

ESSEX STUDENT LAW REVIEW

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DEAR READER,

WE WELCOME YOU TO THE SECOND ISSUE OF THE ESSEX STUDENT LAW REVIEW! THE ESLR IS THE LEADING PLATFORM FOR ESSEX STUDENTS TO DEBATE LAW, POLICY AND CURRENT AFFAIRS. DESPITE THE DIFFICULTIES CAUSED BY THE COVID-19 PANDEMIC, THE ESLR HAS WORKED TIRELESSLY BEHIND THE SCENES TO PRODUCE THE SECOND ISSUE FOR ESSEX STUDENTS.

AS OF 2021, THE REVIEW HAS SUCCESSFULLY INTEGRATED INTO THE ESSEX LAW SOCIETY AND WILL CONTINUE TO PROVIDE STUDENTS AT ESSEX WITH UP-TO-DATE, HIGH-QUALITY ARTICLES AND CASE SUMMARIES THAT ARE BOTH APPEALING AND ENGAGING.

THE ESLR IS SERVED BY A VERY COMPETENT AND BRIGHT EDITORIAL BOARD ALONG WITH SUPPORT FROM THE ESSEX LAW DEPARTMENT. THE 2020/21 BOARD HAS HELPED SHAPE THE SECOND ISSUE AND THE REVIEW'S FUTURE GOALS AND OBJECTIVES.

YUSUF PANAH, THE ESLR'S FOUNDER AND EDITOR-IN-CHIEF WILL BE GRADUATING THIS YEAR AND THEREFORE WILL BE LEAVING THE REVIEW. WE ARE PROUD TO ANNOUNCE THAT THE ESLR WILL BE LED BY OUR COMPANY LAW EDITOR, UNA HAZNADAR. THE REVIEW IS CONFIDENT THAT UNA WILL ACCELERATE THE REVIEW INTO ESTABLISHING ITSELF AS THE LEADING PLATFORM FOR LEGAL DEBATE AND DISCUSSION AT THE UNIVERSITY OF ESSEX.

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ESLR WOULD LIKE TO THANK THE FOLLOWING PEOPLE FOR THEIR CONTRIBUTION AND ASSISTANCE:

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ESLR



PARENT COMPANY LIABILITY: NEED FOR REFORM?

BY UNA HAZNADAR
EDITOR

The UK is home to some of the largest multinational corporations in the world, some of which operate through an integrated network of subsidiary companies. They are, through their global activities, often involved in human rights and environmental abuses.

Important developments have taken place over the last 25 years in this specific area of law, however, it is still clear that further reform must be established to ensure clarification.

WHY SHOULD PARENT COMPANIES BE HELD RESPONSIBLE?

There are a number of reasons why it becomes necessary for victims to be able to sue parent companies for violations committed by their subsidiaries. For example, a subsidiary may lack financial resources to compensate all victims adequately.

In some other instances, the legal system of the country where the subsidiary is incorporated may not provide victims with a basis to hold the said company accountable. Alternatively, the victims may not understand complex corporate structures or may not see any real distinction between the parent company and its subsidiaries in view of intertwined decision-making processes.

PROTECTION FOR PARENT COMPANIES

The two corporate/company law principles, which parent companies have invariably been relying on when dealing with such allegations, are those of 'separate legal personality' and 'limited liability.'

The principle of 'separate legal personality' means that a company is an artificial legal person separate from its shareholders, directors and executives. The result of this is that parent

companies are generally not liable for the conduct of their subsidiaries.

The principle of 'limited liability' limits the liability of a shareholder for the corporate conduct to the extent of its investment in the given company.

CLASSIC VEIL EXCEPTIONS

As it stands now, in order to find a parent company liable for the conduct of its subsidiaries, the court must pierce the corporate veil. Courts have faced this with reluctance. They have however clarified some exceptions where the corporate veil will be pierced. The classic veil exceptions include, among others, façade/sham/fraud and the Single Economic Unit (SEU) argument.

When a subsidiary company is created as a sham, the courts will pierce the corporate veil. As Lord Keith said in *Woolfsen v Strathclyde Regional Council* (HL) (1978): "It is appropriate to pierce the corporate veil only where special circumstances exist, indicating it is a mere façade concealing the true facts."

The SEU argument however has been less accepted by courts ever since its rejection in *Adams v Cape Industries plc* [1990] Ch 433. In that case, Slade LJ stated: "Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which normally attach to separate legal entities."

THE LAW AS IT STANDS NOW

The UK legal system has incorporated two concepts when dealing with parent company liability; a duty of care and due diligence.

Firstly, the duty of care has been constructed as a direct obligation that a parent company owes towards a stakeholder. It exists irrespective of the liability of the subsidiary, although to prove a breach of a parent company's duty of care, litigators may have to demonstrate the responsibility of its subsidiary.

Secondly, a duty of care owed by a parent company towards a stakeholder entails a due diligence obligation by the parent company to oversee the activities of the corporate group in order to prevent all torts that could potentially damage such a stakeholder (the due diligence arises as a consequence of duty of care).

As the law stands now, in a landmark decision in 2017, *Lungowe v Vedanta Resources* the Court of Appeal ruled that a number of claimants could pursue a claim against a Zambian mining company and its English parent in the English courts. In this case, the residents of the Zambian city of Chingola brought proceedings against Vedanta Resources plc, the UK-incorporated parent company, and Konkola Copper Mines (KCM), its Zambian subsidiary. They brought claims for personal injury, damage to property and loss of income caused by water pollution from waste discharged from the Nchanga copper mine, which was owned and operated by KCM.

The claimants successfully argued that Vedanta owed them a duty of care because it exercised substantial control over KCM. LJ Simmons applied the usual test for the existence of a duty of care:

- a) was the damage complained of foreseeable;
 - b) was there a relationship of sufficient proximity between the parent company and the subsidiary; and
 - c) were the circumstances such that it is fair, just and reasonable to impose a duty of care on the parent company for the acts of the subsidiary.
-

DLJ Simmons stated that a duty may be owed by a parent company to the employee of a subsidiary, or a party directly affected by the operations of that subsidiary in two circumstances:

- a) where the parent company has direct responsibility for devising a material health and safety policy, the adequacy of which is subject of the claim; or
- b) the parent company 'controls' the operations which gave rise to the claim.

The judge also endorsed guidance from the decision in *Chandler v Cape*, which described circumstances in which the three-part negligence test referred to above may be satisfied:

- a) the business of the two are in a relevant respect the same;
- b) the parent company had or ought to have had superior or specialist knowledge compared to the subsidiary;
- c) the parent company had knowledge of the subsidiary's systems of work;
- d) the parent company knew or ought to have foreseen that the subsidiary was relying on it to use that superior knowledge to protect the claimants.

This case set precedent for bringing claims for parent company liability from countries of its subsidiaries and the countries where the tort was committed (home countries) to the UK courts. However, even though the claimants were allowed to bring proceedings, their claim failed and they were not compensated for their losses.

CASE EXAMPLES WHERE VICTIMS WERE NOT ALLOWED TO BRING A CLAIM IN THE UK

In 2018 *Okpabi and others v Royal Dutch Shell plc* and another, claimants from Nigeria tried to bring claims against Shell's Nigerian subsidiary

and Shell UK for effects caused by their oil leaks. At the preliminary hearing, the courts held that they were not able to establish the requisite level of proximity.


In *AAA & Others v Unilever (UPLC) and Unilever Tea Kenya Limited (UTKL)* [2018] EWCA Civ 1532. Former employees and residents of a Kenyan tea plantation weren't able to claim for inter-tribal violence on the plantation caused by a close-run general election in Kenya. The court held that no duty of care was owed by either UPLC (the UK parent company) or UTKL (Nigerian subsidiary) as the damage was not foreseeable; nothing remotely comparable had ever occurred on the plantation before.

THE NEED FOR REFORM

Regardless of the case law provisions, the law on parent company liability is still very uncertain. The Parliament must respond by reforming the law to clarify parent companies' responsibilities and liabilities for human rights abuses. Some of the reasons include that victims face insurmountable barriers to justice in their home countries (countries where the torts have occurred and where the subsidiaries are located), information vital to proving the claim is under lock and key with the companies (both parent and subsidiary). The UK government and UK multinational companies have signed up to international standards on responsible business conduct, however, there seems to be a clear trend towards embedding the corporate responsibility to protect human rights into law.

The government and the Law Commission are yet to address the issue, despite the Treasury Select Committee's and the House of Lords Bribery Act Committee's encouragement.

Overall, the issue of parent company liability is still clearly present and it seems that it will remain so until further reform is enforced.



MENS REA: A NECESSITY IN ITS CURRENT FORM OR A HINDRANCE IN ESTABLISHING CRIMINAL LIABILITY?

BY JEROME MATHEW
EDITOR

It may come as a shock for many to comprehend that when a person commits murder, they do not automatically become guilty of murder in the eyes of the law. This is the case for many other major offences too. 'Actus non facit reum nisi mens sit rea,' which translates to 'an act does not make a person guilty of a crime unless their mind is also guilty.'

This is the fundamental phrase in which criminal law is based on, and centres around the meaning that a crime consists of two elements: the commission of a guilty act, known as *actus reus*, and the presence of a guilty mind, known as *mens rea*. Both are required to be present in a case for the Courts to prove criminal liability.

WHY MOTIVE MATTERS

One may ask themselves, why does a person's state of mind matter so much that without the required motive they cannot be held liable for that particular offence? This is true even when the defendant has committed a criminal act or

omission, therefore fulfilling the *actus reus* element of the offence. This question has been asked by many and the assessment of *mens rea* has been in constant debate and rightfully so, as many of us are quick to assume a person's guilt when they have committed or caused a crime.

