

## Outline of talk 2 July 2004

Before starting I should say that I have been away for ten days. This means that I have had to prepare this talk from memory. I regret to say that despite the most careful searching I was unable to find the materials to be able to quote more precisely among the stocks of information on French campsites.

The subject of this talk is the challenge to a common law system of the application of Community law. On that basis I should make a further disclaimer. To provide any useful insights on the challenges facing a common law system from the application of Community law would require knowledge of how these challenges differ from those facing other legal systems. There is plenty of academic legal material from other member States on particular directives and regulations. There is an increasing volume of Commission sponsored reports on how different member States have implemented directives. There is much that can be inferred from the issues which come before the European Court of Justice. But at best these give clues to the underlying differences. There is very little of which I am aware that addresses the differences directly.

I suspect that the problem is the inherent difficulty of comparative law. It is the nature of different legal systems that the same goal is approached by different routes, and different goals by very similar routes. Conceptual differences may therefore be concealed or sometimes the use of the same concept may produce arbitrary results. So a comparative lawyer has to know and understand not just one system but two or more. Otherwise he is in the realm of Donald Rumsfeld's "unknown unknowns".

The problem exists even within the UK. I am reminded of an occasion when I was a very junior lawyer. I shared a room with a Scottish colleague (the Scots have a different legal system from ours) and we were both working for a very senior lawyer who was called upon to advise on the most serious and difficult issues affecting the government, often at very short notice when a crisis had arisen. One day he stuck his head round the door of our room and said to my colleague "I am just going to a meeting on a case of interference by some vital defence radar with an industrial process; quickly, the law of nuisance is the

same in Scotland isn't it?" My colleague said that as far as he knew it was. Only when our boss had gone did we discover that in the relevant respect, which prevails when someone comes to a nuisance, it was fundamentally different. I never found out what happened to the radar.

The point about this story is that for all three of us there were unknown unknowns. That is precisely the position with the subject we are now addressing.

However it is undoubtedly the case that there is a strong perception among Ministers that the application of Community law is somehow peculiarly difficult in a common law system. The suggestion, by politicians of both major parties, is that we make much more of a meal of it than other member States and there have been a series of initiatives and reports seeking to get to the bottom of the problem. The most recent report was by a former colleague of mine, Robin Bellis, and my main purpose today is to offer some thoughts on the issues he raises.

Copies of the report, and of a thoughtful commentary on it by a legal group in the City of London, are (I hope!) available at the back of the room, unfortunately only in English.

One of Bellis' main conclusions is that the problem is not one of incompetent implementation of directives by the UK, but goes back to the negotiation and implementation stage. So I too will start there. First let me dispose of two myths.

It is sometimes alleged that there is something about Community drafting which makes it impossible for our courts to handle, at least in raw form. That is clearly wrong. Our courts can and do interpret directly applicable Treaty provisions and regulations. They interpret the European Convention on Human Rights (which I know is not Community drafting). On a number of occasions we have chosen to extend directly applicable Community provisions into the domestic area, most notably in the competition field, where we provided expressly for developing European jurisprudence to apply, so that even the very lowest court would be required to overrule the House of Lords on a domestic law issue if there were

subsequent European case law. It has worked very well. We similarly applied the then Recognition and Enforcement of Judgments Conventions, with only minor adaptations, between the UK law districts. And, crucially UK judges regularly refer to the underlying directive rather than the implementing legislation. As I say, there is not a problem. My colleague Mary Arden will be talking further about the Courts' approach.

The second myth is that the problems are because of political fudges at the negotiation stage. As Anne has said, they happen. Of course they do. Very often also we will be satisfied with something imperfect for fear of getting something worse. But generally the issues that subsequently cause legal difficulty were there in the draft when it first appeared.

