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Specific performance: Exploring the roots of 'settled practice'

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to industry and civil rights groups than direct governmental censorship.[42] This approach has also attracted support in the United States in the wake of *Reno*. A proposal currently before Congress would, if adopted, require Internet service providers to make the software that permits parents to control Internet access available at no cost to the consumer.[43] The Clinton Administration has encouraged the development of a system for 'rating' Internet sites (for example, by indicating whether they contain profanity, sexual content, or violent imagery) and allowing users to choose whether they want to have access to sites given certain ratings. The First Amendment bars only government action that suppresses speech; it does not affect the power of private individuals to act in ways that might inhibit freedom of expression.[44] A system of self-regulation, provided it does not involve an element of governmental coercion, might well survive a First Amendment challenge.[45]

Ultimately, policymakers must balance the advantages and harms that result from communication over computer-based systems like the Internet. This will require a fresh assessment of the meaning of the principle of freedom of expression, its costs and benefits, and its centrality to the political cultures in which policymakers find themselves. In this regard, the approach taken by the United States Supreme Court in *Reno*, however uncompromising it may seem, will be the starting point of analysis.

Specific Performance — Exploring the Roots of 'Settled Practice'

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The recent House of Lords decision in *Co-operative Insurance Society Ltd* v *Argyll Stores (Holdings) Ltd*[1] is destined to become a landmark in the law relating to specific performance. At first blush, however, it might have been thought that it was the Court of Appeal decision[2] that merited this description instead, the court

42 See European Commission's Communication, n 40 above, at 12. The Commission has also contemplated more direct governmental involvement in the control of illegal and harmful content on the Internet. In a recent Green Paper, the Commission has proposed a Directive designed to improve cooperation and enhance the exchange of information between Member States and the Commission regarding regulatory issues concerning the Internet. See Commission of the European Communities, *Green Paper on the Protection of Minors and Human Dignity in Audiovisual and Information Services: Green Paper from the Commission to the European Council*, COM(96) 483 Final (1996). The Commission has also encouraged greater police, judicial and industry cooperation in combating the use of the Internet to further criminal activities, and in devising 'some common penal standards' in connection with harmful content appearing on the Internet. See European Commission's Communication, n 40 above, at 10–11.

43 Family-Friendly Internet Access Bill, HR 1180 (introduced 20 March 1997).

44 *Hudgens* v *NLRB*, 242 US 507, 513 (1976).

45 In dicta, the Supreme Court noted in *Reno* that 'requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes' might be a less restrictive means for achieving the government's end of protecting children from indecent expression. 1997 US LEXIS 4037, at 61. This leaves open the possibility that such a requirement might be upheld if challenged under the First Amendment.

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1 [1997] 2 WLR 898.

2 See [1996] Ch 286. Indeed, this particular case has been described, in a leading text, as a 'radical and controversial decision': see Gareth Jones & William Goodhart, *Specific Performance* (London: Butterworths, 2nd ed, 1996) 51.

there having granted (albeit by a majority[3]) specific performance compelling the defendant to carry on a business in the context of a long-term lease. The House, however, reversed this decision, reiterating and reinforcing the 'settled practice'[4] to the effect that orders requiring a contracting party to run a business would not generally be made.[5] At one level, the significance of *Argyll* lies in the meticulous care with which Lord Hoffmann (who delivered the sole substantive judgment with which the other Law Lords agreed) examined the rationale undergirding the 'settled practice'. *Argyll* also raises issues as to the interrelationships amongst the factors that shape the discretion as to whether or not to grant specific performance. At another level, the case stands out as one of the rare occasions when jurisprudential concepts are openly canvassed and applied in a practical context, thereby emphasising the neglected importance of the conceptual underpinnings of the law.[6]

The facts and decision

The defendant tenant entered into a 35 year lease with the plaintiff landlord for the largest shop in a shopping centre. The defendant in fact owned a chain of supermarkets, of which the premises concerned housed one (this particular supermarket being the anchor tenant in a shopping centre comprising approximately 25 shops). Because of fierce competition, however, the defendant decided to close down its loss-making or less profitable supermarkets. The supermarket on the demised premises was in fact a loss-making one and the defendant decided to close it, giving the plaintiff only about a month's notice to that effect; the lease itself had another 19 years to run. Such a course of action was, however, in clear breach of a covenant in the tenancy agreement which enjoined the defendant '[t]o keep the demised premises open for retail trade during the usual hours of business in the locality and the display windows properly dressed in a suitable manner in keeping with a good class parade of shops'. The plaintiff then attempted to persuade the defendant to continue trading until a suitable assignee had been located in return for a temporary rent concession. The defendant furnished no response[7] and, instead, stripped the shop and closed it as originally scheduled. The plaintiff then commenced the present action claiming specific performance of the covenant just mentioned as well as damages.[8] It should be noted that the lease was in fact ultimately assigned with the plaintiff's consent, so that the specific significance of the appeal before the House was about costs. The broader significance of the decision, however, is obvious.

The House of Lords held in favour of the defendant and, as already mentioned, reversed the Court of Appeal's decision to grant the plaintiff specific performance of the said covenant.