However, a person's motive or *mens rea* allows the criminal justice system to differentiate between someone who did not intend to commit a crime and someone who intentionally set out to commit a crime. It also helps the courts to distinguish between different levels of criminal conduct. Therefore, giving out different punishments based on the person's intention regarding committing a specific offence.

ASSESSING MENS REA IN MURDER CASES

For example, If D causes the death of V, he has

committed the actus reus of murder. However, whether D will be found guilty of murder or manslaughter for example, will depend on whether he had the mens rea for that offence.

If D killed V with an intention to kill or cause grievous bodily harm (GBH) he is guilty of murder. As murder requires an intention to kill or cause GBH – nothing short of that will constitute liability for murder. This goes to show that different crimes have specific mens rea requirements and what does not constitute as murder, may instead constitute as a manslaughter offence, only if the required mens rea is found. However, if D did not have the mens rea for either murder or manslaughter he cannot be held criminally liable for V's death, even though his act or omission has resulted in V's death. This reflects the impact and importance of the Court's assessment of mens rea and its function in establishing criminal liability.

STRICT LIABILITY OFFENCES

This may lead you to believe that mens rea is a requirement for the establishment of criminal liability in all offences. However, it is interesting to note that certain crimes are defined in a way where there is no need to assess D's state of mind. Some statutory crimes have no mens rea requirements for one or more elements of its corresponding actus reus. These are known as 'strict liability offences,' and these types of offences remain problematic in terms of autonomy, as liability is still possible in the absence of an individual's choice/sufficient state of mind.

These specific offences are those often involving minors and is best illustrated by statutory rape laws which punish the act of having sex with a minor even if the perpetrator honestly believed that the minor was of legal age. These laws often seem harsh, but they are in place for the protection of minors.

Regarding strict liability offences, the presumption of mens rea will not apply where the legislation is explicit about the fact that no mens rea is needed.

This can also prompt oneself to ask; does the existence of strict liability offences insinuate that mens rea is not essential and therefore, is it a necessity before the courts? Or is it a hindrance in establishing criminal liability? This is the question which this article hopes to provide insight on.

SUBJECTIVE v OBJECTIVE

Before evaluating whether the current application of mens rea is essential or a hindrance in proving liability, it is vital to understand the current application of this by the Courts. Currently, the law identifies two distinct approaches to assessing mens rea:

Subjective Test:

Which attempts to find out the defendant's actual state of mind, considering their own characteristics and their perception of the circumstances at the time. For example, regarding recklessness, did they foresee the risk? If the defendant themselves did foresee the risk, then they would be liable.

Objective Test:

In contrast, this is used by Courts which focuses on the external standard that the defendant ought to have met, therefore being potentially liable if they fall below that standard. This standard would be that which was obvious that a reasonable person would have met.

EXAMPLES OF MENS REA

Some examples of mens rea that the Courts need to satisfy are intention and recklessness, which results in a criminal offence. Therefore, analysing these specific examples will allow you to think critically about the importance of mens rea in Courts, and whether it is actually needed.

Intention:

This is the most serious level of fault, demonstrating the greatest culpability and blameworthiness. Intention can be satisfied by the Courts in two different ways; direct intention, regarding D's aim or objective – what is the purpose of D's conduct? In this case, the judge should avoid any elaboration of what is meant by intent.

In contrast, another way in which intention can be satisfied is indirect (oblique) intention. This is where the result is an almost inevitable consequence of D's act, and D recognises this, which the jury believes that this amounts to intention.

Recklessness:

To satisfy a mens rea of recklessness, it must be proven that D foresaw the risk of the particular circumstance or result, and D then unreasonably took that risk. It is also important to remember that recklessness is assessed subjectively.

Mens Rea – Efficient? Or in Need of Reform?

As we now have a thorough understanding on how mens rea is currently assessed in Courts, the question now points to whether satisfying this element is doing more harm than good? How efficient are the Courts in critically analysing a person's state of mind? As it is impossible to know for sure what a person intended. Is the flaw in mens rea that it hinders the criminal justice's mission of giving out fair judgments and punishments corresponding to a person's acts or omissions? Or is it purely focused on implementing justice? These are the issues that we must consider when assessing the necessity of mens rea.

Firstly, regarding the current two approaches to assessing mens rea; the subjective test and the objective test, there have been continued conflict between these approaches. This has inevitably led to inconsistency with regard to the sentencing of the Courts.

It is vital for Courts to provide reliable, consistent and predictable verdicts. So, this raises the question of whether the Courts should consider reforming these two approaches to provide more consistency. It is important to also remember the advantages and disadvantages of both approaches and perhaps the ideal test will be one that combines both approaches.

However, mens rea can also hinder establishing criminal liability when it comes to its vague terms and definitions. This has led to out of date meanings in law for offences and therefore, made it difficult for Courts to interpret the mens rea requirements for specific offences.

A possible solution that would allow the Courts to establish mens rea elements more consistently and fairly, would be to codify mens rea terms. Perhaps this would allow for a settled vocabulary, settled core definitions and most importantly, creating the clarity of definition necessary in improving the law.

Final Thoughts

Is mens rea, a core component of modern criminal law, given more importance that needed by the Courts? I suppose the answer to these questions depend on one's moral definition and whether a person's state of mind should have that big of an impact on their sentencing, when the crime has already taken place.

The law attempts to provide a distinguishing trait between those that intended to commit a crime, and those that unintentionally committed a crime. The need for mens rea in its current form provides a safeguard to those who have unintentionally committed a crime. It will be interesting to see how the law will proceed from this. Will the Courts reform the entire approach to assessing mens rea, or leave it as it is? Only time will tell.



LAW SAVING THE HUMAN RACE

BY DIMEJI AJISAFE
EDITOR

There is a disproportionate application of law beyond the access one has to quality legal protection, and racial inequality is prevalent in how the law applies to certain groups of people. It is important to develop a contingency plan ready to be put to action whenever those with authority misappropriate resources and their responsibilities to weaken a subsection of people in society. This is done by looking beyond the language of the law in the legal context and instead one must look at the abuse of power conferred upon authorities.

POLICE ABUSE OF POWER

Racial relations have long been at the forefront of public outcry but has appeared most recently after the death of George Floyd in May 2020. Its aftermath sparked international protests to stop police abuse and racial injustices throughout the world and ignited conversations amongst those who abuse of power while upkeeping law. In Europe, the case of Bouyid , which made its way to the European

Court of Human Rights (ECtHR) shows how a vindictive police authority can assert dominance over others. The tension amongst the local Brussels – Capital police district and the Bouyid family started as early as 1999, when one of the Bouyid brothers was accused of intentionally scratching a police car. This escalated to several incidents between the family and the local police which came to a head when on two separate occasions within a few months, two of the brothers were slapped by police members during their intake. This is the basis of the case which was presented to the court. It is important to note that while Bouyid was not racially motivated, this particular type of behaviour calls into question the entire principle of justice, law and order. On each occasion of intrusion leading up to the final trial, there were excuses given to explain the actions of the police officers. The lack of accountability to these acts of denigration and humiliation suffered at the hands of those

tasked with protecting the public is a harsh reality. If those assigned to protect the public instead are the ones that they need to be weary of the most, this leads to a huge problem and has called into questions of substantial police reform.

POLICE PROTECTION WANTED

There needs to be a clear balance in exercising the power conferred upon police authorities in ensuring they perform their job measured against the proportionality of violence used in the line of duty. One needs to be objective and use the amount that is reasonably necessary. This not only reflects on the current system in place but requires a systematic approach in the way that discretion is used in the field. For these practices to amount to beneficial reform, there also needs to be set consequences in place to allow for discipline amongst those who choose to ignore the procedures. Currently, as to not unleash floodgates, there is a high standard before any real consequences are faced by police officers while acting in the line of duty. This is conferred reviewing the statistics of officers arrested for murder between 2005 and 2020 which shows 11 convicted for manslaughter and less than 10 for both involuntary manslaughter and murder with 6 and 5, respectively (2020 Statista). Shalia Dewan from the New York Times also notes that few officers are even charged when causing death from their actions taken during duty and from those that are charged, only a third are convicted. Governments' needs to ensure that there are safeguards, such as the protocols put into place within legislation to allow for the courts to properly enforce regulatory actions whenever necessary. An example would be a similar procedure to judicial review that is specific to assess the actions of members of public authority who are accused of abuse of power. This is a long-term solution for a continuing issue present between police authorities and the public. Looking past the escalating tension fueled by race, one can have a sense that overall public sentiment of

the police has slowly declined. To ensure cooperation whenever necessary from members of the public, there needs to be a continual reflection on society's perception and treatment towards minority communities. For example, the overall reaction that arose from the death of George Floyd, a strong enough conviction to change can amount to substantive impact. As in Bouyid, there should not be a case by which police can abuse those in question by using coercive and violent tactics simply due to personal history. There must be a clear indication of what is tolerated and must be followed as a matter of law. It is not acceptable to interpret the law in the way that fits with illicit actions but are enforced as the law makers intended.

It is of growing importance for police officers to remain impartial in the line of duty and this must be of critical need in the pursuit of justice. If one were to continue to remain hostile in the attempt to seek the truth, there is already an instance of guiltiness that is affirmed in the suspect. It becomes not a matter of 'innocent until proven guilty,' but rather the contrary. A divide that has grown larger is now in play with the key forces that retain the power at the forefront of this power imbalance. The use of law needs to find consistency in how it is applied to not only govern people but also to guide so unwanted actions come with a deterrent. If any illegal behaviour goes unpunished, this will lead to further exploitation that will not fix the system but lead to further corruption. A key feature of "Law and Order" is the fact that all actions have the proper consequences, however, in this area we tend to see a disconnect from holding officers accountable for their actions in the name of 'acting in the line of duty'.

