meaning of that Act', with the Act defining by s 7 that 'personal chattels' included fixtures. Thus, the court thought it 'properly admitted, that where there is a conveyance of the land the fixtures are transferred, not as fixtures, but as part of the land, and the deed of transfer does not require registration as a bill of sale'.[151] The court also noted that the decision in *Mather v Fraser*[152] had stood for some time, and '[i]t is of great importance that the law as to what is the security of a mortgagee should be settled . . . we feel that it should not be reversed unless we clearly see that it is wrong'.[153] *Mather* concerned the overlap between mortgage law and the law on bills of sale, but what is clear is that the point of the litigation in *Holland* was merely to avoid the problems caused by the Bills of Sale Acts. It is at least arguable that *Holland*'s role as the leading authority for the meaning of fixtures must be limited, and that its true value lies in demonstrating the mechanism by which mortgagees can extend their security into personal property, i.e. by determining things to be fixtures.

Mather v Fraser[154] concerned the status of machinery fixed to the floor of a factory. The vice chancellor, Sir W Page Wood, applied the basic rule that if goods had become annexed to the land they would become part of the realty and, thus, come under the mortgagee's interest. As to the argument that the failure to register the transfer of the machine as a bill of sale would void the agreement, he held that the Bills of Sale Act 1854 would not apply:

> That Act only says that where a person makes a bill of sale of any part of his chattels, including fixtures, that bill of sale must be registered in a particular way. Here, no bill of sale was ever required to be made. A conveyance is made of the freehold, and that conveyance carries fixtures. To hold that an Act of Parliament, which says that, where bills of sale are used, they shall be dealt with in a particular manner, applies to a case where no such thing is used or required to be used, but where the whole of the property passes by the conveyance of the fee-simple would be to give a construction to the Act far beyond anything which was within its purview.[155]

150 (1869) LR 5 QB 123 127.

151 (1872) LR 7 CP 328, 333.

152 (1856) 2 K & J 536; 69 ER 895.

153 (1872) LR 7 CP 328, 340.

154 (1856) 2 K & J 536; 69 ER 895. Considered the leading case by Lord Macnaghten in *Reynolds v Ashby* [1904] AC 466, 471.

155 (1856) 2 K & J 536, 558; 69 ER 895, 904–05.

For the vice chancellor,[156] the Bills of Sale Act 1854 was intended to deal with cases such as *Ex parte Sparrow*,[157] where a mortgage over all the personal property of the mortgagor had been granted, and the mortgagee was entitled to take possession upon default. The mortgagee did take possession, just before the mortgagor became bankrupt. The vice chancellor considered this to have been a 'very great convenience',[158] and in *Ex parte Sparrow* Knight Bruce LJ 'expressed great doubt as to the validity of such provisions, unless the assignor had substantially other property besides that comprised in the deed, or was in solvent circumstances independently of that property'.[159] The Bills of Sale Act 1854 was intended to solve this particular potential problem,[160] but there is little in the way of clarification in the statutes of after-acquired goods. More importantly, the lack of appropriate delineation between consumer and commercial situations, though almost certainly anachronistic, is at the root of the current conceptual and practical problems.

Subsequent changes to the bills of sale regime did not lead to a change in judicial approach. In 1888 the Court of Appeal was faced with *In re Yates, Batcheldor v Yates*.[161] Here, the owner of land (which was used for business purposes) mortgaged the land without any reference to fixtures or trade machinery. Following the mortgagor's death, his creditors argued the mortgage was void as to the trade machinery, under the Bills of Sale Acts 1878 and 1882. Lindley LJ said:

> where the mortgaged property includes valuable trade machinery . . . [t]he question we have to decide is this, whether a mortgagee of a mill, under a mortgage framed as this is, can seize and sever and sell, apart from the land or mill, the trade machinery on it. If he can, then it strikes me, that, as regards trade machinery, it would be impossible to avoid the conclusion that this is a bill of sale, and void because it is not registered.[162]

Since the machinery passed only by virtue of being attached to the freehold, and the mortgage deed only provided a power of sale and not a power to possess the machinery as goods separate from taking possession of the freehold, the mortgage was not an assignment of the machinery.[163] The key test was whether the goods had become fixtures, in which case they simply become part of the land, even if this test was more formal than functional.[164] Thus, the mortgage was not a bill of sale within the meaning of the Acts and thus gave a valid security over the goods. However, judicial dislike for the legislative deeming, by s 5 of the 1878 Act, of trade machinery to be goods arguably caused judicial restriction of the debate over the extent to which goods become attached to land.[165]

156 Ibid 558–59; 905.

157 (1852) 2 De G M & G 907; 42 ER 1127. Sir W Page Wood VC had been counsel in *Ex parte Sparrow*.

158 (1856) 2 K & J 536, 559; 69 ER 895, 905.

159 (1852) 2 De G M & G 907, 913; 42 ER 1127, 1129.

160 Cf. *Meux v Jacobs* (1875) LR 7 App Cas 481, 488 (Lord Chelmsford): 'It would be a most extraordinary conclusion for your Lordships to arrive at, that, because, for a particular purpose, that is to prevent frauds upon creditors, it is provided in the interpretation clause of an Act of Parliament [i.e. the Bills of Sale Act 1854] that fixtures are to be deemed personal chattels, therefore they are made personal chattels to all intents and purposes, and that also, as between mortgagor and mortgagee, they are personal chattels, although certainly these persons are not within the terms of the Act.'

161 (1888) LR 38 ChD 112.

162 Ibid 124.

163 Ibid 120 (Cotton LJ).

164 (1888) LR 38 ChD 112, 125 (Lindley LJ).

165 Ibid 127–29 (Bowen LJ).

In re Yates was distinguished soon after in *Small v National Provincial Bank of England*,[166] which concerned a conveyance of mortgaged land 'together with all and singular the fixed and moveable plant machinery and fixtures, implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises'. The mortgagee had attempted to sell machinery in which the claimants had an interest as trustees for the mortgagor's creditors. In contrast to *In re Yates*, 'personal chattels are plainly assigned *quâ* chattels, and not as a portion of the land'.[167] Stirling J dismissed an argument that the reference to fixtures in the deed was mere surplusage,[168] thus, there had been an assignment of the machinery. The failure to register the deed as a bill of sale rendered it void, entitling the claimants to an injunction.[169] Within a couple of months, *In re Brooke* came before Kekewich J.[170] In *Brooke* the conveyance did mention machinery (unlike *Yates*), but it did not have the additional wording which enabled Stirling J to distinguish *Small* from *Yates*.[171] Thus, *Yates* applied, and Kekewich J stated that:

> . . . apart from any criticism of the words of the instrument, you cannot say that fixed machinery which was conveyed to the mortgagee as part of the premises to which it was attached is a separable part of the mortgaged property in the state in which it was subjected to the mortgage.[172]

In *Ellis v Glover and Hobson Ltd*,[173] there was a mortgage of freehold land, with a covenant not to remove fixtures without the mortgagee's consent. Trade machinery was installed under a hire-purchase agreement: title would pass only on full payment and the vendor could remove the machinery in the event of default. Upon such removal, the mortgagee sued. It was held that the machinery had passed with the freehold. The Court of Appeal had to contend with the various opinions expressed in *Hobson v Gorringe* and *Reynolds v Ashby*,[174] as well as its previous decision in *Gough v Wood*.[175] Whilst in *Gough* this permission to remove goods was implied, in *Ellis* no such implication was possible. Fletcher-Moulton LJ held so even though it gave rise to the potential for fraud on the part of the mortgagor and mortgagee as against third-party financiers of goods attached to the realty.[176] He based this on the difficulties faced by third parties in finding out if there was actually a mortgage over the relevant land[177] and, whilst he thought estoppel might protect against fraud, he could see no case that went so far and, thus, he would rely on intervention from the legislature or the House of Lords to alter the law.[178] In essence, there has to be an agreement to protect the mortgagee from claims that it had taken goods it was not entitled to, and this was the case here.

166 [1894] 1 Ch 686.

167 Ibid 691 (Stirling J).

168 Ibid.

169 Ibid 692.

170 [1894] 2 Ch 600.

171 Ibid 611.

172 Ibid 613.

173 [1908] 1 KB 388.

174 Ibid 394 (Fletcher-Moulton LJ).

175 [1894] 1 QB 713.

176 [1908] 1 KB 388, 397.

177 This is ultimately a historical problem in light of the modern system of registered land following the Land Registration Act 2002.

178 [1908] 1 KB 388, 398. Farwell LJ gave essentially the same reasoning regarding estoppel (398–400).

Finally, it is worth noting *Re Rogerstone Brick and Stone Co Ltd*,[179] as that case is cited by Cousins and Clarke as authority for the general rule that fixtures pass to the mortgagee.[180] The Court of Appeal considered whether a debenture holder was entitled to the proceeds of sale of goods. The court held that a company's interest in goods as a mortgagor ended when the goods were sold by the mortgagee. The right of the mortgagee to remove fixtures, as against the company's lessor, did not infringe the Bills of Sale Acts. Younger J in the Chancery Division held it was 'clear that a mortgage of a lease by the lessee will carry with it the fixtures of the property which is in lease when the power to remove the fixtures is in the tenant',[181] meaning in effect that the mortgagor in the course of a trade cannot remove fixtures as against the mortgagee, other than when goods are not owned by the mortgagor.[182] In the Court of Appeal it was confirmed that the tenor of the mortgage was such that there was no separate right to the goods.[183] The goods, as fixtures, did not have a sufficiently separate identity, though severance of the fixtures would suffice to enable the mortgagor to recover them at any point in the future.[184]

McBain suggests that the differentiation between trade and non-trade fixtures in the bills of sale regime was formulated in order to take into account a residence-based home-workshop economy.[185] However, the Victorian period, i.e. the relevant period for the doctrinal development considered herein, saw a massive shift away from home-workshops and the putting-out system that necessitated such structures (and the authorities herein demonstrate that trade-fixture cases truly involved situations other than home-workshops):[186] 'Once a place of production, new technology was turning the house into a place of consumption.'[187] There was significant change in the volume and nature of consumption of goods by individuals throughout the Victorian period.[188] A considerable proportion of those new goods were connected to the home itself, cooking and cleaning implements, cutlery and crockery, and decorative and ornamental objects,[189] alongside consumables such as drinks or foodstuffs. Some of these new goods would themselves increase consumption,[190] and fashion began to exert its own power to enforce and enhance consumption.[191] However, these changes in material culture did not have a substantive impact on judicial reasoning, which may simply be due to the (inevitably) greater volume of commercial disputes concerning commercial goods. The law had changed though, meaning that the courts, to protect commercial interests in light of an utterly inappropriate bills of sale regime, had to formulate procrustean rules for fixtures

179 [1919] 1 Ch 110.

