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Positivism in the English Law of Contract

Andrew Phang*

While there has been no paucity of *theoretical* discussion on the law of contract,[1] there has, in English law at least, been little clear evidence from the *courts* themselves which particular jurisprudential approach is favoured.[2] This is not surprising, given the rather formal nature of the English legal system.[3] Herein, perhaps, lies a clue — that English law in general and its contract law in particular are generally oriented towards so-called 'black letter law'; or, to be more precise, that the generally favoured conception of law is that of positivism.[4] As already mentioned, however, there has been little *express* acknowledgement of this approach by the courts. This is why two important cases decided by the Court of Appeal[5] merit consideration. Each of these decisions has had (for the time being at least)[6] a profound influence upon its own particular area of the English common law of contract. The first, *Kleinwort Benson Ltd* v *Malaysia Mining Corp Bhd*,[7] concerned the legal effect of a specific clause in a letter of comfort; the second, *Bank of Nova Scotia* v *Hellenic Mutual War Risks Association (Bermuda) Ltd, The Good Luck*,[8] was a lengthy

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1 Examples include P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979); Charles Fried, *Contract as Promise* (1981); Hugh Collins, *The Law of Contract* (1986); and by the same author, 'Contract and Legal Theory' in *Legal Theory and Common Law* (1986) ch 8; John Adams and Roger Brownsword, *Understanding Contract Law* (1987); and Peter Gabel and Jay M. Feinman, 'Contract Law as Ideology' in David Kairys (ed), *The Politics of Law* (1982) ch 8. The periodical literature is, of course, extensive.

2 If, of course, one accedes to Stanley Fish's proposition that there is no such thing as a discernible theory in the sense that it can be described and discussed, but rather that it only exists in the actual engaging in the practice itself, then there is no further point to this comment or, indeed, any jurisprudential piece for that matter: see eg Stanley Fish, 'Working on the Chain Gang: Interpretation in Law and Literature' (1982) 60 *Texas Law Review* 551; 'Wrong Again' (1983) 62 *Texas Law Review* 299; 'Still Wrong After All These Years' (1987) 6 *Law and Philosophy* 401; and 'Dennis Martinez and the Uses of Theory' (1987) 96 *Yale Law Journal* 1773. I shall, however, assume, for the purposes of the instant comment at least, that Fish is wrong, and that it *is* possible to speak of theory; there are, in fact, some very persuasive replies to Fish: see eg Pierre Schlag, '*Fish* v *Zapp*: The Case of the Relatively Autonomous Self' (1987) 76 *Georgetown Law Journal* 37 and Steven L. Winter, '*Bull Durham* and the Uses of Theory' (1990) 42 *Stanford Law Review* 639, and, as we shall see, the English courts themselves support this more optimistic view.

3 See generally P.S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law — A Comparative Study of Legal Reasoning, Legal Theory and Legal Institutions* (1987).

4 cf H.L.A. Hart, *The Concept of Law* (1961) and William Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *Law Quarterly Review* 557.

5 See also *Banque Financière de la Cité SA* v *Westgate Insurance Co Ltd* [1989] 2 All ER 952, affirmed [1990] 2 All ER 947. As the comments (by the Court of Appeal) pertaining to the philosophical approach adopted do not deal with the law of contract proper, they are not, strictly speaking, wholly germane to the narrower inquiry of the instant comment; they do, nevertheless, impact upon the wider sphere of commercial law, and provide at least an indication that the positivistic approach may operate outside the strict parameters of contract law: see the discussion below.

6 The second, *The Good Luck*, below n 8, has just been heard by the House of Lords: see [1991] 2 WLR 1279. The court did not, however, deal with the issue which forms the focus of the present comment, *viz*, the contractual implication of terms, preferring to decide solely on the basis (and contrary to the Court of Appeal's holding) that there had been a breach by the defendant of the express terms of the letter of undertaking (see the statement of facts below). More importantly perhaps, no indication was given as to the jurisprudential approach favoured, and thus does not aid in elucidating the themes considered here.

7 [1989] 1 WLR 379.

8 [1989] 2 Lloyd's Rep 238, reversed by the House of Lords: see above n 6.

judgment that not only traversed many complex points relating to the law of insurance as well as the relationship between tort and contract, but also contained very significant pronouncements upon the contractual implication of terms, the latter of which constitutes the focus of the instant comment.