TRAPPED EMPLOYMENT

The law is never objective and can be manipulated from private individuals, who similar to public authorities, may have a level of protection afforded to them due to their status. This is shown perfectly in the case of Okedina

whereby a Malawian national was brought into the UK to work for a family. After Ms. Judith Chikale's six-month visa expired, she was falsely led to believe that it had been extended by her employer Mrs. Ivy Okedina. This led to her working an added 2 years in the country after her visa status made her ineligible to stay. Upon asking for more money and subsequently being dismissed and ejected from the house, Ms. Chikale sought retribution through the courts by which she discovered the deceit from her employer. It was then asserted that the claims brought forth, including request for wages subject to the Minimum Wage Regulations 1999, unpaid holiday, breach of Working Time Regulations 1998, and failure of itemised pay slips were all contractual claims. Mrs. Okedina then argued that due to the Claimant's illegality in the country, the contract was unenforceable. While traditionally this is sufficient to throw the claim, applying the common law principle of illegality, helps protect one whose actions are contrary to public policy, but denying enforceability is still the best response.

The common law principle of illegality is controversial compared with the typical statutory illegality by which Ms. Okedina solely relied upon in the first claim for dismissal. Her defence relies solely on the provisions of the Immigration, Asylum and Nationality Act 2006, sections 15 and 21 respectively. The additional common law requirement, however, was a saving grace for the true victim in this case as it afforded Ms. Chikale liberties that allowed her to explore options offered to those under employment with no knowledge of her true immigration status. There is no denying this is often the opposite case than expected but thankfully her lawyer kept her best interest in mind when resolving the situation. There needs to be a level of protection to all afforded who look to the law as the solution to fix wrongs. This case shows that one can be easily exploited even by those who place a high-level of trust within and may seem to support you with good intentions. There could be a much different outcome if not for the ability to look beyond the provisions and take the peculiar

nature of each case into consideration.

RETRIBUTION IN EMPLOYMENT PROTECTION

At times it can be easy to simply take the word of those who hold a higher position or status within society. Ensuring that due diligence is taken when it comes to employment and immigration status will ensure a smooth transition if there is transparency between the employer and employees. Okedina resulted in the employer's claim being dismissed after fighting the judgment of damages being paid to Ms. Chikale in back-pay along with an additional sum for the fraudulent claims. This shows the development of the law by which those who are even illegally in the country can be justly protected by its law as to not be abused by those willing to abuse it for their own good. In Bouyid, the ECtHR found in favour of the appellants on the grounds brought to the court including violation of art. 3 of the Convention, under both its substantive head and procedural head resulting in damages being paid. This judgment was substantial due to the appellants having to seek a just remedy from courts outside their own country and being given the much-deserved respect duly after the inhumane treatment from the office. These two cases are a demonstration of how the law can be used to undo the human nature that brings unjust causes. The implications of these rulings will be used to help further protect those in the future from abuse of power and will hopefully allow more to seek the courts as a necessary means of retribution.



JUDICIAL INDEPENDENCE - A CORNERSTONE OF THE BRITISH CONSTITUTION

Judicial Independence is an integral part of the British Constitution and has been recognised as such as early as the 18th century. Montesquieu explains the dangers of interfering with the judiciary: judgments can become arbitrary and the Rule of Law will vanish. The Act of Settlement [1700] enacted a dismissal mechanism for judges taking away the Sovereign's ability to remove a judge if a decision did not satisfy them. This is heavily linked with the constitutional principle of the Separation of Powers between the three branches of government (the legislative, the executive and the judiciary) and is also linked with the Rule of Law. For our purpose we will simply refer to the rule of law as defined by Lord Bingham:

"[...] All persons and authorities within the state,

whether public or private, should be bound by and entitled to the benefit of laws publicly prospectively promulgated and publicly administered in the courts."

This means that the rule of law cannot be upheld, if for example the government could not be prosecuted for transgressing the law. Therefore, judicial independence is essential to prevent the legislative or executive branch from interfering in legal decisions and going unpunished. We can conclude that judicial independence is essential for the democratic governance of Britain, the Lord Chancellor has a statutory duty to protect the independence of the judiciary via article 3 of the Constitutional Reform Act. This includes preventing interference by Ministers of the Crown (including himself) with judicial decisions. In recent years, the office of the Lord Chancellor has come under increasing criticism as judges have not felt protected enough from

interferences. A commonly cited example of ministerial interference is the controversy of the sentence given in the 2006 Craig Sweeney case (a sex offender). This led to the Home Secretary of the time, John Reid to express his disagreement publicly. However, Lord Chancellor Falconer acted promptly to explain to the chief of the executive, the Prime Minister at the time, Tony Blair, why Reid's criticism was disrespectful of judicial independence. This is a good example of judicial independence being at the centre of the uncodified British constitution as all members of the state recognise its importance.

The following situation is different and highlights what could happen if judicial independence is not defended properly. On the 4th of November 2016, the headline of the Daily Mail read "Enemies of the People" along photos of three Divisional Court judges. This was in the context of the Miller case where the court was asked whether government needed Parliament's approval to give notice of Brexit to the European Union. This is a case involving the press rather than Ministers interfering with the judiciary. However, we must ask ourselves whether the Lord Chancellor of the time, Liz Truss MP should have intervened in a similar fashion to Lord Falconer, rather than allowing the headline on the basis of freedom of speech. The judges involved in this ruling felt unsafe, as reported by Lord Thomas, due to the incendiary comments made by the press, this could easily be reproduced and amplified in the age of social media. How can we expect good judicial independence if giving out a judgment can cause safety concerns for individual judges? In these conditions would courts be able to be an "independent and impartial tribunal," as the European Convention on Human Rights Article 6 mentions as essential conditions for a fair trial. Other than the judicial independence issue that this headline caused; it also shone light on the debate surrounding "judicial activism".

JUDICIAL ACTIVISM: AN ISSUE OR A PRETEXT FOR REFORM?

In recent years academics and legal experts have criticised and warned Parliament about the increase in judicial power. This could be blamed on the enhanced judicial independence that came from the creation of the Supreme Court. In a 2011 lecture, Lord Sumption questioned what the limit of the judiciary was before it would be considered to have overstepped into the executive and legislative functions. The current conservative government in its manifesto has clearly expressed a wish to reform the judiciary, relaying Lord Sumption's warning about judicial activism through judicial review and other means:

"We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays."

Before declaring that there is a need for broad constitutional reform it is important to evaluate the veracity of the different claims made about judicial review and the increase of judicial power. Judicial activism is when judges frequently express their public policy views through judgments, implying that the judiciary is capable of legislating in a similar fashion to Parliament without having the democratic legitimacy to do so. Now that the United Kingdom has left the European Union, the most influential judgments in the British jurisdiction come from the Supreme Court. If judicial activism were to be omnipresent in Supreme Court decisions, we would often find judgments going against Acts of Parliament, therefore indirectly refusing Parliament's supremacy. If we focus on the field of human rights for example, since its creation in 2011, the Supreme Court has only made three declarations of incompatibility using the Human Rights Act 1998, whereas the House of Lords had made

four in nine years, showing a greater degree of compliance by the Supreme Court.

However, we must consider Ekins' claim that the Supreme Court has given out judgments whose content threatens Parliament's sovereignty. He mentions two judges and especially Lady Hale's judgment in *R (Privacy International) v Investigatory Powers Tribunal* saying that they (as Supreme Court Justices) might refuse to uphold an Act of Parliament that has for objective to limit or prevent judicial review. Defiance from Supreme Court Justices, along with the controversial *Miller* case and the prorogation of Parliament, has meant that different proposals for reform of the judiciary have found support among the current government. This has amounted to initiatives of evaluation of judicial accountability and especially the appointment process to the Supreme Court. It has been reported that the aim would be to "implicitly degrade the authority of the Court by expanding its membership". Another suggestion to increase judicial accountability would be to include Parliamentary review to the process of senior judicial appointments.

It is legitimate to wonder whether these proposed changes would endanger judicial independence by allowing other branches to have too much control over individual senior judges. This would be similar to the tyrannical situation that Montesquieu describes. Although these reforms would prevent unwanted judicial activism, they could result in a situation similar to the despotic concentration of powers Montesquieu describes when the Separation of Powers is not upheld with liberty as its first objective. On the other hand, if we instead consider Carrese's approach to "judicial activism" as a result of a shift of the British constitution towards "common-law constitutionalism" rather than it being an encroaching of the judiciary into Parliamentary matters. Unlike the pejorative term of judicial activism, this understanding directly involves

judges in the evolution of the uncoded constitution in a "subtle" and "gradual" manner in order to maintain "timeless moral precepts".

Overall, judicial independence is central to the good functioning of British constitution, ensuring liberty via fair trials and accountability of other branches. The recent criticism and the suggested reforms of the Supreme Court can either be viewed as a logical consequence of "judicial activism" viewed as a defiance to Parliamentary Sovereignty. However, this rise in "judicial power" can also be seen as a consequence of well executed judicial independence allowing the prosecution of a sometimes overreaching executive and the protection of rights that are inherent and fundamental. This is shown by the increase in delegated authority but also the implications of certain landmark cases like *Miller* where without the Supreme Court's judgment the executive could have been given significant powers over Parliament. Lastly, a closing statement from Montesquieu, who saw judicial independence as essential as it could "moderate partisanship" and "ensure individual security".



