It gives me great pleasure to welcome you to the first edition of our Bulletin to be published in 2016. Once again, I thank the indefatigable Nicola Preston, who oversees contributions (and applies such pressure as may be necessary to obtain them) for her much valued role as editor. Reflecting upon the legal landscape over the past year, there are a number of prevalent themes, some would say shoals, which I am sure affect a number of our readers. The relentless downward pressure on

Richard Jones QC  Head of Group

continued...
money available within HM Court Service has made itself felt, especially in some areas (by no means all, though) where efficiency has been left becalmed. A heavy percentage charge related to the size of the claim has undoubtedly caused some eager litigators [both professional and otherwise] to pause and consider, and, in some instances parties have suffered a degree of hardship.

Some of us are still wrestling with cost budgeting, which seems to be met by a varied response from members of the judiciary, some wildly enthusiastic, and other distinctly less so. It is a rare skill to be able to predict with precision the likely costs of different stages of litigation, especially complex litigation with all its unforeseeable twists and turns. But at least the tide has turned against the more draconian implications of the Court of Appeal’s unhelpful ruling in Mitchell. While any publicity is supposed to be better than none, it is a curiosity that a cyclist in Downing Street has earned a form of notoriety which will endure for some time.

I wish you all a very happy and peaceful 2016. As always, I hope that we continue to provide a friendly, effective and cost efficient service to all of our clients. And that we help you to avoid, so far as is possible, those unwelcome shoals.

Richard Jones QC
Head of Group

THE COMMERCIAL GROUP ARE PLEASED TO ANNOUNCE...

Mohammed Zaman QC
appointed Deputy Head of The Commercial & Chancery Group

Mohammed Zaman QC joined No5 in 2014 and has a broad commercial litigation and international arbitration practice covering a wide range of contractual, property and regulatory disputes. His work includes a particular emphasis on civil fraud, company, insolvency and regulatory matters, as well as complex disputes generally. Mr Zaman is admitted as a practitioner in the Dubai International Finance Centre (DIFC) Court and has regularly appeared before the Dubai World Tribunal.

Ilott v. Mitson
Revisited: What we learnt this time round
Emma Williams
PAGE 14

Re-Opening Unfair Credit Transactions
Susanne Muth
PAGE 16

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As an ongoing endeavour to provide our clients with the best possible service, we welcome your feedback and comments on this publication. Please email marketing@no5.com
PAUL BLEASDALE QC TO STEP DOWN AS No5 HEAD OF CHAMBERS

One of the country’s leading sets of barristers is to have a new Head of Chambers. Paul Bleasdale QC has held the post since 2010 and his term of office expires at the end of the month. He is to be replaced by Chancery silk Mark Anderson QC who has been one of the deputy heads of chambers since 2014. Mr Anderson is a leading specialist in commercial dispute resolution and professional liability as well as being authorised to sit as a Deputy High Court Judge.

Mr Anderson said: “It is a great honour to be asked to take over as head of such a progressive and successful set and I look forward to the challenge, but Paul Bleasdale will be a hard act to follow. Paul has enjoyed conspicuous success in the role, providing a rock of support to barristers and staff alike, working selflessly, tirelessly and uncomplainingly in all our interests with a sure touch and unfailing judgment. He has been outstanding. I am humbled to be taking over an organisation that has such an enviable reputation nationwide, a reputation due in no small part to Paul’s leadership.”

No5 WINS CHAMBERS BAR AWARDS REGIONAL CHAMBERS OF THE YEAR 2015!

The development and excellence of No5 Chambers, recognised in both Legal 500 2015 & Chambers and Partners 2016, have continued upwards with No5 being awarded Regional Chambers of the Year by Chambers UK this year. Chambers & Partners 2016 comment “This set is increasingly prominent when it comes to high-value commercial work, with members regularly handling complex contractual, corporate, trusts and insurance disputes.”

The Commercial & Chancery Group is proud to be at the forefront of the developing relationship between Birmingham City & No5 Chambers

No5 Chambers and its sister company NoVate Direct Legal Solutions became a Diamond Partner of Birmingham City Football Club in June 2015. Ian Dutton, Birmingham City’s Head of Commercial, said: “This is fantastic news for the club and its supporters. No5 is a high profile, local & national name and we’re thrilled to be associated with such a successful organisation.”

NEWS IN BRIEF...

→ Paul Joseph and Shakil Najib appointed to the Attorney Generals B Panel, Richard Adkinson re-appointed to regional panel, Christopher Snell and Philip Dayle appointed to baby barrister panel.

→ JOHN WEST REACHES LANDMARK OF 50 YEARS AT THE BAR.

→ Louise Corfield is now the proud parent of Imogen Olivia Barlow. Louise will resume practice in the Spring.
AVOIDING THE ACCIDENTAL SETTLEMENT

The question of whether two parties have entered into a binding settlement compromising a case is often just (if not more) as acrimonious a matter as the substantive case. In particular, as the devil is often in the detail of any settlement, the intention is often that even where settlement is agreed in principle, one party does not wish to be bound to the settlement until all the terms are agreed and embodied in a signed document.

If this is the intention then it is important that the same is made well known to the other negotiating party, in order to avoid the pitfall of finding oneself having inadvertently entered into a binding settlement, prior to concluding those subsequent negotiations.
In *Bieber & Ors v Teathers Limited (In Liquidation)* [2014] EWHC 4205 (Ch) the Court provided both a useful reminder of the applicable principles and highlighted the potential for such inadvertent settlement to be reached, in that case through the exchange of emails.

**The Facts**

Bieber concerned an action by multiple investors in film and television productions set up by the Defendants. The claim was valued at £20 million and, following the liquidation of the Defendants, approximately £10 million was available in assets in order to meet the claims through an insurance policy.

Mediation was unsuccessfully attempted and the matter was set down for a 15-day trial commencing 21 July 2014.

On 18 June 2014, solicitors for the Claimant’s emailed the Defendant’s solicitors indicating a willingness open dialogue between the parties with a view to settling the proceedings. Negotiations then ensued between the parties, from which (at trial) a key factual dispute provided for the payment of Y+2 within 28 days, in full and final settlement of the claim and counterclaims. The Defendants were invited to sign and return the same. Instead of doing so, the Defendants circulated a longer form settlement agreement (first prepared for the unsuccessful May mediation), which contained, amongst other matters, clauses concerning the provision of indemnities.