180 See n 19.

181 [1919] 1 Ch 110, 119, following *Meux v Jacobs* (1875) LR 7 App Cas 481.

182 Following *Ellis v Glover and Hobson Ltd* [1908] 1 KB 388 and *Reynolds v Ashby* [1904] AC 466.

183 [1919] 1 Ch 110, 123 (Swinfen Eady MR).

184 Ibid 127–28 (Eve J).

185 McBain (n 116) 498.

186 J Flanders, *The Making of Home* (Atlantic Books 2014) 49–50, 84 (citing D Hussey and M Ponsonby, *The Single Homemaker and Material Culture in the Long Eighteenth Century* (Ashgate 2012) 85: noting that a Birmingham widow had a shop in her downstairs room and, as a file-maker, that it would have contained an anvil and bellows, but that this was in the early eighteenth century), 93, 98–100.

187 Flanders (n 185) 111. See also e.g. J Baudrillard, *The System of Objects*, J Benedict (trans) (Verso 2005) 69: 'The private realm of the household is indeed where the vast majority of our everyday objects are to be found.'

188 See e.g. A Briggs, V*ictorian Things* (Batsford 1988); Flanders (n 186) ch 4, and especially at 140ff (noting the quantitative and qualitative increases in goods).

189 Briggs (n 188) 227. On the growth of cluttered living spaces, see e.g. Flanders (n 186) 136.

190 Flanders (n 186) 111–15.

191 Ibid 255 and cf. T Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* (Macmillan 1899).

and fittings which could not provide an appropriate regime in light of the development of both a culture of consumerism of both land (in the form of residential consumer purchase-money mortgages) and goods.

3.1 Arguments against allowing mortgagees to acquire security interests in personal property

If a mortgage agreement could cover after-acquired goods, mortgagees would benefit from the creation of an unregistered security interest which neither fits within the scheme of land registration[192] nor within the current structure of security interests over goods.[193] Yet, this is the effect of the nineteenth and early twentieth-century judicial attempts to carve out protection for commercial lenders in response to the bills of sale regime, under the guise of the application of an alleged doctrine of fixtures and fittings. The functional effect of this has been the creation of a loophole, enabling mortgages to cover after-acquired goods, and this appears to be what the HSBC mortgage agreement set out above is attempting to do. Furthermore, recent judicial preference for assertion over analysis has not clarified whether this is appropriate. Nevertheless, there are some suggestions that consumers should be able to grant a non-possessory security interest over their goods.[194] It is argued that this is the wrong approach.

The shift in the relationship between commercial and consumer consumption of goods must be placed alongside historical understanding of real property ownership and control ideologies. As Fox notes, the 1925 property reforms 'provided the courts with the ideology, the language, the tools and the justification to adopt a presumption in favour of sale, to value land as a capital asset only, and to disregard the non-financial interests of occupiers in their homes'.[195] This ideology of property-commensurability focuses not on users (mortgagors), but on those concerned with the exchange value, i.e. creditors (mortgagees).[196] The establishment of this ideology arguably prevented reassessment, in light of the substantial growth in mortgage-financed home-ownership, of the capacity of consumer residential mortgagors to charge after-acquired personal property by virtue of the initial residential purchase-price mortgage. This, combined with the growth in acquisition of goods, dislocated the commercially focused doctrine from the practical reality of personal property and consumer purchase-money mortgages.

English law affords only limited recognition to a concept of 'home'[197] and has tended to subject the very notion of home to 'commercialism'.[198] However, the notion of home as a legally valuable concept has gained considerable academic traction.[199] Whilst there

192 It is conceptually otiose to suggest that the only effective way in which the owner of goods can protect him or herself against the annexation of goods to land is by agreeing with the hirer that he or she can enter the land, and then registering that as a notice of an equitable right of entry. Cousins and Clarke (n 18) [15–02]; Harpum et al (n 18) [23-022]; Land Registration Act 2002, s 32(1); 9 [1914] 1 Ch 50 (approved in 9[1996] 1 AC 454, 475 (Lord Browne-Wilkinson)).

193 It would also appear to be 'anathema to Roman-Dutch law': D L Carey Miller, 'Fixtures and Auxiliary Items: Are Recent Decisions Blurring Real and Personal Rights?' (1984) 101 South African Law Journal 205, 209.

194 Sheehan (n 129) 360. Sheehan recommends a registration system for security interests for consumers, modelled on the New Zealand Personal Property Security Act 1999.

195 Fox (n 8) 69.

196 Ibid 255–60.

197 Ibid 10–11.

198 Fox (n 8) 39–40 arguing that the changing emphasis from the Rent Acts to the Housing Acts in the 1980s indicated an ideological preference for the commercialisation of the real property market.

199 See generally Fox (n 8); Fox O'Mahony and Sweeney, *The Idea of Home in Law* (n 8). Cf. S M Stern, 'Residential Protectionism and the Legal Mythology of Home' (2008–2009) 107 Michigan Law Review 1093.

are various conceptualisations of the elements that make up home,[200] a key factor amongst others is how residential property provides unique canvases for the expression of self by the acquisition of things,[201] a 'backdrop' for living.[202] Things – goods – are props for living. Yet, the sentimentalising and, thus, the trivialisation of the concept of home make it easy to exclude the concept from legal analysis;[203] this makes it in turn equally easy to devalue those props of life: goods. The laudable aims of those engaged in attempting to give greater legal value to the concept of home is acknowledged, but it is submitted that their position would only be strengthened through acknowledgment and utilisation of the importance and value of things in the development of a more comprehensive and accurate representation of a concept of home.[204]

The demonstrable personal relationship people can have with goods[205] affects how people view their homes.[206] Goods within the physical house are as important to the development of a home as the physical structure itself:[207] 'A house encompasses an array of different materials, from furniture and fixture to ornaments and décor, collectively creating a dwelling experience that is greater than the sum of its parts . . . They are what transforms our house into our *home*.'[208] Even if the goods are peripheral, they can have a framing effect[209] or a signalling function.[210] Our relationships with things directly and indirectly reveal aspects of ourselves:[211] 'possessions often remain profound and usually the closer our relationships are with objects, the closer our relationships are with people'.[212] Serious individual, familial and social costs result from repossession of a house.[213] These costs would be exacerbated if the mortgagee could also repossess goods, the loss of which can also lead to serious psychological harm.[214]

200 See Fox (n 8) 23–24 and ch 4. As to the dynamic concept of 'home', see e.g. T Wikstrom, 'The Home and Housing Modernisation' in D N Benjamin, *The Home: Words, Interpretations, Meanings, and Environments* (Ashgate 1995) 268.

201 Flanders (n 186) 148–49, 253: 'The choice of goods, and how those goods were presented, were as important as the objects themselves.' See also Fox (n 8) 168–71; S Gosling, *Snoop: What Your Stuff Says about You* (Profile Books 2008) (the manner in which people display tangible goods within private and semi-private spaces is a strong indicator of personality type); Baudrillard (n 187) 13–14.

202 Fox (n 8) 3.

203 Ibid 24. See also e.g. *Re Citro* [1991] Ch 142, 150 (Nourse LJ).

204 It must be noted that, for example, the discussions of the dangers of repossession in the first three chapters of Fox O'Mahony and Sweeney, *The Idea of Home in Law* (n 8) fail to do this. One minor counter-example is in ibid 4, fn 16, noting that M J Radin, 'Property and Personhood' (1982) 34 Stanford Law Review 957 recognised the potential for confusion between real and personal property.

205 See e.g. Radin (n 204); R Belk, 'Possession and the Extended Self' (1988) 15 Journal of Consumer Research 139; C Jarrett, 'The Psychology of Stuff and Things' (2013) 26(8) The Psychologist 560, 560 (describing Belk's article as 'seminal'). See also e.g. Baudrillard (n 187) 91: 'our everyday objects are in fact objects of a passion – the passion for private property'.

206 See generally D Miller, *Home Possessions: Material Culture Behind Closed Door*s (Berg 2001).

207 See generally Flanders (n 186).

208 A Hecht, 'Home Sweet Home: Tangible Memories of an Uprooted Childhood', in Miller (n 206) 123.

209 D Miller, *Stuff* (Polity Press 2010) 50–54.

210 See e.g. Baudrillard, *The System of Objects* (n 187). Cf. Miller (n 209) 12–13 (signalling is not the only function of things).

211 See e.g. Radin (n 204); Flanders (n 186).

212 D Miller, *The Comfort of Things* (Polity Press 2008) 1.

213 See e.g. J Ford, R Burrows and S Nettleton, *Home Ownership in a Risk Society: A Social Analysis of Mortgage Arrears and Possessions* (Policy Press 2001). See further Fox (n 8) ch 3, especially 109–22; Fox O'Mahony and Sweeney, *The Idea of Home in Law: Displacement and Dispossession* (n 8) and S Bright, 'Dispossession for Arrears: The Weight of Home in English Law' in Fox O'Mahony and Sweeney, *The Idea of Home in Law* (n 8).

214 See e.g. Belk (n 205) 143. See also R H Tawney, *The Acquisitive Society* (Harcourt, Brace & Co 1920) 66–67.

4 Conclusion

The consequence of the current doctrinal position is that mortgagors might not realise the extent mortgagees can control their goods, and the exercise of such control might have a disproportionately negative impact. As Lord Cozens-Hardy MR warned a century ago:

> it certainly seems to me to savour of serfdom to say 'You shall not leave the house in which you are living without my consent; you shall not dispose of a chair or a table in your house on which I have no charge without my consent, and if you do the whole amount of principal and interest will immediately become payable instead of being payable by instalments.'[215]

There are many factors that have impacted on this area of law, but it is clear that the law on fixtures and fittings and mortgages was heavily influenced by the effect of the bills of sale regime. Reform of the archaic bills of sale regime is essential[216] and, although recent experience does not bode well,[217] the Law Commission has begun the process of analysing the current regime with an aim to publishing recommendations for reform in the summer of 2016.[218] It remains to be seen whether the specific problem identified in this article will be examined, let alone resolved, especially as the reform process is focused on the problems facing non-corporate creditors and debtors.[219] Recent government intervention to protect persons from being dispossessed of their goods for non-payment of rent must be applauded.[220] If this restriction is possible, then surely prohibitions on residential purchase-money mortgagees extending security over after-acquired goods must also be politically, if not judicially, possible. If mortgagees wish to have a right to remove goods from land in order to reduce waste or to enable efficient disposition of repossessed land, then they should be allowed to do so only in the narrowest fashion. This should take the form of an express agreement separate to the mortgage deed (rather than being a component part of the mortgage deed). For residential mortgages at least, this right should not be allowed to take the form of security over the goods themselves. If creditors wish to acquire security over goods, then they must be required to follow the requirements for such a transaction (and in such cases the proposals of the Law Commission on bills of sale would be broadly appropriate).[221] The law of fixtures and fittings should not be used as a tool to avoid the strictures of personal property security law.