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3 Millett LJ dissenting.

4 n 1 above, 902.

5 And see *Attorney-General* v *Colchester Corporation* [1955] 2 QB 207, 217, *per* Lord Goddard CJ — the very first authority cited by the House in the instant case.

6 See eg M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 6th ed, 1994) 2.

7 Principally, so it appears, because its representative was himself retrenched: see n 1 above, 902.

8 Supplemented by an injunction; on the (similar) relationship between specific performance and mandatory injunction, cf *Dowty Boulton Paul Ltd* v *Wolverhampton Corporation* [1971] 1 WLR 204, 212, *per* Sir John Pennycuick V-C as well as the Law Commission's Report, *Landlord and Tenant: Responsibility for State and Condition of Property* (Law Com No 238, 1996) at para 9.15. See also generally Jones & Goodhart, n 2 above, 311–317.

Constant supervision and other factors

The 'settled practice'

According to Lord Hoffmann, the 'settled practice', that the court will not grant orders compelling a particular party to carry on business, 'has never, so far as I know, been examined by this House',[9] and it was thus 'open to [the plaintiff] to say that [the practice] rests upon inadequate grounds *or* that it has been too inflexibly applied'.[10] This general approach is to be commended as a valuable counterweight to the tendency to treat the longevity of precedents as decisive of the parties' rights.[11] Lord Hoffmann also pointed out that while specific performance is traditionally regarded as an exceptional remedy under English law, the reverse was the case with respect to civil law systems.[12] However, he then proceeded to observe that '[i]n practice' there was a less substantive difference; the relevant principles applicable in the English context were 'reasonably well settled and depend upon a number of considerations, mostly of a practical nature, which are of very general application' and whilst he had 'made no investigation of civilian systems', he would 'a priori ... expect that judges [in these systems] take much the same matters into account in deciding whether specific performance would be inappropriate in a particular case'.[13] This emphasis on comparative law is to be welcomed,[14] and it is perhaps not inappropriate to observe that Lord Goff (although he did not sit on this appeal) emphasised the increasing importance of comparative law in an extrajudicial lecture a decade ago.[15]

Turning to the main reasons traditionally prayed in aid of the 'settled practice', Lord Hoffmann began by pointing out that this practice was 'not entirely dependent upon damages being an adequate remedy'.[16] He focused, instead, on the element of *constant supervision by the court*, a concept so well-entrenched as part of textbook law, that it is seldom analysed and, instead, is often repeated almost as a ritual incantation. What constant supervision did *not* mean, Lord Hoffmann remarked, was literal supervision by the court itself. However, the party enjoined to perform would be liable for contempt if it persisted in disobeying the court order.[17] But, as

9 n 1 above, 902.

10 *ibid* (emphasis added).

11 Witness, for example, the primary reason for the House of Lords in *Foakes* v *Beer* (1884) 9 App Cas 605 not overruling *Pinnel's Case* (1602) 5 Co Rep 117a, 77 ER 237 in the context of the insufficiency of consideration in respect of a promise to accept part payment in full settlement of a money debt. See now also *Re Selectmove* [1995] 1 WLR 474. But cf Lord Goff, n 15 below, 84–85.

12 See n 1 above, 902–903. See also Jones & Goodhart, n 2 above, 2.

13 See n 1 above, 903.

14 It is significant, perhaps, that Lord Hoffmann as well as Lord Steyn (who did not sit on the instant appeal) were both originally from South Africa (see Ellison Kahn, 'Two South African Law Lords' (1995) 112 SALJ 312), whose legal system is a combination of civil law as well as common law; and see, in this lastmentioned regard, Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross — Civil Law and Common Law in South Africa* (Oxford: Clarendon Press, 1996). Reference may also be made to Lord Steyn's landmark judgment on common mistake in *Associated Japanese Bank (International) Ltd* v *Credit du Nord* [1989] 1 WLR 255 esp at 265 and 268–269.

15 See Lord Goff, 'Judge, Jurist and Legislature' [1987] *Denning LJ* 79, 92–94.

16 n 1 above, 903, and citing Sir John Pennycuick V-C in *Dowty Boulton Paul Ltd* v *Wolverhampton Corporation* [1971] 1 WLR 204, 211 and 212.

17 n 1 above, 903 and citing Megarry J in *CH Giles & Co Ltd* v *Morris* [1972] 1 WLR 307, 318. See also *The South Wales Railway Company* v *Wythes* (1854) 1 K & J 186 at 201, 69 ER 422, 429, *per* Wood V-C; affd (1854) 5 De G M & G 880; 43 ER 1112; *Blackett* v *Bates* (1865) LR 1 Ch App 117, 124, *per* Lord Cranworth LC as well as the Law Commission's Report, above, n 8 at para 9.27. Reference may also be made to *Retail Parks Investments Ltd* v *Royal Bank of Scotland Plc* [1996] SCLR 652 (Court of Session, Inner House).