The parties remained at odds over the terms of the formal settlement agreement. The Claimants applied to the Court seeking a declaration that a binding settlement was reached by the exchange of emails between the solicitors on 29 June 2014, by which the Claimants had agreed to settle the proceedings for a payment of (Y+2).

**The Principles**

Although appearing prior to the Court’s recitation of the facts, the judgment in Bieber provides a helpful summary (at [14]) of the principles that are to be applied when considering whether a binding settlement has been concluded.

Likewise the Court rejected the suggestion that the simple cash offer to settle in the terms of the offer of 20 June 2014 could not have been intended (without further negotiation on specific terms including the indemnity position) to have been sufficient to resolve a complex dispute. Although the underlying dispute was complex the terms of the offer were not.

On 27 June 2014 the Defendants made what was described as a “*take it or leave it offer*” [at a sum described as Y+2]. The Claimants’ request that the Defendants seek further instructions (on an improved offer) was rejected by the Defendant. Accordingly on 29 June 2014 the Claimants’ solicitor emailed in the following terms;

“In the circumstances, my clients will accept [the offer at Y+2]. We will send round a draft consent order in the morning.”

Order recording the amounts due to each of the Claimants but proposed to leave the question of the amount to be borne by the liquidator and insurer respectively to the Defendant.

That offer was rejected by the Defendant on 23 June 2014, who made a counter offer [for a sum described as Y+1] expressed to be a “*cash payment made to your clients within the 28 day period*”.

Although the Defendant subsequently attempted to argue that the reference to the offer dated 20 June 2014 as being one that was acceptable “*in principle*” suggested that it was not intended that this offer was capable of acceptance, the Court rejected that analysis determining that had the offer been accepted, the essential terms [the sum to be paid, the time for payment and the effect on the litigation of the agreement] would have been agreed and that this was sufficient to amount to a binding agreement.

Upon receipt, the Solicitor for the Defendant replied;

“*Noted, with thanks*”.

Thereafter on Monday 30 June 2014, the Claimant’s solicitor provided a draft consent order incorporating the standard Tomlin provisions. The draft Order provided for the payment of Y+2 within 28 days, in full and final settlement of the claim and counterclaims. The Defendants were invited to sign and return the same. Instead of doing so, the Defendants circulated a longer form settlement agreement (first prepared for the unsuccessful May mediation), which contained, amongst other matters, clauses concerning the provision of indemnities.

The parties remained at odds over the terms of the formal settlement agreement. The Claimants applied to the Court seeking a declaration that a binding settlement was reached by the exchange of emails between the solicitors on 29 June 2014, by which the Claimants had agreed to settle the proceedings for a payment of (Y+2).

**The Principles**

Although appearing prior to the Court’s recitation of the facts, the judgment in Bieber provides a helpful summary (at [14]) of the principles that are to be applied when considering whether a binding settlement has been concluded.

These are;

(a) The question of whether a binding settlement has been reached is to be determined objectively by considering the whole course of the parties’ negotiations. Importantly once, objectively considered, the parties concerned have reached agreement in the same terms on the same subject matter, a contract will have been formed even though it is understood that a formal agreement will be entered in to subsequently that records [or potentially even adds] to the terms agreed;

(b) Generally the subjective state of mind of the negotiating parties, and by extensive any subjective (but not communicated) reservations of one party will be irrelevant and evidence as to the same is inadmissible;
Avoiding the Accidental Settlement continued

(c) If, on an objective analysis of the parties’ conduct the parties intended to conclude a legally binding agreement, the fact that certain terms of economic or other significance have not been agreed does not prevent it being determined that the parties have reached a concluded agreement. The minimum requirement is that the parties shall have agreed all the terms necessary for there to be an enforceable contract- so a failure to agree terms such as confidentiality clauses will not prevent the conclusion being reached that the parties have entered into a binding settlement;

Firstly, neither by use of the express term nor as a matter of objective observation was it the case that the Parties had intended their negotiations to be “subject to contract”.

(d) Where the parties wish to ensure that an agreement that might be made orally or in the context of this case by the exchange of email does not become binding until all the terms are embodied in formal legal document, then they may do so by expressly stipulating that their negotiations will take place “subject to contract”;

(e) The express stipulation “subject to contract” is not required where it was the mutual understanding of the negotiating parties that this was how the negotiations were being conducted;

(f) Whilst “subject to contract” negotiations are most often found in the context of land, the rule may apply equally in any form of contractual negotiation;

(g) Whether there was a mutual understanding that negotiations would proceed on a “subject to contract” basis, is a question of fact for each case;

(h) Even where negotiations have been initially commenced on a “subject to contract” basis, it is open to either party to remove or otherwise waive that stipulation.

The Finding
Applying the above principles, the first question for the Court was whether, considered objectively, the parties had reached a concluded agreement in the exchange of emails on 29 June 2014. The Court concluded that they had. Although the underlying litigation was complex the terms of the settlement- found initially within the 20 June 2014 letter and later refined by the exchanges of correspondence up to the email of 27/29 June 2014 - was comparatively simple and evidently an offer that was capable of acceptance, notwithstanding the outstanding issue between the parties as to the position on the third party indemnities.

Further, the Court rejected the Defendant’s analysis that the negotiations were to be concluded on a “two-stage” basis - with the amount to be paid agreed first but no binding agreement completed until the second stage (where the precise terms of the settlement) had been agreed upon. Had this been the position, then the Defendant’s email of 29 June 2014 would have drawn attention to the fact that the parties now had agreement on the settlement sum but further agreement was needed on the precise terms before a binding settlement was concluded. The phrase “Noted, with thanks” did no such thing.

Indeed the fact that the parties were prepared to negotiate further as to the precise terms of the settlement (it ought to be noted that it was the Claimant who proposed the circulation of a consent order) did not prevent a binding settlement from arising. Firstly, neither by use of the express term nor as a matter of objective observation was it the case that the Parties had intended their negotiations to be “subject to contract”. In particular there was nothing in the email exchange of 29 June 2014 that was suggestive of crucial elements of the settlement remaining outstanding.