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215 *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, 312.

216 Law Commission (n 21) xiv. The flaws of the regime were identified almost immediately: *Thomas v Kelly and Baker* (1888) LR 13 App Cas 506, 517 (Lord Macnaghten). See also McBain (n 116) 477: 'arguably, the [Bills of Sales Acts] comprise some of the worst legislative drafting of all time'. This legislative failure is compounded by the almost unusable state of the register itself: Gullifer and Hurst (n 127) 686–87.

217 Department for Business, *Innovation and Skills, A Better Deal for Consumers: Consultation on Proposals to Ban the Use of Bills of Sale in Consumer Lending* (2009) proposed abolition of the bills of sale regime for consumer lending. For an accurate critique, see Sheehan (n 129).

218 <http://www.lawcom.gov.uk/project/bills-of-sale> accessed 16 December 2015. The Law Commission published its consultation paper on this topic during the period that this article was under submission: Law Commission, *Bills of Sale: A Consultation Paper* Law Com CP 225 (2015). The consultation paper did not consider the issue at the heart of this article.

219 This focus of the reform was predicted in Gullifer and Hurst (n 127).

220 The Taking Control of Goods Regulations 2013 (SI 2013/1894). Perversely, it appears that some purchasers are restricted by the terms of their funding arrangements from *adding* to their property: B Lewis, 'Buyers "penalised" for Improving Home under Help to Buy' BBC News, 15 March 2015 <http://www.bbc.co.uk/news/uk-wales-politics-31870011> accessed 16 December 2015.

221 The author has responded to that consultation (in a joint response with Dr Orkun Akseli, Durham Law School). Economy unfortunately prevents a detailed examination of those proposals here.

NILQ 66(4): 367–86

The vanishing law of Crown act of state

PAUL SCOTT

*Lecturer in Public Law, University of Southampton**

Introduction

The doctrine of Crown act of state,[1] which permits the Crown to resist claims in tort brought against it on the basis that the action giving rise to the allegedly tortious act constituted an 'act of state', has never enjoyed any great clarity.[2] No wonder: it has been for much of its history little more than an extrapolation from a small number of disparate and unusual cases, some of them barely reasoned and most of which belong to a very different constitutional era.[3] The recent judgment of the Court of Appeal in the joined appeals in *Serdar Mohammed v Ministry of Defence* and *Rahmatullah v Ministry of Defence*,[4] together with the first instance decisions of Leggatt J in each case,[5] amounts to a much-needed clarification and modernisation of a doctrine which stands as one of the constitution's more uncertain and anachronistic elements. This article maps the effect of these recent decisions on the substance of the doctrine, arguing that not only have they deprived the doctrine of much of its assumed effect but that they in fact demonstrate that the doctrine is really no such

* I thank Mark Telford and Marta Iljadica for their comments on earlier versions of the present work. My thoughts on this question were heavily influenced by a number of long conversations with Matt Nicholson on this and related issues and I thank him for his time and insight.

1 Alternatively, 'British' or 'domestic' act of state. The doctrine in question is labelled as such so as to distinguish it from the separate doctrine now known as 'foreign act of state'. On the relation between the two, see most recently *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843, [375]: 'The two principles [foreign act of state and crown act of state] are distinct and, in our view, have different rationales.' On foreign act of state, see the recent case of *Belhaj v Straw* [2014] EWCA Civ 1394 and, discussing it in the context of the doctrine's development, Matthew Nicholson, 'The Political Unconscious of the English Foreign Act of State and Non-Justiciability Doctrine(s)' (2015) 64 International and Comparative Law Quarterly 743. One of the cases discussed in the present work – *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB) – also raised issues of foreign act of state. Those issues were separated out and joined with *Belhaj* on appeal to the Supreme Court, with argument taking place in November 2015.

2 Perhaps the most impressive attempt to make sense of the issue is Amanda Perreau-Saussine, 'British Acts of State in English Courts' (2008) 78 British Yearbook of International Law 176.

3 Amongst them the following: *Buron v Denman* (1848) 2 Exch 167, 154 ER 450; *Walker v Baird* [1892] AC 491; *Poll v Lord Advocate* (1899) 1 F 823, (1897) 5 SLT 167; *Johnstone v Pedlar* [1921] 2 AC 262; *Nissan v Attorney General* [1970] AC 179.

4 [2015] EWCA Civ 843.

5 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB); *Yunus Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB).

thing. It has crumbled under scrutiny and talk of it, which obscures rather than illuminates the key questions about the role of the courts in relation to the Crown's torts abroad, should now be abandoned.

Some background

Crown Act of state reflects certain background features of the historical and contemporary constitutional order. The first is the exclusion of the Crown's prerogative powers from the jurisdiction of the courts, which in the past would review the existence and scope of the power in question – and so establish whether what had been done by the executive was indeed within the prerogative[6] – but would not examine the use to which such powers were put.[7] The second is the rule – one of the 'legal prerogatives' of the Crown – that 'the King can do no wrong', glossed by Chitty as meaning that 'his Majesty, individually and personally, and in his natural capacity . . . is not amenable to any other earthly power or jurisdiction . . . The law supposes it impossible that the King himself can act unlawfully or improperly.'[8] The effect of this, said Chitty, was that, at least since the reign of Edward I, 'the Crown has been free from any action at the suit of its subjects'.[9] The common law recognised instead in the context of certain claims (including those relating to individual property rights) a mode of proceeding against the Crown known as a 'petition of right' which was codified and regularised by a statute of 1860.[10] A petition of right was severely limited in its scope. First, permission to bring a petition was required, though in practice not refused where a prima facie case was established. Moreover, it was 'a fatal bar to the success of a petition of right to allege a tortious act on the part of the Crown . . . for such an allegation violated the rule that the Crown could do no wrong, and that rule has not been abrogated either at common law or by the Petitions of Right Act, 1860'.[11] Where a petition of right was unavailable, an alternative would be to bring a personal action against any Crown servant who could be identified as responsible for the wrongful act, reflecting the claim that: 'although in the eyes of his courts the king can do no wrong, a wrong apparently done by the king could be attributed to his servants, and that those servants, however, senior, were answerable not solely to the king but also to the courts'.[12] The opportunity to bring an action against the Crown's servants or agents in person – though the basis of some of the common law's most celebrated decisions protecting individual liberty[13] – was subject to the possibility that the Crown would ratify or adopt the action of its servants (if it had not authorised it in

6 See e.g. Coke in *The Case of Proclamations* (1611) 12 Co Rep 74, 77 ER 1352: 'the King hath no prerogative but that which the law of the land allows him'.

7 See e.g. *China Navigation Company v Attorney General* [1932] 2 KB 197.

8 Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (J Butterworth & Son 1820) 5.

9 Ibid 339.

10 Petitions of Right Act 1860.

11 E C S Wade, 'Liability in Tort of the Central Government of the United Kingdom' (1954) 29 New York University Law Review 1416, 1418. The case usually taken as establishing that rule is *Viscount Canterbury v Attorney General* (1842) 1 Ph 306, though Perreau-Saussine (n 2) 230 says that the justification offered by the judge in the case, Lord Lyndhurst LC, for the relevant conclusion is 'dubious because so confused'. See also *Tobin v* R (1864) 16 CBNS 310 and *Feather v* R (1865) 6 B & S 257.

12 Perreau-Saussine (n 2) 229.

13 Most obviously, *Entick v Carrington* (1765) 19 State Trials 1029. This possibility was often exploited by the Crown in order to undercut its own immunity: it would nominate a servant against whom an action in tort might be brought and indemnify that person for damages and costs. For the deprecation and then rejection of this practice by the courts, see *Adams v Naylor* [1946] AC 543 and *Royston v Cavey* [1947] KB 204.

advance), leaving only the (empty) possibility of an action against the Crown itself or some extrajudicial remedy.[14] Both the non-reviewability of the prerogative generally and the specific immunity of the Crown in its own courts must be borne in mind when considering the nature and historical operation and development of the doctrine of Crown act of state. Both, however, have been significantly eroded – the former, as we shall see, by a series of decisions of the English courts over the last 30 or so years; the latter by the enactment of the Crown Proceedings Act 1947.[15] These developments call into question the traditional understanding of Crown act of state.

A third contextual factor is choice of laws. Previously, a tort committed abroad could be the basis of a claim in the English courts only if the conduct giving rise to it was recognised as a tort by both English law and the law of the jurisdiction in which it occurred – this was the 'double actionability' rule.[16] Since the enactment of the Private Law (Miscellaneous Provisions) Act 1995, however, the general rule is that, for the purposes of tort, 'the applicable law is the law of the country in which the events constituting the tort or delict in question occur'.[17] Given that the doctrine of Crown act of state does not apply to actions carried out in Britain (with the possible but now perhaps unlikely exception of those perpetrated upon hostile aliens),[18] the effect will normally be that the law governing situations in which the doctrine is invoked will be foreign law, the content of which must be proved as a question of fact. The applicability of foreign law to the relevant facts does not, though, preclude the pleading of Crown act of state: the doctrine is a rule of procedure and so 'its availability is governed by English law as the law of the forum'.[19] This presumes that England is in fact the forum in which the relevant claims are brought. It usually will be, not least because the relevant claims are being brought against a minister of the Crown. A successful plea of Crown act of state, in either of the two forms which the doctrine takes, will not prevent the claim thereby repelled from being brought in another jurisdiction: it is likely, however, that such a course of action is, for any number of reasons, substantially less attractive than is proceeding in an English court.

The dualism of Crown act of state

Though, considered holistically, the doctrine of Crown act of state is much diminished by them, a key feature of the most recent round of judgments is the reaffirmation, in the face of direct challenge, of the doctrine's dualism: the existence within it of two separate rules, one which identifies certain matters as non-justiciable and so prevents their consideration by English courts altogether, and another which provides a defence to a claim in tort arising out of conduct which the courts would otherwise be willing and able

14 *Buron v Denman* (1848) 2 Exch 167.

15 Crown Proceedings Act 1947, s 2. On that Act, see generally Glanville Williams, *Crown Proceedings* (Stevens & Sons 1948). For an account of the debates leading to its enactment, see Joseph M Jacob, 'The Debates behind an Act: Crown Proceedings Reform 1920–1947' [1992] Public Law 452.

16 On which see *Phillips v Eyre* (1870) LR 6 QB 1 and *Boys v Chaplin* [1971] AC 356. The rule was abolished by s 10 of the Private Law (Miscellaneous Provisions) Act 1995.