The outbreak of the Coronavirus, which as of January 2021 has killed 2,300,000 people worldwide, has exhibited unprecedented challenges to the sports sector. The economic and social unsettlement, caused by the pandemic, has proved to be far-reaching, causing severe disruption within sport governing bodies and the cancellations of events and competitions; the postponement of both the Euro 2020 and Tokyo Olympics and the first cancellation of Wimbledon since World War II.

This disruption has resulted in long-lasting economic damage and the inevitable bankruptcy of many sports organisations and teams.

In an attempt to limit the scope of financial loss, football governing bodies and leagues have attempted to adapt to the pandemic rough accelerated regulations, such as the Premier League's Project Restart, which outlined significant health and safety protocols in order to provide the non-stop live sports

coverage and content that we have grown to expect throughout the pandemic.

This article will take a look at the broader legal issues and challenges COVID-19 has brought on the sports sector – weakness of sports governance, use of force majeure and procedural changes to alternative dispute resolution (ADR).

FORCE MAJEURE

The never-ending list of cancellations of sport events and competitions is a cruel consequence of the global health pandemic. The cancellation of sport events and competitions not only affects more than just those participating but it also impacts suppliers, supplying products and services for the event, the sponsors who have spent significant funds and resources on the event and the distressed fans worldwide.

TV right holders suspending payments due for broadcasting competitions that have been delayed or cancelled is one of many challenges facing event organisers in the sports industry.

Despite the All-England Lawn Tennis Club's (AELTC) decision to cancel Wimbledon, they received an insurance pay-out estimated at around £114m. Since 2003, the organisers of the Grand Slam competition have been covered by pandemic insurance, which significantly reduced their overall loss of income following the COVID-19 pandemic. Others were not so lucky and in search of compensation were left to rely on the existence of a certain contractual clause – Force Majeure.

Force majeure is a common clause hidden away in the boilerplate provisions of many commercial contracts. Force majeure clauses stipulate that an exceptional event or circumstance can excuse a party from fulfilling their contractual obligations to another party.

For a party to rely on the clause, three distinct criteria must be satisfied:

- The event must be beyond the reasonable control of the affected party;
- The force majeure event in question must have prevented the affected party from performing its contractual obligations; and
- The affected party has attempted to mitigate the event.

When deciding whether compensation is due, courts will consider the three components of the force majeure clause. In England, it is up to the parties to decide what constitutes a force majeure event and the remedies or steps they will take if such an event occurs. As a force majeure event is different to a breach of contract, parties are usually excused from their contractual obligations or provided alternative remedies – an extension of time or variation of the contract.

Does COVID-19 classify as a force majeure event? It is certain that the pandemic is unprecedented and can be described as an exceptional event that has the potential to affect a party's contractual obligations beyond their reasonable control. However, the courts will pay particular attention to the other components of the clause to determine whether or not COVID-19 can be relied upon in that particular contract and case. Should the contractual clauses include terms such as pandemic or epidemic, COVID-19 will most likely be covered under such clause.

Whilst not all relevant parties in the sports industry will receive compensation for their significant loss of income throughout the pandemic, it is the hope that there will be an increase in Government support to the sector through financial support measures. As the damage caused by the pandemic flows through all industries and sectors, governments will likely provide targeted assistance to those sports with a significant contribution to the economy.

What is certain is that the pandemic has forced commercial parties to review the wording of their force majeure clauses and protect themselves from further contractual liabilities but what remains the truth is that force majeure will only be applied in exceptional circumstances.

SPORTS GOVERNANCE

The U.K. is one of many countries that have a non-interventionist approach to sports, they believe governance in sport should be an internal matter and that insiders of the sport would be best equipped to make judgments on such matters, rather than the courts.

This approach was highlighted by Lord Denning in *Enderby Town F.C. v F.A.* [1971] who argued that 'justice can often be done in domestic tribunals better by a good layman than by a

bad lawyer’.

Instead, national governing bodies (NGBs) such as the Football Association (FA) regulate their sports, relying on the legal concept of autonomy. This concept provides national governing bodies with the legal capacity for self-governance through the use of voluntary agreements between the body and its participating members (i.e., the FA and football clubs).

Before the pandemic, a study by Dr Geeraert highlighted that sports federations are lacking good governance. She argued that one of the reasons why good governance hasn’t been implemented in the sports sector is because of the conflicting interests and policy solutions between stakeholders. Those who benefit from the “status quo” do not want the much-needed reform.

Inadequate corruption risk assessments and the lack of transparency in the appointment of board members are some of the deficits outlined by her more recent report, Sports Governance 2019. Maybe if FIFA had adequate corruption procedures in place, they might have escaped international embarrassment after several senior Fifa officials were arrested on corruption charges in 2015.

Since the pandemic, many sporting bodies have come to terms with the fact that COVID-19 has exposed the shortcomings of sports governance, particularly in the world of football. These shortcomings present a challenge to the concept of sports autonomy, which might be replaced by the alternative, “supervised autonomy” proposed by Ken Foster.

The shortcomings of sports governance have been exemplified by the demise of Wigan Athletic Football Club. Only after a month of a controversial change in ownership, the club entered into administration as a result of poor finances catalysed by the severe drop in ticket

sales and decrease of foreign investment. What hasn’t helped the club is the current EFL regulatory approach to insolvency. In Insolvency law, one of the ways a company can avoid liquidation is through entering into a legally binding, company voluntary agreement (CVA) with its creditors. This agreement allows for the troubled company to restructure their payment of debts to its creditors and provide it with the necessary breathing space to avoid a collapse.

Under EFL Regulation 12.3, clubs that enter into an “Insolvency Event” will be subjected to a 12-point penalty deduction. By incurring the penalty, clubs who are already close to the relegation zone may be relegated as evidenced by Wigan who plunged into League One. This is particularly damaging for football clubs as their financial survival is highly dependent on their on-field success. For example, Deloitte revealed that promotion to the Premier League would generate an additional £170 million over three seasons for the promoted clubs.

Wigan subsequently lost an appeal against their penalty by the Independent Disciplinary Commission who concluded that the club entered into administration as a result of bad business practice rather than by an unforeseeable event that can be characterised as a ‘Force Majeure’ event.

The traditional autonomous model of sporting bodies and non-interventionist government approach might be one of the reasons why sports governance hasn’t caught up with the various challenges facing the industry. It seems practical given the gravity of the pandemic that adopting a more flexible approach to the rules surrounding insolvency in sports should be considered along with personal guarantees for liabilities to be given by club directors.

French and Burns from Gateley Legal argue that the use of restructuring plans or moratoriums should fall outside the definition of the EFL’s ‘Insolvency Event’ rule – providing clubs with

the necessary breathing space and restructuring tools to provide better governance within the club.

It will be interesting to see whether the shift towards an online-friendly approach will continue after the pandemic.

ALTERNATIVE DISPUTE RESOLUTION

As there is no single authority or body in the UK that automatically has jurisdiction over sporting disputes, the Court of Arbitration for Sport (CAS) - an independent institution created in 1984 - provides for services to facilitate the settlement of sports related disputes through alternative dispute resolution. The CAS resolves a variety of legal and disciplinary disputes (i.e., doping allegations) in the field of sport through arbitration. It does this with enforceable judgements known as 'arbitral awards'.

Alternative Dispute Resolution (ADR) refers to the various methods of resolving disputes between parties that do not involve going to court - a key benefit for involved parties as it is usually a quicker, more private and cost-effective process.

The far-reaching and extensive consequences of the pandemic might be a pertinent factor in the 900 more procedures compared to last year that CAS has dealt with.

To deal with the record number of cases, CAS is one of many institutions that has had to digitalise and revamp ADR during the pandemic. The ADR process had to be reshaped and allow for changes such as electronic filing and online hearings. Last July, CAS released a new Code which presented changes to the CAS Procedural Rules. One of these changes is the introduction of an e-filing platform, which allows parties to avoid serving documents in hard copy.

Ultimately, CAS has adjusted its procedural rules in line with many other institutions that deal with disputes and other legal issues. The changes highlight the long-lasting impact of COVID-19 on ADR procedures in the sports industry.



HAVE THE COURTS MOVED TOO FAR FROM THE OBJECTIVE TEST LAID OUT WITHIN MILROY TO DETERMINE WHETHER AND WHEN A TRUST HAS BEEN FULLY CONSTITUTED?

BY MALIK MIKEL (LLB LAW)
SUBMISSION

It is a deeply-rooted equitable maxim that equity will not perfect an imperfect gift nor come to the assistance of a volunteer. Since the seminal case of *Milroy*, it has been argued that succeeding common law decisions have undermined the cornerstone equitable maxims and 'the courts have moved too far from an objective test'. The author shall explore landmark case judgments and commentary *inter alia* in exploration of this phenomenon.

TRADITIONAL APPROACH

Milroy revealed that a gift is fully constituted if given as an absolute gift, or through a voluntary trust. However, 'to render a voluntary [trust] valid and effectual, the settlor must have done everything, which...was necessary to transfer the property; limited to declaring and truly transferring the property to the trustee or constituting oneself as a trustee of the property. This test was overtly objective and strict, as a trust falling outside the objective test would

not be fully constituted; as exemplified within *Re Fry*. Furthermore, if the first route of intention was ineffective upon examination the court would refuse to give effect by applying alternative modes, preserving the equitable maxim that 'equity will not make perfect an imperfect gift'. Nevertheless, the intransigence was reconsidered within succeeding case law.

INTRODUCTION OF EQUITY'S 'GLOSS'

Rose served to incorporate additional consideration of subjective intention, placing a preliminary 'gloss' on the *Milroy* principle by implementing the 'Re *Rose* Principle' or the 'Every effort rule' (subsequently applied within *Mascall*). *Evershed MR* distinguished *Milroy*, mandating that once the donor had done everything within his power, at that moment, he would hold a constructive trust for the donor. The test partially undermined the former maxim as here, equity would consider the

imperfect gift as complete. Nonetheless, the author deems Rose an early necessary step away from the Milroy requirements. The introduction of a trivial consideration of conscionability through the 'Every effort rule' signifies a positive step of relaxation of the previous test whilst not completely undermining the objective requirement.