Finally the Court considered the question of whether the Parties’ conduct in the period post 29 June 2014 was admissible as a matter of law for the purpose of deciding whether a contract was concluded on that date. Citing Newbury v. Sun Microsystems [2013] EWHC 2180 (QB) - itself a useful example of the fact that, if one wishes to negotiate on a “subject to contract” basis, adopting that term expressly removes all doubt- the Court concluded that it was not. Once it outwardly appeared that the parties to a negotiation had agreed, on a particular date, in the same terms on the same subject matter then conduct after that date will not be a legitimate aid in determining whether or not the parties reached agreement on that particular date. Such conduct may be relevant if it is alleged that there has been a variation or new agreement and indeed may be admissible where it is alleged that the agreement is partly in writing and partly oral to test the question of whether the terms were agreed. However where it is said that an agreement was reached, contained within documents, then once it is objectively considered (on those documents) that agreement been reached, evidence of conduct thereafter is inadmissible.

Comment
Settling a claim can often be a more fraught and difficult process than fighting the same to trial. In any settlement process there is often a considerable desire [and indeed considerable utility] in trying to agree on the broader issues before moving to concentrate on the detail, with the hope that progress will beget progress. This is particularly the case on the Court steps, where considerable efforts are often expended to get agreement on the “big ticket” items thereafter leaving the detail for subsequent negotiation. However merely because a party wishes to see progress does not mean that there is a desire to be bound until all aspects of the settlement have been agreed. This is particularly the case in commercial matters where clauses that might be considered to be ancillary those matters that Bieber identifies as the core elements of any settlement (being the sum to be paid, the time for payment and the effect on the litigation of the
agreement), such as indemnities against third party claims, confidentiality etc. can be as, if not more, important to the client’s broader commercial objectives than the compromise of the particular case being negotiated.

Settling a claim can often be a more fraught and difficult process than fighting the same to trial.

Bieber and Newbury offer timely reminders that, where that is the intention, it is vital that this is made clear. Although it is not necessary to explicitly include the phrase “subject to contract”, as the absence of the phrase will not prevent the conclusion being drawn that the negotiations were being conducted upon that basis, both Bieber and Newbury make clear that the use of those words will remove any doubt as to whether agreement has been reached prior to the execution of a formal written agreement. Furthermore, the Court in Bieber placed considerable reliance upon the fact that the Defendants, when acknowledging acceptance of their offer, did not take the opportunity to remind their opponents that the detail of the settlement remained to be agreed and that no binding settlement would arise until those details were agreed upon. Clearly if the desire is to negotiate on a “subject to contract” basis, then it is prudent to make this explicitly known and if there is doubt as to whether your opponent is either genuinely unaware or is perhaps being “selective” in their remembrance of how the negotiations are being concluded- it never hurts to reiterate the point for the sake of clarity.

Cavendish Square Holdings v. Markessi; ParkingEye Limited v. Beavis

[2015] UKSC 67

In these conjoined appeals the Supreme Court considered the law relating to penalty clauses in contracts. The Cavendish appeal concerned an alleged penalty clause in a share sale agreement which restricted competition by the seller of the shares and stipulated a reduced price in the event of a default on his part.

The Beavis appeal involved a parking charge of £85 if the permitted period of free parking was exceeded.

The Supreme Court held that the purpose of the law relating to penalty clauses was to prevent the recovery of money under a term of a contract which bore little or no relationship to the loss suffered. The law, therefore, regulated the remedies available for the breach of a party’s primary duty but not the primary duties themselves. That was the essence of the classic distinction between a penalty and a genuine pre-estimate of loss.

Earlier decisions had held that “penal” meant “unconscionable and extravagant”. The Supreme Court now held that the true test was whether it was a secondary obligation which im posed a detriment on the contract breaker that was out of all proportion to the legitimate interest of the innocent party, which interest related only to the performance of the contract (or some alternative to performance). There was no interest in simply punishing the defaulter.

Despite the fact that the law relating to penalty clauses was open to criticism, it was not appropriate either to abolish or extend it.

The price adjustment in the Cavendish appeal was a primary obligation, despite the fact that it was not referable to the loss suffered. This was because the purchaser had a legitimate expectation in the enforcement of the restrictive covenants which extended beyond the mere recovery of loss. In part, this was as a result of the specific wording of the clause and the fact that there was no mechanism for substituting a different price in the event of a breach than the one provided for in the contract itself.

In the Beavis appeal, the parking charge had two main objectives, both of which were reasonable. These were: (1) to manage efficient use of the spaces and (2) provide an income stream for ParkingEye to meet the costs and make a profit. In these circumstances, the charge was not a penalty. The fact that motorists regularly used the car park was itself evidence of the reasonableness of the charge. In other words, it was an acceptable price to pay for the convenience of parking there. Merely because some customers underestimated the time they needed to park there did not make the charge excessive or otherwise a penalty. Nor did the charge infringe the Unfair Terms in Consumer Contracts Regulations 1999. To the extent that the courts below had found support in the Protection of Freedoms Act 2012 for finding that the charges were unenforceable, that was a misreading of that statute as the reference there to “obligation” did not exclude the penalty doctrine.
The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 are now well established in domestic law, having been enacted, primarily, so as to implement the European Council Directive 2008/118/EEC concerning the general arrangement for excise duty. However, the correct interpretation of various aspects of the 2010 Regulations remains an all too frequently litigated matter; characterised by the first-tier Tribunal promulgating unhelpfully contradictory decisions.

The most recent discord over the correct interpretation of the 2010 Regulations arises out of Regulation 13, a Regulation frequently invoked by HMRC when it seeks to recover what it believes to be unpaid excise duty on allegedly ‘smuggled’ goods.

Regulation 13 provides as follows:

1. Where excise already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

2. Depending on the cases referred to in paragraph [1], the person liable to pay the duty is the person –
   (a) making the delivery of the goods;
   (b) holding the goods intended for delivery; or
   (c) to whom the goods are delivered.”

The correct interpretation of Regulation 13(1) has, in and of itself, caused HMRC significant anxiety; however the Tribunal has provided helpful guidance in the decision of B&M Retail v. HMRC [2014] UKFTT 902 (16 September 2014).

Contrary to the contentions of HMRC, in B&M Retail the Tribunal held that the duty point pursuant to Regulation 13(1) could only arise once. The person liable to pay the duty is the person set out in Regulation 13(2) at the time when the duty point first arises. Prior to the decision in B&M Retail, HMRC had attempted to charge those further down the supply chain excise duty, contending that as they were a person ‘holding the goods’ (even though the duty point had arisen much earlier), they remained liable to account for the duty. That no longer appears to be the case; however permission to appeal to the Upper Tribunal has been granted and the outcome thereof is awaited.