17 Private Law (Miscellaneous Provisions) Act 1995, s 11(1). An exception exists where it is 'substantially more appropriate' for the applicable law to be that of another country, in which case the law of that country is preferred': Private Law (Miscellaneous Provisions) Act 1995, s 12.

18 *Johnstone v Pedlar* [1921] 2 AC 262.

19 *Yunus Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB), [218] (fn). See: Private Law (Miscellaneous Provisions) Act 1995, s 14(3)(b): '[N]othing in this part . . . affects any rules of evidence, pleading or practice or authorises questions of procedure in any proceedings to be determined otherwise than in accordance with the law of the forum.'

to consider. The origin of that dualism is *Buron v Denman*.[20] The defendant (a naval commander) was tasked by the governor of Sierra Leone with freeing two British captives detained as slaves on the Gallinas islands, at the mouth of the eponymous river.[21] In doing so Denman took possession of and then destroyed barraccoons (slave huts) belonging to Buron, a Spanish slave trader, and took Buron's slaves back to Sierra Leone to be liberated. All this was the subject of vast praise from ministers and naval figures. When Buron sued in trespass, the central question was whether Denman's conduct could be 'justified as an act of state, done by authority of the Crown'.[22] That is, was the subsequent ratification of the act, in terms of approving letters sent by various secretaries of state and the Lord of the Admiralty upon becoming aware of it, equivalent to prior authority? Though the judge whose summing-up is reported, Parke B, was less sure on this point than his brethren, the majority in the Exchequer Court held in the affirmative, leaving Buron with a remedy only against the Crown via a petition of right[23] or, in the alternative, the possibility of seeking some diplomatic remedy.

The context of the decision in *Buron* was such that no enquiry into the concept of act of state, or its significance, was undertaken: what mattered was that Denman's potential individual liability was extinguished by the subsequent ratification. It appears that the sole act of state case cited in argument was *Elphinstone v Bedreechund*[24] in which it had been held that a municipal court had no jurisdiction over the seizure of property carried out, in contravention of the articles of capitulation, against the governor of a conquered fortress: the character of the seizure was 'that of hostile seizure . . . regard being had both to the time, the place, and the person, and consequently that the Municipal Court had no jurisdiction to adjudge upon the subject'.[25] A series of nineteenth-century cases before and after *Buron* concurred: certain questions were not suitable for consideration in the domestic courts.[26] But, insofar as can be inferred from the brief discussion of the point, it seems that the doctrine of act of state does not operate in *Buron* as it did in *Elphinstone*.[27] Instead, act of state appears to function as a defence to a claim in tort over which the courts enjoy rather than abjure jurisdiction: hence Park B's reference to Denman's actions being '*justified* as an act of state'.[28] And, certainly, that is how *Buron* has come to be treated, notwithstanding the thinness of the textual basis of that conclusion. To the older act of state rule of non-justiciability it was taken to have added a second rule: the doctrine had assumed a dualist nature.

20 *Buron v Denman* (1848) 2 Exch 167, 154 ER 450.

21 For a much fuller account of the background to the case, see Charles Mitchell and Leslie Turano, '*Buron v Denman* (1848)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Tort* (Hart 2010).

22 (1848) 2 Exch 167, 188.

23 Though Perreau-Saussine has neatly demonstrated the uncertainties in the application of the procedure to *Buron*'s case (n 2) 229–32.

24 (1830) 1 Kn 316, 12 ER 340.

25 Ibid 360–61.

26 See e.g. *Cook v Sprigg* [1899] AC 572, 578: 'It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.'

27 Though see *Feather v R* (1865) 6 B & S 257, 296, where Cockburn CJ takes *Buron* to show that 'where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is adopted by the government of this country, it becomes the act of the state, and the private right of action becomes merged in the international question which arises between our own government and that of the foreigner'.

28 (1848) 2 Exch 167, 187 (emphasis added).

This dualism was observed by Emelyn Wade.[29] In a seminal contribution, he noted that the phrase 'act of state' was most closely associated with the defence available to Crown servants for criminal[30] or tortious actions in certain circumstances (not, famously, against British subjects for acts done in Britain)[31] – a rule evidenced by *Buron v Denman* and various cases decided since. However, 'the narrow application of the term as a defence to what would otherwise be a tortious or criminal act does not explain its full scope':[32] it denoted also a category of acts not justiciable in domestic ('municipal') courts. Thus, notwithstanding that the *Buron* rule arose subsequently to the justiciability rule, it had by the 1930s managed to achieve priority over it. Reasoning inductively from cases of both types, Wade defined an act of state as 'an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown.'[33] When Wade's distinction was taken up and filled out by Lord Mcnair, the defence again took priority,[34] being stated to exist alongside 'a rule which is wider and more fundamental, namely, that "those acts of the Crown which are done under the prerogative in the sphere of foreign affairs" . . . cannot form the basis of an action brought against the Crown, or its agents or servants, by any person, British or alien, or by any foreign state, in British municipal tribunals.'[35] Note that the phrasing limits the non-justiciability rule in two ways: it applies to the situations involving (a) the exercise of the prerogative and even then only (b) in the realm of foreign affairs. Where Wade had identified all of the standard act of state cases as exemplifying the tort defence, however, Mcnair placed in that category only *Buron v Denman* and *Johnstone v Pedlar* (in which the doctrine did not apply because the claimant was a friendly alien). *Walker v Baird* he conceptualised as an instantiation of the non-justiciability rule. Though Mcnair admitted that the scope of both limbs was obscure, as was the relation between them, he took as evidence of their distinctiveness the fact that the tort defence, unlike the non-justiciability rule, 'is not valid against a British subject'.[36] The doctrine's dualism was accepted by the House of Lords in *Nissan v Attorney General*,[37] but only in obiter: the doctrine was of no application there because the act in question – the taking of the plaintiff's hotel as headquarters for the British command in Cyprus – was not itself an act of state.[38] Not only, therefore, is *Buron* a weak authority for the existence of the tort defence: it was for a long time the only such authority. The doctrine's dualism has always rested upon fragile foundations.

29 E C S Wade, 'Act of State in English Law: Its Relations with International Law' (1934) 15 British Yearbook of International Law 98. An older discussion of the doctrine is found in William Harrison Moore, *Act of State in English Law* (John Murray 1906).

30 On the application of the act of state doctrine to criminal acts, see James Fitzjames Stephen, *A History of the Criminal Law of England* vol II (Macmillan & Co 1883) 63–64. Given the reconceptualisation of the tort defence rule which has taken place in recent years (discussed below), its ability to provide a defence to criminal acts must be strongly doubted.

31 A proposition for which Wade cites *Entick v Carrington* (1765) 19 St Tr 1029.

32 Wade (n 29) 99.

33 Ibid 103.

34 Lord Mcnair, *International Law Opinions* vol I (CUP 1956) 111.

35 Ibid 112. The quoted phrase is from E C S Wade and G Godfrey Phillips, *Constitutional Law* 4th edn (Longman, Green & Co 1950) 193.

36 Mcnair (n 34) 116, fn 1.

37 *Nissan v Attorney-General* [1970] AC 179, 220B–C (Lord Morris) and 231D (Lord Wilberforce).

38 [1970] AC 179, 215G (Lord Morris), 227B (Lord Pearce), 235H (Lord Wilberforce) and 240C–D (Lord Pearson).

Before the Court of Appeal in the joined appeals, the dualism of Crown act of state was directly challenged, as it had been also in the High Court in *Rahmatullah*. The situation of Mr Rahmattullah, originally captured by British forces in Iraq and handed over to American forces who detained him in Afghanistan, has been the subject of significant attention by the English courts.[39] He was released from detention in Afghanistan and returned to Pakistan, his homeland, in June 2014. Crown act of state becomes relevant in the context of private law and Human Rights Act 1998 (HRA) claims brought by him against the Ministry of Defence and the Foreign Office. For reasons that will be explained shortly, Rahmatullah sought to argue that there are not – as had been said by Wade and Mcnair and accepted in *Nissan v Attorney General* – two limbs to the Crown act of state doctrine but only one; that 'the Crown act of state doctrine is solely a rule of justiciability and there is no separate rule which can provide a defence to a claim in tort'.[40] This involved reconceptualising *Buron v Denman*, the case taken to evidence the existence of the tort defence, as 'merely an expression of the non-justiciability rule in a case where the defendant was an agent of the Crown, rather than the Crown itself'.[41] It was argued that the significance of the post hoc ratification of Denman's acts was that those acts were thereby rendered sovereign acts 'operating at the international level of the state's relations with a foreign state and its subjects and hence as inherently non-justiciable'.[42] If that was the case, then the alleged tort defence was simply a misunderstood instantiation of the non-justiciability rule rather than something separate from it. If the non-justiciability rule did not apply, then nor could – on this reading – the tort defence.

This monist reading of the doctrine is attractive: its acceptance would bring clarity and coherence to a particularly unclear area of law and, more importantly, involve abandoning the claim, to which the reading of *Buron* which has prevailed throughout the twentieth century amounts, that the Crown's say-so is sufficient to give rise to a defence in law to wrongful conduct upon which the courts are otherwise capable of adjudicating. What would seem to be the countervailing cost of the manoeuvre – the exclusion from the courts' jurisdiction altogether of the matters giving rise to the alleged tort – is not as great as it initially seems, given the inroads, discussed below, which both the High Court and the Court of Appeal accept as having been made into the non-justiciability rule. Crucially, this submission as to the doctrine's monism reflects both the general context and the specific terms of the decision in *Buron* better than does most of the literature (which accepts the existence of a separate tort defence), not asking that case to bear a burden which the very thin treatment of the matter therein cannot sustain. Given that the defence in tort which *Buron* is often taken as evidencing had never since been successfully pleaded in the English courts, to declare untenable the dominant reading of the case, and the doctrinal dualism to which it gives rise, would not have involved contradicting an established body of law.

Nevertheless, the monist reading of the Crown act of state doctrine was rejected both in the High Court and again in the Court of Appeal. Both courts emphasised that the existence of the act of state tort defence and thus the dualism of the Crown act of state

39 For the story of Rahmatullah's habeus corpus writ, see *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2011] EWCA Civ 1540; R*ahmatullah v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2012] EWCA Civ 182; and *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2012] UKSC 48.

40 *Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB), [201].

41 [2014] EWHC 3846 (QB), [202].