THE INTRODUCTION OF UNCONSCIONABILITY

Choithram served to introduce the preliminary idea of unconscionability and expand equity's 'gloss' through the introduction of a third limb; one could declare himself and others as trustees; as the court acknowledged that the donor's conscience would be affected in appliance of either of the Milroy limbs. Through fairness, a new maxim was introduced, 'although equity will not assist a volunteer, it will not strive officiously to defeat a gift'. The third limb expanded the 'gloss' further, incorporating supplementary consideration of subjectivity through consideration of donor conscience, further relaxing the strict rules set in Milroy. The author considers Choithram an expansion of the original test, but one in which the subjective consideration complements rather than undermines the objective test, as the 'gloss' did not offer a 'magic cure', vague statements would not suddenly become binding. Furthermore, the two equitable maxims could exist without conflict. Therefore, the author does not consider this move too far from an objective test.

DRASTIC DEVIATION

The most notable deviation from the objective test was illustrated within Pennington, extending equity's 'gloss' further by affirming Lord Browne-Wilkinson's dictum within Choithram, and formally introducing the 'principle of unconscionability' as a fourth limb; mandating that effective transfer could exist from the moment in which it became 'unconscionable to allow the settlor to resile'.

This decision principally gave equity the power to perfect an imperfect gift, undermining the previous maxim. The author posits Pennington signified a well-defined deviation from the 'gloss' created in Rose, but, a move too far away from the original objective test. Imperfect gifts could be perfected against the former equitable maxim. Previous mandatory requirements were made redundant as the donor was no longer required to 'actually' do everything within their power. Under Pennington, the courts were compelled to fully assess the subjective intention of the donor (contradicting Milroy). Previously, Milroy recognised two modes of identifying effective transfer via trust, Pennington resulted in four, incorporating a plethora of considerations outside objective intention. Whilst this significant deviation could prove beneficial in certain cases by sanctioning the donors' true intended trust, a counter-argument which the author maintains is that Pennington had overstretched the equity's boundaries and was too far of a step in achieving intended trusts. Whilst the previous 'gloss' served to relax the law, Pennington actively worked against Milroy, whilst creating legal ambiguity for the courts and those who intend on creating new trust.

The above-mentioned presents illustrations of court deviation through equity's 'gloss' and its development. However, to further assess the extent to which the courts have moved too far away from the objective test, one must also consider the various exceptions that can perfect imperfect gifts.

CONTINUING INTENTION TO MAKE AN INTER VIVOS GIFT

Where an inter vivos gift is imperfect due to failure by the transferor of the relevant property to the transferee, the imperfect transfer will become perfect upon the death of the transferor provided: there is clear intention to make an inter vivos gift, the subject matter is capable of enduring, there is present intention

to give, the intention continues until death and the intended transferee obtains legal ownership by appointment as executor or personal representative. Creation of an exception to the maxims set in Milroy highlight contradiction. Moreover, the court's heavy reliance on the subjective intention of the donor rather than an objective analysis disputes the principle set by Milroy that effective transfer must be assessed objectively.

assessment. The legal uncertainty created through the divergence accompanied by the violation of longstanding maxims elucidate that the courts have indeed moved too far from an objective test to determine whether and when a trust has been fully constituted.

DONATIO MORTIS CAUSA (DMC)

A donor can evade the Milroy rules requiring deliverance and have their imperfect gift perfected upon death Provided the DMC requirements are fulfilled. In addition, cases such as Re Lillingston, Woodward and Dillion illustrate that depending on the nature of the property actual or constructive deliverance will suffice.

PROPRIETARY ESTOPPEL

The equitable principle of Proprietary estoppel can form the basis of a claim to perfect an imperfect trust, provided there is an assurance and act of reliance on the promise inter alia. The assessment of assurance requires subjective analysis, further evidencing divergence from an objective test.

CONCLUSION

Overall, it is logical to conclude that since the seminal case of Milroy and the establishment of the aforesaid equitable maxims, succeeding case law has exemplified a drastic deviation away from Milroy to the extent that it can no longer be considered a truly objective test. Milroy started with two modes of constitution via trust, both requiring objective assessment. However, succeeding case law has undermined the equitable maxims, expanded the modes of constitution of trust to more than four and demonstrated that equity can indeed perfect an imperfect gift through a wholly subjective



JACQUELINE POTTER AND NEIL POTTER V THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS [2019] KFTT 554 (TC)

UNA HAZNADAR
EDITOR - COMPANY LAW

CASE FACTS

Mr and Mrs Potter were the directors and equal shareholders of Gatebright Ltd ("Gatebright"). The company provided brokering services to customers who wanted to trade in precious metals, as Mr Potter was an introducing broker and a dealer at the London Metal Exchange ("LME"). Due to Mr Potter's ongoing medical issues, the couple decided to voluntarily liquidate their company and apply for an Entrepreneur's Relief ("ER") in the tax year of 2015-2016. Her Majesty's Revenue and Customs ("HMRC") denied their application for an ER, which led to an appeal on the decision.

THE ISSUES

The two issues that the Tribunal Court had to decide on were whether:

- 1) the company had ceased trading before 12 November 2012 – outside the three-year period in condition B in section 169I, Taxation of Chargeable Gains Act 1992 ("TCGA"); or
- 2) the investment of reserves in the bonds meant that the company's activities had become investment activities.

Both those reasons were stated in HMRC's report on reasoning for denial of the application.

JUDGMENT ON FIRST ISSUE

There were no questions of trade pre-2009, which was when the last invoice was issued by Gatebright. However, the company's business drastically declined in 2008 when global financial crisis struck. In order to safeguard the company's reserves, which consisted over £1,000,000, Gatebright bought two six-year investment bonds in the amount of £800,000, which matured in November 2015. The money was distributed via dividends. The rest of the money was retained by Gatebright as working capital, but was ultimately distributed as dividends between 2009 and 2015 as it was not needed.

Business between 2009 and 2015 was drastically lower than in previous years. In 2009, the impact of the financial crisis could be clearly seen as banks withdrew lines of credit and clients weren't confident in taking risks, as little or no credit was available. After the last invoice was issued by the company in March 2009, Mr Potter took ill and was unable to work for four months. When he returned, he sought to pick up the business but the bank that he was working with ended its agreement with Gatebright because it was not giving credit and the clients were not trading. With that, Mr Potter lost his regulatory licence to trade.

As Mr Potter had been in the business for over 30 years, he had many contacts among banks and clients and he got in touch with them in order to start new negotiations and continue to trade. Mr Potter argued in court that even though no invoices were being issued and the continuity of closing deals to generate trading income was not present, he did not, at any point, have the intention to stop trading; he proved that to the court by continuous attempts to stay in touch with the “metal family” (the people he had recently been in business with). Following 2009, Mr Potter dealt with 2 more illnesses and physical injuries which slowed down the business even more, as well as with a burglary and an assault on his son.

This case provided no documentary evidence, as Mr Potter stated that all conversations were carried out over the telephone and not recorded, or discussed at informal meetings over breakfast/lunch. The judge however accepted Mr Potter’s oral submissions as a witness and found that the company was in fact carrying out trading activities at least up to November 2012. The first issue was therefore resolved in favour of the Appellants.

JUDGMENT ON THE SECOND ISSUE

HMRC’s other reasoning was that Gatebright was disqualified from being a trading company because its other activities (those that aren’t trading activities) consisted of more than 20%. The Tribunal Court disagreed and stated that all activities carried out by Gatebright were either for the purpose of starting to carry out a trade or preparing to carry out a trade.

The company did not carry out investment business in the relevant period as the purchase of the bonds was a one-off purchase. Mr Potter argued that it was done in order to safeguard the company’s accumulated profits when no bank seemed like a safe enough place to

deposit money. He also argued that Gatebright had been depositing money and receiving income from it during the entire course of its existence and that there was no intention of changing the company’s nature to an investment company. There were no further investment activities after the investment had been made in 2009.

The court stated that there are factors pointing both ways but ruled in favour of the Appellants, allowing the appeal. He did however recognise that it was a finely balanced case.

IMPACT

The decision given in this case may be helpful for those seeking ER in relation to the disposal of the shares of their company. In addition, it has helped clarify the definition of “trading company” in section 165A (3), TCGA and provided it with a slightly broader meaning.

Lastly, it has great importance because it clarified that a company can be a trading company even if it is not actually making any trading income. A statement was given by Mr Potter, trying to prove this exact point: “If the shop is open, but nobody buys anything, it does not change the business classification.” The judge to some extent agreed with the provided and so do I. There must be a time where it becomes clear that there is a realistic possibility that regardless of all the efforts in the business, the chances of new transactions being made (if they were not executed for a long time) is so low that the business must change its classification (and continue with other activities).



RAJAN RUSSELL V EDWARD CARTWRIGHT, ROBERT SLOSS, TIMOTHY BARLOW [2020] EWHC 41.

UNA HAZNADAR
EDITOR - COMPANY LAW

CASE FACTS

The case concerned 4 individuals who had entered into a joint venture ("JV") in 2011 to buy and develop residential property in the Greater London region. The JV took the form of a UK company of which each individual was a director and in which each of them held 25% of the shares. To regulate the JV's affairs, the individuals entered into a Framework Joint Venture Agreement ("FJVA"). The JV developed two sites and identified a third opportunity up until 2013 when things with one of the directors (Mr Russell – the claimant) started going south and he sought to leave. A settlement was drawn up and pursuant to it, Mr Russell was to retain an interest in the two property-developments that were underway and to receive fees in the future if the developments were successful.