So if those are not the problems, what are they? Community drafting is very different from ours, in both style and approach. People say directives are getting very detailed, and so they are. But changing that would not be the answer. For example even the most general directive needs to have a determinable scope and it is in this respect that the difficulties perhaps most often appear. Our drafting approach tends to use a lot of definitions. We are very happy to extend or qualify. We care about boundaries. Community drafting, I suspect under French influence, tends to eschew definitions, on the basis that words should bear their natural meanings. (We are less hung up about that. Thus for many years the provisions on taxation of cars were all in terms of horses, with the term "horse" defined to include a "car". It may be no accident that the draftsman who perpetuated this approach when consolidating the legislation was herself a keen rider.)

Our approach could not work at Community level. It only works for us because of the drafting process which I will mention shortly. But I suggest that the approach that is adopted in the Community is equally problematical. It depends on the word used having a clear natural meaning. But even the equivalent word will not have the same meaning in other languages. When one is concerned with legal terms, the concepts may also be different. As I say, our courts have no difficulty in interpreting the words of the Act governing VAT, which follow the wording of the directive in referring to goods and services, as applying to

buildings, but that is because later on there is an express reference to buildings. But we had a terrible struggle with Unfair Contract Terms. That similarly refers to goods and services. Our existing law, which used the same concepts, did not apply to what we call real property, which to us is very definitely neither a good nor a service. Did the directive apply to rented property, where there were a large number of unfair contract terms? It was genuinely unclear. Vulnerable consumers were therefore not given protection.

Directive drafting therefore has to be multi-lingual and multi-referential. Mary was the joint organiser of a wonderful conference last year where the Chief Legislative draftsman from Canada described the process they now go through to draft simultaneously in English and French, so that neither is a translation of the other, and in terms both of common law concepts and the civil law concepts used in Quebec. It was a fascinating description and Mary may be able to say whether it will shortly be published. I am sticking my neck out in saying so, because I cannot prove it, but I would suggest that within the Community we are more affected by the failure to adopt this approach because we are the odd ones out in terms of legal tradition, just as Quebec suffered more in Canada because it was the odd one out. In other words it is not a problem with the common law. It is a problem with being different.

I have taken the approach to definitions as the example because I think it illustrates the problem caused by the difference of approach. It is obvious that it causes problems for others but three devices commonly adopted to address them also cause further difficulties for us. The first is the tendency, when it is obvious that a definition is required, to include it in the recitals, (even though that is a clear violation of the Inter-institutional agreement). Robin Bellis mentions one where “establishment” (in the case of an organisation established in more than one member State) is defined for the purposes of electronic commerce. We have great difficulty with such a technique. We do not know how to handle it since recitals are not normative and if they are capable of being so then that is likely to affect the interpretation in other respects.

The second problem is when riders are inserted, often to please one member State, which are not a qualification of the original proposition. Again to take the

example of electronic commerce, we were forced by such riders to a ridiculously wide, and frankly unsustainable, interpretation of the country of origin principle.

The third problem is when something is simply assumed to be part of the concept at issue and is then referred to later. There are some very deep examples of this in the Company law field dating from the directives adopted before we joined in 1972, which we have failed to solve for thirty years and now, I suspect, never will. The example I want to use to illustrate the point will, I hope, be easier to explain. (It also has the advantage that the European Court of Justice has told us the answer.)

We in the UK do not have the concept that a worker is generally entitled to be represented, and certainly not that such representatives should normally exist. So when we came across references to things requiring to be done by or to workers' representatives we said "we do not have those and therefore the requirements do not apply".

We call that the "Dogs must be carried" argument. On the Underground there are, or used to be before automatic ticket machines, two notices. "Dogs must be carried" and "Tickets must be shown". They are grammatically identical. But the meaning is quite different. If you do not have a dog you do not have to get one. But it is no excuse for not showing your ticket that you do not have one. In the case of workers' representatives the European Court of Justice told us that we were in tickets territory.

Again I suggest that it may be because we are often the odd one out that we get caught by such things more frequently (if indeed we do – there is no reliable analysis; concepts imported from us almost certainly cause equal difficulties for others). But it all comes back to the drafting approach, namely the need to ensure that the concepts used are capable of applying in different languages and in different legal systems. All too often it is apparent that, perhaps because of the process I am going on to describe, they do not work in any. Perhaps the person who set out what was meant by Working Time knew what it meant, and probably had a logical structure in mind. The directive as proposed and adopted certainly did not succeed in conveying a meaning to the European Court of

Justice who, faced with a series of unpalatable alternatives, have adopted a meaning that nobody wants.