42 Ibid [204]. For the equivalent submission in the Court of Appeal, see [2015] EWCA Civ 843, [332]–[335].

doctrine had been widely accepted, in *Nissan* and elsewhere.[43] This is unfortunate – in *Nissan*, the act of state rule at issue was the non-justiciability rule, rather than the tort defence, and that submission failed. But on the wider point, the judges are correct: the literature clearly shows that, in the time since it was decided, *Buron* has had thrust upon it, consistently if not unanimously, a meaning which it does not easily bear but which the courts – or at least the lower courts – are rightly hesitant to overturn altogether.[44] In rejecting the rewriting of *Buron* offered here, Leggatt J further observed that act of state as a defence to a tort claim is 'sound in principle and rests on a proper appreciation of the separation of powers'.[45] That claim played no role in the reasoning of the Court of Appeal, which instead emphasised – without explanation or elaboration – that the doctrine must have two elements because the two rules 'are applicable in different circumstances', a reference (presumably) to the fact that the non-justiciability rule, unlike the tort defence, applies also to public law claims:[46] the distinction which Mcnair identified – that the non-justiciability rule alone applies to British citizens – seems now improbable.[47] The logic of this point is dubious: the two rules can have differential applicability only if they first exist, and so their differential applicability is not a factor which can be adduced in favour of their existence. Nevertheless, in light of the way in which the Court of Appeal's judgment (re)frames – and, in effect, significantly narrows – the act of state tort defence, principle does not count against the rule's continued existence as strongly as might otherwise have been the case. For now, it suffices to note that the opportunity of bringing coherence to the doctrine by holding it to consist of a single rule has twice been rejected, in large part upon the basis of the untested assumptions of a series of textbook writers. The Supreme Court, when it considers these issues, would be advised to offer a fuller elaboration of the point, whether or not it endorses the Court of Appeal's narrowing of the tort defence. In the meantime, the doctrine of Crown act of state retains its superficial dualism even as its two limbs are progressively eroded and its coherence as a doctrine is undermined.

The non-justiciability rule

The non-justiciability limb of Crown act of state had, before the doctrine's dualism was reaffirmed in *Rahmatullah*, been significantly undercut by the decision of the High Court in *Serdar Mohammed* – the case with which it was later joined on appeal. The claimant had been captured by British forces in Afghanistan and later transferred into the custody of the Afghan authorities. He claimed that his detention by the British forces was unlawful under both Afghan law and the HRA. Leggatt J accepted that the detention was unlawful from the point of view of both Afghan and international law. In determining the application of the non-justiciability rule, he first considered the rule's rationale, adopting

43 [2014] EWHC 3846 (QB), [208]

44 See also *Nissan* [1970] AC 179, 220: 'Though the conception of an act of state as illustrated in *Buron v Denman* has been so recognised that it cannot now be overthrown I would hope that occasions for dependence on it as a defence will become increasingly rare.'

45 [2014] EWHC 3846 (QB), [208]

46 Leggatt J In *Serdar Mohammed* suggests that, although Crown act of state does not 'operate in the field of public law to bar a claim for judicial review', its non-justiciability limb is 'similar if not identical to the rule that acts of the Crown which are done under the prerogative in the sphere of foreign affairs are unreviewable' [2014] EWHC 1369 (QB), [379]. For the reasons given below, this seems to be false: the non-justiciability limb of Crown act of state in effect *does* apply to public law claims, being simply an instantiation of the same general rule of justiciability as governs (some) uses of that prerogative. As the Court of Appeal notes: 'whether issues are justiciable cannot depend on the nature of the proceedings' [2015] EWCA Civ 843, [324].

47 [2014] EWHC 1369 (QB), [397].

both Elias LJ's claim in *Al-Jedda (No 2)* that this is a question about the relationship between executive government and the courts ('To what extent and in what circumstances should the court refuse to hold the executive to account in its dealings with foreign states or its handling of foreign relations?')[48] and the idea that the 'conceptual normative basis' of the doctrine lies in the notion of the separation of powers.[49] The general principle is that 'the conduct of foreign affairs is the province of the executive arm of the state and that the judiciary should not involve itself in (or bring into jeopardy) the conduct of such affairs'.[50] Note here that, unlike in Mcnair's discussion quoted earlier, the concern is purely with the subject matter of the power (foreign affairs) rather than its source.

The articulation of that principle indicates clearly the impossibility of the non-justiciability rule working as it did in the (mostly nineteenth-century) cases which evidence it. Though it would once have been accurate to suggest that English law excluded altogether judicial oversight of the executive's exercise of the foreign affairs prerogative (as it did the prerogative as a whole), such a general proposition is no longer sustainable in light of a series of decisions which have brought the prerogative, in both its primary and secondary forms, within the jurisdiction of the courts – decisions which, crucially, post-date the last consideration of the doctrine of Crown act of state by the highest court.[51] Most prominent amongst these is the *GCHQ* case, which confirmed a judicial willingness, flashes of which had already been visible,[52] to review not merely the existence of prerogative powers but their exercise;[53] from there on, prerogative powers would be excluded from review not on the basis of their source (which no longer enjoyed blanket exclusion) but on the basis of their subject matter.[54] Though not listed by Lord Roskill in *GCHQ* as one of the powers the exercise of which would by virtue of its subject matter remain beyond the courts' reach,[55] the foreign affairs prerogative was identified as such by Lord Fraser.[56] The decision of the House of Lords in *Bancoult (No 2)*,[57] however, demonstrates, suggests Leggatt J,[58] that, as has happened in relation to other prerogative powers singled out in *GCHQ*,[59] the excluded status of the foreign affairs prerogative has itself been partially eroded. Rather than it being recognised in law that 'certain areas of decision-making by the executive such as foreign policy are "no go" areas for the courts',[60] the golden rule which now applies to the prerogative is that reviewability is a function of the extent to which a particular decision of the executive is 'justiciable'.

The relevance of these background shifts is that the broader Crown act of state rule – in which it operates as a rule of non-justiciability which is 'similar if not identical to the

48 *Al-Jedda v Secretary of State for Defence* [2010] EWCA Civ 758, [197].

49 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), [373].

50 Ibid [374].

51 Which took place in *Nissan v Attorney General* [1970] AC 179.

52 *R v Criminal Injuries Compensation Board ex parte Lain* [1967] 2 QB 864.

53 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

54 Ibid 407 per Lord Scarman.

55 Ibid 418 naming 'the making of treaties, the defence of the realm, the prerogative of mercy the grant of honours, the dissolution of Parliament and the appointment of ministers'.

56 Ibid 398.

57 *R v Secretary of State for Foreign and Commonwealth Affairs ex parte Bancoult* [2008] UKHL 61.

58 [2014] EWHC 1369 (QB), [376].

59 See e.g. *R v Ministry of Defence ex parte Smith* [1996] QB 517, indicating that the management of the armed forces includes a large reviewable element.

60 [2014] EWHC 1369 (QB), [376].

rule that acts of the Crown which are done under the prerogative in the sphere of foreign affairs are unreviewable'[61] – has been diminished. Therefore, as the non-reviewability of the prerogative in general, and that relating to foreign affairs in particular, has been chipped away at, so too has the possibility of a successful invocation of the non-justiciability element of Crown act of state. Two points can be made about Leggatt J's treatment of the issue: first of all, though commendable from the point of view of principle, it is in large part the result of changing attitudes as to the appropriate relationship of courts and executive which are too well embedded to have been challenged here, rather than any initiative of the judge's own. Second, the question of how the tortious conduct is framed – whether it can be conceptualised as a particular decision which is itself justiciable in an English court, rather than as an aspect of a decision which directly reflects high policy – becomes vital to the question of whether the non-justiciability element of Crown act of state can be successfully pleaded. Here, it is accepted that the decision which challenged it was not one of high policy; it is not something which is 'not cognisable by the court', as Lord Pearson put it in *Nissan*.[62] Instead, the relevant decision was that to detain a particular individual and, Leggatt J notes, rather than being the sort of decision for which the courts are ill-equipped, the legality of detention is 'quintessentially a matter for the court'.[63] As such, he concluded on this point, 'insofar as the Crown act of state doctrine rests on a principle of justiciability, the doctrine has no application in the present case'.[64] Having been in this way brought up to date in *Serdar Mohammed*, the non-justiciability element of the doctrine was at first instance held to be similarly incapable of repelling the claims brought by Rahmatullah.[65]

Much of the admirable clarity of Leggatt J's judgment on this point is missing from the Court of Appeal's reasoning in arriving at the same conclusion as did he. That court says nothing of the prerogative and instead incorporates an inconclusive discussion of the Supreme Court's consideration of non-justiciability in *Shergill v Khaira* – a consideration which implicitly distinguishes the act of state doctrine from non-justiciability proper but which seems to identify that doctrine with the tort defence limb[66] – and elements of the decision of the Court of Appeal in *Al-Jedda (No 2)*, discussed further below. The overall effect of these considerations seems to be to leave the non-justiciability rule where it had been left by Leggatt J, in that it prevents the consideration by the courts of 'high level policy' decisions, in relation to which there may be no judicial standards available for application by the courts, or where it would be constitutionally inappropriate for the courts to enquire into the matter:[67] the manner in which these considerations interact is, however, not explored. More significant is the apparent shift in the basis of the non-justiciability rule from the rules as to the reviewability of the prerogative on the one hand to that of the general issue of justiciability on the other. This shift leaves ambiguous the question of what sort of non-justiciability is at issue in Crown

61 [2014] EWHC 1369 (QB), [379].

62 *Nissan v Attorney-General* [1970] AC 179, 327.

63 [2014] EWHC 1369 (QB), [381].

64 Ibid [383].

65 [2014] EWHC 3846 (QB), [200].

66 The Supreme Court refers to the doctrine 'confer[ing] immunity from liability on certain persons in respect of certain acts' [2014] UKSC 33, [41]. Moreover, the Court of Appeal in *Serdar Mohammed/Rahmatullah* observes also that it is unclear whether the doctrine referred to by the Supreme Court is that of foreign of Crown act of state [2015] EWCA Civ 843, [320]. The better reading is that it is the latter.