With clarity, for the moment, in respect of Regulation 13(1), HMRC has now turned its attention to Regulation 13(2).

On its face, Regulation 13(2) appears to provide HMRC with a choice as to the person whom it considers to be liable for any unpaid duty. One might foresee, therefore, a disgruntled Appellant arguing before the Tribunal that HMRC’s decision to charge it excise duty was ‘unreasonable’ as it was, for example, merely an innocent party. That argument stands no prospect of success; indeed it was dismissed with brevity in the recently argued case of Leicester Express Logistics Limited v. HMRC [2015] UKFTT 476 (TC). The Tribunal commented thus:

“…we consider the intention of reg 13(2) – and art 33(3) from which it is derived – is to establish a liability on all [my emphasis] those persons for the excise duty, and it is open to HMRC to assess any liable person.”

That view, the Tribunal contended, is bolstered by the CJEU decision in Stanislav Gross v. Hauptzollamt Braunschweig (case C/165/13).

However, of more interest to the Tribunal is the question of how one interprets Regulation 13(2)(a) and 13(2)(b). It is here where the dichotomy in judgments arises. “Holding” is not defined by either the Regulations or the Finance Act; and the EU Directive is of little assistance.

In recent times, the concerned
Appellants have been lorry drivers; largely ignorant of the fact that their load may be non-duty paid (and thus indicative of a smuggling attempt). Rather than assessing the drivers’ employers, HMRC has chosen to assess the drivers themselves as being either the person: (a) making delivery of the goods; or (b) holding the goods intended for delivery.

In Carlin v. HMRC [2014] UKFTT 782 (TC), a case concerning a disgruntled lorry driver, the Tribunal held that: “Mr Carlin was not holding the goods for the purposes of the legislation. Following the decision of Lord Justice Hooper in R v. May the tribunal believes Mr Woods or Woods Transport was the holder of the goods and Mr Carlin was merely the courier.”

That is a perfectly sensible analysis. Extending HMRC’s reasoning, if a TNT driver crossed the border with a lorry full of individual packages to deliver to a number of individuals, and one of those packages was non-duty paid, the driver would be liable for duty. That is an illogical position.

Nonetheless, the decision in Carlin is directly contradicted by the Tribunal’s decision in McPeake v. HMRC [2015] UKFTT 0356 (TC). There the Tribunal found that a lorry driver was “holding” within the meaning of Regulation 13(2)(b) merely because he was: (i) unsupervised; (ii) not subject to the control of any other person; and (iii) had responsibility for the goods.

The decision in McPeake, however, fails to address the most pertinent point that underpins the present argument. Both Carlin and McPeake appear to place reliance on the Court of Appeal’s decision in Taylor & Wood [2013] EWCA Crim 1151. Discussing the correct interpretation of Regulation 13(1), the Court of Appeal decided that the wording of the Regulation and the related Article 7(3) of the Directive:

“To seek to impose liability on entirely innocent agents . . . would no more promote the objective of the Directive that those of the Regulations.”

“strongly support[s] the conclusion that a person who has de facto and legal control of the goods at the excise duty point should be liable to pay the duty. That conclusion is all the more compelling where the person in actual physical possession does not know, and has no reason to know, the [hidden] nature of the goods being transported as part of a fraudulent enterprise to which he is not a party. To seek to impose liability on entirely innocent agents . . . would no more promote the objective of the Directive that those of the Regulations.”

Thus, the correct assessment under Regulation 13(2) is not restricted to who was in actual possession of the goods at the time when the duty point arises. HMRC must go further if it is to be able to assess the person holding those goods: it must establish that the person holding had actual or constructive knowledge of the fact that the goods he/she/it was transporting were to be diverted with the intention that duty is evaded. Absent such knowledge, it is hard to see – following the Court of Appeal’s reasoning – how HMRC can assess a driver as the transporter’s innocent agent.

Permission to appeal to the Upper Tribunal in respect of the decision(s), it is understood, in both McPeake and another related case, has recently been granted. One further case before the first tier Tribunal – Perfect v. HMRC – is due for decision in the interim.

It is to be hoped that following the Upper Tribunal’s determination in both B&M and McPeake; the current surge of litigation surrounding Regulation 13 can be quashed.
first among equals

A tenant’s defence under the Equality Act 2010 to possession proceedings
A recent ruling provides greater protection to tenants seeking to raise discrimination defences but where does this leave the social landlord seeking to repossess?

**Aster Communities Ltd (formerly Flourish Homes Ltd) v. Akerman-Livingstone (Equality and Human Rights Commission intervening) [2015] UKSC 15**

This case has provided some much needed clarity on the courts’ approach to defences under the Equality Act 2010 as opposed to defences brought under article 8 of the ECHR. While both defences involve a consideration of proportionality, it has been confirmed that the two must be approached in different ways; more specifically, a discrimination defence will not need to pass the high test of being “seriously arguable” to survive summary disposal. While it might seem at first a fairly subtle distinction, it is likely to change the landscape of litigation in this area and will set a much higher bar for the social landlord seeking to evict its tenant.

Mr Akerman-Livingstone, aged 47, had been diagnosed with prolonged duress stress disorder or complex post-traumatic stress disorder as a result of sustained childhood physical and emotional abuse by his parents. When he became homeless in 2010, Mendip Council had turned him down in accommodation with the claimant housing authority, Aster Communities. Over the next nine months the local authority made several offers of permanent accommodation but these were all turned down by Mr Akerman-Livingstone either because the properties were too close to where he had been abused as a child, or too far from his GP whom he relied, or for other reasons relating to his disability. In 2011, the local authority, having declared that it had discharged its duty under section 193 Housing Act 1996 and that Mr Akerman-Livingstone was now intentionally homeless, terminated its provision of temporary accommodation and initiated possession proceedings.

Mr Akerman-Livingstone argued that the possession proceedings amounted to disability discrimination within sections 15 and 36 (1) (b) Equality Act 2010 and that they also violated his article 8 rights.

The Supreme Court was asked to consider whether the principles applicable to article 8 defences, laid down in Pincock and Powell, should also apply to discrimination defences under the 2010 Act.

