NOURISHED BY THE TIDE: THE EUROPEAN INFLUENCE ON ENGLISH LAW

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Introduction

It is both an honour and a real pleasure for me to be invited to deliver this lecture established in David Vaughan's name. It is no exaggeration to say that he has been a pioneering and relentless champion of European law at the Bar. In the early days, I think David was something of a lone voice in his Chambers, then known as 1 Brick Court. But I think all would agree that it is David's vision, industry and resourcefulness that have helped to transform what is now Brick Court Chambers into without doubt one of the foremost Chambers practising EU law in Britain. I am delighted that Clifford Chance decided to celebrate all that David has achieved and contributed by establishing this lecture in his honour.

For my subject, I want to share some reflections on the contribution of European law to English law. By *European* law, I mean the law of what is now the European Union. I shall not address the jurisprudence and approach of the Strasbourg Court under the European Convention on Human Rights (*the ECHR*). And by *contribution*, I do not refer to the prominent role which EU law now occupies in many areas of the law practised and enforced in this country. As is well known, EU law is now applied, either directly or through transposition of directives, in a vast number of fields, from competition law to company law, from employment law to environmental law. Depending on your perspective, that is a cause for satisfaction or dismay. But those are areas into which I shall not enter.

Rather, what I mean is the way in which I believe EU law has influenced, without any obligation or requirement, purely domestic English law. And I refer to English law as

embracing not only the common law, but also legislation and, indeed, what I shall somewhat portentously call legal discourse.

Foreign Law and English law

In one sense, at least as regards the English common law, this may be regarded as an example of what Sir John Laws has aptly termed the catholicity of the common law:[1] its ability to draw, over time, on certain ideas or concepts from other legal systems. The notion that judges merely state the law and do not develop it is a well-known fiction. English judges, particularly at appellate level, when confronted with a difficulty of principle or theory often look at the approach taken in respected common law courts overseas, particularly in Australia, New Zealand and Canada. As we become both more cosmopolitan and internationally minded, it is only logical that our judges should occasionally consider the approach in civil law countries of continental Europe.

Indeed, the absorption of ideas and the drawing of inspiration from civil law is not a new phenomenon at all. Professor Simpson has shown how even such an ingrained part of English land law concerning a method of acquiring easements by implied grant, known to lawyers as the rule in *Wheeldon v Burrow*s, when articulated by the 19th century Court of Appeal in the case of that name was drawing on a passage in the first edition of *Gale on Easements* from 1839, which in turn was heavily influenced by French Civil Code.[2] As for more recent developments, Lord Bingham demonstrated in one of his illuminating lectures how the fashioning of the Mareva injunction owed much to appreciation of the French practice of *saisie conservatoire*.[3] Such an openness to foreign legal ideas is indeed a feature of all legal systems, albeit to a greater or lesser extent at various stages of their development. As that perceptive Australian scholar who made his academic home in England, Sir Carleton Allen observed long ago, "law is seldom of pure-blooded

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1 J. Laws, "Lecture III: The Common Law and Europe", Hamlyn Lectures (2013), available at: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/laws-lj-speech-hamlyn-lecture-2013.pdf

2 A.W.B. Simpson, "The Rule in Wheeldon v. Burrows and the Code Civil" *in Legal Theory and Legal History: Essays on the Common Law (1987).*

3 T. Bingham, "'There is a World Elsewhere': The Changing Perspectives of English Law" in *The Business of Judging* (2000), p 98

stock and 'national' is a dangerous word to use, without qualification, of almost any legal institution."[4]

However, there is I believe a subtle but significant difference in the subject I wish to examine. Where foreign law has been relied on in the process of domestic legal development, it has largely been through the industry of Counsel in citing such authorities, or the research or sometimes personal education or interest of the judge. By that I do not mean to suggest that it is altogether haphazard: in a case at the highest appellate level, Counsel would be expected to look at least at any major Commonwealth authorities. Nonetheless, I think that at least as regards continental civil law, the exposure has an element of happenstance. And as regards all foreign law, the adoption of its concepts or principles is entirely voluntary. By contrast, British judges and lawmakers are regularly and increasingly exposed to the concepts and principles of EU law as a matter of obligation. Not only are our courts bound by the interpretations and rulings given by the Court of Justice of the European Union (*the ECJ*) on matters of EU law, but the rights which arise under the Treaty or secondary EU legislation, whether directly as regulations or indirectly through directives that have been transposed into domestic law, are enforceable in our domestic courts. Those EU rights apply alongside any relevant domestic rights and so stimulate an obvious comparison.