Lord Hoffmann quite pertinently pointed out, this 'does not really meet the point'.[18] The crux of the problem lay, rather, in the fact that the court might have to give 'an indefinite series' of rulings to enforce the said order whenever there was a breach and a consequent application by the party aggrieved and it was this 'which has been regarded as undesirable'.[19] That was not, however, the end of the matter, for his Lordship then proceeded to elaborate upon the *reasons* why the possibility of such repeated rulings was undesirable. And it was at this point that the issue of contempt (mentioned earlier) finally became directly relevant: as 'the only means available to the court to enforce its order',[20] punishment for contempt, was nevertheless 'a powerful weapon: so powerful, in fact, as often to be unsuitable as an instrument for adjudicating upon the disputes which may arise over whether a business is being run in accordance with the terms of the court's order'.[21] The consequences were dire and undesirable: quite apart from damaging the defendant's commercial reputation, it would literally coerce that party to run its business in a certain manner when it had in fact decided that it was not in its economic interest to run the business at all; in addition, enforcement (particularly in the context of repeated applications over a period of time) was 'likely to be expensive in terms of cost to the parties *and* the resources of the judicial system'.[22] The focus, interestingly, was not only on the individual freedom of the party but also on the more utilitarian consideration of non-wastage of resources as well.[23]

There were, however, obstacles to the 'settled practice': principally in the form of a rather formidable number of relatively recent precedents that appeared to suggest that the rubric of constant supervision should either be severely limited or even done away with altogether. In, arguably, the most influential of these precedents, the focus lay not so much in the basic *ratio decidendi* of the case itself, but, rather, in the (more specific) observation by Lord Wilberforce in *Shiloh Spinners Ltd* v *Harding* [24] to the effect that '[w]here it is necessary, and, in my opinion, right, to move away from some 19th century authorities, is to reject as a reason against granting relief, the impossibility for the courts to supervise the doing of work'.[25] Indeed, this observation has been repeatedly cited, most notably, by Sir Robert Megarry V-C, who took it as having done away with the rationale of constant supervision altogether.[26] Subsequent opinions (although sympathetic towards this tack and thus advocating flexibility) were nevertheless more tentative,[27] not least because of the equally formidable array of authorities that endorsed the concept of constant supervision instead.[28] Indeed, in the

18 n 1 above, 903.
19 *ibid.*
20 *ibid.*
21 *ibid* 904.
22 See generally *ibid* (emphasis added). But it should be noted that committal for contempt is by no means the only remedy: see n 45 below.
23 Although insofar as the latter was concerned, individual costs were also mentioned. See also the discussion in the last substantive part of this comment.
24 [1973] AC 691.
25 *ibid* 724.
26 See *CH Giles & Co Ltd* v *Morris* [1972] 1 WLR 307, 318 and *Tito* v *Waddell (No 2)* [1977] Ch 106, 322. Reference may also be to *Posner* v *Scott-Lewis* [1987] Ch 25, 35–36, *per* Mervyn Davies J.
27 See eg *Gravesham Borough Council* v *British Railways Board* [1978] Ch 379, 404–405, *per* Slade J and *Braddon Towers Ltd* v *International Stores Ltd* [1987] 1 EGLR 209, 212–214, also *per* Slade J (this case was decided in 1979 but was only reported in 1987).
28 See eg *The South Wales Railway Company* v *Wythes* (1854) 1 K & J 186, 60 ER 422, affd (on other grounds) (1854) 5 De G M & G 880, 43 ER 1112; *Blackett* v *Bates* (1865) LR 1 Ch App 117; *Powell Duffryn Steam Coal Company* v *Taff Vale Railway Company* (1874) LR 9 Ch App 331; *Ryan* v *Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116; *Attorney-General* v *Colchester Corporation* [1955] 2 QB 207; and *Dowty Boulton Paul Ltd* v *Wolverhampton Corporation* [1971] 1 WLR 204.

present case, Lord Hoffmann was clearly of the view that the observation by Lord Wilberforce in the *Shiloh Spinners* case did not impact adversely on the requirement of constant supervision; he was of the view that, read in context, Lord Wilberforce's observation was directed more towards the situation of relief against forfeiture (which was precisely what the *Shiloh Spinners* case was in fact about) than against orders for specific performance.[29] It is suggested that the approach adopted by Lord Hoffmann is clearly supported by not only a close reading of Lord Wilberforce's judgment but also by cogent academic commentary to like effect.[30]

What, then, about cases where specific performance *was* in fact granted, despite the 'settled practice' of not granting specific performance entailing constant superintendence of the court? A case oft-cited in this regard is the Court of Appeal decision of *Mayor, Aldermen, and Burgesses of Wolverhampton* v *Emmons*[31] which involved a building contract. A close perusal of the case, however, will reveal that the focus of the court was, in the main,[32] on another factor, *viz*, the need for definiteness in the terms of the contract.[33] And it has been argued that the case itself should be interpreted as a clear repudiation of the constant supervision requirement.[34] Yet another case (also frequently cited) concerns a more recent decision: that of Sir John Pennycuick V-C in *Jeune* v *Queens Cross Properties Ltd*,[35] where specific performance was granted in respect of a landlord's covenant to repair. Interestingly, both cases were distinguished by Lord Hoffmann, who classified both, despite their seemingly divergent subject-matter, as instances involving orders requiring the defendants concerned 'to achieve a result', as opposed to orders requiring the defendants 'to carry on activities', including 'running a business over a more or less extended period of time' (which was in fact the situation in the present case).[36] In his Lordship's view, '[t]he possibility of repeated applications for rulings on compliance with the order which arises in the [latter] case does not exist to anything like the same extent in the [former]';[37] he proceeded to add that '[e]ven if the achievement of a result is a complicated matter which will take some time, the court, if called upon to rule, only has to examine the finished work and say whether it complies with the order'.[38] It is submitted that while the distinction is persuasive, there is the danger of infinite regress, for even in an ostensibly one-off situation, say, that of repairs, it is still possible for the court to be subjected to repeated applications if the defendant is extremely recalcitrant; in point of fact, every situation necessarily involves a process of sorts, although it is admitted that the conduct of a business is a far clearer example and constitutes a situation where the danger of repeated applications to the court is even more probable.