It is not the purpose of the present comment to critique the substantive points of law enunciated in the above-mentioned cases. Indeed, these decisions have already been the subject of a number of perceptive notes and articles.[9] This comment seeks, rather, to focus upon the common jurisprudential basis behind both decisions and its practical implications for English commercial law in general, and its law of contract in particular.

The basic jurisprudential premise behind both these cases is, it is submitted, clear: both decisions evince an extreme positivism, emphasising in no uncertain terms that legal rules are separate and distinct from moral considerations. I do not propose to restate the now-famous Hart-Fuller debate on whether or not there is a *necessary*[10] connection between the law on the one hand, and morality on the other.[11] Readers familiar with this debate will, however, perceive that, if the proposition just made be accepted, it would be clear that the English courts have chosen the Hartian side of the divide. Before proceeding to analyse the implications of the adoption of such an extreme positivistic stance, the brief facts and respective decisions, as well as some passages from the two cases under consideration, are set out in order to support as well as illustrate the general argumentation in the present piece.

Turning, first, to the *Kleinwort Benson* case, the plaintiff merchant bankers had advanced funds to the defendants' wholly-owned subsidiary in order to enable the latter to deal on the London Metal Exchange. In return, the defendants gave the plaintiffs a letter of comfort, the crucial portion of which reads as follows: 'It is our [ie, the defendants'] policy to ensure that the business of MMC Metals Limited [ie, the defendants' subsidiary] is at all times in a position to meet its liabilities to you under the above arrangements.' The loan facility was later increased in return for a second (and operative) letter of comfort in materially identical terms (including the crucial portion just set out). The tin market collapsed, and the subsidiary not only ceased trading but also later went into liquidation. The plaintiffs thus brought an action based on the (operative) letter of comfort, and the Court of Appeal (reversing the decision of Hirst J at first instance)[12] found in favour of the defendants, holding

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9 See eg F.M.B. Reynolds, 'Uncertainty in Contract' (1988) 104 *Law Quarterly Review* 352; A.M. Tettenborn, 'Commercial Certainty — A Step in the Right Direction?' [1988] *Cambridge Law Journal* 346; B.J. Davenport, 'A Very Comfortable Comfort Letter' [1988] *Lloyd's Maritime and Commercial Law Quarterly* 290 (for comments on the *Kleinwort Benson* case at first instance); D.D. Prentice, 'Letters of Comfort' (1989) 105 *Law Quarterly Review* 346; Andrew Ayres and Adrian Moore, '"Small Comfort" Letters' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 281 (comments on the *Kleinwort Benson* case at the Court of Appeal stage); B.J. Davenport, 'The Duty of Disclosure' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 251; and Malcolm Clarke, 'Insurance: Arabian Nights, But No Duty to Tell the Bank' [1989] *Cambridge Law Journal* 363 (comments on *The Good Luck* at the Court of Appeal stage). See also Ian Brown, 'The Letter of Comfort: Placebo or Promise?' [1990] *Journal of Business Law* 281.

10 See the discussion below.

11 See generally the initial exchange: H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593 (reprinted as Essay 2 in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983)); and Lon L. Fuller, 'Positivism and Fidelity to Law — A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630. For later works, see H.L.A. Hart, above n 4, ch 9; Lon L. Fuller, *The Morality of Law* (revised ed, 1969); and Hart's book review of the last mentioned work in (1965) 78 *Harvard Law Review* 1281.

12 See [1988] 1 WLR 799.

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that no legally binding obligation arose by virtue of the letter of comfort. Ralph Gibson LJ (with whom both Nicholls and Fox LJJ agreed) held that the relevant clause in the letter of comfort was of no legal effect and involved, at best, a 'moral responsibility' on the part of the defendants[13]; in fact, the learned Lord Justice took pains to observe, right at the conclusion of his judgment, thus[14]:

> The consequences of the decision of the defendants to repudiate their moral responsibility are not matters for this court.

It is significant to note that not a few commentators are of the view that the present result would be welcomed by the commercial (here, banking) community.[15] While this point may not appear at all unusual, it should be borne in mind, simply because it has a bearing on the general issues canvassed in the instant comment.