67 [2015] EWCA Civ 843, [323].

act of state. The point can be made with reference to the two categories of non-justiciability identified by the Supreme Court in *Shergill v Khaira* and reiterated by the Court of Appeal here. The first such category includes circumstances in which 'the issue in question is beyond the constitutional competence assigned to the courts under our conception of the separation of powers', such as in relation to the transactions of foreign states and proceedings in Parliament.[68] In this category, 'once the forbidden area is identified, the court may not adjudicate on the matters within it, even if it is necessary to do so in order to decide some other issue which is itself unquestionably justiciable'.[69] By contrast, in the second category, 'comprising claims or defences which are based neither on private legal rights or obligations, nor on reviewable matters of public law', this inability to look past the non-justiciability of the matter does not apply. Instead, the courts will adjudicate upon the matter if 'a justiciable legitimate expectation or a Convention right depends on it' as it will also in the case of private law liabilities.[70] A key example, the Supreme Court said in *Shergill*, is that in which 'the court declines to adjudicate on the international acts of foreign state or to review the exercise of the Crown's prerogative in the conduct of foreign affairs'.[71]

Though the Supreme Court in *Shergill* had, as noted above, implicitly distinguished the Crown act of state doctrine from non-justiciability proper, it would seem to logically follow that one or other of these positions must be the case for that doctrine to the extent it is based upon a non-justiciability rule. The references by the Supreme Court, in relation to that second category, to the prerogative, the rule against the reviewability of which has often been identified (as by Leggatt J in *Serdar Mohammmed*) with the non-justiciability limb of Crown act of state, give some weak basis for thinking that the Crown act of state non-justiciability rule works as does the second category of general non-justiciability identified in *Shergill*. Nevertheless, the better view must (unfortunately) be that the non-justiciability element of Crown act of state, where it operates, does so in the same manner as in the first category of non-justiciability in *Shergill*. Most clear, and probably dispositive of the question, is that where it comes to discuss the compatibility of the act of state doctrine with Article 6 of the Convention on Human Rights, the Court of Appeal makes specific reference to the first category of non-justiciability, noting that it is 'not concerned in this case with the second category of non-justiciability identified by the Supreme Court . . . as the claimants seek to invoke private law rights'.[72] This conclusion is buttressed by the Supreme Court's references in *Shergill* to transactions of foreign states (the original subject of the act of state doctrine) and to the separation of powers, which Leggatt J had identified as the basis of the non-justiciability rule in *Serdar Mohammed*.[73] Finally, this conclusion would seem to follow from a consideration of the basic logic of the situation: if the non-justiciability rule is equivalent to the Supreme Court's second category of non-justiciability in *Shergill*, then that limb of Crown act of state has been hollowed out even further than Leggatt J suggested has been the case, to the point that it is not clear that it could ever actually prevent the courts from hearing a case, no matter how grand the questions of foreign (or other) policy upon which it would require the court to adjudicate. The effect of assimilating the non-justiciability rule of Crown act of state to this first category of general non-justiciability is that the court cannot enter a 'forbidden area' even

68 *Shergill v Khaira* [2014] UKSC 33, [42].

69 Ibid [42].

70 Ibid [43].

71 Ibid.

72 [2015] EWCA Civ 843, [371].

73 [2014] EWHC 1369 (QB), [373].

if to do so is necessary in order to decide private law rights, a conclusion which gives further reason for believing that the act giving rise to the tort should be framed as narrowly as is plausible, so as to keep it – if at all possible – outside the realm of non-justiciability. When the matter is considered by the Supreme Court it would do well to consider splitting the difference, by distinguishing the different factors identified by the Court of Appeal as rendering a matter non-justiciable – briefly, the need to consider questions of high policy, the absence of judicial standards and questions of constitutional appropriateness – and assimilating only the third of these to the first category of non-justiciability identified in *Shergill*. In relation to the first factor in particular, there is no reason to believe that it alone justifies the courts refusing to consider a matter where it is necessary for them to do so in order to determine an individual's legal rights. It should be, therefore, brought within the second category of *Shergill* non-justiciability. If this sort of differentiation in turn encourages the courts to clarify what are the various bases of non-justiciability and the manner in which they interact, then so much the better.

This apparent shift in the explanation of the non-justiciability limb of Crown act of state raises further questions about Crown act of state, justiciability and the prerogative. First, does the shift indicate that the non-justiciability limb of the Crown act of state doctrine is not limited to circumstances in which the act giving rise to the tort claim is carried out under the prerogative powers (and has therefore been increased in scope)? This point is subtle. The reason why the two matters have often been conflated is that, to the extent that non-justiciability arises in the context of foreign affairs, it applies to powers which in the modern constitution are found entirely within the prerogative. Nevertheless, the approach which the courts have taken to reviewability in the prerogative case law is, as discussed, now unambiguous: reviewability is a function of the subject matter of a power rather than its legal source. There is, therefore, it seems, no longer any basis for distinguishing between the question of justiciability as regards the prerogative and as regards other sources of legal authority. In turn, this suggests that, though the Crown act of state non-justiciability rule has often been thought of as an instantiation of the prerogative's non-reviewability, it might apply equally beyond the prerogative. In fact, the best understanding may be that the prerogative was never truly non-justiciable per se, but instead that the subject matter of all or most of the prerogative powers was non-justiciable, rendering the prerogative non-justiciable only indirectly and contingently – what has changed over time has not been the courts' approach to the review of the prerogative, but the range of subject matters of which they regard themselves as unable to take cognisance. If the significance of this reconceptualisation by the Court of Appeal is only potential rather than actual, it is because there are no powers to conduct foreign affairs which exist in statute rather than the prerogative – nothing, that is, on which the now rethought (and so implicitly widened) rule can be brought to bear. Following from this, a second question: if this limb of the doctrine is nothing more than an instantiation of the general approach taken by the courts to the question of justiciability, what reason is there for separating it out and packaging it as an aspect of a separate doctrine? The answer seems to be that there is none. To the extent that it is a rule of justiciability, the doctrine of Crown act of state adds nothing to, but in fact merely reflects, general principles of (non-)justiciability and the understanding of the appropriate constitutional separation of power which underpins them. These principles may 'bite' more frequently on 'acts of state' as Wade understood them, but they will not do so inevitably or exclusively and any such act will include under its umbrella an infinite number of lesser acts which are unambiguously justiciable. The Court of Appeal has therefore reaffirmed here the doctrine's dualism by confirming the existence of the doctrine's tort defence

limb, only to simultaneously offer an understanding of the non-justiciability limb which calls that dualism back into question by showing that this first limb is not a rule of law special to the Crown.

To return to the cases at hand, the detention of Serdar Mohammed was accepted by the Court of Appeal, as it had been by the High Court, to be suitably distant from any decision of high policy as to be well within the scope of the courts' jurisdiction, similar issues having been already considered in the context of judicial review claims.[74] Because the adjudication of Serdar Mohammed's claims could take place without entry into any 'forbidden area', the non-justiciability rule was no bar to it. But despite it having accepted Leggatt J's hollowing-out of the non-justiciability rule, the Court of Appeal noted the possibility that, contrary to what had been said at first instance, the claims of Rahmatullah[75] might be caught even by the now-eroded rule. To explain why requires an understanding of *Al-Jedda v Secretary of State for Defence*,[76] a previous case arising out of the military action in Iraq and Afghanistan in which Crown act of state was pleaded. The claimant had been arrested in Iraq in 2004 and detained by UK forces in a military detention centre. After his release, he sought damages for unlawful imprisonment. When Al-Jedda's tort claim arrived in the Court of Appeal, the majority took the view that his detention was lawful under Iraqi law and so his appeal, from the decision of Underhill J, was dismissed without any binding decision about Crown act of state having been made. Nevertheless, two of the members of the Court of Appeal – Arden LJ, who dissented on the lawfulness of the detention under Iraqi law and whose views on Crown act of state were therefore dispositive of the issue for her, and Elias LJ – expressed the view that, as had been suggested by the judge at first instance, the doctrine of act of state in its non-justiciability form was applicable here, preventing the courts from enquiring into the legality of the detention. This view was, however, a function of the earlier House of Lords decision in *Al-Jedda (No 1)*[77] that detention for the purpose of the internal security of Iraq was rendered obligatory by UN Security Council Resolutions which, though couched in the language of authorisation and not obligation, bound the UK to detain individuals where it was necessary for the internal security of Iraq. It was this obligation which transformed the specific act of detention from a probably justiciable decision into one over which the doctrine of Crown act of state would have displaced the courts' jurisdiction.[78] It is this same logic – not strictly part of the ratio of *Al-Jedda (No 2)* – which the Court of Appeal in *Serdar Mohammed/Rahmatullah* suggested might have been capable of distinguishing Rahmatullah's detention from that of Serdar Mohammed, such that the non-justiciability rule would exclude the consideration of the former and not the latter.

Viewed in light of later decisions, this account of the application of Crown act of state to the facts of *Al-Jedda* is problematic. Why does the erosion of the general rules of non-justiciability which was accepted in *Serdar Mohammed* both at first instance and on appeal not similarly place the specific decision to detain Al-Jedda firmly back within the courts' purview, given the distance between the decision to take military action and the decision to detain the particular individual? As noted by Leggatt J in *Rahmatullah*, '[i]t was not necessary to challenge the decision to send British forces to Iraq in order to judge

74 *R (Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin).

75 Along with the so-called 'Iraqi civilian claimants'.

76 *Al-Jedda v Secretary of State for Defence (No 2)* [2010] EWCA Civ 758.

77 [2007] UKHL 58.

78 [2010] EWCA Civ 758, [108]–[110] and [195].

whether the detention of Mr Al-Jedda was lawful under Iraqi law'.[79] But even if the principle of the issue were – contrary to the view taken by Leggatt J in *Serdar Mohammed* and in *Rahmatullah* and endorsed on appeal[80] – unimpeachable, the conclusion is built upon a shaky foundation. The House of Lords' decision in *Al-Jedda (No 1)* that the claimant's detention was not merely authorised but required by the UN Security Council resolutions, and his rights under Article 5 of the European Convention on Human Rights (ECHR) were therefore ousted (by virtue of the UN Charter's subordination of all other international legal obligations to the writ of the UN),[81] was called into question by the decision of the European Court of Human Rights in Strasbourg. It was there held that, contrary to the House of Lords' assessment, 'neither Resolution 1546 nor any other United Nations Security Council Resolution explicitly or implicitly required the UK to place an individual whom its authorities considered to constitute a risk to the security of Iraq into indefinite detention without charge'.[82] If accepted by the domestic courts, this assessment would break the link, upon which the relevant remarks in the Court of Appeal's decision in *Al-Jedda (No 2)* are predicated, between the indisputably non-justiciable choice to contribute British forces to the Multi-National Force in Iraq and the specific act of detaining Al-Jedda. Though it is the House of Lords' decision which continues to bind the domestic courts, the Supreme Court has given permission to appeal to a case (in respect of which Leggatt J granted a leapfrog certificate)[83] which challenges the decision of the House of Lords on the UN point. If that claim succeeds, the defence of act of state as the majority of the Court of Appeal in *Al-Jedda (No 2)* would have applied it will be unavailable in relation to the detention of individuals in Iraq, the decision to detain not being attributable to an overriding obligation arising from the UN Charter. Leggatt J therefore suggested in *Rahmatullah* that, insofar as it is necessary to explain it, *Al-Jedda* should be explained (contrary to the terms in which it was in fact decided) 'on the basis of the narrower Crown act of state defence rather than by invoking the rule of justiciability'.[84] This conclusion was endorsed by the Court of Appeal in the joined cases: the 'observations in *Al-Jedda* on the applicability of the act of state principle cannot be justified on grounds of non-justiciability'.[85] As such, the possible distinction floated between the situations in Afghanistan and Iraq was illusory and the (eroded) non-justiciability rule failed also to exclude the consideration of Rahmatullah's claim.