Whilst discussions were going on about the settlement agreement, the JV was involved in negotiations to purchase a fourth development site in Wembley. The Settlement Deed was executed on July 16th 2014 while the purchase of Wembley was finalised just six days later. When Mr Russell found out about the Wembley deal, he issued proceedings against the remaining directors of the JV for failure to disclose that business opportunity to him.

THE ISSUE

The claimant sued on four grounds:

1. Breach of fiduciary duty
2. Breach of express/implied terms of the FJVA (duty of good faith)
3. Fraudulent non-disclosure
4. Unlawful means of conspiracy

The respondents denied all allegations and countersued on grounds that present proceedings brought by Mr Russell constitute a breach of the terms of the Settlement Deed, and that he is accordingly obligated to pay their costs on the indemnity basis.

JUDGMENT

The judge at the High Court disagreed with each of the grounds.

Firstly, the individuals did not owe each other any fiduciary duties. A fiduciary is "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence." This means that they would have had to put their own personal interest aside in order to pursue what was in the interest of another. This however was not the case; the individuals were not partners, and even though

they might have referred to themselves as that, the court held that it was only business terminology. They were shareholders of a company and the nature of their relationship was such that they were entitled to pursue their own interests.

Secondly, express duty of good faith was limited to specific matters; such that were not in favour of the claimant (e.g. "at all times to act in good faith as regards the procurement of business for the JV"). In regards to an implied duty of good faith, the judge said that because the FJVA was such a detailed document, it would not be essential to imply a broader obligation of it. If the parties intended to impose an obligation of good faith they did so, which can be seen through the express terms.

Thirdly, in regards to fraudulent non-disclosure, the claimant was obliged to proceed to completion of the agreement. If he had been induced to enter by fraudulent misrepresentation or non-disclosure, he could seek rescission, but no subsequent misrepresentation or non-disclosure would be relevant.

Lastly, deciding on the matter of conspiracy, the judge held that the defendants were not conspiring against Mr Russell. Any and all information would have been disclosed to him, provided he requested it. No employees were instructed to withhold information from the claimant. As he showed no interest in any such information, the defendants felt no need to disclose it to him.

On the point of dishonesty, the judge had to apply a two stage test; determining the actual state of the individual's knowledge or belief as to the facts and determining whether the individual's conduct was honest by reference to the objective standard of ordinary decent people. She held that the test already fails at the first stage, as there was no awareness of the

duty to disclose to the defendants.

IMPACT

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R (MAUGHAN) V HER MAJESTY'S SENIOR CORONER FOR OXFORDSHIRE [2020] UKSC 46

JEROME MATHEW
EDITOR - CRIMINAL

CASE FACTS

On 11 July 2016, James Maughan, who was a prisoner at HMP Bullingdon, was found hanging in his cell and was pronounced dead shortly after. At the inquest, the Senior Coroner for Oxfordshire conclusively decided that the jury could not safely reach a conclusion of suicide, as the jury could not be sure beyond reasonable doubt that James had intended to kill himself.

The Senior Coroner put questions to the jury and asked them to make a narrative statement of the circumstances of James Maughan's death on a balance of probabilities (applying the civil standard of proof.) The jury answered the questions by reflecting that on a balance of probabilities he intended fatally to hang himself and that increased vigilance would not have prevented his death. Thus, the same conclusion of suicide was effectively reached by different means.

This conclusion was distressing for the deceased's family, who held strong Catholic beliefs regarding suicide. James' brother sought

to challenge the determination of the inquest by way of judicial review. Therefore, he argued that the Senior Coroner incorrectly instructed the jury regarding the applicable standard of proof in suicide, which could only be reached by application of the criminal standard of proof (beyond a reasonable doubt.)

THE LAW

The law has been in debate over which standard of proof is to be applied at an inquest where the death might have been caused by suicide or unlawful killing. The balance of probabilities (the civil standard) or beyond a reasonable doubt (the criminal standard.)

Previously, both the Divisional Court and the Court of Appeal had found that the civil standard of proof should apply to suicide, while the criminal standard should continue to apply to unlawful killing. This was due to a risk of possible criminal charges being brought against an individual. Traditionally, in order to be satisfied that either conclusion should be returned, the criminal standard of proof was required.

THE SUPREME COURT'S DECISION

The Supreme Court came to a highly controversial judgement splitting the court, by a majority of 3 to 2. It was found that the standard of proof for suicide and unlawful killing should be reduced to the lower civil standard of proof.

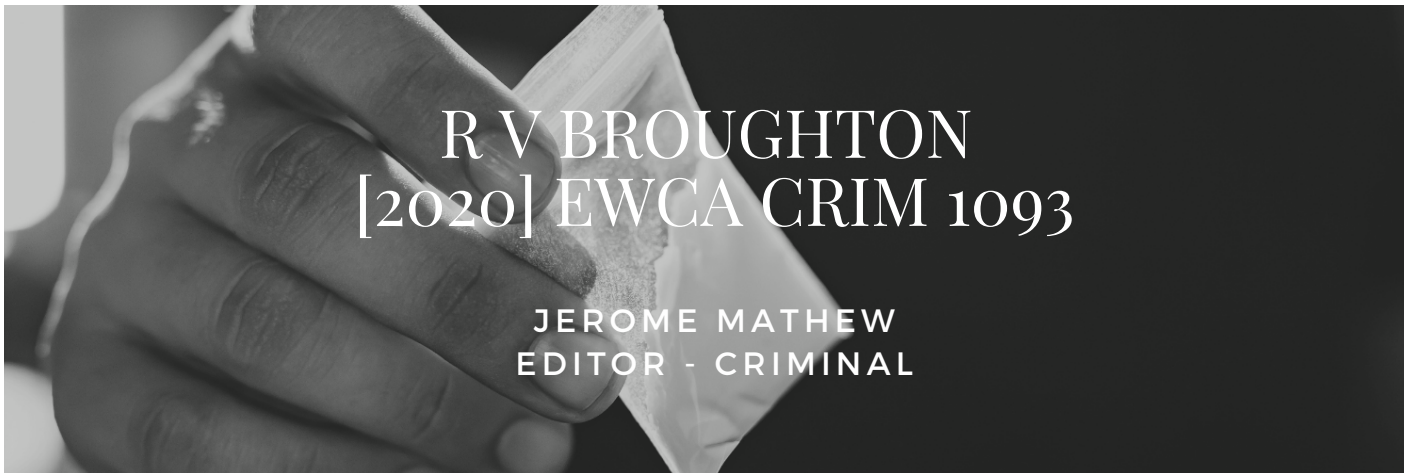
Lady Arden further concluded that the civil stand of proof applied to short form conclusions of suicide. As to apply different standards of proof for short form and narrative conclusions would lead to an internally inconsistent approach to finding facts. The standard of proof for all conclusions at inquests, including those regarding suicide and unlawful killings were to be based on the balance of probabilities.

IMPACT

This controversial decision is bound to have wide reaching implications for deaths in England and Wales for the near future. The Supreme Court's decision on the standard of proof for suicide and unlawful killing verdicts in inquests will undoubtedly lead to consistent and similar outcomes. Within businesses and law firms, regarding suicide, this may lead to a better recognition of mental health concerns, as it is now easier to provide standard of proof regarding suicide.

Additionally, law firms and businesses would want to put certain schemes and operations in place which focuses on mental health, as the long hours associated with a career in law would put a heavy strain on mental health, increasing risks of suicide.

Furthermore, being able to prove unlawful killings in the lower threshold is also likely to lead to a number of practical implications for inquests that involve work-related deaths. Therefore, businesses and law firms would have to be more aware regarding the well-being of their employees, consumers and clients.



CASE FACTS

The defendant (Broughton) supplied Louella, his girlfriend with a controlled Class A drug, namely 2C-P and also “bumped” it up by either increasing the dose or mixing it with ecstasy or ketamine.

Sometime later, Louella experienced a bad reaction to the drugs and the defendant asked someone to get medical assistance. However, the medical staff never reached them in time and as a result, the girl died. The defendant was charged with gross negligence manslaughter, as he owed the girl a duty of care to find help when her condition deteriorated to the point where her life was obviously in danger.

The defendant then appealed on the grounds that the prosecution failed to obtain sufficient evidence from which the jury could conclude that his negligence is what caused the girl's death.

THE LAW

In order to establish a gross negligence

manslaughter conviction, it has to be clear that at the time when the victim's condition was such that there was a serious and obvious risk of death, the defendant was grossly negligent in failing to obtain medical assistance and that such assistance would have saved the victim's life.

This particular case concerned whether the defendant, having owed a duty of care to his girlfriend, breached that duty which in turn lead to her death.

COURT OF APPEAL'S DECISION

The Court of Appeal allowed the defendant's appeal and repealed the conviction. The evidence obtained by the prosecution was not capable of proving causation. As to establish a conviction for gross negligence manslaughter, the prosecution must show that all six elements have been met. For example, (i) the defendant owed an existing duty of care to Louella, (ii) the defendant negligently breached that duty, (iii) at the time of the breach,

there was a serious and obvious risk of death, (iv) It was therefore reasonably foreseeable at the time of the breach which gave rise to a serious and obvious risk of death, (v) that breach caused a significant contribution to the death of the victim and finally, (vi) the circumstances of the breach were exceptionally bad and so reprehensible as to justify gross negligence conviction.

It was further sufficient for the Court to prove that the defendant's act was a significant contributory cause of the death, rather than the sole or principal cause of death. This meant that they must have proved that the victim would have lived but for the defendant's negligence, in the sense that her life would have been significantly prolonged.