It is also pertinent to note that Lord Hoffmann was much influenced by the broad practical considerations embodied within the observations of Slade J in *Braddon*

29 See generally n 1 above, 905–906.
30 See A.S. Burrows, 'Specific Performance at the Crossroads' (1984) 4 LS 102, 110 and, by the same author, *Remedies for Torts and Breach of Contract* (London: Butterworths, 2nd ed, 1994) 357. See also Jones & Goodhart, n 2 above, 50, n 5.
31 [1901] 1 QB 515. See also *Carpenters Estates Limited* v *Davies* [1940] Ch 160.
32 In addition to the factor as to whether or not damages would be an adequate remedy.
33 See also *Joseph* v *National Magazine Co Ltd* [1959] Ch 14; *Redland Bricks Ltd* v *Morris* [1970] AC 652; and *Peninsular Maritime Ltd* v *Padseal Ltd* (1981) 259 EG 860.
34 See Burrows, n 30 above, 108 and 355, respectively.
35 [1974] Ch 97; cf also *Peninsular Maritime Ltd* v *Padseal Ltd* (1981) 259 EG 860.
36 See [1997] 2 WLR 898 at 904. Reference may also be made to Burrows, 'Specific Performance at the Crossroads', n 30 above, 107.
37 n 1 above, 904.
38 *ibid.*

Towers Ltd v *International Stores Ltd*[39] to the effect that lawyers had for many years advised their clients to act according to the 'settled practice'.[40] It has, in fact, been argued that the Court of Appeal decision granting specific performance had 'disturbing' implications for the business community, not least because of the point just mentioned, but also because of the difficulty of finding potential assignees that is thereby generated.[41]

Notwithstanding Lord Hoffmann's persuasive reasoning, it is suggested that, whilst committal for contempt is the only effective sanction available to the court to secure enforcement of its order, instances of disobedience are likely to be the exception rather than the rule;[42] in other words, punishment for contempt is a double-edged sword, and may indeed prove to be the deterrent against disobedience as well as incentive to performance that it was intended to be. What if the party concerned were nevertheless recalcitrant? It has been argued that 'the prospects of repetition, although an important consideration, ought not to be allowed to negative a right'.[43] And this raises the related issue of having to balance the applicant's right to performance against the harsh punishment that will be inflicted upon the defendant. It should also be noted that where a company is concerned (as in the instant case), committal for contempt cannot be directed at the company as such but can, at best, be only directed at the officers of the company.[44] But this point would not of course apply in situations where individuals were committed for contempt.

One further point may be made, and addresses the issue of wastage of resources: as Professor Treitel argues, it may be possible for the court to appoint an expert as its officer in order to supervise performance of a recalcitrant defendant or, alternatively, the court could empower the applicant to appoint a person to act as agent of the defendant who then supervises the latter in ensuring enforcement of the order.[45]

In the light of the arguments militating against the 'settled practice', it is suggested that it might be better for the courts to allow for the possibility of decreeing specific performance even if it involves a continuous process (such as the running of a business) as opposed to the obtaining of a fixed result. In any event, it is submitted that the concept of constant supervision ought not to be a conclusive factor in the decision of the court as to whether or not to grant specific performance.[46] Consistent with this suggestion, it is also highly significant to note that Lord Hoffmann himself was prepared to allow the courts to depart from the 'settled practice' in 'exceptional circumstances';[47] thus:

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39 [1987] 1 EGLR 209, 213.

40 See n 1 above, 902 and 907.

41 See generally Jones & Goodhart, n 2 above, 53–54.

42 See *CH Giles & Co Ltd* v *Morris* [1972] 1 WLR 307, 318, *per* Megarry J. See also G.H. Treitel, *The Law of Contract* (London: Sweet & Maxwell, 9th ed, 1995) 930; Burrows, 'Specific Performance at the Crossroads', n 30 above, 110; and Alan Schwartz, 'The Case for Specific Performance' (1979) 89 Yale LJ 271, 304.