The consequence has been to bring into our law, and therefore our legal thinking, a host of regimes, concepts and principles not by the selective and individual choice of the judges trying the case but by statute as a result of our membership of the EU. Of course, those regimes, concepts and principles are mandatory only insofar as EU law is being applied, but the influence they exert is, I think inevitably, much wider. And I believe that we have perhaps not sufficiently appreciated the extent to which our domestic legal developments over the past four decades have as a result drawn inspiration from the influence of legal principles and patterns applied through EU law.

[4] C. K. Allen, *Law in the Making* (1951), p. 87

Legislation

I turn first to the area of legislation and in that area, as you might expect, to competition law. The UK was rather later than most European countries in modernising its competition law, replacing the antiquated Restrictive Trade Practices Act 1976 with the Competition Act in 1998 (*the 1998 Act*). In the statute, we adopted virtually identical proscriptions of anti-competitive practices as are found in the EU Treaty so that the domestic Chapter I and Chapter II prohibitions mirror what are now Articles 101 and 102 of the TFEU. And the persistence of that mirror was enshrined by section 60 of the 1998 Act. That requires that any question arising in relation to competition in the UK should be dealt with:

> "in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union."

And the court must act so as to secure that no inconsistency between the principles it applies and those applied by the European Courts in determining any corresponding questions under Community law.

These provisions of section 60 exert a broad influence. So the Competition Appeal Tribunal (*the CAT*) last month delivered a judgment in *Skyscanner v Competition and Markets Authority*[5], a case concerning a challenge to a decision of the Office of Fair Trading, now the Competition and Markets Authority (*the CMA*) to accept commitments regarding a restrictive practice between hotels and online travel agents. This was a judicial review, conducted according to the ordinary judicial review principles that would apply in the Administrative Court, and the commitments were essentially a matter of enforcement and procedure. But referring to section 60, the CAT drew on the principles in the *Alrosa* judgment of the ECJ considering the approach to judicial review of acceptance of commitments by the European Commission.[6]

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5 [2014] CAT 16

6 Case C-441/07 P *European Commission v Alrosa* [2010] ECR I-5949

In many ways, it is hardly surprising that a modernised UK competition law should follow the European model. I believe that virtually all Member States have done the same. And, indeed, so has the legislation of many countries far outside Europe, adopting the EU rather than the US model. Antitrust law has been one of the EU's most successful exports.

But in fashioning our regime for the enforcement of competition law, it was by no means obvious that we should give the national competition authorities (*NCAs*) the power both to investigate and decide on violations of the law, including the imposition of very substantial financial penalties. That is not the regime in the US, nor is it the approach adopted in Austria, in Sweden or in the only other common law country in the EU, the Republic of Ireland. They have all chosen a prosecutorial model, where it is a court that decides on the case brought by the NCA. Several other States created a clear division of jurisdiction between two different agencies. The regime enacted in the UK in 1998, 25 years after we joined the EEC, very consciously followed the architecture of the competition regime of the Community with all decisional power in the administrative authority, subject only to appeal to a court.

When in 2011 the Government embarked on reform to the UK competition regime, one of the options put out for consultation was that we should change to a prosecutorial model.[7] That suggestion indeed received powerful support in responses from, among others, the Joint Working Party of the Bar and Law Society and the UK Competition Law Association.[8] However, as is well-known, Government decided to retain the decisional, EU model, so the new CMA has all the power that the Office of Fair Trading had beforehand.

The other landmark statute passed in 1998 was of course the Human Rights Act (th*e HRA*). One of the challenges presented was how to establish a regime of fundamental human rights for the UK while preserving the hallowed sovereignty of Parliament. The formal mechanism for squaring this constitutional circle was the introduction of the

[7] *A Competition regime for growth: A consultation on options for reform* (March 2011)

[8] The responses to the consultation are available at: https://www.gov.uk/government/consultations/a-competition-regime-for-growth-a-consultation-on-options-for-reform

declaration of incompatibility which the courts could make when a statute was found to contravene a right under the Convention. But the practical means for achieving the result, which has proved much more significant, was section 3 of the HRA. It is worth recalling wording of section 3(1):

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

And then the additional provision, in sub-section 3(2)(a):

> "This section applies … to primary legislation and subordinate legislation whenever enacted."

