UNITED KINGDOM ASSOCIATION FOR EUROPEAN LAW

ANNUAL LECTURE BY

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1966 and All That: Changing Our Minds in a Post-Brexit World

1. An important feature of the European Union (Withdrawal) Act 2018 is section 6(5).[1] As originally enacted it provided that:

> "In deciding whether to depart from any retained EU case law, the Supreme Court or the High Court of Justiciary must apply the same test as it would apply in deciding whether to depart from its own case law."

2. "Retained EU case law" is defined as any principles laid down by the Court of Justice of the European Union and any decisions of the European court which includes the General Court. The term 'same test' is a reference to the House of Lords' 1966 Practice Statement[2] made by Lord Gardiner. The Practice Direction noted that the use of precedent is an indispensable foundation upon which to decide what is the law and how to apply it to individual cases. It went on:

> "Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore, to modify their present practice and, while treating former decisions of this house as normally binding, to depart from a previous decision when it appears right to do so."

3. During the passage of the EU Withdrawal Bill, there appears to have been little consideration or debate as to whether this test was the appropriate one. Dominic Raab the then Minister of State for Courts and Justice stated on the Government's behalf at one point:

> "The crucial point reflected in clause 6 is that the intention is not to fossilise past decisions of the ECJ forever and a day. The clause provides that our Supreme Court—and, indeed, the High Court of Justiciary in Scotland—will be able to depart from pre-exit case law. In doing so, they will of course apply the same tests

[1] I am grateful to my judicial assistant, Jake Thorold, for his invaluable help in preparing this lecture.

[2] *Practice Statement (HL: Judicial Precedent)* [1966] 1 WLR 1234, [1966] 3 All ER 77 (26 July 1966). This has been carried forward to the Supreme Court without the need for a further PD: *see Austin v Southwark London Borough Council* [2010] UKSC 28; [2011] 1 AC 355, para 25 *per* Lord Hope.

as they do when departing from their own case law in the ordinary way."

4. Although the power to depart from retained EU law was initially reserved in England and Wales to the Supreme Court, it has since been extended to allow the Courts of Appeal across the UK also to depart from EU case law but also applying the 1966 test. The Minister introducing the draft regulations to the House of Commons described the test as well established and capable of being easily understood and applied without any further guidance. There was, he said, "a wealth of case law underpinning the Supreme Court's test that has evolved over time to ensure that courts take into account changing circumstances and modern public policy."[3]

5. In this lecture I will be looking at some of that "wealth of case law" and considering how the recent "repurposing" of this venerable old test devised in the Swinging Sixties is likely to work in this new and rather different context.

6. The first thing to note about the 1966 Practice Direction is how broadly it is expressed but how narrowly it has been applied. The Court will depart from a previous decision "when it appears right to do so". As Professor David Feldman has observed, no court is likely to depart from a previous decision when it appears *wrong* to do so.[4] Unsurprisingly, therefore, the House of Lords – in particular Lord Reid – attempted to draw up guidelines.

7. These were neatly summarized by Alan Paterson in his book *The Law Lords*:[5]

    a. the Practice Statement should be used sparingly and only very rarely to be used to change the interpretation of legislation or documents;

    b. it ought not to be used where it would upset the legitimate expectations of people who had arranged their affairs in reliance on the existing law or where it is difficult to foresee the consequences;

    c. it ought not to be used where the Law Lords merely consider that the earlier decision is wrong;

    d. On the other hand, it *ought* to be used to overrule a decision that has caused great uncertainty; or to overrule a decision that is not in keeping with some broad consideration of justice or with contemporary social conditions or modern perceptions of public policy.

8. Let me give a couple of examples of where the test has been applied from very different areas of the law. An early well known one is *Herrington v British Railways Board* [1972] AC 877; [1972] 2 WLR 537 where the House of Lords overruled its earlier decision of *Addie & Sons v Dumbreck* [1929] AC 358. That earlier case had settled the law with 'stark simplicity' by deciding that no duty of care was owed to trespassers. Herrington, a

[3] Debate on the draft European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, debate in the Delegated Legislation Committee introduced by Alex Chalk MP The Parliamentary Under-Secretary of State for Justice: Hansard 17 November 2020.
[4] David Feldman, Emeritus Rouse Ball Professor of English Law, University of Cambridge*: Departing from Retained EU Case Law*, UK Constitutional Law Association blog, 11 January 2021.
[5] Alan Paterson, *The Law Lords* (London: Macmillan, 1982), pp. 156-157.

six year old boy was electrocuted and suffered severe burns after he had wandered from a play park onto a live railway line through a part of a fence which had been pushed down. The House of Lords held that there was 'something beyond' the earlier decision merely being wrong which justified the departure. The House of Lords overturned *Addie* and held that the British Railways Board had owed a duty of care to Herrington.