The facts of the second case, *The Good Luck*,[16] were complex. Put simply, the defendants were mutual war risks insurers who insured various vessels in the 'Good Faith' group, and to which the vessel concerned, the 'Good Luck,' belonged. The plaintiff bank provided finance to the 'Good Faith' group, and the 'Good Luck' was in fact mortgaged to it, with the benefit of the insurance being assigned to the plaintiffs and a letter of undertaking provided by the defendants to the plaintiffs. In breach of the terms of the policy, however, the 'Good Faith' group sent vessels (including the 'Good Luck') on voyages into a prohibited zone without informing either the defendants or the plaintiffs, thus rendering these vessels uninsured. The defendants' representatives discovered this but did not inform the plaintiffs. In the meantime, the plaintiffs rescheduled loans with the defendants, the plaintiffs being aware of mortgaged vessels trading in the prohibited zone, but being under the impression that the necessary insurance cover existed. The 'Good Luck' was hit by a missile and was declared a constructive total loss. The plaintiffs then brought an action, claiming that they had suffered loss by advancing funds to the 'Good Faith' group in ignorance of the true state of affairs. Numerous issues arose — *inter alia*, whether the defendants were in breach of the express terms of the letter of undertaking; whether if, indeed, an obligation of the utmost good faith arose on the facts, a right to damages arose by virtue of its breach; and whether there was a duty on the defendants' part to speak that arose under an implied term and/or in tort. The Court of Appeal held that there was neither a breach of the express terms nor a duty to speak premised on any one of the aforementioned bases. Our present focus is (as stated at the outset) on the argument centering on the implied term.

The issue pertaining to the contractual implication of terms in *The Good Luck* arose in the following manner. The trial judge, Hobhouse J, had held, *inter alia*, that a term ought to be implied to the effect that the defendants were under a duty to disclose to the plaintiff bank either the fact that they (ie, the defendants) knew that the shipowners were dishonestly jeopardising the cover provided by them in fraud of the plaintiff bank, or the fact that they knew that the shipowners were jeopardising the cover at the least in breach of their obligations to the plaintiff bank without its concurrence. As already mentioned, the Court of Appeal reversed this holding on appeal, deciding that in the absence of actual fraud by the defendants themselves, no such term could be contractually implied. It held that the defendants were at perfect liberty to prefer their own commercial advantage to disclosure, and

13 See [1989] 1 WLR 379 at 391.

14 *ibid* at 394.

15 See eg Prentice, above n 9 at 348; cf also the remarks of Ralph Gibson LJ himself: see [1989] 1 WLR 379 at 393.

16 [1989] 2 Lloyd's Rep 238, reversed by the House of Lords: see above n 6.

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that there was therefore no *legal* duty of disclosure; what remained was a mere *moral* duty to inform the bank — in the words of May LJ who delivered the judgment of the court[17]:

> It is regrettably immoral if a party to a commercial arrangement of this nature is willing, because of the way he sees his own commercial advantage, to keep silent about such conduct, but immorality of conduct does not by itself provide a basis for implying a term in a contract. It serves only as an incentive to the court to imply the term if, on principle, it is possible to do so.

Before attempting to summarise as well as comment on the direct impact and implications of the approach taken in the two cases briefly considered above, it ought to be noted that the present discussion is confined within the fairly narrow compass of the English law of contract. Two important points have to be made at this juncture.

First, we ought at least to acknowledge that this positivistic tack, being but one approach,[18] need not necessarily be adopted by the courts of other countries. To be sure, any departure may be difficult where former British colonies are concerned. This might well, for example, be the case in so far as Singapore (where the writer comes from) is concerned, simply because (if nothing else) Singapore law in general, and its commercial law in particular, are still premised very much upon that of the English.[19] I have, however, ventured to suggest elsewhere that, even allowing for the almost rigidified adherence to English contract law, there have been, and undoubtedly will be, opportunities for the gradual development of a uniquely Singaporean contract law.[20] The rate of development would, obviously, vary from country to country, with some making more rapid progress than others. Various factors may account for the relative disparity in development, including differences in the respective legal traditions as well as cultures of the countries concerned. Australia (a former Dominion), for example, has, especially in recent years, developed her law of contract to a degree that makes it very different from that of the English.[21]

The second point has to do with the perception of English courts when dealing with issues *outside* the law of contract proper. There are academic, judicial as well as extra-judicial suggestions that the positivistic approach manifested in *Kleinwort Benson* and *The Good Luck* extends to other commercial areas as well. Professor

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17 *ibid* at 269.