43 See *CH Giles & Co Ltd* v *Morris* [1972] 1 WLR 307, 318, *per* Megarry J.

44 And see *Retail Investments Ltd* v *Royal Bank of Scotland plc* [1996] SCLR 652, 665 (Court of Session, Inner House).

45 See Treitel, n 42 above, 930–931, as well as Schwartz, n 42 above, 293–294; Jones & Goodhart, n 2 above, 46; and Robert J Sharpe, 'Specific Relief for Contract Breach' in Barry J. Reiter & John Swan (eds) *Studies in Contract Law* (Toronto: Butterworths & Co (Canada) Ltd, 1980) ch 5. See also Burrows, *Remedies for Torts and Breach of Contract*, n 30 above, 358, n 15 where RSC Ord 45 r 8 is also pertinently referred to (see also *Parker* v *Camden London Borough Council* [1986] Ch 162, 175 and 178, *per* Sir John Donaldson MR and Browne-Wilkinson LJ, respectively); reference may also be made to Burrows, 'Specific Performance at the Crossroads', n 30 above, 110.

46 See also Treitel, n 42 above, 931.

47 n 1 above, 907.

> I can envisage cases of gross breach of personal faith, or attempts to use the threat of non-performance as blackmail, in which the needs of justice will override all the considerations which support the settled practice.[48]

More generally, this raises the question whether the entire approach toward specific performance ought to be radically reconceived and this remedy become the rule rather than the exception. If this be the case, then, of course, the various limitations on specific performance (such as constant supervision) diminish greatly (or even wholly) in importance. There is, of course, no clear answer to what has become an interesting debate,[49] although it is suggested that it is unlikely (under English law at least) that such a radical change will occur. Less radically, a suggestion that a strong (albeit rebuttable) presumption in favour of awarding *damages* on a *cost-of-restoration* basis be considered instead may merit serious attention.[50] But, once again, this particular measure of damages may not find much favour in the English context, particularly after the recent House of Lords decision in *Ruxley Electronics and Construction Ltd* v *Forsyth*.[51]

Linkages

Argyll also prompts questions as to what possible linkages there might be amongst the various general factors traditionally utilised to ascertain whether or not specific performance ought, on balance, to be granted.[52] Whilst adequacy of damages as a factor was mentioned, the focus of Lord Hoffmann's judgment was upon the factor pertaining to constant supervision by the court. Indeed, his Lordship clearly indicated that these two factors were separate and distinct.[53]

Lord Hoffmann not only referred to the requirement of constant supervision by the court but also to the need for the presence of yet another factor, *viz*, the definite nature of the terms of the contract itself (and, hence, clarity and precision of the court's order).[54] Indeed, it should be noted that Lord Hoffmann also decided that the obligation in the instant case was, in any event, too imprecise to be enforced.[55] On a related note, the literal language as well as tenor of the judgment suggest that both these last-mentioned factors (ie, constant supervision of the court and definiteness in the contractual terms) are separate and independent — a suggestion that finds support not only in the discussion in the textbooks but also in case-law as

48 *ibid* 909.

49 cf eg Schwartz, n 42 above, on the one hand, with Anthony T. Kronman, 'Specific Performance' (1978) 45 U Chicago L Rev 351 and (especially) Edward Yorio, 'In Defense of Money Damages for Breach of Contract' (1982) 82 Columbia L Rev 1365, on the other (indeed, it may be apposite to point to some affinity between some of the argumentation in the lastmentioned article and the reasoning of the House in *Argyll*: see Yorio, esp at 1404). Reference may also be made to Sharpe, n 45 above.

It is interesting to note that, in Scotland, specific performance (ie specific implement) is available as a *legal* right, a situation quite different from that which exists under English law: see *Retail Parks Investments Ltd* v *Royal Bank of Scotland plc* [1996] SCLR 652, 669, *per* Lord Cullen (Court of Session, Inner House).

50 See generally Yorio, n 49 above, 1402–1404.

51 [1994] 1 WLR 650; and see Andrew Phang, 'Subjectivity, Objectivity and Policy — Contractual Damages in the House of Lords' [1996] JBL 362 and Jill Poole, 'Damages for Breach of Contract — Compensation and "Personal Preferences": *Ruxley Electronics and Construction Ltd* v *Forsyth*' (1996) 59 MLR 272.

52 See generally Jones & Goodhart, n 2 above, ch 2 for a succinct, yet highly informative, general account.

53 See the main text accompanying n 18, above.

54 See n 1 above, 904–905. See also n 33 above.

55 n 1 above, 907.

well.[56] It is, however, suggested that there is a necessary (even significant) overlap between these two factors, for if there is insufficient precision (and therefore inadequate guidance to the defendant), can it not be argued that it would be equally (and simultaneously) difficult for the court itself to supervise the execution of the order, even assuming that there were no other objections?