This was hailed by many at the time as an ingenious and innovative creation. But to the EU lawyer, the statutory wording had a familiar ring. For the doctrine of consistent or conforming interpretation is no more and no less than the so called *Marleasing* principle developed by the ECJ in the case of that name in 1990[9], and reiterated many times since. Although the Lord Chancellor did not say so at the time when introducing the Human Rights Bill in Parliament, there can be little doubt that EU law was here the direct inspiration.

This conscious parallelism eventually received express judicial recognition. The Rent Act 1977 contained a provision that the surviving spouse who had been residing with the protected tenant of a dwelling-house will succeed to that protected tenancy. The statute provided that, for this purpose, a spouse shall be a person who was living with the original tenant as his or her wife or husband. The House of Lords had held, in a case decided in 1999, where the original tenant had died in 1994, that this wording on its ordinary reading could not extend to a same-sex couple.[10] In *Ghaidan v Godin-*Mendoza,[11] the tenant died after the HRA had come into force, and the House of Lords was confronted with the question of whether its earlier interpretation could stand. It was

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9 Case C-106/89 *Marleasing v La Comercial Internacional de Alimentacion* [1990] ECR I-4135

10 *Fitzpatrick (A.P.) v Sterling Housing Association Ltd* [1999] UKHL 42, [2001] 1 AC 27

11 [2004] UKHL 30, [2004] 2 AC 557

held that if applied in that way, the statute amounted to discrimination against homosexuals in infringement of their rights under Article 8 of the ECHR. At the time the appeal was heard, a Bill that would change the law to extend equivalent protection to same sex couples was before Parliament. Nonetheless, the majority of the Appellate Committee held that pursuant to section 3 of the HRA, the relevant provision of the Rent Act 1977 could be read as extending the definition of spouse to persons living with the original tenant "as if they were" his or her wife or husband, and thus embraced a same sex partnership.

Given the previous decision of the House of Lords on the same provision, this raised acutely the question, what was the boundary of the different interpretation that could result from section 3 in order to comply with the ECHR? Therefore attention focused on the expression in section 3, "so far as possible." In his speech in the Appellate Committee, Lord Steyn quoted from *Marleasing*, which he said provided a "significant signpost" to the meaning of section 3(1). And he drew on the approach previously adopted by the House of Lords in applying *Marleasing* and the interpretative obligation under – as it then was – EEC law. Lord Rodger did likewise in his sensitive discussion of the distinction between interpretation and amendment, and he expressly stated that, when enacting section 3(1), Parliament will have been aware of what the courts had done in order to meet their obligation of consistent interpretation under European law.

Ghaidan is an important and influential decision. In 2006, the Court of Appeal had to consider the VAT treatment of phone cards and in particular whether section 10A of the Value Added Tax Act 1994 could be interpreted consistently with the 6th EC VAT Directive[12] – in other words, the Court had to apply the *Marleasing* principle. And in determining the scope of the *Marleasing* principle, the Court turned to the discussion in *Ghaidan* for guidance as to the limit of the techniques to be applied.[13]

Thus we have come full circle: the scope of the interpretive obligation under EU law is clarified by the discussion of the duty of Convention compliant interpretation under the

[12] Council Directive 77/388/EEC on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value-added tax: uniform basis of assessment

[13] *R (IDT Card Services Ireland Ltd) v Customs and Excise Commissioners* [2006] EWCA Civ 29, [2006] STC 1252

HRA, because that purely domestic provision in the statute owes its provenance to an EU principle.

Remedies

From legislation, I turn to remedies. No lecture in honour of David Vaughan would be complete without a reference to the great *Factortame* saga, in which he played a memorable part.

The proceedings concerned provisions of the Merchant Shipping Act 1988, and associated regulations, that imposed UK nationality requirements on the owners of vessels required to be registered under that statute. As is well known, the compatibility of that provision with the EC Treaty was challenged by a number of Spanish fishing boat operators and the English court referred certain questions to the ECJ for a preliminary ruling.[14] But the applicants further sought an interim injunction to prevent the Secretary of State enforcing the statute pending the outcome of the case and thus in effect requiring him to treat the Spanish fishing vessels as entitled to registration for that period. The Divisional Court granted such an injunction, and the Government's appeal reached the House of Lords in record time: I think less than nine weeks between Divisional Court's order and the opening of the appeal in House of Lords, with a hearing and judgment of the Court of Appeal in between. The application for interim relief based on both domestic and EU law.