18 See generally W.B. Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167, reprinted in substantially the same form in the author's book, *Philosophy and the Historical Understanding* (2nd ed, 1968). For applications of this rather important but, it is submitted, underrated philosophical argument in various fields, see eg John N. Gray, 'On the Contestability of Social and Political Concepts' (1977) 5 *Political Theory* 331; Thomas D. Perry, 'Contested Concepts and Hard Cases' (1977) 88 *Ethics* 20; and my article, 'Jurisprudential Oaks from Mythical Acorns: The Hart-Dworkin Debate Revisited' (1990) 3 *Ratio Juris* 385.

19 See generally both my articles (as well as the literature cited therein): 'Theoretical Conundrums and Practical Solutions in Singapore Commercial Law: A Review and Application of Section 5 of the Civil Law Act' (1988) 17 *Anglo-American Law Review* 251; and 'Reception of English Law in Singapore: Problems and Proposed Solutions' (1990) 2 *Singapore Academy of Law Journal* 20.

20 See generally Andrew Phang Boon Leong, *The Development of Singapore Law — Historical and Socio-Legal Perspectives* (1990) chs 2 and 3.

21 The development has taken place in a great number of areas; prominent ones include that of unconscionability (see *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447); promissory estoppel (see *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387); and privity as well as restitution (see *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107). And see generally M.P. Ellinghaus, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13.

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Finn,[22] for example, observes that compared to Australia, New Zealand, Canada and (especially) the United States, the English courts have quite comprehensively rejected what he terms as 'good faith and fair dealing' or 'neighbourhood' which is 'other-regarding' and, in his words, 'rich in moral connotation.'[23] On the other hand, Sir Gerard Brennan, a judge of the High Court of Australia, while content to admit that morality is employed by judges to 'inform'[24] the various legal prinples, comes down rather firmly on the side of positivism[25]; he does not, in other words, endorse a *necessary* connection between law and morality.[26] In addition to these academic as well as extra-judicial comments, it is worthy to note that there is at least one recent case *outside* the strict boundaries of contract law proper which emphatically endorses this general positivistic approach. This is the Court of Appeal decision in *Banque Financière de la Cité SA* v *Westgate Insurance Co Ltd*,[27] which was recently affirmed, but on somewhat different grounds, by the House of Lords.[28] The issues in this case (at the Court of Appeal stage at least)[29] were, like that in *The Good Luck*,[30] rather complex, having to do, in the main, with the duty of disclosure in insurance contracts (and, perhaps more importantly, whether an action in *damages* could be founded *merely* by virtue of a breach of that duty itself) as well as issues pertaining to the tortious action in negligence for pure economic loss. Once again, while canvassing these two different issues, the Court of Appeal took the opportunity to emphasise, at each point, the positivistic nature of the judicial enterprise.[31] First, when considering the test of materiality under an insurance contract, Slade LJ observed thus[32]:

> However, in the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent.

Since this passage occurs in the context of the law of insurance, it is arguable that the proposition pertaining to positivism in English contract law applies equally to other spheres of commercial law as well. Be that as it may, there was, as already alluded to above, a second issue, *viz*, that concerning the tort of negligence where, in considering the issue of justice and reasonableness, Slade LJ commented thus[33]:

> this ... is one of those many cases where the legal obligation falls short of the moral imperatives. ... The law cannot police the fairness of every commercial contract by reference to moral principles.