That leads me on to what I want to say about the drafting process. Our system appears to be very different from the Community system. We have a system under which one person, with primary legislation almost always the most senior person in the team, has absolute control of the drafting process. However, he is not supposed to concern himself with policy. In other words there is a sharp division of function. It is everyone else on the team's job to put together the policy, in the case of primary legislation along with all the legal considerations, and then put the dossier, explaining exactly what it is desired to achieve but not drafting, to the draftsman, who is called Parliamentary Counsel. He then asks questions designed to probe whether the structure hangs together conceptually. If it does, or is changed so that it does, then he alone will produce the legislative draft to give effect to it. The fact that he is not concerned with the policy gives him immense authority. He is not pushing a line and if he says it cannot be done then it is accepted that, however desirable in principle, it is not achievable. He retains this control at all subsequent stages, in practice even when the text is being considered by Parliament.

Parliamentary Counsel are generally extremely fine lawyers. They have to be to fulfil the role since if the questions they ask show that they do not understand the issues then their authority is lost. But it is the function that gives them that authority.

In contrast, Community drafting is bottom up. As we see it, it starts with a desk officer who is concerned equally with policy and law and goes up the line and horizontally across to other Directorates-General and the Legal Service, where everyone has their two pennyworth. Sometimes things are added in which are clearly outside the scope as discussed just now, which adds to the interpretative problems I was mentioning. A current example is the revised 8<sup>th</sup> directive on auditing which has had added into it provisions that do not relate to the audit of the accounts of Community entities. It is arguable that the addition has quite profound effects on the required regulatory structure for auditing services.

But even at a more detailed level the lack of a single controlling hand in the drafting gives rise to a number of difficulties. The most obvious is that one cannot assume that the same word has the same meaning throughout the document. Conversely one cannot assume that a drafting difference is intended to have substantive effect. Of course the same words are frequently used as have been used in previous directives, on the basis that agreement has been reached on them in the past, but if the context is different then they will not naturally have the same effect. The result is that each proposition stands on its own instead of being integrated into a structure.

As I explained, I wrote this lecture on holiday but from memory there are examples even in the newly agreed Convention. The provisions about how far member States are free in the way they implement directives were changed. (I gather they were changed back in the final version, but that reinforces my point.) Was the change intended to widen member States' freedom or was it just a difference of wording? In our tradition we would certainly assume the former but one cannot make such an assumption with Community drafting. There is a similar issue on the statement on the supremacy of Community law, which is causing considerable difficulty politically in the UK. Why could it not just have said that, in the event of conflict, Community law prevails over the law of a member State, which is well established? Again almost certainly no change of effect was intended and it was not therefore, as I understand it, a political issue.

But things like that are, in legal terms, deeply unsettling to us as lawyers. Parliamentary Counsel work on two related maxims. One is that unnecessary words go septic. In other words, as Lord Falkland said, if it is not necessary to say something then it is necessary not to say it. The other is that Parliament does not legislate in vain, in other words that any change is intended to have effect. (We do have a mechanism for revising and restating the law, in the shape of the Law Commission, of which Mary was a most distinguished chair, and this proposition applies less in that process, but it certainly does apply when Parliament is considering programme bills.)

As I say, the fact that these principles are not followed is very disturbing for us. Again I am speculating but I suspect that the reason we are at one end of the

spectrum on this issue is because of the relationship between the common law and legislation.

The predominant source of law, at least in terms of volume, is now legislation. But the principle still applies that legislation only ousts the common law to the extent that it expressly so provides. In contrast, as I understand it in a system where the law is codified, it is possible to restate and express things in different ways and new propositions are added to the structure. Of course, over time, the additions may change the structure but there is no antithesis between them.