Giving the reasoned speech in the House of Lords, Lord Bridge held that under English law an injunction, and thus also an interim injunction, was not available against the Crown. This view rested largely on the relevant provision, section 21 of Crown Proceedings Act 1947. On the basis that such interim relief was not available in judicial review proceedings under domestic law, the House of Lords made a second reference to the ECJ asking whether the absence of interim relief against the Crown was itself a breach of European law.[15] The application for interim relief based on both domestic and EU law. And in due course the ECJ responded with a ruling that a national court must

[14] *R. v Secretary of State for Transport, Ex p. Factortame Ltd* [1989] 2 CMLR 353

[15] *R. v Secretary of State for Transport, Ex p. Factortame Ltd* [1990] 2 AC 85

have jurisdiction to grant interim relief when that was necessary to protect a directly enforceable Community right, and that it must therefore set aside any rule of national law that precludes the grant of such relief. [16]

When the case came back to the House of Lords following that ruling, interim relief was duly granted.[17]

However, a few years later, the issue arose in a purely domestic context on somewhat extraordinary facts. In *M v Home Office*, The Home Office deported an asylum seeker from Zaire whose application for asylum had been refused. Immediately upon his learning of the refusal, he had applied for leave to seek judicial review. It was in fact a renewed application; his initial application had been refused and that refusal upheld by the Court of Appeal. So far, these facts are hardly unusual. But what was unusual, indeed exceptional, was what happened next. Simplifying a rather complicated story, the judge, initially hearing what was an urgent out of hours application, received what appeared to be an undertaking on behalf of the Home Office not to remove the applicant pending determination of his leave application. And yet that same evening the applicant was nonetheless flown out of UK. When the judge learnt of that, and I think while the applicant was in the course of travel to Zaire, the judge made, *ex parte*, a mandatory order that Secretary of State procure the return of applicant to the UK and that he be kept in care of Her Majesty's Government until further order. The Secretary of State was advised that the order was outside the jurisdiction of the judge and that it would be set aside, and he decided that the applicant should <u>not</u> be returned to Britain. That was the background against which proceedings started against the Home Office and Home Secretary, Kenneth Baker, for contempt.

But if the court had no power to make a coercive order against the Crown, then it was strongly arguable that the Secretary of State could not be guilty of contempt. So the question of power to grant an interim injunction against the Crown was directly engaged. The case known as *In re M*,[18] was recognised as being of constitutional importance and in

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16 C-213/89 *R. v Secretary of State for Transport, Ex p. Factortame Ltd* [1990] ECR I-2433

17 *R. v Secretary of State for Transport, Ex p. Factortame Ltd* (No 2) [1991] 1 AC 603

18 [1994] 1 AC 377

argument the Secretary of State unsurprisingly relied strongly on view of the law expressed by Lord Bridge in *Factortame*.

However, the House of Lords held that an injunction, including an interim injunction, could be made against the Crown and that the relevant section of the Crown Proceedings Act 1947 did not have the effect attributed to it in *Factortame*. In large part, this conclusion rested on considerable authority and learning deployed before the Appellate Committee on this point by Sydney Kentridge QC for applicant, whereas in *Factortame* the position under domestic law as opposed to Community law had been something of a sideshow. What was in effect the judgment of the Appellate Committee is found in the speech of Lord Woolf. He noted that since the House of Lords' decision in *Factortame* there had been the "important development" that in the second reference in that case the ECJ held that someone whose rights under Community law would be irremediably infringed must be able to obtain interim relief from the court of a Member State. Lord Woolf remarked:

"…the unhappy situation now exists that while a citizen is entitled to obtain injunctive relief (including interim relief) against the Crown or an officer of the Crown to protect his interests under Community law he cannot do so in respect of his other interests…which may be just as important."

That observation does not form a basis on which the outcome of *In re M* was reached – indeed as a matter of law it could not do so directly. But I think it would be surprising if this anomaly did not play a part, and perhaps an important part, in inclining the members of Appellate Committee towards the outcome they desired to reach.