22 Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87, especially at 92 and 99.
23 *ibid* at 92.
24 'Commercial Law and Morality' (1989) 17 *Melbourne University Law Review* 100 at 102.
25 See especially *ibid* at 105. See also *ibid* at 106, where he observes thus with regard to the purposes of morality and law: 'The purpose of one [ie, morality] is justice; the purpose of the other [ie, law] is justice according to law. The purposes are not coincident, but they are not opposed.' This last sentence, while apparently suggesting a happy compromise, comes down, in substance, on the side of positivism.
26 See the arguments below. See also the reference to Lord Devlin's views: see below n 34.
27 [1989] 2 All ER 952. For perceptive comments, see B.J. Davenport, 'The Duty of Disclosure' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 251; and F.A. Trindade, 'Commercial Morality and the Tort of Negligence' (1989) 105 *Law Quarterly Review* 191.
28 [1990] 2 All ER 947. See David Allen's note in this issue of the MLR.
29 The House of Lords focused principally upon the issue of causation.
30 [1989] 2 Lloyd's Rep 238.
31 It is significant to note that Professor Finn briefly alludes to both these occasions in his article at n 22 above.
32 [1989] 2 All ER 952 at 990.
33 *ibid* at 1013.

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It is significant to note that the court, although dealing with an issue outside the sphere of both contract as well as (more generally speaking) commercial law, nevertheless took pains to point toward the imperative of positivism in the sphere of commercial contracts. It might well be the case, therefore, that the positivistic judicial approach is pervasive not only in the realm of the English law of contract, but also in its commercial law generally. Let us now turn to a summary of the broader themes and implications, with particular reference to the English law of contract.

As can be seen from a brief synopsis of the cases concerned, the courts have adopted an extremely positivistic approach, endorsing pragmatic commercial considerations that Lord Devlin has acknowledged in his extralegal capacity.[34] If this indeed be the general practical approach (as it is submitted it is), it would appear that arguments of fairness are going to receive short shrift from the courts, at least in so far as commercial disputes are concerned. The study of law in the commercial context must thus be conducted along amoral lines. One wonders, however, whether the result would be a mere empirical hotchpotch, devoid of any guiding theory. It is also a moot point whether any contextual study of the law *can* in fact be achieved along such amoral lines, whatever the perception of the courts themselves might be.

There is, in addition, a problem of consistency. Many doctrines are based upon fairness; examples include that of promissory estoppel,[35] and the doctrine of unconscionability itself.[36] It is therefore clear that the English courts have at least implicitly accepted that positivism is not a judicial philosophy that can apply across the board. Even in so far as the various fairness doctrines in English contract law are concerned, however, there does appear to be a fear of crossing over, as it were, into unbridled extralegal judgments.[37] This fear probably accounts for the rejection of Lord Denning's broad principle of inequality of bargaining power enunciated in *Lloyd's Bank* v *Bundy*[38] by the House of Lords in *National Westminster Bank* v *Morgan*,[39] as well as the rejection of a similar line of reasoning by the Privy Council in *Hart* v *O'Connor*.[40] Of relevance, too, in this 'line-drawing,' in so far as the acceptance (or otherwise) of fairness doctrines is concerned, is the approach adopted by the Privy Council in *Pao On* v *Lau Yiu Long*.[41] It is submitted that such 'line-drawing' may be traced to the remnants of a positivistic frame of mind, even where the central focus is that of fairness. Viewed as a whole, therefore, the *predominant* trend appears clear enough.

It might, of course, be argued that in at least *Kleinwort Benson* and *The Good Luck*, the whole point was to distinguish what was legally enforceable from what was not. However, such an argument begs the question. The crucial issue is whether moral factors ought to be taken into account as an *integral* part of the law itself, and the courts in both cases have chosen to answer this question in the negative. This is not, of course, to state that there are no other possible jurisprudential approaches — a point that we have already alluded to and which we shall be dealing with in more detail shortly. Further, if one accepts a very broad interpretation of

34 See *The Enforcement of Morals* (1965) ch III, especially at 44, 47 and 51.

35 See eg per Oliver J in *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 151–152; and the numerous references to the rationale of unconscionability in the recent High Court of Australia case of *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387.

36 See eg the Australian decision of *Commercial Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447, that takes, however, a somewhat broader approach than the English position. See also above n 21.

37 And cf Lord Devlin, above n 34 at 46.

38 See [1975] 1 QB 326 at 339.

39 [1985] AC 686.

40 [1985] AC 1000.

41 See [1980] AC 614 at 634.

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what might constitute 'morality' to include any form of extralegal concerns (such as policy factors), then it is at least arguable that the courts in both *Kleinwort Benson* and *The Good Luck* could conceivably have arrived at diametrically opposite conclusions, had the courts considered morality as an integral factor in arriving at their respective decisions.