If I am right then this may explain why we are more precise in our legislative technique. To say that we are more precise sounds boastful and desirable, but I do not mean it like that. I do not mean logically precise. I mean more hard fought, with everything having to be spelled out. The corollary is that we are very frightened of general propositions. We think they may mean what they literally say and so we try and restrict them. Whether we can change I do not know. As I say the courts are perfectly able to interpret Community law in a Community law sense. But it does cause particular difficulty with propositions to be incorporated into existing domestic legislative structures. I will have more to say on this point when I come back, shortly, to implementation techniques.

But first to sum up on this area. It is easy to criticise Community drafting. But what I am absolutely clear about is that every Commission official wants to do a good job and is concerned, as everyone concerned with legislation has to be, that it achieves the desired effect. But for the reasons I have tried to set out, which relate both to the drafting approach and the process, it does lead to a product which we find difficult to handle. We are not alone in criticising it but I suspect we are unique, even including Ireland, in our starting point.

Robin Bellis suggested importing, in effect, our drafting system into the Community. Ministers felt that it would not be achievable in practice and I am sure they were right. Robin himself acknowledged the problem. But, trying to bridge the two traditions, what I think one can clearly say is that the internal coherence and structure of Community legislation is vitally important. It is too late when one gets to the negotiating stage. It has to come earlier. It was a

great honour to be invited to give this talk and if I have achieved anything then I hope it has begun to explain why we care about it.

That leads me to the implementation stage. What do we do with our shiny new directive when we get it home. The first answer is usually “nothing”, for quite a long time. Implementation is seen as a separate process with a timescale dictated by the due date for implementation.

Before then it is impossible to interest Ministers or those in charge of allocating resources. It is also very difficult to get stakeholders interested.

Ministers have in any case usually been far less closely involved than with domestic legislation, where at least with primary legislation we seek their views on every detail in the process. The whole primary legislation team on the domestic side, as Robin Bellis has observed, is also usually far more senior and well resourced, so there is an impetus to take it through and complete the task.

None of this happens with directives. If there is a team then it is likely to be dispersed when the directive is agreed. I suspect we are not alone in not turning our minds to implementation immediately. When we try and talk to colleagues in other member States about problems we are encountering we frequently get nowhere, although increasingly academics are beginning to come in at that stage.

(This lecture, for example, was written on the back of a paper by Jonathan Rickford on the Takeovers Directive.)

Some directives create a new area of law. The Acquired Rights Directive is an obvious example and the Takeovers Directive will very largely do so. But most directives will address issues which are already the subject of legislation. Very occasionally, all that is needed is a minor change but far more often the scope will be different or the same problem will be addressed in a different way. The first question for those responsible for implementation then is whether to integrate into the existing law in the area or make parallel provision. By “integrate” I do not just mean putting something into the same legislative instrument as the existing law. That is always an option. I mean substantive

integration so that the domestic law and the Community derived law form a single set of propositions. Obviously that is the ideal but in practice there are disadvantages. Almost by definition integration is likely to favour the directive concepts at the cost of the domestic law approach, which people do not like, and may be politically difficult particularly if it involves levelling down in certain areas, as is frequently the case in the consumer area. Then there is the question about what to do with the area uncovered by the directive. The Consumer Sales directive made perfectly sensible but different provision from the Sale of Goods Act for remedies, which are the heart of the Act, for consumers. On an integrated basis, should the new remedies apply to the whole field of the Act ie non consumers or should the harmonised structure be broken down? It is also technically very much more difficult.

So the temptation is to leave some or all of the existing law as it stands and to make parallel provision to implement the directive. So far as I know (but have been unable to check) no decisions have been taken on implementation of the Market Abuse directive. This is a particularly striking example because the inspiration for Community action in this area was the Market Abuse provisions of the Financial Services and Markets Act 2000. Inevitably what has emerged is significantly different in scope and other respects. I was therefore interested to see the following quote from the Financial Services Authority (in response to a complaint, by reference to the Market Abuse directive of ever more regulation) just before I went.