At first instance the judge, applying the approach outlined in *Manchester City Council v. Pincock (Secretary of State for Communities and Local Government Intervening) [2011] 2 AC 104* and *Hounslow London Borough Council v. Powell (Secretary of State for Communities and Local Government Intervening) [2011] 2 AC 186*, decided that, as he considered neither defence to be seriously arguable, he was entitled to take a summary approach and make an order for immediate possession. On appeal, this approach was upheld ([2014] EWCA Civ 1081).

The Supreme Court was asked to consider whether the principles applicable to article 8 defences, laid down in *Pincock and Powell*, should also apply to discrimination defences under the 2010 Act.

A change in approach...

In *Akerman* the Supreme Court held that, while the twin aims will in most cases be sufficient to trump a tenant’s article 8 rights, it cannot be taken for granted that they will likewise overreach a tenant’s 2010 Act rights. Consequently, a different approach has to be taken in assessing proportionality under the 2010 Act such that summary disposal of discrimination defences will rarely be appropriate and in the vast majority of cases it will be right to allow the defence to run to trial for a full consideration of the evidence.

*Is it right?*

On technical analysis, the distinction drawn between the two forms of defence must be correct: they spring from two very different pieces of legislation which in turn have very different purposes. While it might be superficially attractive to have a universal method in dealing with that most elusive of terms “proportionality”, such an inflexible and undiscriminating approach has to be flawed insofar as it fails to take account of the differing aims of the Convention on the one hand, and the Equality Act 2010 on the other.

continued...
Born out of the back-drop of World War II, the Convention rights were intended to provide a broad code by which democratic societies could regulate public powers and ensure the ultimate protection of the individual. They provide overarching protection to the ordinary man from the misuse of power by the state. The Equality Act 2010, on the other hand, has a different aim: to shield those with protected characteristics against unequal treatment. To this end, it is far more focussed in its provisions, prohibiting specific discriminatory acts and providing in some cases that particular positive steps must be taken to ensure equality. As per Lady Hale’s assessment at [25]:

“...the substantive right to equal treatment protected by the Equality Act 2010 is different from the substantive right which is protected by article 8. All occupiers have a right to respect for their home. Parliament has expressly provided for an extra right to equal treatment – for people to be protected against direct or indirect discrimination in relation to eviction. Parliament has further expressly provided, in sections 15 and 35, for disabled people to have rights in respect of the accommodation which they occupy which are different from and extra to rights of non-disabled people.”

Section 35 (i)(b) in particular provides specific security to tenants, singled out by that provision as a class deserving of special protection. It is a right that is stronger and more specific than that afforded by the sweeping provisions of article 8. It has to follow, therefore, that while the broad-brush approach of summary assessment might lend itself to the disposal of an article 8 defence, where the twin aims of the social landlord can be taken as a given, it is not appropriate in assessing a defence under the 2010 Act where the particular circumstances of the case have to be so carefully taken into account to ensure equality. It cannot have been Parliament’s intention that such fundamental and specific rights should be dealt with by way of summary determination without a thorough consideration of the evidence.

Moreover, when one considers how a discrimination defence operates in practice, it is clear that summary determination is unequal to the task of assessing the switching burden of proof, codified in section 136.

Under section 15 of the 2010 Act, it is for the defendant to establish facts which enable the court to decide three things [i] he is disabled; [ii] in being evicted he has been treated unfavourably; and [iii] the eviction is because of something arising in consequence of his disability. It is likely to be the case in most cases that the defendant will have to adduce medical evidence to discharge this burden, such evidence dealing with the diagnosis under the first limb, and the far more complicated issue as to causation under the third, showing a clear link between the unfavourable treatment and the disability. This will rarely be a straightforward connection and certainly not one which can be readily assumed. Provided that the tenant discharges this burden, it is then for the claimant landlord to establish that its treatment of the tenant was in the proportionate pursuit of a legitimate aim. Sections 15 and 35 of the 2010 Act do not lend themselves therefore to a process of summary determination as the proportionality of the landlord’s actions cannot be so readily taken as a given, as per Lady Hale at paragraph 35:

“It simply does not follow that, because those twin aims will almost always trump any right to respect which is due to the occupier’s home, they will also trump the occupier’s equality rights.”

This decision hauls possession proceedings back in line with other areas of discrimination law. It feels wrong (and post Ackerman it is wrong) that a tenant faced with eviction from his home should have to overcome such a high hurdle before being allowed to pursue a discrimination defence at a full hearing when he would face no such barrier were he to allege unfair treatment in his workplace or any other area of his life.

So while many will see Ackerman as the Supreme Court retracing its steps on the issue of proportionality, in all it has to be a welcome decision. It realigns discrimination defences with their statutory aims and, in so doing, it underlines the distinction with convention rights. Unyoked, the two defences can now develop separately and on their own terms.
What are the implications for landlords?

Many social landlords will see the result in *Akerman* as opening the door to discrimination defences being run as a matter of course, complicating and protracting what ought otherwise to be routine possession proceedings. It is right that many social landlords find their means considerably stretched: they are tasked with the difficult job of allocating scarce and precious social housing in accordance with their statutory duties while juggling the various and competing needs of the vulnerable whom they are asked to house. It certainly would be salutary for the landlord, and no doubt much cheaper, if the courts were prepared to dismiss these defences summarily.

It must be remembered, of course, that summary disposal of a discrimination defence is still an option for the courts under CPR 55.8 applying the test of whether the claim is “genuinely disputed on grounds that appear to be substantial”. This might be the case where the landlord can show, for example, that the defendant has no real prospect of proving a disability, or that it was plain that possession was not being sought because of something arising in consequence of his disability; however, such cases are likely to be rare.

In the majority of cases where a 2010 Act defence is raised the landlord will necessarily face a significantly more arduous task in having to convince the court of the proportionality of its actions than if faced with an article 8 defence. Assuming that the tenant has provided the court with prima facie evidence of a disability and causation, the landlord will have to put time and effort into addressing the defence and providing evidence to justify its claim.

The outcome for Mr Akerman-Livingstone

Unfortunately for Mr Akerman-Livingstone, his appeal was dismissed on the basis that events had moved on so significantly from the earlier hearings that a rehearing would be futile. The claimant landlord had been served with a notice to quit by the freeholder and been informed by Mendip Council that it was no longer required to provide accommodation in that building. In light of this, it was decided that a rehearing would inevitably result in a possession order being made and it would therefore not be a kindness to the defendant to prolong the unavoidable.