In the *Kleinwort Benson* case, for example, while the broader expectations of the banking community were ostensibly satisfied,[42] other commentators have pointed to *opposing* policy factors that might have entailed a different decision; these include the fact that there might have been *other* perfectly valid reasons for the defendant parent company to have refused a guarantee in place of a letter of comfort, whilst still intending, nevertheless, to undertake a legal obligation toward the plaintiffs (for example, the fact that guarantees were beyond their corporate powers, or to save face)[43]; in addition, certain commentators point to the fact that under English law at least, since the parent company is not liable for the debts of its subsidiaries, the non-enforceability of letters of comfort might pose problems.[44] It is of interest, too, to note that in the New South Wales decision of *Banque Brussels Lambert SA* v *Australian National Industries Ltd*,[45] Rogers CJ arrived, on the interpretation of very similar wording in a letter of comfort, at an opposite conclusion, finding that the relevant letter was in fact promissory in nature.[46] What is interesting for our present purposes is the fact that Rogers CJ adopted a very broad approach, observing that '[i]t is inimical to the effective administration of justice in commercial disputes that a court should use a finely tuned linguistic fork.'[47] He was also apparently aware that moral considerations *could* form a part of the law, referring to Professor Finn's article in the process[48]; he further referred to the legal position of letters of comfort under French law, which position is apparently premised upon arguments of *fairness*.[49] In so far as *The Good Luck* is concerned, I have suggested elsewhere[50] that the difference in result arrived at between the trial court and the Court of Appeal could be explained by the fact that the trial judge, Hobhouse J, adopted moral (in that case, altruistic) considerations whereas the Court of Appeal, as we have already seen, chose to adopt a rather extreme positivistic stance.

What, then, are the implications of the approach described above? It is submitted that a positivistic approach accompanied by pragmatic commercial considerations will continue to dominate English contract law (and, quite possibly, even commercial law generally). A slight tension will result from the infusion of certain doctrines premised upon fairness, but the outlook for a full development of these doctrines appears bleak in view of the fact that positivistic considerations will result in *ad hoc* limits, some examples of which have been mentioned above. All this is, it is submitted, of real practical significance in the formulation of an approach toward legal argumentation in commercial disputes. For the English jurist, however, the

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42 See above n 15.
43 See Tettenborn, above n 9 at 347. See also per Rogers CJ in the *Banque Brussels* case, below n 45.
44 See Brown, above n 9 at 290; and Prentice, above n 9 at 348–349. The latter writer, however, states (at 349) that '[r]eform in this area, however, belongs to the field of company law and not that of contract.'
45 Unreported (date of judgment, 12 December 1989); briefly noted in [1990] *Butterworths Journal of International Banking and Financial Law* at 172–173. All subsequent references to this case will be to pages in the transcript of the judgment.
46 And on an academic level, cf the critique of the *Kleinwort Benson* case by Brown, above n 9.
47 See transcript at 42.
48 Above n 22: see transcript at 4.
49 See transcript at 34–35.
50 'Implied Terms Revisited' [1990] *Journal of Business Law* 394.

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parameters of legal theory in so far as its bearing upon legal practice is concerned must necessarily (and unfortunately) remain confined to the positivism that has hitherto been the hallmark of English jurisprudence.[51]

Whilst this may reflect the English position, it is submitted that this need not necessarily be the case. To recapitulate, moral arguments (premised on fairness) are not unknown to English law; and even in the specific sphere of letters of comfort, a broader approach may possibly be adopted.[52] There are, of course, inherent difficulties in adopting such an approach. Brennan J himself, in an extra-judicial speech that has already been referred to, pointed to two dangers as follows[53]:

> the danger that a judge might mistake his or her own moral predilections for the moral imperatives which, by broad consensus, enjoy recognition and acceptance; and
> the danger that orderly legal development will be imperilled by the piecemeal dismantling of old principles without substitution of a new coherent body of doctrine.