‘A spokesman for the FSA said that it would be unfair to blame the FSA for a mounting tide of regulation because an estimated 75pc of the new rules that the organisation had introduced over the last year derived from EU directives. He added: “The Mad is an EU directive, The great amount of regulation that we do is driven by EU directives which the FSA doesn’t create. We limit our own initiative regulation to the greatest extent possible because there is so much coming from the EU that we don’t want to add to.”’

I have not been able to check but it sounds as though the directive will be implemented alongside the existing law. For the reasons I have given that may be the best or the only practicable course. But it certainly adds to the perception

that Community law is an added burden. We are not the only member State to have problems in this respect but, if the analysis of why our legislation is different is correct, it may be the case that integration is more difficult for us and so it happens less often.

That brings me to the hotly debated topic, once the choice of integration or stand alone has been made, of copy-out versus elaboration. In simple terms the issue is whether to use the exact words of the directive when implementing or to seek to use different words more in line with our own legislative approach. There is, of course, no absolute right or wrong answer. Some directive provisions are instructions to a member State to develop a structure. As the series of European Court of Justice decisions on the Package Travel Directive illustrated, that is true of Article 7 of that directive, however deceptively simple it looks. In other cases, member States are given a choice and it would be an abdication of their responsibility not to take it. In still other cases, the meaning is clear and expressing it in UK domestic legal language, or in an arrangement more akin to what we are used to, may help the intended reader and so further the objective of the directive. The debate is not relevant in any of these cases.

The really hard case is where, for the reasons I have attempted to address in what I said on drafting and negotiation, it is clear that the directive must have a determinate scope or effect (rather than giving member States a choice) but it is not clear what it is. The issue then is whether to seek to give a meaning which may be wrong but at least will assist those to whom the law applies to understand what is required of them.

I have to tell you that feelings run very high on this issue. Otherwise close friends have to avoid talking about it for fear of falling out. It is clear that there is a deeper philosophical divide. So far as I know the intensity of debate is unique to the UK. I suspect that if we could understand what that divide was we would be close to answering the question as to what the difficulties are for a common law system in the application of Community law.

What the debate is about is the best way of providing certainty. That is something we have been able to count on. The absolute sovereignty of

Parliament, which is the defining characteristic of our constitution, means that if Parliament legislates to say that black is white then as a matter of UK law, the absolute whiteness of black is unchallengeable. Community law is a challenge to that. Other member States have the same issue, notably Germany and the Grundnorm, but in the UK the complete lack of a formal distinction between, on the one hand, the most fundamental constitutional statute and, on the other, the most obscure technical provision on the lawful measure in which bananas can be sold from a market stall, means that it affects the whole of our law.

One of the things that appears to have led the House of Lords (in its judicial capacity) to decide that the UK was culpably wrong in the Spanish Fishermen case (Factortame) where we had legislated to deny fishing rights to non UK owned fishing companies, even though incorporated in the UK, was a minute advocating the use of primary (ie Parliamentary) legislation to give effect to the policy on the basis that it would then be immune from challenge. It did not work.

But it only did not work because the challenge was against the government. As between subjects, the law as provided by Parliament will continue to govern their relations unless overridden by directly applicable provisions. And whatever else may or may not be the case, directives are not directly applicable.

But they can be directly effective. And the law that purports to implement them or the law that exists in an area where they should have been implemented has to be construed sympathetically so as to accord where possible with their true meaning.

I am, and have been since the issue first came up fifteen years or so ago, *parti pris* on the issue of copy out. I hope therefore that I will not misrepresent the opposite view. The benefit of copy out, where appropriate, is that it directs the court to the true source of law and means that it need only look at one document rather than two in seeking to follow its duty of sympathetic interpretation and avoids the need to invoke direct effect to override the domestic implementing legislation where inconsistent. It recognises that every court in the Community is a Community court and not just a national court. Ultimately therefore it should

contribute to the proper interpretation of Community law, whatever that might turn out to be.