To conclude on the non-justiciability rule: the overall effect of this element of the recent series of decisions will be to deprive the rule of much of its practical effect. That is, though it is accepted that matters of high policy remain non-justiciable, it will not always, or even usually, be the case that, where a tort claim is advanced, the specific action or decision allegedly giving rise to it will exist in a sufficiently close nexus with such matters as to be similarly excluded. Indeed, such a situation may, in fact, be highly exceptional. Instead, a litigant will be challenging the specific action which affects him or her as an individual, which the courts will usually and rightly characterise as a separate act, capable of being adjudicated upon by the courts without them carrying out any

79 *Yunus Rahmatullah v Ministry of Defence* [2014] EWHC 3846 (QB), [194].

80 [2015] EWCA Civ 843, [323].

81 United Nations Charter, Article 103: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

82 *Al-Jedda v UK* (2011) 53 EHRR 23.

83 *Al-Waheed v Ministry of Defence* [2014] EWHC 2714 (QB).

84 [2014] EWHC 3846 (QB), [197].

85 [2015] EWCA Civ 843, [330].

illegitimate foray into the conduct of foreign policy, which, they recognise, remains the exclusive province of the executive.[86] Though there undoubtedly exists, at least in theory, a category of actions or decisions which are capable of giving rise to a claim in tort but which are in fact themselves by nature non-justiciable, that category is likely to be small, and the smaller it is, the less significant is the non-justiciability rule of Crown act of state. More fundamentally, however, the treatment of the issue in the Court of Appeal suggests that it is no longer sensible to consider the non-justiciability rule as an aspect of some special doctrine of Crown act of state and so to focus attention on what is or is not such an act. It is an instantiation of general principles of justiciability which are not unique in their application to the Crown, to the prerogative, or even to those acts traditionally designated 'acts of state'. To conceive it as such makes room for a more determined focus upon those general principles.

The tort defence

The cumulative effect of the cases which are the subject of this article has been to erode the tort defence rule of Crown act of state to at least the same extent as the non-justiciability rule. The basis of that erosion is, however, more direct and deliberate, being the conscious effect of those cases rather than – as was mostly the case with the non-justiciability rule – merely the effect of bringing to bear upon it several decades of evolution elsewhere in the constitutional order. As noted, the separate existence of this second rule was confirmed, in the face of direct challenge to it, by both the High Court and Court of Appeal. Yet that rule, though so closely tied to the non-justiciability rule as to subsist within the same doctrine, must – if it is not to be considered to have been undermined in the same way, and for the same reasons, as has been that first rule – not only be something other than a mere instantiation of the non-justiciability rule, but have a separate basis from it altogether; one which survives the constitutional developments of *GCHQ* and *Bancoult* and so on. The basis identified by Leggatt J in *Serdar Mohammed* was that, in the field of foreign relations, court and executive should speak with 'one voice'[87] – though in relation to the rights and liberties of the subject at home, the courts may and indeed must protect the individual against the executive, very different considerations apply in the field of foreign affairs, such that the individual has no expectation to be protected against unlawful executive action.[88] This would not prevent the courts applying domestic public law principles to actions taken by agents of the UK in Afghanistan, but, he said, '[i]t is not the business of the English court to enforce against the UK state rights arising under Afghan law for acts done on the authority of the UK government abroad, where to do so would undercut the policy of the executive arm of the UK state in conducting foreign military operations'.[89] The Crown act of state doctrine is on this view (re-)conceptualised as an exception to the general principle permitting foreign torts to be the basis of a claim in domestic courts where the foreign law is the applicable law, analogous to the rule whereby English courts will refuse to enforce a right arising under

86 This was essentially the basis upon which *Nissan* was resolved, with four of the five judges in the House of Lords taking the view that there was not a sufficiently close connection between the conclusion of the international agreement and the occupation of the hotel for the latter to fall within the doctrine. Lord Reid similarly held that a claim of act of state was not possible, though on the basis that the plaintiff was a British subject.

87 Three cases are cited in which reference was made to the one-voice principle: *Al-Jedda v Secretary of State for Defence* [2009] EWHC 397 (QB), [212]; *Government of the Republic of Spain v SS 'Arantzazu Mendi'* [1939] AC 256, 264; *British Airways Board v Laker Airways Ltd* [1984] 1 QB 142, 193.

88 [2014] EWHC 1369 (QB), [394].

89 Ibid [395].

foreign law if to do so is contrary to public policy: 'its effect is to preclude the enforcement of that tort claim in the courts of this country'.[90] Leggatt J was at pains to emphasise how narrow is the rule on the basis of which the tort claim here fails: it applies 'only to executive acts done abroad pursuant to deliberate UK foreign policy'; those 'which are directly authorised or ratified by the UK government'.[91] But the decision to detain Serdar Mohammed was such an act: the defence of act of state succeeded there,[92] as it would have also on the approach of the High Court in *Rahmatullah*, if it could be shown that his arrest and detention was in accordance with the UK's detention policy.[93]

Because it may yet prove relevant, several points can be made as regards this conceptualisation of the public policy underlying the choice of laws rule. The first is that it demonstrates what we may have already suspected: there is no coherence whatsoever to the doctrine of Crown act of state, the two rules of which are wholly separate from each other and contingently combined under an umbrella term which can now be seen to be deeply misleading. The second is that it is poorly grounded in the case law – in evidencing it Leggatt J relied not on anything said in the various Crown act of state cases but instead on the characterisation of *Buron v Denman* found in a textbook on the conflict of laws, providing an account of the rule which does not unambiguously follow from the terms of the case.[94] A third point: the cases cited in relation to the one-voice principle speak primarily to a different set of circumstances – that where the executive has an official opinion on a question which must be taken to be an opinion of the state as a whole and with which it makes no sense for the courts to disagree. The paradigmatic example is the question of whether a certain state exists, as was at issue in *Government of the Republic of Spain v SS 'Arantzazu Mendi'*.[95] Here, instead, insofar as there is a relevant question on which the executive and the courts might disagree, it is a question of law, and who but the courts are entitled to form an authoritative view on such a question? To take such a view and then discard it as a matter of policy is an unfortunate extension of the one-voice principle which provides an unattractive incentive for the executive to act in a way that it knows – as it did here – to be unlawful. Fourth, the conceptualisation of the act of state offered here would seem to be in tension with the claim made by Leggatt J in *Rahmatullah* that, despite what was argued there, not only does the defence exist, but that it 'rests on a proper appreciation of the separation of powers'.[96] If courts choose, even in a limited field, to speak as they are mandated to do by the executive, then what is taking place is not an actualisation of the separation of powers ideal but its denial. Fifth, and finally, the explanation of the tort defence offered by Leggatt J at first instance is not just a merely technical clarification of the rule's basis. Had it been accepted by the Court of Appeal, it would have widened the scope of the overall doctrine of Crown act of state. We can make the point by considering the invocation of Crown act of state in *Nissan v Attorney General*, which failed because the taking of the hotel was not sufficiently closely connected to an 'act of state' (the making of an agreement with Cyprus) for it to fall within the non-

90 [2014] EWHC 1369 (QB), [396].

91 Ibid [397].

92 Ibid [395].

93 [2014] EWHC 3846 (QB), [224].

94 [2014] EWHC 1369 (QB), [391], quoting *Dicey, Morris & Collins, The Conflict of Laws* 15th edn: Lord Collins et al. (eds) (Sweet & Maxwell 2015) [5-057]: 'X, an officer of the Crown, duly authorised, destroys property of A, a Spanish subject at a place outside the United Kingdom and Colonies. Spain and the United Kingdom are at peace, and X's act is tortious by the law of the place where it is committed. X's act is an act of state, and the court will not entertain an action by A against X.'

95 [1939] AC 256.

96 [2014] EWHC 3846 (QB), [208].

justiciability rule. However, applied to those same facts, the tort defence would, on the approach of Leggatt J here, have succeeded: the taking of the hotel may not have been an act of state or suitably closely connected to one, but was presumably nevertheless within the category of 'executive acts done abroad pursuant to deliberate UK foreign policy'.[97] What this suggests is that, though the combined decisions of Leggatt J in *Serdar Mohammed* and *Rahmatullah* weakened the non-justiciability rule (having the desirable effect of asserting the courts' jurisdiction over acts which would previously have escaped it), the range of actions in respect of which tort claims would be barred by Crown act of state was in fact widened by them. This must be counted as both perverse and retrogressive.

These points are, however, of less significance than they might have been as a result of the decision of the Court of Appeal that, though this limb of the act of state doctrine is indeed a procedural rule of domestic law reflecting public policy, the public policy considerations must be assessed on a case-by-case basis and, as such, the tort defence will not succeed simply because the conduct giving rise to the claim is 'a sovereign act done abroad pursuant to deliberate foreign policy'.[98] This conclusion is justified in part on the basis that there does not exist a similar bar in relation to public law claims (and nor is the defence available in relation to claims under the HRA), and in part on the sense that the tort defence as conceptualised by Leggatt J was simply out of place – 'no longer sustainable' – in the modern constitutional context.[99] Drawing an intriguing comparison between the tort defence of the Crown act of state doctrine and the law on public interest immunity before and after *Conway v Rimmer*,[100] the Court of Appeal held that, in deciding whether the defence should be available, the courts should consider 'whether, in the particular factual circumstances of the case, there are any compelling considerations of public policy which would require the court to deny a claim in tort founded on an act of the Executive performed abroad'.[101] We can, it seems, understand from this that the default situation will be that the tort defence does *not* apply even to acts done pursuant to a deliberate foreign policy – only where sufficient justification is given to depart from that default will the executive convince the courts to bar the tort claim in question. Moreover, it seems that even any compelling considerations identified in favour of barring a tort claim would require to be balanced against countervailing considerations in favour of rejecting the defence: it was accepted by the Secretary of State that claims for torture could not be repelled on this basis,[102] while the Court of Appeal took the view that the tort defence, as a reflection of public policy, is unlikely to be capable of successful invocation 'if the conduct in issue constituted a grave breach of international law or human rights law'.[103] Having rejected the specific public policy rationale identified by Leggatt J, the Court of Appeal has deprived the executive of the ability to bar certain claims on the basis of little more than its mere say-so. As a correlate, it has acquired for the courts a new decision-making authority, according to which it will determine whether or not the reasons offered for seeking to bar certain tort claims are suitably compelling. The decision of the Court of Appeal therefore neatly fits the pattern of administrative law in the last half-century or so, whereby the courts have slowly but surely rewritten

97 Leaving aside the question of whether the fact that the claimant was British would, as Lord Reid suggested, have prevented the pleading of Crown act of state.