It is conceded that the difficulties just mentioned are, and ought to be, genuine concerns. It must not, however, be forgotten that there *are* other conceptions and theories of law that in fact acknowledge the problems of subjectivity and actively embrace them, eg American Realism[54] and, more recently (and, arguably, more radically),[55] the Critical Legal Studies movement.[56] Given the rather entrenched view of legal positivism in the English legal world, however, it appears unlikely that something so deeply ingrained in the psyche of academics,[57] lawyers and judges will be easily replaced by an alternative conception of law and legal practice. Indeed, both *Kleinwort Benson* and *The Good Luck* bear ample testimony to this fact. Further, the concern with subjectivity and uncertainty is not an entirely unfounded one. The concept of the Rule of Law is based upon an at least reasonable conception of neutrality, albeit not in as holistic a fashion as jurists like Dworkin would have us believe.[58] It certainly appears, too, that English judges do not perceive, as appropriate to their enterprise, the articulation of jurisprudential approaches. Arguably, the only real jurisprudential concern that has an inextricable connection with the world of legal practice is the 'law-morality debate.' Be that as it may, it appears clear that the English bench have come down firmly on the side of the positivist camp. A corollary of this is that other conceptions or theories of law are, by their very nature and mode of discourse, unlikely to be seriously considered by the English bench.[59] The following observations by Lord Goff in his Maccabaean Lecture in Jurisprudence delivered in 1983 are, in this context, particularly apposite[60]:

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51 See above n 3 and n 4, and the accompanying main text.

52 eg the *Banque Brussels* case, above n 45. And in so far as the implication of contractual terms is concerned, see above n 50, and the accompanying main text.

53 Above n 24 at 101–102.

54 See generally William Twining, *Karl Llewellyn and the Realist Movement* (1973); Edward A. Purcell Jr, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973) especially chs 5 and 9; and Laura Kalman, *Legal Realism at Yale, 1927–1960* (1986).

55 All this is, of course, relative, and should be viewed in its historical context (see generally n 54 above and the literature cited therein).

56 For a good general overview, see Mark Kelman, *A Guide to Critical Legal Studies* (1987).

57 Though I hasten to add not all; this is especially the case where academics are concerned.

58 See generally Ronald Dworkin's works as follows: *Taking Rights Seriously* (1977); *A Matter of Principle* (1985); and *Law's Empire* (1986).

59 Although I argue to the contrary below.

60 See 'The Search for Principle' in *Proceedings of the British Academy* (1983) vol LXIX, 169 at 182–185 (emphasis added).

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> The basic truth is simply this; that we are each of us, judge and jurist, conditioned by the work which we are called upon to perform. Judges have to decide particular cases . . . we are using *facts* to develop principles. . . . Jurists, on the other hand, do not share the fragmented approach of the judges. They adopt *a much broader* approach, concerned not so much with the decision of a particular case, but rather with the place of each decision in the law as a whole. *They do not share our intense view of the particular; they have rather a diffused view of the general. . . . Certainly, the prime influence upon jurists is not so much facts as ideas: and just as fragmentation presents a danger for practising lawyers . . . so jurists are subject to danger from preconceived ideas* . . . their broader view of the law is not only creative, but immensely influential . . .

He goes on, however, to add[61]:

> the dominant power should, I believe, be that of the *judge*. This is not because the judge is likely to be a better lawyer than the jurist; far from it. It is because it is important that the dominant element in the development of the law *should be professional reaction to individual fact-situations, rather than theoretical development of legal principles. Pragmatism must be the watchword.* . . . Life is a far more fertile creator of legal problems than the most ingenious draftsman of moots, and theories are not necessarily drawn sufficiently widely or accurately to accommodate all these unforeseen and unforeseeable contingencies . . . *Judges are not generally philosophers, they are not generally jurisprudents. The majority of them do not interest themselves in current schools of philosophical thought, linguistic or otherwise* . . .

In conclusion, first, while what Lord Goff says is true, it would be a shame if judges thought that they should not contribute to an express articulation (on occasion at least) of the jurisprudential premises that are, or ought to be, followed by the courts. Indeed, I would venture to state that it is *impossible* for any judge *not* to have some underlying judicial philosophy. Despite what Fish contends,[62] it is submitted that theory can and does exist in everyday legal life. To be sure, the discourse of jurists is quite different. To persist, however, in *deliberately* confining jurisprudential analyses to the realm of abstract theory by a process of 'isolation' is, it is respectfully submitted, an error that does little credit to the understanding as well as the development of the law as a whole. Extra-judicial observations of a theoretical cast are not, in fact, wholly unusual — witness, for example, the remarks by Lord Goff, as well as numerous other speeches by eminent judges.[63] It is suggested that more light can be shed on the theoretical underpinnings of the judicial process via such speeches if express statements to like effect in judgments are felt to be too radical.