While the decision was too late to protect Mr Akerman-Livingstone from eviction it will from now on provide a much firmer shield for other tenants who allege that they are suffering unequal treatment by reason of their disability.
Few cases can lay claim to being before the Court of Appeal twice. Yet, Ilott v. Mitson [2015] EW CA Civ 797 can do just that. On its second airing before the Lord Justices we find the statutory framework of the Inheritance (Provision for Adults and Dependants) Act 1975 (“the 1975 Act”) almost strangely straightforward; yet, as is often the case, poorly applied in the courts below.

The 1975 Act

The 1975 Act provides a coherent and sensible method of assessing whether reasonable provision for a claimant has, or has not, been made. Reasonable provision [in respect of claimants other than surviving spouses or civil partners] means:

‘such financial provision as it would be reasonable in all of the circumstances if the case for the application to receive for his maintenance’ (section 1(2) 1975 Act)

Maintenance is a tricky word. Ostensibly straightforward and yet defined, vaguely, in Re Dennis deceased [1981] 2 AER 140 at 145-6 as follows: ‘the word “maintenance” connotes only payments which, directly or indirectly, enable the applicant in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him.’

It is, I suggest, this vagueness which accounts for much of the difficulty experienced by the courts below in Ilott.

Section 2 1975 Act provides that where the disposition of the deceased’s estate effected by his will or the law relating to intestacy is not such as to make reasonable financial provision for the claimant then the court may:

“(a) Make an order for the making to the claimant out of the net estate of such periodical payments and for such term as may be specified in the order; and/or
(b) Make an order for the payment to the claimant out of that estate of a lump sum of such amount as may be specified...”.

Section 3 1975 Act lists the wide range of factors which the court shall take into account in deciding whether reasonable financial provision has been made. In short, those factors are:

(a) The financial resources and financial needs the claimant has or is likely to have in the foreseeable future
(b) The financial resources and financial needs which any other claimant has or is likely to have in the foreseeable future
(c) The financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future
(d) Any obligations and responsibilities which the deceased had towards any claimant or any beneficiary
(e) The size and nature of the net estate
(f) Any physical or mental disability of any claimant or any beneficiary
(g) Any other matter, including the conduct of the application or any other person, which in the circumstances of the case the court may consider relevant

One of the peculiarities of claims under the 1975 Act is the way in which court must necessarily examine, so thoroughly, a great range of factors before it. The court examines the internal mechanisms of a family; often, a sort of post mortem is performed as to where relationships broke down – as they often have done so in such claims. The minutiae of the...
claimant’s life, too, is considered. Litigation is often fraught, often stressful; but, this is especially true is 197 Act claims. True, too, is the exacting examination required of a family – both before and after a deceased’s passing.

The facts of Ilott

The claimant in Ilott was estranged from her mother – the deceased. Blame lay, the court found, on both sides for the estrangement. Primarily, the estrangement was caused by the claimant’s decision, at the age of 17, to leave home in 1978 and move in with the man who would become her husband.

Although happy, the life that they made for themselves was relatively meagre. Both relied heavily on state benefits. DJ Million, in the court at first instance, found that the deceased had unreasonably excluded the applicant from any financial provision in her will despite the claimant’s needy financial circumstances.

So far, so straightforward. An award ought to be made to the claimant under the Act. Where problems arose, however, was in assessing what that award should be.

The award – first instance

The judge at first instance, DJ Million, directed himself that a capitalised sum must be based on an income need. Of particular note, DJ Million rejected the claimant’s claim for £186,000 to purchase the family home and other sums to improve the property. DJ Million considered all of the suggestions put forward by the parties as unsuitable and settled upon an award of his own calculation.

Part of DJ Million’s own calculation was a number of considerations. DJ Million concluded that the claimant had some earning capacity but that would not be enough to meet her financial means. He took the claimant’s share of the tax credit received by her and her husband and used that as a ‘ceiling’ beneath which an award should be made.

Crucially, DJ Million found that the amount of tax credits received by the claimant represented the amount of maintenance which the government accepted as necessary to provide the claimant with a basic, but reasonable, standard of living. In other words, DJ Million concluded that the level of state benefits as the ceiling on the amount he could award for the claimant’s maintenance (at [25]). The DJ then took into account the At a Glance tables and concluded that £69,200 would provide the claimant with an income of £4,000 per year. He then capitalised the sum as £50,000, whilst emphasising that this was a rough approximation.

The award – on appeal to the High Court

Parker J did not find error in DJ Million’s reasoning.

The award – on appeal to the Court of Appeal

On appeal Arden LJ found three issues fell for considerations:

i. Were there any errors in the reasoning of DJ Million on financial provision which result in his judgment being set aside?

ii. If so, should the Court of Appeal re-exercise the discretion of DJ Million or remit the matter once more back to the trial court?

iii. If this court is to re-exercise the discretion, how should it do so?

Arden LJ, with whom Ryder LJ and Sir Colin Rimer agreed, found that there were errors within the district judge’s reasoning. In particular, the district judge wrongly equated the level of state benefits with reasonable financial provision. He took state benefits to represent a ‘ceiling’ as to what reasonable financial provision meant and that such a ceiling could not be exceeded. DJ Million appeared to find that the claimant’s living could not be improved but only, in the strictest sense, maintained or continued. In addition DJ Million had failed to consider the effect that an award would have upon the claimant’s state benefits. And, although such information was not before him, he had failed to ask for such information to be provided.

On appeal, the Court of Appeal was informed that a capital sum would not affect the claimant’s state benefits [see [43]].

Arden LJ concluded that the correct award was an award of £143,000 – the sum required to purchase the claimant’s home and the reasonable expenses of acquiring it. Owning the property would also allow the claimant to release its equity and to raise capital in the future; such a consideration was important as the claimant did not have a pension. In addition, Arden LJ gave the claimant an option to receive £20,000.

Conclusions

Ilott demonstrates the importance that practitioners fully apprise themselves of the effect an award will have upon state benefits.

Of note, too, is the thinking found in Ilott that state benefits do not necessarily equate with reasonable financial provision. State benefits do not represent a ceiling under which reasonable financial provision ought to be made. Reasonable financial provision can, in some circumstances, represent an improvement to a claimant’s financial position.