Throughout Lord Hoffmann's judgment is also to be found constant reference to the idea of fairness. In reviewing the requirement of clarity, for example, his Lordship referred to the possible oppression to the defendant that might result if it were coerced into complying with imprecise obligations under the threat of committal for contempt in the event of disobedience.[57] He was also of the view that to grant specific performance might cause injustice by possibly allowing the plaintiff to enrich himself at the defendant's expense.[58] It should, however, be noted that Lord Hoffmann was more concerned, in the final analysis, with the 'public interest':[59] a point to which we will return in the next part. One is, in fact, given the overall impression that there are various *conceptions* of fairness. His Lordship did, for example, *also* acknowledge that the defendant's conduct in the present case was less than desirable: a fact that weighed heavily with the judges at the Court of Appeal stage.[60] Lord Hoffmann, however, was of the view that although the court would brook no egregious conduct,[61] the parties in the present case were 'large sophisticated commercial organisations' who must have been aware of the 'settled practice':[62] 'there was no element of personal breach of faith'.[63] But this argument may be a double-edged sword, for could it not be equally argued that *not* to grant specific performance would result in unfairness to the applicant instead?[64] As we have seen, Lord Hoffmann solved this problem by holding that the parties were of roughly equal bargaining power and sophistication.

Returning to the issue of linkages, it is suggested that this reference to unfairness does in fact raise the issue of *hardship*,[65] which is traditionally considered as a separate and independent factor. It could of course be argued that the sense in which 'hardship' is presently being utilised is much looser. This argument is indeed persuasive, except for the fact that the meaning of 'hardship' as a *separate* factor is in fact precisely as just described; there is, in other words, no precise meaning attributable to the concept, with the entire inquiry being one which is very much fact-dependent and (in, I suspect, mostly subconscious ways) dependent

56 See eg *Greenhill* v *Isle of Wight (Newport Junction) Railway Company* (1871) 23 LT 885, 887, *per* Malins V-C. And cf *The South Wales Railway Company* v *Wythes* (1854) 1 K & J 186, 69 ER 429, which was decided on the factor of constant supervision, but was affirmed on appeal on the ground that the contractual terms were too vague (see (1854) 5 De G M & G 880, 43 ER 1112).

57 n 1 above, 905.

58 *ibid* 906. See also Sharpe, n 45 above, 129, which was in fact cited by Lord Hoffmann in the instant case: see *ibid.*

59 Which was not served by wasting resources and maintaining an already hostile relationship: see n 1 above, 906.

60 *ibid* 908; and citing Leggatt, Millett and Roch LJJ's views in [1996] Ch 286 at 295, 301 and 295, respectively.

61 See also n 48 above. See also generally Charles Fried, *Contract As Promise* (Cambridge: Harvard University Press, 1981) ch 2.

62 n 1 above, 909. He was also of the view that in the light of the defendant's perception of the 'settled practice', its stripping of the store was not as unreasonable as would appear at first blush: see *ibid.*

63 *ibid.*

64 See eg *Greene* v *West Cheshire Railway Company* (1871) LR 13 Eq 44, 50–51, *per* Sir James Bacon V-C. See also *per* Fuller CJ in the US Supreme Court decision of *Union Pacific Railway Company* v *Chicago, Rock Island and Pacific Railway Company* 163 US 564 (1896) at 600.

65 See also Jones & Goodhart, n 2 above, 5 and I.C.F. Spry, *The Principles of Equitable Remedies* (Australia: The Law Book Company Limited, 4th ed, 1990) 102.

upon the particular court's jurisprudential outlook as well.[66] If this argument is accepted, then it is admittedly, but a short step to claim that the factor of 'hardship' would somehow infuse the discussion of virtually every other factor in the context of specific performance.[67] And this may, in turn, lead to the question as to whether or not it is really meaningful to classify the concept of 'hardship' under a separate heading, apart from (say) pedagogical reasons. It is tentatively suggested that the factor of 'hardship' is traditionally classified separately in large part because it constitutes an avenue by which the court can introduce an element of compassion into the inquiry itself: an element that is not otherwise easily introduced.[68]

The importance and practicality of jurisprudence

It bears repeating that it is but very rarely that a court decision not only raises but also affords explicitly the opportunity to discuss jurisprudential concepts. *Argyll* it is suggested, is one such occasion, for which teachers who try to inculcate in their students the value (yes, even practical value) of theory should be most grateful.[69] I should, however, hasten to add that no definitive answers are given as such, but in highlighting, *inter alia*, the significance that theoretical concepts play in the *process* of judicial reasoning, *Argyll* does much to encourage jurisprudential debate.

More specifically, *Argyll* is an excellent illustration of the continuing tension between individual rights on the one hand and utilitarian considerations on the other.[70] This is a theoretically intractable conundrum and may well be so because each concept was developed at a separate and distinct historical point in time and may ultimately represent, on a theoretical level, incommensurable and irreconcilable concepts.[71] But the reality of law in general and the common law in particular does not allow the judge the luxury of sitting on the fence. He or she deals with real life situations, for which a decision *must* be given, and which decision will necessarily impact on the lives of the litigants concerned. *Argyll* is an excellent illustration of the *process* of balancing as the court attempts to reconcile the tension mentioned above, and it manages, it is suggested, to do so by recourse to the *specific factual matrix* before it. This may, perhaps, explain why Lord Goff, for example, is at pains to point to the importance of *facts* in the context of actual adjudication[72] and this case appears to lend support to the thesis (stated tentatively here) to the effect that the *practical denouement* of an *intractable abstract* dilemma may well be why, despite the continuous doubts expressed about the absence of objectivity,[73] adjudication continues without any anxiety or loss of

66 See also generally the discussion in the next part.

67 See also eg Spry, n 65 above, 89–90 and Burrows, *Remedies for Torts and Breach of Contract*, n 30 above, 371.

68 See Andrew Phang, 'Positivism in the English Law of Contract' (1992) 55 MLR 102; cf also *Braddon Towers Ltd* v *International Stores Ltd* [1987] 1 EGLR 209, 212, *per* Slade J who expressed great reluctance at having to follow the 'settled practice'. But cf Lord Steyn, 'Does Legal Formalism Hold Sway in England?' (1996) 49 CLP 43.