From public law, I turn to private law and once again to the dismantling of a long-established principle. Although money paid under mistake of fact is generally recoverable, that was not the case for money paid under mistake of law. In particular, that meant that money paid to a public authority – and the most obvious example is payment of tax – at least without the compulsion of threatened legal proceedings, was not recoverable as of right. In consequence, even if the tax authority reimbursed the overpayment, the taxpayer would not be entitled as matter of law to interest.

The question of whether to overturn this principle came before House of Lords on the appeal of Woolwich Building Society concerning a claim for repayment of some £57 million by way of composite rate tax, a particular tax on building society dividends and interest.[19] That was a purely domestic tax, imposed pursuant to domestic regulations, which the court declared in proceedings brought by Woolwich to be *ultra vires*. The Revenue repaid the principal sum but refused to pay interest. In a now celebrated decision, the House of Lords, by a majority, departed from long-standing authority and expressly reformulated – the word is that of Lord Goff – the principle so as to establish that the subject who makes a payment in response to an unlawful demand of tax acquires forthwith a *prima facie* right in restitution to repayment.

The justice of the position in *Woolwich* may seem obvious, yet it is pertinent to recall that Lords Keith and Jauncey dissented in the decision. The main issue was whether there was such weight of authority against the principle contended for by Woolwich that this was a matter that should be left for Parliament and not susceptible to development by the courts. In the way that is customary for English decisions, the reasoning of the majority is based heavily on close analysis of a large number of cases, and then of authority from the Commonwealth and also reference to a judgment of Oliver Wendell Holmes in the US Supreme Court. But in what is the leading speech, Lord Goff, with whom Lord Browne-Wilkinson agreed, set out six reasons for rejecting the argument of the Revenue. I think it is appropriate to quote the sixth, which Lord Goff expressed as follows:

"There is a sixth reason which favours this conclusion. I refer to the decision of the European Court of Justice, in *Amministrazione delle Finanze dello Stato v. S.p.A. San Giorgio* (Case 199/82) [1983] E.C.R. 3595, which establishes that a person who pays charges levied by a member state contrary to the rules of Community law is entitled to repayment of the charge, such right being regarded as a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting the relevant charges…The *San Giorgio case* is also of interest for present purposes in that it accepts that Community law does not prevent a national legal system from disallowing repayment of charges where to do so would entail unjust enrichment of the recipient, in

[19] *Woolwich Building Society v Inland Revenue Commissioners* [1993] AC 70

particular where the charges have been incorporated into the price of goods and so passed on to the purchaser. I only comment that, at a time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law".

As always, it is impossible to determine what weight that factor played and I suspect the result would probably have been the same without the *San Giorgio* case. But what I think is of interest is not simply that EU law was relied on along with other foreign comparisons but that the anomaly of there being discordant remedies was given emphasis.

Principles

And so to principles or concepts more generally. In his seminal judgment in the *GCHQ* case[20] in 1984, in setting out the bases of judicial review, Lord Diplock famously expressed the three established grounds in terms of illegality, irrationality and procedural impropriety. And then he added this:

"That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in my mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community."

I appreciate that proportionality was also at that time part of jurisprudence of the Strasbourg Court applying the ECHR, but I think there is little doubt that Lord Diplock had in mind the role of proportionality in Community law. Certainly that was the interpretation placed on Lord Diplock's observation five years later by Lord Roskill in the *Brind*[21] case, where he also held out the possibility of the future development of the law to embrace a principle of proportionality. Lord Bridge agreed with that view, but both Lords Roskill and Bridge held that *Brind* itself was not an appropriate case for such

[20] *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 at 410
[21] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696

development. And at least two of the other members of the Appellate Committee were firmly of the opinion that proportionality was no part of English common law.

In his FA Mann lecture, delivered later that same year, Lord Bingham noted the high threshold involved in the test of rationality and expressed the view that proportionality was worth a modest investment as a growth stock.[22]

And then in *Alconbury*[23], a case in 2003 under the HRA, Lord Slynn said:

> "I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law. Trying to keep the Wednesbury principle and proportionality in separate compartments seems to me to be unnecessary and confusing."

That however, was *obiter*, since the case arose directly under the HRA, and the other members of the Appellate Committee did not adopt this view.