Although a highly useful authority, my view is that Ilott only takes us so far in understanding the real workings of the 1975 Act. The vagueness with which ‘maintenance’ is defined remains problematic. There is still room for much debate as to what ‘maintenance’ within the context of the 1975 Act should be taken to mean. As Ryder LJ remarked in Ilott: ‘I have not found it necessary to comment further upon how maintenance is to be construed for the purposes of s 1(2) of the 1975 Act. In so far as there is a debate about that, it can await a case in which the circumstances permit of a broader discussion’. We await such a case with interest.

Emma Williams
Re-Opening Unfair Credit Transactions
Section 140A-C
The Consumer Credit Act 2006 added sections 140A to 140C to the Consumer Credit Act 1974. The new sections came into force on 6 April 2007 in substitution for the earlier “extortionate credit bargain” provisions, formerly enshrined in sections 137-140 of the 1974 Act. The old regime had set the bar to relief too high and had proved largely ineffectual in providing a remedy to debtors and sureties wishing to challenge the terms of their agreements. Section 140A can be relied on by a debtor or a surety provided they are natural persons. Significantly, access to the relief under section 140A is not limited by reference to the amount advanced under the credit agreement.

Section 140A confers a wide discretion on the court to make an order under section 140B in connection with a credit agreement. That discretion is engaged if the court determines that the relationship between the creditor and the debtor is unfair to the debtor by reason of (a) any terms of the agreement or of any related agreement and/or (b) the way in which the creditor has exercised or enforced his rights under the agreement or any related agreement and/or (c) any other thing done (or not done) by, or on behalf of the creditor, either before or after the making of the agreement or any related agreement. Once a debtor or surety alleges that the relationship is unfair, section 140B(9) requires the lender to prove that it is not.

The impact of the Court of Appeal decision in Harrison was that section 140A unfairness could not be established unless the debtor or surety could rely on some breach of a legal or regulatory duty on the part of the lender. In that case Tomlinson LJ delivering the only reasoned judgment commented that he found the commission taken by the lender [87%] “quite startling” and added that there would be “many who would regard it as unacceptable conduct on the part of the lending institutions to have profited in this way”. Nevertheless he declined to find that the relationship was thereby rendered unfair because the lender had committed no breach of the ICOB rules either in charging the commission or in failing to disclose it. In particular, he rejected resort to “visceral instinct that the relevant conduct is beyond the Pale” and stated that the touchstone had to be the standard imposed by the regulatory authorities pursuant to their regulatory duties.

The impact of the Court of Appeal decision in Harrison was that section 140A unfairness could not be established unless the debtor or surety could rely on some breach of a legal or regulatory duty on the part of the lender. It was that apparent requirement which led the Court of Appeal to dismiss Mrs Plevin’s appeal (in Plevin v. Paragon Finance Ltd) because her principal complaint that Paragon’s unfairness was non-disclosure of the amount of commissions could not be said to involve any breach of ICOB (or any other) duty. In the conjoined appeal of Conlon v. Black Horse Briggs J expressed his discomfort about the principle laid down in Harrison and stated that, had he been free to do so, he would have regarded a “visceral instinct that the relevant conduct was beyond the Pale” as a persuasive starting point in the analysis whether such conduct gave rise to an unfair relationship.

Plevin in the Supreme Court [2014] 1 WLR 4222
On Mrs Plevin’s appeal to the Supreme Court, Lord Sumption turned the tables on the potential reach and utility of section 140A for debtors and sureties when he overruled Harrison as wrongly decided. Lord Sumption accepted that the view which a court may take of the fairness or unfairness of a debtor-creditor relationship might be influenced by the standard of the commercial conduct reasonably expected by the creditor, and in this particular instance the ICOB rules were some evidence of what that standard was. But he was equally clear that the content of the ICOB rules could not be determinative of the question posed by section 140A, because the regulatory requirements and section 140A were doing different things.

The fundamental difference was that the ICOB rules imposed obligations on insurers and insurance intermediaries, whereas section 140A did not impose any obligation, but was concerned with the question whether the creditor’s relationship with the debtor was unfair. Further differences flowed from this starting point. The regulatory rules imposed a minimum standard of conduct applicable in a wide range of situations, enforceable by action and sounding in damages. Section 140A by contrast introduced a broader test of fairness to be applied to the particular debtor-creditor relationship, which in the appropriate case would lead to the transaction being re-opened as matter continued...

1 [2013] EWCA Civ 1658 2 with whom Lady Hale, Lord Clarke, Lord Carnwath and Lodge Hodge agreed 3 then s.150, now s.138D FSMA 2000
Re-Opening Unfair Credit Transactions continued

The question of fairness involves a large element of forensic judgment, but there are some pointers that a relationship might be unfair.

...of judicial discretion.

While the standard of conduct expected from practitioners by the ICOB rules was laid down in advance by the FCA, the standard of fairness in a debtor-creditor relationship was a matter for the court, on which it had to make its own assessment in each particular instance. It followed from these considerations that the question whether the debtor-creditor relationship was unfair was not the same as the question of whether the creditor had complied with its ICOB obligations, and the facts which would be relevant to answer each question were manifestly different.

Indicia of an Unfair Relationship

Lord Sumption remarked that section 140A was deliberately framed in wide terms with very little guidance about the criteria for its application. As such section 140A was undoubtedly intended to introduce a broad definition of unfairness, in place of the narrowly framed provisions, which had previously governed “extortionate credit bargains”. The scope of the section extended to any case in which human action or inaction produced unfairness.

The question of fairness involves a large element of forensic judgment, but there are some pointers that a relationship might be unfair. Lord Sumption identified as foremost among these a relationship which was so one-sided as substantially to limit the debtor’s ability to choose. He recognised that large differences in financial knowledge and expertise (and an inherently unequal relationship in that regard) were probably a feature of the great majority of relationships between commercial lenders and private borrowers, and that it could not have been Parliament’s intention that the generality of such relationships should be reopened for that reason alone. In his view it was a question of degree.

The provision to a financially unsophisticated debtor of bad advice, or no advice, about the suitability of a relatively complex product (like PPI) would commonly result in a one-sided relationship substantially limiting the debtor’s ability to choose. In Mrs Plevin’s case there existed a sufficiently extreme inequality of knowledge and understanding. Any reasonable person in Mrs Plevin’s position who had been told that more than two thirds of the PPI premium was going to intermediaries, would have been bound to question whether the insurance presented value for money and whether it was a sensible transaction to enter into. The fact that she was left in ignorance made the relationship unfair.