69 cf Andrew Phang, 'Legal Theory in the Law School Curriculum — Myth, Reality, and the Singapore Context' (1991) 6 Connecticut J Int Law 345.

70 See also John Adams & Roger Brownsword, *Understanding Law* (London: Fontana Press, 1992) esp at 36–40.

71 And see generally Alasdair MacIntyre, *After Virtue* (Indiana: Notre Dame Press, revised ed, 1984).

72 See generally Lord Goff, 'The Search for Principle' (1983) 69 *Proceedings of the British Academy* 169, 182–186.

73 In particular, by the Critical Legal Scholars.

legitimacy; in this sense, Lord Goff's own views[74] seem to be somewhat more pessimistic than they ought to be inasmuch as they do not conceive of the judges as philosophers as such. It is of course true that it is the jurist who aids in synthesising the law laid down by the judges, but it is suggested that judges do perform a *philosophical function* in the practical arena, albeit as Lord Goff himself puts it, according to 'the principle of gradualism'.[75]

In *Argyll*, it can be seen that Lord Hoffmann is all too aware of the theoretical conundrums — in particular, the conflict between individual rights and utilitarianism, as well as the conflict between individual rights themselves (here, belonging to the plaintiff and defendant, respectively). On the one hand, he acknowledges the moral argument that supports the plaintiff's application for specific performance, stating that '[t]he principles of equity have always had a strong ethical content and nothing which I say is intended to diminish the influence of moral values in their application'.[76] In addition, there were general arguments from fairness that arose in the course of the case itself.[77] On the other hand, Lord Hoffmann had earlier considered the rights of the defendant, in particular, possible unfair interference with its individual liberty via proceedings for contempt.[78] And this illustrates that rights do not exist in a vacuum and that in any given situation, there will almost always be a conflict between two parties' rights. Which, then, is to prevail? If the answer is that it is all subjective, then the argument from rights is greatly diminished, even emasculated.[79] Given Lord Hoffmann's references to wastage, however, can one argue that, although finding (in the final analysis) in favour of the defendant, he had, in effect, adopted a utilitarian approach?[80] If this be the case, then the defendant's rights would appear to have been generalised as well as merged into a broader utilitarian argument; and, given the final outcome of the case, it would appear, further, that it was this broader argument that prevailed, and the plaintiff's rights ignored as a result. One other interpretation, however, is that this *remained* a situation of conflicting individual rights, albeit settled via consequential arguments.[81] But this approach also falls prey to many of the traditional arguments levelled against utilitarianism, for example, incommensurability and the dreaded argument of subjectivity. A *yet further* approach brings us back to the very tentative thesis proffered above, ie, that a *factual* approach may aid in the solution of abstract conundrums. By its very nature, however, no clear theoretical *formula* is available. In the present case, for example, Lord Hoffmann was not unaware of the moral arguments in favour of the plaintiff.[82] However — and as we have seen — in the light of the *specific factual context* of the case itself (principally, the fact that *both* parties were 'large sophisticated commercial organisations' who could well look after themselves[83]),

74 See Lord Goff, n 72 above, 185–186.
75 See generally Lord Goff, n 15 above. And on the issue of academic contributions, see Peter Birks, 'Adjudication and Interpretation in the Common Law: a Century of Change' (1994) 14 LS 156.
76 n 1 above, 909.
77 See generally the main text accompanying nn 57–68, above.
78 See generally the main text accompanying nn 17–23, above. See also Jones & Goodhart, n 2 above, 5.
79 And see generally in this regard, Roberto Mangabeira Unger, *Knowledge and Politics* (New York: The Free Press, 1975) esp at ch 3.
80 See generally the main text accompanying nn 24–25 and 59, above, as well as the judgment of Millett LJ in the Court of Appeal ([1996] Ch 286, 304–305). Reference may also be made to Burrows, n 30 above, 107 and 358, respectively.
81 See Roger Brownsword, 'Ethics and Legal Education: Ticks, Crosses, and Question-Marks' (1987) 50 MLR 529 esp at 531.
82 See the main text accompanying nn 48 and 76, above.
83 See the main text accompanying nn 61–63, above.

his Lordship decided in favour of the defendant; in other words, given the fact that the *plaintiff's rights* were *neutralised*, so to speak, in the context of the factual matrix in which the dispute occurred, there was no reason why the broader societal reason centring on the prevention of wastage ought not to prevail. This is consistent with Lord Goff's 'principle of gradualism', which (as he terms it) is an 'essentially pragmatic approach', in which the injunction is to '[l]et facts develop principles: do not let principles, still less rules, be so dogmatically stated as to preclude a just decision on the facts'; and this, in his view, means that judges ought not to be over-ambitious and over-state the law.[84]