As this quotation from Lord Slynn indicates, it must be recognised at once that the principle of proportionality does not come only from Community law. It originated, indeed, in German law (more precisely Prussian law) and as I have said it is amply deployed in the jurisprudence of the Strasbourg Court. But I believe it was through law from Luxembourg alongside law from Strasbourg that proportionality came to exert an influence in this country, and as those observations of Lords Diplock and Roskill indicate, at the beginning it was Luxembourg that played a more pronounced role.

I shall return to the question of the status today of proportionality as a ground for judicial review under English administrative law. But I want first to consider proportionality at a more general level. When I started at the Bar, proportionality was regarded as an eccentric continental neologism. I think one cannot under-estimate the transformation in

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22 Bingham, *op. cit.*, at p. 97

23 *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at [51]

the role this concept has come to play. The concept of proportionality is now firmly part of English legal discourse – and here I am referring to something much broader than its application in judicial review.

Proportionality played a prominent part in Lord Woolf's proposals for the reform of English civil procedure, in his reports of 1995 and 1996[24], which led to the new Civil Procedure Rules. In those rules, it is there up front as part of the overriding objective and it infuses many of the rules, not just as regards costs, but also, for example, as regards disclosure.[25]

Public bodies and agencies now frequently incorporate references to proportionality in their rules or guidelines. So in the field of competition law, the market investigation regime under the Enterprise Act 2002 (*the 2002 Act*) is a purely UK creation – it has no European underpinning and has its origins – as those with long memories may recall – in the complex monopoly references. The 2002 Act, in the provisions dealing with remedies, does not refer to proportionality. But the Guidelines put out by the Competition Commission (*the CC*) (now, the CMA), on market investigations, originally in 2003 and then revised and now adopted by the CMA, state that in considering the reasonableness of different remedy options the CC will have regard to proportionality.[26]

So it was that when Tesco brought a judicial review challenge before CAT to some of the recommendations in the CC's report in the supermarket investigation, that challenge could be firmly based on the principle of proportionality.[27] There was no doubt that it fell to the CAT to assess the remedy on the basis of a substantive proportionality test, although neither EU law nor the HRA was engaged.

Furthermore, even in substantive law, proportionality is not confined to a basis of challenge to administrative or executive action. It plays an important role in antitrust

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24 *Access to Justice* (Interim Report) (June 1995) and (Final Report) (July 1996)

25 CPR, Parts 1.1, 31.3 and 44.3-4

26 Guidelines for Market Investigations: Their Role, Procedures, Assesment and Remedies (CC3, 2003), para 4.10; (CC3 Revised, 2013), para 342

27 *Tesco Plc v Competition Commission* [2009] CAT 6

analysis. As the ECJ very recently reminded us in its *Mastercard* judgment[28], the question of whether a restriction escapes the prohibition of Article 101 TFEU as ancillary to an operation which in itself is neutral or positive in antitrust terms depends on whether the restriction is proportionate to the objectives of the related operation.[29] The ambit of the Court's judgments in *Wouters*[30] and *Meca-Medina*[31] remains somewhat uncertain: when do regulatory or professional rules that are ostensibly restrictive of competition-perhaps not ostensibly, you may say manifestly restrictive of competition, when do they nonetheless fall outside Article 101? But it is clear that it incorporates as an essential criterion that the restriction is proportionate to the legitimate objective being pursued.

What then about proportionality as a ground for judicial review in English law, outside the sphere of EU law or the HRA? That is a subject that has generated voluminous commentary and debate, both academic and indeed by judges writing extra-judicially. It would be both presumptuous and impossible to attempt to summarise all the arguments in this lecture. Where fundamental rights are engaged, even if not technically in terms of the ECHR, it seems that something close to proportionality review will be conducted, even if it assumes the clothing of a heightened *Wednesbury* rationality test. Where the issue is whether a public authority can resile from the legitimate expectation it has created, one criterion now applied is whether that response is proportionate.

In *Wells and Walker* in the Divisional Court in 2007, Laws LJ remarked that "*Nowadays irrationality "Wednesbury unreasonableness" seems a somewhat old-fashioned legal construct*" and he observed:

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28 Case C-382/12 P *MasterCard and others v European Commission,* judgment of 11 September 2014

29 See at para 89.

30 Case C-309/99 *Wouters v Algemene Raad van de Netherlandse Orde van Advocaten* [2002] ECR I-1577

31 Case C-519/09 P *Meca-Medina v European Commission* [2004] ECR I-6991

> "we are increasingly accustomed to the framing of substantive challenges to public decisions in terms of proportionality, and not only in European and human rights contexts."[32]

But although coming from a judge with exceptional experience in this field, that too was *obiter*, and the observation was not adopted when the case reached the Court of Appeal and the House of Lords.