Conduct which is “beyond the Pale”, although strictly legal, may give rise to an unfair relationship and afford a debtor or surety a remedy under s.140B.

Utility of Section 140A

The main interest of the Supreme Court decision in Plevin [including cases outside PPI litigation] lies in opening the way for a debtor or surety to argue that a lender has acted unfairly in all the circumstances, even if it has complied with its regulatory obligations. Lord Sumption opined that once the decision in Harrison was discarded, section 140A can be seen to give extensive protection to the debtor (or surety) extending beyond the right to enforce the lender’s legal duties, in any situation where the lender or its associates (or their agents) have made the relationship unfair.

Conduct which is “beyond the Pale”, although strictly legal, may give rise to an unfair relationship and afford a debtor or surety a remedy under s.140B. While in each particular case the court will seek to make an order which is proportionate to the nature and extent of the unfairness, the range of possible orders in the s.140B menu is extensive.

...
Menelaou v. Bank of Cyprus UK Ltd
[2015] UKSC 66

The facts of this case were that Ms Menelaou was bought a property by her parents as (as she thought) an unencumbered gift. In fact, her parents had been indebted to the defendant bank in the sum of £2.2 million which had been secured by two charges on the family home. The family home had been sold to enable Ms Menelaou’s house to be bought. When Ms Menelaou’s parents bought her the property, the bank agreed to release the charges on the family home in return for being granted a new charge over Ms Menelaou’s house. The claimant was entirely unaware of the charge and when she found out about it she sought rectification of the register on the ground that the charge was invalid. As Ms Menelaou’s solicitor had failed to obtain her signature on the charge form, the defendant bank conceded the invalidity but counterclaimed on the basis of unjust enrichment.

The Supreme Court, applying Benedetti v. Saviris [2014] AC 938, held that on a claim of unjust enrichment the court had to ask whether (i) the defendant had been unjustly enriched, (ii) the enrichment had been at the claimant’s expense, (iii) the enrichment was unjust and (iv) there were any defences available to the defendant. Provided that there was a sufficient causal connection between the payment and the enrichment there was no reason why a claim for unjust enrichment could not succeed against an indirect recipient.

Ms Menelaou was found to have been unjustly enriched as she had become the owner of a property the value of which was considerably greater than it would have been but for the avoidance of the charge. If the charge was avoided, the bank would be left without security which was central to the whole arrangement.

Re Coniston Hotel (Kent) LLP (In Liquidation)
[2015] EWCA Civ 1001

The members of Coniston Hotel (Kent) LLP (“the LLP”) appealed against the decision of the High Court ([2014] EWHC 1100 (Ch)) where the administrators had been granted summary judgment by Morgan J. The LLP was formed so that a hotel could be built and run. Prior to opening, the LLP encountered financial difficulty. The LLP’s bank requested a second valuation which, ultimately, was much lower than the first valuation which had been sought by the LLP. Consequently, the bank refused to provide additional funding. The appointment of the administrators followed. The hotel was sold to a company associated with the bank. The members of the LLP issued claims against the administrators for mismanagement and misconduct. The allegations raised by the member were manifold. However, it is possible to divide the allegations into two broad tranches. Firstly, the members of the LLP alleged that the administrators had failed to secure the additional funding required to prevent the hotel project from collapsing. Secondly, the members of the LLP alleged that the administrators had been party to a pre-determined arrangement so that the bank would be able to purchase the hotel at an undervalue. The allegations raised were, undoubtedly, serious.

Notably, the allegations raised by the members of the LLP were similar to cases analysed in a report authored by the Entrepreneur in Residence at the Department for Business, Innovation and Skills into the lending practices of banks. There were, therefore, issues within the case of substantial public importance. However, the facts in the present case did not give rise to issues which ought to go forward to trial once the well-trodden test for summary judgment was applied.

On applying that test, the Lord Justices concluded that the court below had been correct. The members of the LLP had not put forward evidence which suggested that additional funding was, indeed, available from other sources. Nor had the members put forwarding serious evidence of the alleged conspiracy. It followed that there was no real prospect of the members of the LLP successfully bringing their claim. Although of great seriousness, the allegations were not borne out by the evidence. Accordingly, the appeal was dismissed.
This was an appeal from a decision HHJ Simon Barker QC, sitting as a Judge in the Chancery Division, by Mrs Sharma, who was the liquidator of Mama Milla Ltd (“MML”). She had been ordered to pay £548,074-56 (“the Sum”) by way of compensation for her breach of duty as liquidator pursuant to section 212 Insolvency Act 1986.

The company had been involved in VAT fraud. Just prior to the liquidation, MML had placed orders with Top Brands and Lemoine Services for the purchase of goods, which were to be delivered to its customer, SERT, which they were. SERT paid the Sum into MML’s account with NatWest. Shortly thereafter was the creditors’ voluntary winding up of MML and the account was frozen. The Sum was transferred into Mrs Sharma’s account with Barclays. Between November 2011 and April 2012, Mrs Sharma repaid the Sum into various accounts for the benefit of SERT, in the belief that the goods had not been delivered to it.

The Judge had decided that Mrs Sharma was liable as she had failed in her core duties under section 107 Insolvency Act 1986, in that she had not applied the property in satisfaction of MML’s liabilities pari passu (subject to any preferential payments). Thus the payments by her to SERT were in breach of duty and were negligent.

An argument based on illegality was first raised in her skeleton argument at trial. The Judge found that was permissible but that any such argument was peripheral on the facts, especially as Mrs Sharma was oblivious of the fraud despite the existence of circumstances that ought to have alerted her.

Mrs Sharma’s appeal failed. The Chancellor, giving the judgment of the court, said that judgments of the Supreme Court in Les Laboratoires Servier v. Apotex Ltd [2014] 3 WLR 1257; Hounga v. Allen [2014] 1 WLR 2889 and Bilta v. Nazir [No 2] [2015] 2 WLR 1168 gave rise to uncertainty on the proper approach to a defence based on illegality and that needed to be addressed by the Supreme Court. That, however, did not hamper the Court of Appeal in this case because it was found that, on any approach, there simply was no causal connection or link between the claim and the illegality. In other words, it had not been necessary for the Respondents to rely on anything illegal in order to found their claim against Mrs Sharma. As there was no causative relationship to the loss claimed, the appeal failed.