It is suggested that Lord Hoffmann's recognition of the one set of tensions in *Argyll* (between individual rights and utilitarian goals) is in fact mirrored in and (in many ways) unpacked in an extrajudicial context in his Upjohn Lecture[85] — in particular, in his discussion of the reasonable man in the context of the law of negligence. He distinguishes the tension (not unlike that discussed above) between the attribution of responsibility on the basis of moral fault and the award of compensation by way of distribution of loss, the latter of which is 'a matter of social justice which does *not* require any *moral fault* at all'.[86] And this gives rise to an 'ambiguity in the objects of the law'.[87] Lord Hoffmann does not purport 'to debate the merits of these two different approaches to liability in negligence',[88] which is thoroughly understandable in the light of the proposition proffered above to the effect that no (at least universal) solution to the tension is possible. The problem, in his view, however, is that 'the courts have never brought themselves to admit to the tension' and this has resulted in a blurring of the lines between the two objects.[89] He then makes a very important point, as follows:

> I happen to believe that judges should always give the real reasons for their decisions. ... But I think it does the legal profession no good to wrap its reasoning in mystery and it would be better if we came clean.[90]

And, true to his advice, Lord Hoffmann does indeed clearly set out, in *Argyll*, the precise reasons for his decision. There was, in the instant case, however, a further set of tensions — between the parties' respective rights — that was, it has been suggested, handled via a *factual* resolution.[91]

Conclusion

Argyll will become a landmark in the law relating to specific performance. Lord Hoffmann's meticulous and perceptive judgment has not only brought to the fore but has also illuminated many (oftimes latent) issues underlying the law in this

84 See generally Lord Goff, n 15 above, 87.
85 See Lord Hoffmann, 'Anthropomorphic Justice: The Reasonable Man and His Friends' (1995) 29 *Law Teacher* 127.
86 See Lord Hoffmann, *ibid* 130 (emphasis added). See also Ross Parsons, 'Negligence, Contributory Negligence and the Man Who Does Not Ride the Bus to Clapham' (1957) 1 Melbourne Univ L Rev 163 which is, in fact, cited by Lord Hoffmann himself.
87 See Lord Hoffmann, n 85 above, 131.
88 *ibid* 134.
89 *ibid.*
90 *ibid.*
91 In an earlier piece, Lord Hoffmann appeared to endorse the views of Ronald Dworkin, but such endorsement must, it is suggested, be at least modified in the light of his latest views: see Book Review, (1989) 105 LQR 140 esp at 142–144.

particular sphere. His is also a judgment that very clearly demonstrates the judicial process in *theoretical* action.

On a strictly doctrinal level, it is clear that the concept of constant supervision continues to constitute a major obstacle to the grant of specific performance in the context of continuous acts (such as the running of a business). Its contours as well as underlying foundations have nevertheless been thoroughly explored, clarified and even reshaped, but, consistent with the pragmatic cast of adjudication, the door has been left slightly ajar — to be firmly pushed open should the need arise.[92] It is ironic (yet clearly praiseworthy) that such pragmatism recognises that, on occasion, moral criteria (by and large feared as 'messy'[93]) will both inform and infuse the judicial process in order that justice might prevail.

Sale or Return Contracts: Shedding a Little Light

John N. Adams*

There is very little authority on 'sale or return' transactions. The Court of Appeal decision in *Atari Corporation* v *Electronics Boutique Stores (UK) Ltd*[1] is welcome as it shines a little light into this dark corner. It deals with the question of what a 'buyer' who decides to 'reject' the goods must do in order to exercise its right of 'rejection'. I have argued elsewhere[2] that sales on approval should be distinguished from sale or return transactions. Briefly, the difference is that 'sales on approval' are *in fact* sales subject to a right of rescission,[3] whereas 'sale or return' transactions are not at the outset sales: they only become contracts of sale in the circumstance set out in section 18 rule 4 of the Sale of Goods Act 1979.[4] Sale or return transactions are primarily a method of financing inventory.[5] They are akin to requirements contracts in that in both cases the supplier carries the cost of unsold goods, but differ from requirements contracts in that any contract of sale is preceded by a contract of bailment under which the property in the goods can pass to the 'buyer' or a third party in certain circumstances. The analysis by the Court of Appeal in *Atari* was concerned with what those circumstances are.

The facts

The plaintiffs in this case had been awarded summary judgment for the price of some electronic computer games and hardware delivered to the defendants pursuant to orders received from the defendants. The terms of the first and largest order provided: 'Payment — 30 November 1995. Full S.O.R. until 31 Jan 1996'.

92 See the main text accompanying nn 47–48, above.
93 And see n 68 above.

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1 [1998] 1 All ER 1010.
2 J.N. Adams (ed.) *Essays for Clive Schmitthoff* (Abingdon, Oxon: Professional Books, 1983) p 1.
3 See *Head* v *Tattersall* (1871) 7 Ex 7.
4 Set out below.
5 See Uniform Commercial Code Art 2-326.