So beyond the narrow confines I have mentioned, the issue remains open, and the development that Lord Diplock foreshadowed in 1984 has still not occurred 30 years later. But I think it is significant that in a stimulating analysis setting out the arguments for and against in his book on Administrative Law,[33] Professor Craig lists as one of arguments in favour of the adoption of proportionality as a standard for review the fact that EU jurisprudence has demonstrated that proportionality can be - and indeed is - applied with varying degrees of intensity to accommodate different types of decision, and therefore does not necessarily lead to a more intrusive review by the judge as is feared by some who argue against its application.[34]

Further, one of the powerful reasons for its adoption is that in many cases an EU law challenge – or indeed a human rights challenge – will be involved alongside a purely domestic law challenge. And it would be much simpler if a different basis of review did not have to be applied depending on which aspect of the challenge is under consideration. The complication becomes even greater in borderline cases.

I can give an illustration from the antitrust field. Where the CMA conducts an investigation leading to a decision enforcing the proscription of an anti-competitive agreement or arrangement, sometimes it acts only with regard to the Chapter I prohibition, because there is no effect on trade between Member States, and in other cases also in the application of Article 101 TFEU because there is an effect on inter-state trade. In the second case, where EU law is being applied, it is very likely that a challenge

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32 *R (Wells) and R (Walker) v Parole Board* (2007) EWHC 1835 (Admin), [2008] 1 ALLER 138 at [38]

33 P. Craig, *Administrative Law* (7th edn., 2012), paras 21-030 to 21-038

34 *Ibid*, para 21-034.

to the procedural steps taken by the CMA could be based on proportionality. It seems to me very unattractive that a challenge to what can be exactly the same kind of action, in the course of application of what is effectively the same substantive law, the question of whether proportionality is available as a self-standing ground of judicial review might depend on whether or not the investigation is being conducted under Article 101 as well as the Chapter I prohibition. And the same point can be made of course as regards Article 102 and the Chapter II prohibition. And I might add, in virtually all other respects, the question whether or not the case is brought only under the 1998 Act or also under EU competition rules is a matter of complete indifference.

Of course, many cases do not involve such an overlap and it is notable that in the new edition of Wade and Forsyth's leading treatise on Administrative Law, Professor Forsyth expresses the view not only that reports of the demise of *Wednesbury* unreasonableness have been exaggerated, but that it is likely to remain alive and well as the basis of domestic judicial review.[35]

There are doubtless other aspects of English law that have felt the European influence, which I have failed to cover. And there are areas where the influence is still nascent. One is prospective overruling. In its judgment in *Re Spectrum Plus*[36], the House of Lords held that a particular form of commonly used debenture over book debts created a floating not a fixed charge, overruling a decision to the contrary of Slade J that had stood and been relied on for over twenty five years. Given the commercial consequences, it was submitted that the House of Lords should make its ruling only prospective. But was that course open to it? The issue had never been addressed judicially before and is obviously of great significance. On the facts, all their Lordships held that it was not an appropriate case in any event to postpone the effect of their decision. But the House of Lords nonetheless addressed the question of whether it had power to make its ruling only prospective. Lords Nicholls and Hope, in particular, held that it did, and that there might be circumstances where prospective overruling would be appropriate and permissible. In conducting a review of the approach to this issue by courts elsewhere, they naturally

35 H.W.R. Wade & C. Forsyth, *Administrative Law (*11th edn., 2014), p. 316

36 *National Westminster Bank Plc v Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680

referred in particular to the approach adopted by ECJ - of course only exceptionally - to limit the temporal effect of its rulings, from *Defrenne v Sabena*[37] onwards.

The question of whether the UK should remain a member of the EU is likely to attract increased attention and debate over the coming year. As a sitting judge, it is a question on which I must be careful not to express an opinion. Whether our membership of the EU advances or retards the UK's economic prosperity is not in any event a matter on which I can claim any particular expertise. But of one thing I do feel sure. For the reasons I have tried to outline, the experience of our direct exposure to, and engagement with, the law of the EU has meant that English law – in its broadest sense – has been enriched.

[37] Case 43/75 [1976] ECR 455