The benefit of seeking to elaborate and resolve difficulties of interpretation is that it provides an answer for the citizen pending judicial resolution which may take many years. It therefore seeks to fulfil the duty to which, as I say, we are particularly attached in our legal system, of providing certainty.

The judgment as to which of these two is the greater benefit is one that cannot be determined on a purely logical analysis. Each side would recognise the force of the other's arguments. The advocates of copy out would recognise that it is not an easy option. The advocates of elaboration would recognise the danger as Robin Bellis describes it of providing false comfort to the citizen. He too, or at least his legal adviser, needs constantly to be looking behind the domestic law implementing text and cannot rely on its being interpreted in the way that a text without such a basis would be interpreted.

It is, as I say, a matter of judgment. We have an English spoof history book called "1066 and all that". (1066 is the conventional start of English history.) That describes one side in our Civil War as "Right but Repulsive" and the other as "Wrong but Wromantic". Each side in the copy out debate would regard the other as falling into one of these categories.

What has influenced the Government's attitude, in its consideration of the Bellis report which comes down cautiously on the side of copy out, is the risk of "gold-plating", namely adding additional burden. It is not true that elaboration always increases the burden and, without expressly saying so, I think Bellis exonerates us from the accusation sometimes made that it is done deliberately or overcautiously. But it can undoubtedly happen inadvertently. The Unfair Contract Terms example I gave earlier is an example (probably) of inadvertent under implementation in that the references to goods and services in a UK legal context made it more difficult to argue that rented property was covered. One going the other way was where someone helpfully tried to resolve which types of animals were covered by a requirement for rest breaks. However because the directive said "and other animals" which he then added, and all the other

categories had been covered, we ended up with the political embarrassment of rest breaks for oysters. I mention this apparently trivial example because there is an industry in the UK of making fun of EC legislation for such apparent absurdities, which is very damaging.

The Government's inclination therefore is to favour copy out in appropriate cases, as a means of avoiding extension of directive requirements. That does not however mean that we can ignore the meaning. It puts even more responsibility on us to consider whether the balance has been properly struck. The war of movement may be over but the war of attrition continues and is unlikely to be concluded for some time. As I say, what is at stake are deep prejudices (in the best sense of the word) about the nature of our law.

Finally, I just want to add a brief word on what is sometimes suggested as a solution, namely "guidance". It is right and proper that we should seek to expose to stakeholders how we have approached the solution we have reached. We should give them, and the courts, all the material which we have considered. But it is difficult in our system to go further.

Firstly if the "guidance" were determinative to any extent it would be a further tier of legislation. It would therefore be elaboration by another name.

More important it cuts across the classic UK civil service role. There is no institutional entrenchment of the civil service the way there is in other, probably most other, member States. Legally a Civil Servant can still be dismissed instantly. We are not the basis for a *Rechtstaat*. The rule of law (to which we attach great importance) is primarily based on the courts. Our role has been rather aptly described (by Professor Christoph Knill) as interest mediation between societal interests. The characteristic response to a query as to what our legislation, domestic or Community law based, means, is to say "only the courts can decide". It is, of course, true that in all systems ultimately only the courts can decide. It is a peculiarity of our system that we tend to hold back from seeking to provide any kind of firm interpretation at any earlier stage.

The consequence is that the citizens, including the non-legislative parts of the state, are left very much on their own in knowing what to do. I have only caught

snatches of it on the short wave radio in France but I gather there has been a considerable debate while I have been away on why different police forces acted differently in deciding what material the data protection legislation required to be destroyed on suspicions of criminal activity. (The case in question relates to child murderer.) I express no view (not least because I do not have one) on the right answer legally but I would end by saying that it is a characteristically British administrative approach that each part of the public sector was left to interpret the law itself in a very difficult area. That will not change. It is part of the UK system. But it does make the copy out debate even more stark. The citizen really is exposed, unassisted, to the raw Community instrument. That makes it all the more important to do everything we can to make that instrument of the highest quality legislatively. Whether we support the policy of a particular approach or not we owe a duty to get it as right as we can legally.

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