Additionally, medical experts submitted that the victim would have had a 90% chance of survival, if administered help at a time when there was a serious and obvious risk of death. Therefore, the Court concluded that there was a realistic possibility that she would not have lived (10%), which meant that the defendant's actions or omissions could not be proved to fulfil the six requirements for gross negligence manslaughter.

IMPACT

In *R v Broughton*, causation could not be established to the criminal standard. The Court failed to consider the fact that a medical expert will never be able to give their opinion in terms of 'beyond reasonable doubt' or 'on the balance of probabilities'.

This particular case allows law firms and businesses to look at the six requirements more carefully and analyse whether their actions constitute gross negligence manslaughter, in which one of their consumers or employees have died as a result of negligence.

Furthermore, businesses are encouraged to closely analyse who they owe a duty of care to and how they can go about without breaching that duty.



R (ON THE APPLICATION OF BRIDGES) V CHIEF CONSTABLE OF SOUTH WALES POLICE [2020] EWCA CIV 1058

DIMEJI AJISAFE
EDITOR - HUMAN RIGHTS

CASE FACTS

This case involved the appellant, Edward Bridges, a civil liberties campaigner and the respondents: South Wales Police Force (SWP) along with the Police and Crime Commissioner for South Wales, Secretary of State of the Home Department and two interveners; the Information Commissioner and the Surveillance Camera Commissioner.

When using technology to identify individuals without warning or permission granted by the proper channels it leads to an invasion of privacy and acts against their rights. AFR involved processing facial recognition technology on a civil liberties campaigner. He appeals against the dismissal of his claim for judicial review surrounding the legality of the use of this technology by the SWP.

It was contested that constant re-evaluation had to be made to ensure the efficiency of the process and that also there was a greater risk of false identifications in the case of women and people in the Black, Asian and other minority ethnic backgrounds (BAME).

THE LAW

The present case challenges two deployment dates in which the appellant was caught on an automated facial recognition (AFR) camera operated by the SWP. It was challenged on the grounds of breach of Article 8 of the Convention; detailing the right to privacy along with breach of Articles 10 and 11 of the Convention; which are freedom of expression and of assembly and association, respectively. Lastly, it breaches data protection law, and a breach of the Public Sector Equality Duty (PSED). Mr. Bridges also contested that the SWP failed to comply with obligations under section 149 of Equality Act 2010 which is the public sector equality duty. This legislation sets forth the requirements to ensure there is no discrimination, harassment or victimization and also advancing equality. The technology used in the AFR Locate did not account for the possibility of higher positive matches for female faces of black and minority background, hence acted contrary to this Act.

THE COURT'S DECISION

The present case challenges two deployment dates in which the appellant was caught on an automated facial recognition (AFR) camera operated by the SWP. It was challenged on the grounds of breach of Article 8 of the Convention; detailing the right to privacy along with breach of Articles 10 and 11 of the Convention; which are freedom of expression and of assembly and association, respectively. Lastly, it breaches data protection law, and a breach of the Public Sector Equality Duty (PSED). Mr. Bridges also contested that the SWP failed to comply with obligations under section 149 of Equality Act 2010 which is the public sector equality duty. This legislation sets forth the requirements to ensure there is no discrimination, harassment or victimization and also advancing equality. The technology used in the AFR Locate did not account for the possibility of higher positive matches for female faces of black and minority background, hence acted contrary to this Act.

FUTURE IMPLICATIONS

This ruling expands beyond human rights and the pursuit of individual justice but also calls into play racial impartiality in surveillance. There needs to be a strict adherence to the data collection policies along with the proper procedure necessary to ensure this process doesn't infringe on rights of others. There needs to be a special attention given to identifying correctly as to not falsely implicate the wrong person due to similar facial features.



CASE FACTS

Due to the financial implications from the coronavirus pandemic and the significant impact it had on the families who could no longer work during the 'lockdown,' there were many benefit schemes launched. Amongst them was Universal Credit (UC), Self - Employed Income Support Scheme (SEISS) AND the Job Retention Scheme (JRS). The claimant focuses on financial effects of those not in secure employment, it particularly affects those in the BAME community and their children at risk with special needs. There is an endeavour to show that these policies unfavorably favours a set group of people who are paid under the PAYE scheme which limits the limb b workers implied to be composed of more ethnic people.

COURT'S DECISION

It was held that the schemes were not prejudice regarding equality and was found to be balanced when it came to delivering respite to both women and minority claimants. The court found that while it may have seemed less

favourable to certain groups of people, it also held advantages as those ethnic self-employed folks, that could use the benefit scheme while still working. They found that the threshold for the scheme to be unlawful was not met and thus the JRS in particular satisfied s 149 of the Employment Act 2010 regarding the equality duty placed on the public sector. There was an implication of not abiding to the regulations stated in the Act, which was found to be unproven. Those who were neglected from the furlough scheme due to prejudice were further protected by their rights to unfair dismissals and were also paid redundancy payments.

FUTURE IMPLICATIONS

This ruling can have a significant impact on the way law firms lay out their financial schemes when it comes to employees during times of emergency. There must be a fair assessment that allows firms to effectively deliver appropriate wages and benefits equally across board. It cannot unreasonably favour one subset of employees over another and there must also be contingency plans set in play.



R (ON THE APPLICATION OF DOLAN) V SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE [2020] EWCA CIV 1605

MARTIN BARRAL
EDITOR - PUBLIC

CASE FACTS

Civil parties came forward in May 2020 and submitted three claims to the administrative court, asking for judicial review of the Coronavirus Regulations that were in place during the first lockdown of March 2020. The first claim was that the Secretary of State enacted the Regulations *ultra vires* (without sufficient legal authority). The claimants then declared that the Regulations were unlawful as they breached basic public law principles. Lastly, they claimed that the Regulations breached the European Convention Human Rights that are guaranteed in domestic law through the Human Rights Act 1998. All claims were refused for judicial review. The claimants appealed, and the Court of Appeal heard them in July 2020.

The Regulations that the appellants asked the Court of Appeal to consider were obsolete, becoming academic questions, as by the time of the appeal the Regulations had been amended 5 times already. Only the first claim was found to be of public interest as an

academic question for the Court to accept it and consider it as judicial review. The Court of Appeal immediately sought to answer whether the Secretary of State for Health and Social Care had the adequate legal authority to impose the lockdown.

THE LAW

On the 26th of March 2020, the British Secretary of State for Health and Social Care imposed a “lockdown” with its conditions set out in the Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350). As the pandemic progressed amendments have been made. Regulation 8 gave the framework for enforcing the lockdown and made unreasonable breaches of the lockdown regulations a criminal offence.

The Secretary of State was able to enact these regulations on the basis of the Public Health (Control of Disease) Act 1984 as amended by Health and Social care Act 2008.

THE DECISION

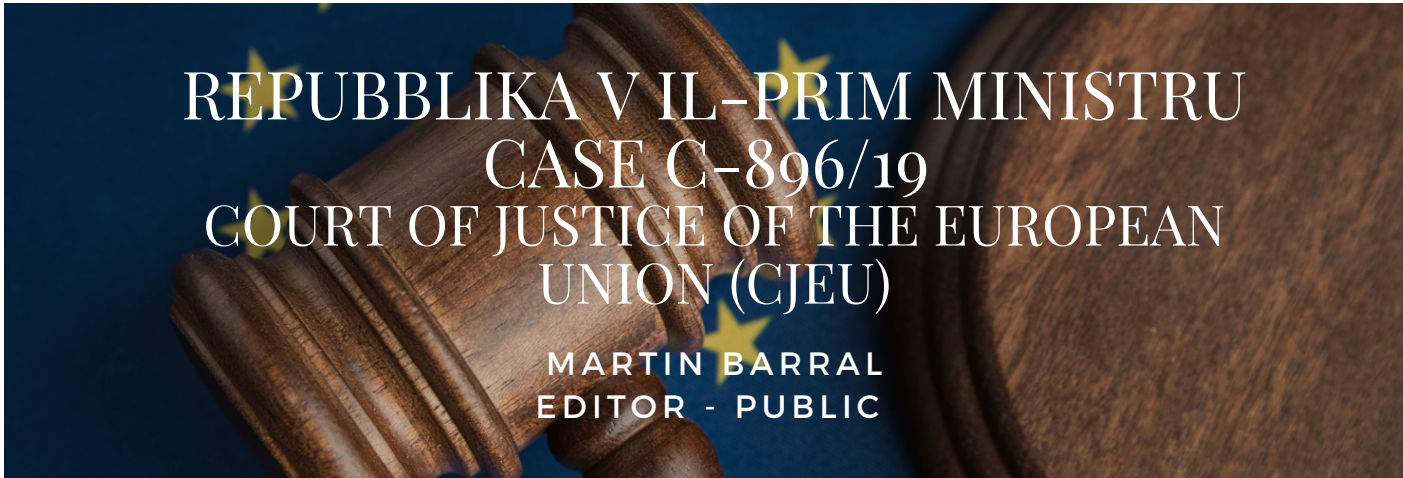
The Court of Appeal found that the lockdown had been put in place with sound legal basis in the Public Health (Control of Disease) Act 1984 as amended by Health and Social care Act 2008, especially section 45R which allows for restrictions to be imposed without presenting a draft to Parliament. The Court also pointed out that Parliament had kept a close look on the Regulations content, for instance banning the use of article 45G(2)(a), (b), (c) or (d) of the 1984 Act that could force a person to undergo medical examination for example.

Furthermore, the Court of Appeal gave an opinion on the two other claims, discrediting them on the basis of proportionality and necessity during these unprecedented times.