Second, what *is* clear is that the English courts do take a rather positivistic stance toward the law. The pronouncements in the various recent cases considered in this comment bear ample testimony to that fact.

Third, while the positivistic bent of the English courts is clear, this does not, in fact, preclude the possibility that other theories might be at work within the English judicial process. Ascertaining what these theories might be would, of course, be a rather more speculative exercise which would probably run foul of the criticisms levelled against jurists generally, as mentioned by Lord Goff above. It is, however, submitted that the possibility of the operation of alternative theories, even within the English system, is not entirely chimerical; as mentioned earlier, the 'law-morality' debate is, by its very nature, one that lends itself better to description in the judgments

61 *ibid* at 185–186 (emphasis added).
62 See above n 2.
63 See eg Lord Devlin, above n 34; Lord Reid, 'The Law and the Reasonable Man,' *Proceedings of the British Academy* (1968) vol LIV, 193; Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22; and Lord Mackay of Clashfern, 'Can Judges Change the Law?' *Proceedings of the British Academy* (1987) vol LXXIII, 285.

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themselves, and its express consideration by the courts is thus facilitated. There might thus be other theories that *better* describe what is, and what ought to be, taking place.

Fourth, the discussion in the instant comment does provide some (albeit only tentative) evidence that there *is* a *practical* difference between positivism on the one hand and natural law on the other.[64] Further, this result (if correct) would also buttress the submission in the preceding paragraph.

Finally, it ought to be remembered that countries differ in many respects, especially from the historical and socio-legal points of view. Positivism is not a theory that is writ in stone, even where the legal system of the country concerned has emerged from the English legal heritage. Judicial attitudes must reflect the ethos and mores of the country concerned. The extreme positivism in the English law of contract as described and analysed in the present comment has merely underscored the need to look beyond fixed and conventional boundaries.

Privacy or Publicity? The Enduring Confusion Surrounding the American Tort of Invasion of Privacy

David Bedingfield*

The creation in Great Britain of a legally recognised right to 'privacy' is apparently supported by everyone not currently employed by the tabloids, at least according to the debate engendered in this journal by the curious case of *Kaye* v *Robertson*.[1] Professor Basil Markesinis argues that the only obstacle to enacting a comprehensive right to privacy is the press itself, which is forcing a cowardly Parliament to stay its hand.[2] Peter Prescott QC, on the other hand, believes that at least where the press has intruded onto private property, remedies already exist that would allow judges to enter injunctions enforcing a right to privacy.[3] Mr Prescott would supplement these remedies by creating a special High Court branch to deal with prior restraint cases, and would also create four further causes of action that he believes would supplement existing law in such a way as to prevent the worst journalistic invasions of privacy.[4]

64 See Deryck Beyleveld and Roger Brownsword, 'The Practical Difference Between Natural-Law Theory and Legal Positivism' (1985) 5 *Oxford Journal of Legal Studies* 1, 26–27 and 30.

*Barrister of Gray's Inn, having previously practised law in Atlanta, Georgia.

1 [1991] FSR 62.

2 'Our Patchy Law of Privacy — Time to do Something About It' [1990] 53 MLR 802.

3 '*Kaye* v *Robertson* — A Reply' [1991] 54 MLR 451.

4 The four actions would be: (1) harassment, mainly by the obsessional freelance photographer who makes it his business to follow celebrities; (2) voyeurism, exemplified by the shooting of bedroom scenes with telephoto lenses; (3) commercial advertising, or the use of a person's name or likeness for the purpose of promoting a commercial product; and (4) quasi-trespass, which would allow a licensee a cause of action where enjoyment of that licence is interfered with. Mr Prescott would allow a defence only for stories revealing that the subject is guilty of a crime for which the sentence may be imprisonment. A broader defence of 'newsworthiness,' in Mr Prescott's view, would not be available. So, for example, an investigative report that shows inhumane treatment of inmates at a prison, where no actual crime was involved, would be actionable (and subject to injunction) if the information had been obtained by stealth, or by trespass on the prison grounds, or by telephoto lens cameras that were trained on the prison windows.

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