98 [2015] EWCA Civ 843, [352].

99 Ibid [358].

100 [1968] AC 910, [1968] 2 WLR 998.

101 [2015] EWCA Civ 843, [359].

102 Ibid [357].

103 Ibid [374]–[375].

notions of constitutional appropriateness, dismantled distinctions which exempted certain executive acts from judicial oversight, and intensified standards of review so as to obtain greater scope to subject to scrutiny the actions of the executive even in its most precious policy areas and to require, as a condition of any attempt to avoid that scrutiny, that the executive justify itself to the courts.

More than that, however, in thus narrowing the tort defence the Court of Appeal has given reason to doubt the usefulness of conceptualising the rule as the aspect of an overarching doctrine known as Crown act of state. That is, unlike in the case of the doctrine as understood by Leggatt J, which stays largely true to the past understanding of the rule's effect (if not its nature), the Court of Appeal has held that just because an act was done by the Crown in pursuit of its foreign policy does not mean a claim arising out of it will be barred. Not only is this not a sufficient condition, however: neither is it a necessary one. The same public policy considerations which may bar a claim based on foreign law in relation to an 'act of state' may similarly bar a claim which does not involve any such thing: the rule, we now see, is merely a general rule of public policy which is a well-known feature of the choice of laws and which is acknowledged within the 1995 Act by a saving provision which provides that nothing in the relevant part 'authorises the application of the law of a country outside the forum as the applicable law for determining issues arising in any claim in so far as to do so . . . would conflict with principles of public policy'.[104] At first instance, Leggatt J had suggested that his own understanding of the tort defence was analogous with this rule. The better view, the decision of the Court of Appeal shows, is that it is simply a manifestation of it, one which does not apply uniquely, or even specially, to the Crown: it would bar a claim of the sort at issue in *Buron v Denman*, but would (in present circumstances) do so even if the defendant was a private party rather than the Crown, given that the enforcement of property rights in slaves would undoubtedly be contrary to public policy. Though the public policy considerations which apply to alleged acts of state may be different, or apply with different weight, the balancing act the courts must undertake is a familiar one, not unique to such acts. In clarifying and narrowing the rule, these judgments have therefore clearly demonstrated that it no longer, if it ever did, makes sense to think of a distinct doctrine of Crown act of state – better to think of two rules, one of justiciability, one of the choice of laws, which will apply (but not exclusively) to certain acts of the Crown, either preventing the courts from adjudicating upon those acts, or barring tort claims arising out of them. To continue to treat the doctrine as something distinct and special – as reflecting a privileged legal status of either the Crown or certain of its acts – would be to wrongly reify it and would obstruct a clear view of what should and will be the legal consequences of the acts of the Crown abroad.

Where at first instance the tort defence had been held to bar the claims of both Serdar Mohammed and Rahmatullah, the tighter understanding of public policy – to be considered on a case-by-case rather than blanket basis – endorsed by the Court of Appeal leads to very different results. In the case of Mohammed, having emphasised the Secretary of State's decision to authorise a detention policy 'outside and contrary to the authority' granted by the UN Security Council Resolutions and contrary to Afghan law, as well as his failure to put proposals for legislation barring tort claims of this sort (as had been done in the USA), the court held that it could see no 'compelling considerations of public policy which should prevent reliance on Afghan law as the basis of the claims in

104 Private Law (Miscellaneous Provisions) Act 1995, s 14(3)(a)(i).

tort brought in these proceedings'.[105] That is, where Leggatt J's understanding of public policy caused Mohammed's claim to be barred, the new, stricter approach of the Court of Appeal means that it can proceed. For Rahmatullah and the Iraqi civilian claimants, the result was ambiguous (though still more favourable to the claimants than that of the High Court) in that the question of where the balance of public policy considerations lay was left open for determination at trial. It is clear, however, that a key factor in that decision will be whether or not the UK was under an overriding obligation, arising out of Security Council resolutions, to detain or intern 'for reasons of security' in Iraq.[106] As discussed above in the context of the *Al-Jedda* case, that question will soon be revisited by the Supreme Court. If it follows the Strasbourg Court in holding that, contrary to its own decision in *Al-Jedda (No 1)*, the UK was under no such obligation, it seems likely that the Crown act of state defence will ultimately fail in barring the tort claims of Rahmatullah and the Iraqi civilians. The *Al-Jedda (No 1)* issue may, however, ultimately impede Rahmatullah's tort claim via the tort defence notwithstanding that the severability of the high policy decision to go to war from the specific decision to detain meant that it failed to do so under the non-justiciability rule.

Two further issues regarding the tort defence were raised for the first time before the High Court in *Rahmatullah* and dealt with there and on appeal. The first was the claim that, even if the defence of Crown act of state had previously existed, it was abolished by the Crown Proceedings Act 1947, s 2(1) of which renders the Crown subject to the normal liabilities in tort in respect of torts committed by its 'servants or its agents', on the proviso that 'no proceedings shall lie against the Crown . . . in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against the servant or agent or his estate'. It was noted above that the origins of the doctrine of Crown act of state date to an era, put to an end by the 1947 Act, in which the Crown could do no wrong; a rule which entailed, for present purposes, that it could not be liable in tort. The argument advanced here was that the defence of Crown act of state was an aspect of the Crown's general immunity in tort and so it, like that more general immunity, was extinguished by the statutory intervention. Leggatt J at first instance rejected this claim;[107] that the Court of Appeal endorsed his rejection of it is, of course, of less significance given that it did so in the context of a diminished, rather than enhanced, tort defence.[108] More important is the claim that the defence of Crown act of state is a procedural bar which interferes with a claimant's rights under Article 6 of the ECHR – one which, even if it pursues a legitimate aim, does so in an arbitrary and disproportionate way. Leggatt J rested his conclusion as to the proportionality of the procedural bar – and therefore its compliance with Article 6 – on the limited scope of the doctrine, which applies only to acts 'done abroad pursuant to deliberate UK foreign policy', and only to claims arising under foreign law (and so not to HRA claims).[109] Nothing in the doctrine prevents any claim being brought in any other jurisdiction, while it remains open to the claimant to challenge the legality of the policy in pursuit of which the acts were committed on English public law grounds.[110] The doctrine's alleged disproportionality was attributed in large part to its potential retrospective operation – i.e.

105 [2015] EWCA Civ 843, [359].

106 Ibid [368].

107 [2014] EWHC 3846 (QB), [212]–[215].

108 [2015] EWCA Civ 843, [345].

109 [2014] EWHC 3846 (QB), [218].

110 Ibid [218].

that it can operate as a defence to tort claims arising out of actions which were 'adopted' subsequent to taking place rather than being authorised in advance, as had happened in *Buron v Denman*. This point was left open, however: the actions out of which Rahmatullah's tort claims emerge were carried out pursuant to a policy established in advance and so there was no need to confirm whether retrospectivity renders the procedural bar a disproportionate interference with a claimant's Article 6 rights.[111] The Court of Appeal, by contrast, treated the two limbs of the doctrine separately. Though its conclusions as to the applicability of the non-justiciability rule rendered the question of the rule's compatibility with Article 6 academic, the court indicated its belief in that compatibility, given that the non-justiciability rule, in reflecting 'limitations on the role of the judicial function which are inherent in the allocation of powers under our constitution', clearly pursues a legitimate aim in a proportionate manner.[112] In arriving at the same conclusion as to the compatibility of the tort defence with Article 6 as had Leggatt J, however, the Court of Appeal suggested that the tort defence as conceptualised at first instance would not be compatible: the absolute nature of the bar would – even if the one-voice principle were recognised as a legitimate aim – be neither a necessary nor a proportionate means of achieving it in light of the unfettered ability to bring public law and human rights claims arising out of the same facts.[113] The tort defence was compatible with Article 6 only because it was rewritten by the Court of Appeal to reflect a fact-specific, case-by-case consideration of public policy.

Finally, alongside the clear and significant narrowing of both the non-justiciability rule and the tort defence, one further issue must be mentioned briefly – the clarification that neither of the doctrine's two rules bars claims under the HRA. This conclusion was arrived at by Leggatt J on the straightforward basis that act of state is a feature of the common law which 'has been overridden by Parliament when it enacted the Human Rights Act'.[114] To read into that Act an implied exception to the basic s 6(1) rule in relation to acts of state would be incompatible with its purpose and create an unwelcome divergence between the enforcement of the ECHR in domestic law and before the Strasbourg Court, to which the doctrine is of no relevance.[115] The Court of Appeal concurred:[116] the narrowing of the doctrine within its traditional domain(s) was therefore accompanied by a refusal to permit its expansion into other areas of law.

Conclusion

The doctrine of Crown act of state is much diminished. It is now clear that the non-justiciability element does not apply to HRA claims, while the tort defence rule permits both those and public law claims. Even where each of the doctrine's rules does apply, their scope is far more limited than would have been understood until recently. All of this is welcome – the very existence of the doctrine is in tension with the rule of law and its progressive limitation is a victory for that idea even if (as seems possible) it ultimately encourages Parliament to legislate in order to fill the gap which recent decisions have opened up. More than that, however, the rethinking of these rules, which has been precipitated by military endeavours in Iraq and Afghanistan, calls into question the coherence of the doctrine *qua* doctrine. First, because the two rules comprising the

111 [2014] EWHC 3846 (QB), [220]–[221].

112 [2015] EWCA Civ 843, [371].

113 Ibid [372]. I take the necessity point to be the implication of the final sentence of that paragraph.

114 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), [412].

115 Ibid [413].

116 [2015] EWCA Civ 843, [354].

doctrine are so different in their basis and their application as to be essentially unrelated. Second, and more fundamentally, because it is now clear that neither rule is unique in its application to the Crown or even to those acts traditionally identified as 'acts of state'. The older rule is an instantiation in the field of foreign affairs of general principles of justiciability and non-justiciability which themselves reflect the undeniable fact that some questions (which, we may debate) are unsuitable for judicial determination. The second is a rule of the conflict of laws reflecting general considerations of public policy which require a case-by-case examination of the relevant act within its specific legal and factual context. The doctrine has been exposed to the scrutiny of courts, which have long since ceased to automatically defer to the executive in the field of foreign affairs, and it has been found wanting. It should now be abandoned, so as to allow the difficult questions of the separation of powers and public policy which lurk behind the two rules to take centre stage.