However, the focus brought by one of the appellants on Article 9 of the ECHR that protects the right to freedom of thought, conscience and religion, has been considered by the Supreme Court in *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392.

IMPACT

The legislative framework and existing Acts of Parliament give a sound legal basis for the Coronavirus Regulations and the Secretary of State's effort in protecting public health. Rather than overriding fundamental rights, these restrictions have simply interfered with them temporarily, as regulation 3 requires the government to review the Regulations at fixed intervals. This judgment gives a public law justification for the strict public health measures put in place to try and stop the spread of Covid-19.



REPUBBLIKA V IL-PRIM MINISTRU

CASE C-896/19

COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

MARTIN BARRAL
EDITOR - PUBLIC

CASE FACTS

Repubblika is a civil society movement that seeks to improve democracy and the rule of law in Malta. A way to achieve that aim is by also attempting to improve judicial independence. A claim was therefore submitted asking whether EU law on judicial independence also affected the judicial appointment of judges by the executive. Repubblika claims that the appointment of judges and magistrates by the President with the Prime Minister's counsel is inconsistent with the principle of judicial independence as set out in EU law.

In order to determine whether a judicial appointment system is flawed and endangers the judicial independence certain things such as arbitrary dismissal, unjustified wage reduction or prevention of judicial review regarding a judge's removal need to be looked out for.

THE LAW

Malta has a codified constitution, the

appointment system of judges for superior courts as well as the appointment for magistrates of inferior courts are set out in articles 96 and 100. Both appointment systems require the President to appoint the judge in accordance with the Prime Minister's advice. In article 96A, the independent Judicial Appointment Committee is constitutionally recognised, its task is to counsel the Prime Minister on upcoming judicial appointment, opinion that the Prime Minister may choose to ignore. The President is given the powers, via article 97, to remove a superior court judge with a two thirds majority in the House of Representatives, with a specific motive like inability to perform duty or proven misbehaviour. Lastly, the discipline of judges and magistrates is enforced by the Committee for Judges and Magistrates, see article 101B.

Malta has been a member state of the European Union since 2004, this means that the domestic law needs to comply with the Treaties and the Charter of Fundamental Rights. Article 2 of the Treaty of the European Union (TEU) gives an outline of the values

shared by all member states, this includes the principle of the rule of law and justice. This is further detailed in the second subparagraph of Article 19(1) TEU where it is required of member states to ensure adequate legal protection in the fields covered by Union Law. Article 47 of the Charter is also important as it seeks to ensure every EU citizen has access to a fair trial and effective remedy from an “independent and impartial tribunal established by law”.

values mentioned in article 2 TEU. Furthermore, this could give EU citizens the ability to seek remedies for infringement of judicial independence, facilitating the safeguarding of democracy throughout the Union.

THE DECISION

The CJEU found that EU law and especially article 19(1) TEU was applicable in enforcing judicial independence in member states, even if judicial appointment is a matter for national law. The reasoning behind this is that national courts will have to give out judgments on matters relating to EU law, therefore the requirement of adequate legal protection in the fields covered by Union Law must be upheld as article 19(1) TEU provides. The Court also added that even if article 47 of the Charter was not directly enforceable in this situation, article 19(1) TEU must still be interpreted in the light of article 47 of the Charter and corresponding case law.

The CJEU ruled that the claim was not substantiated, as the Maltese constitution had a number of provisions that were put in place in order to protect judicial independence. For example, judges receive the highest wage available to civil servants, an independent review committee takes care of judge's discipline but also analyses dismissals. Furthermore, judicial appointment by the executive does not equate to unwanted influence over the judiciary and its judges.

THE IMPACT

Judicial independence is enforceable and should be observed as EU law when designing a judicial appointment system, as it is also considered to be an integral part of the shared



HMRC V PROFESSIONAL GAME MATCH OFFICIALS LTD [2020] UKUT 0147 (TCC)

YUSUF PANAH
EDITOR - SPORTS SECTOR

CASE FACTS

The PGMOL is a 'not for profit' body responsible for match officials in the English Football League, Premier League and Football Association (FA) competitions - with all three organisations funding it. PGMOL employs a number of referees under full-time employment contracts - referred to as the "Select Group" referees. This appeal relates to the referees who undertake their role in their spare time, alongside other full-time employment - they are referred to as "National Group" referees.

PGMOL was embroiled in the complex and controversial subject of employment status. The taxman came knocking on PGMOL's doors for tax contributions not paid between 2014-16 as they determined that the referees in the "National Group" are in fact employed by the organisation. This meant that PGMOL owed a substantial amount of money in back taxes to HMRC. PGMOL did not agree with this determination, disputing the nature of the contract, arguing that the National Group of Re-

feres are self-employed. This dispute was tested in the First-Tier Tribunal (FTT) and Upper-Tribunal courts, respectively.

THE LAW

The key issue in the first appeal was whether the part-time referees were in an employment capacity with PGMOL. PGMOL argument was twofold: firstly that there was no contract between itself and the National Group referees and that if there were, the contractual relationship is one of self-employment.

The test for determining whether a contract is one of service or one for services established in *Ready Mixed Concrete Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, comprises of two elements - mutuality of obligation and control.

Mutuality of obligation refers to the obligation on the employer to provide work and the obligation on the employee to accept that work.

THE FTT'S DECISION

The FTT rejected PGMOL's argument, concluding that there was both an annual overarching contract between PGMOL and each of the National Group referees and several separate contracts in relation to each specific match for which that referee officiated. HMRC's contention was that both or one of the contracts was a contract of employment.

Applying the above RMC test, the FTT concluded that:

(1) There was no mutuality of obligation as there was no legal obligation on PGMOL to provide work or on the referee to accept the work offered.

(2) There was insufficiency of mutuality of obligation and insufficiency of control in the individual contracts to give rise to a relationship of employment.

THE UTT'S DECISION

HMRC released a statement shortly after the judgment and announced that they will appeal to the Upper Tribunal (UT), which they could only do if they believed the FTT to have made an error of law in their decision.

The UT held that there was no error of law and agreed with the FTT's decision, concluding that the referees in the National Group were engaged under contracts for services and were not employees.

IMPACT

Employment status has become a hot topic in today's flexible 'gig' economy, especially since the government announced that from April 2021, businesses and organisations in the private sector will have to determine the employment status of any contractors they engage - representing a huge shift in

employment tax.

The mutuality of obligation requirement is pertinent in evaluating employment status for tax purposes. The issue of 'employment status' arises in both tax and employment tribunals and desperately required clarification on the law of mutuality of obligation, which this case precisely does. However, tribunals will continue to apply the test on a case-by-case basis as this was a unique case where National Group referees were described as 'passionate hobbyists' and did not require the same level of obligation that is required of employees in different sectors.



WORLD ANTI-DOPING AGENCY V. RUSSIAN ANTI-DOPING AGENCY (CAS 2020/O/6689)

YUSUF PANAH
EDITOR - SPORTS SECTOR

CASE FACTS

The World Anti-Doping Agency (WADA) is a private law foundation which promotes and coordinates, at an international level, anti-doping measures in sport.

The Russian Anti-Doping Agency (RUSADA) is the national anti-doping organisation in Russia and a signatory to the World Anti-Doping Code (WADC), which is formally recognised by many sporting bodies such as the International Olympic Committee (IOC).

In 2015, an independent commission set up by WADA found a "deeply rooted culture of cheating" in Russian Athletics, resulting in the ban of Russia's athletics federation in the International Association of Athletics Federation. This was a pivotal moment not just for sport but for the fight against doping in sport.

Fast forward to November 2019, WADA announced that the historical data supplied by RUSADA was rife with inconsistencies and that

they faced another suspension.

Near the end of 2019, WADA unanimously endorsed the recommendation by their compliance committee that RUSADA be declared non-compliant with the World Anti-Doping Code for four years.

RUSADA denied WADA's claims that data was manipulated and deleted from its Moscow anti-doping laboratory. WADA imposed a variety of sanctions before the case was referred to the Court of Arbitration of Sport (CAS).

THE LAW

"Code Article 23.5.9 of the Code provides that CAS's decision resolving the dispute is applicable worldwide, and must be recognized, respected and given full effect by all Signatories in accordance with their authority and within their respective spheres of responsibility."

CAS'S DECISION

RUSADA's appeal against WADA's decision and

and sanctions was to be heard by CAS through arbitration.

CAS held that Russia was bound by the WADA rules and therefore could be held strictly liable. CAS also unsurprisingly found that intentional manipulation of data did take place and that it went "well beyond the mere deletion of incriminating doping samples" and was described as "breath-taking in its audacity".

Ultimately, the CAS panel unanimously determined RUSADA to be non-compliant with the World Anti-Doping Code in relation to its manipulated doping data of the Moscow Laboratory. CAS upheld Russia's Olympic ban but reduced the period from the proposed four-year ban to two-years.

IMPACT

The decision to brand RUSADA as non-compliant with the Code highlighted WADA's commitment in their fight against doping in the sport. It sent a clear signal to sports institutions and athletes that WADA continues to maintain their zero-tolerance approach to doping, ensuring punishment for those found guilty. Despite the punishment, on-lookers will certainly question as to whether enough is being done. The United States Anti-Doping Agency claimed that the outcome was 'watered-down'.

For RUSADA to be reinstated as a compliant signatory, the body must respect all the consequences imposed for non-compliance and pay all monetary fines. The consequences are the harshest punishment ever to be handed to a nation by WADA. Until then, Russia cannot host major sporting events for two years and will not participate in major competitions, such as the 2022 World Cup in Qatar. Russian athletes may only participate in such events as neutral athletes, but this mechanism must be implemented by the relevant governing bodies.

THANK YOU FOR READING