9. More recently the application of the 1966 Practice Direction was considered again in the long running saga about the recovery of corporation tax paid by UK based companies on certain dividends from subsidiaries. The issue before the Supreme Court in the February 2020 iteration of the *Franked Investment Income Group* case[6] concerned the provision in the Limitation Act which postpones the running of the limitation period in a case where the action is for relief from the consequences of a mistake so that the limitation period only starts to run when the plaintiff could with reasonable diligence have discovered the mistake. How did that apply when the mistake was a mistake of law and it was only 'discovered' when a court ruled that the law meant something other than what people had previously thought it meant. Two earlier cases were candidates for being overturned under the 1966 PD, one from 1999 (*Kleinwort Benson*) which had held that mistakes of law fell within the Limitation Act provision postponing the start of the limitation period and one from 2005 (*Deutsche Morgan Grenfell*) which held that the plaintiff could only reasonably discover the mistake of law when a Court had ruled on what the law actually was.

10. My point here is not, you will be pleased to hear, to consider the precise circumstances in which the test was applied but to highlight the detail with which the issue whether to overrule those two earlier cases is considered and the transparency of the exercise that the Supreme Court was undertaking. The justices explain precisely what they are doing and why. The discussion of whether to depart from the previous decisions took up 13 paragraphs of the judgment of the majority in *Franked Investment Income*. An enlarged court of seven justices had been empaneled, as is usually the case where the appellant has ticked the box on the permission to appeal form to indicate that the appellant will be asking the court to depart from one of its own decisions.[7]

11. A general reluctance to overturn previous decisions is influenced by the importance of precedent in the common law system of judicial decision making. It has been described as the cement of legal principle, - as providing the necessary stability to a common law in a constant state of adaptation and repair. Judges in the US Supreme Court have been more forthright than justices here in their approach to overturning earlier decisions even though they also operate in a precedent based system. As Chief Justice Roberts has said, the policy of *stare decisis* is vital to the proper exercise of the judicial function. However, he went on to refer to *Plessy v Ferguson* which in 1896 upheld the constitutionality of racial segregation. That was overruled by *Brown v The Board of Education* in 1954: The Chief Justice said "When considering whether to reexamine a prior erroneous holding, we

[6] *Test Claimants in the Franked Investment Income Group Litigation* [2020] UKSC 47.
[7] See the discussion of this point in the judgment of Lord Wilson in *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland)* [2020] UKSC 36; [2020] 3 WLR 521, para 49.

must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*."[8]

12. As with many features of our legal system which we consider to be essential building blocks of a proper approach to the law, we have to accept that the courts of many other legal systems seem to manage perfectly well without them.

13. One of those courts, is of course, the CJEU in Luxembourg. The CJEU does not have the same system of precedent as exists in this country. That does not mean that it is entirely free to decide cases without regard to earlier decisions. We all know that CJEU decisions are replete with references to earlier cases - though the use made of earlier decisions is very different from what we find in a typical English judgment. The citation of an earlier judgment in an English case will often involve a detailed examination of the facts of the earlier case to see if it can be distinguished in the legal sense from the facts of the case before the court. Reliance on earlier case law in the CJEU tends to focus on a sentence or two extracted from the judgment in the earlier case and inserted in parentheses, along with several others where that same formula has been before.

14. Sometimes the CJEU does change its mind – but in contrast to the House of Lords or the Supreme Court, it tends to say very little about why, even where it does acknowledge that that is what it is doing. Cases where the CJEU has expressly done this are rare.

15. It was probably Professor Craig when he was teaching me my first EU competition law at Oxford who told me about the first *Café Hag* judgment in 1974. In that first *Café Hag* case,[9] the Court ruled that it was contrary to the rules on free movement of goods for a trade mark owner in one Member State to stop goods being imported bearing the same trade mark placed on them from another Member State if the two trademarks were from a common origin even if they were now owned by different undertakings in the two states.

16. In the second *Café Hag* case in 1990,[10] however, the CJEU had the opportunity to change its mind on the basis that the existence of identically trademarked products on the same market would inevitably cause consumer confusion even if they had derived from the same origin. Advocate General Jacobs in his Opinion in the second *Café Hag* case described the question whether the earlier case could be overruled as "a matter of fundamental concern".[11] He urged the Court, in the interests of legal certainty to state expressly that it was abandoning the doctrine of common origin laid down in *Hag I*. He said:[12]

> "The Court has consistently recognized its power to depart from previous decisions, as for example by making it clear that national courts may refer again questions on which the Court has already ruled. … That the Court should in an appropriate case

[8] *Citizens United v Federal Election Commission* 558 U.S. 1 (2010).
[9] Case 192/73 *Van Zuylen Freres v Hag (Hag I)* [1974] ECR 731.
[10] Case C10/89 *SA CNL-SUCAL NV v Hag GF AG* [1990] ECR I-3711, para 10.
[11] *Ibid.,* Opinion para 7.
[12] *Ibid,* para 67.

expressly overrule an earlier decision is I think an inescapable duty, even if the Court has never before expressly done so."

17. The Court acceded to this exhortation but only to a very limited extent. In justifying the departure, the Court stated in its judgment that:

> "it should be stated at the outset that the Court believes it necessary to reconsider the interpretation given in [Hag I] in light of the case-law which has developed with regard to the relationship between industrial and commercial property and the general rules of the Treaty, particularly in the sphere of the free movement of goods."

And that, so far as the CJEU was concerned, was enough said - they then went on to decide that actually the two trademark holders could oppose the import of each other's goods.

18. An example of a national court politely asking the CJEU the question again in the hope of a more helpful answer, as AG Jacobs suggested, is the Court's 2017 decision *M.A.S. and M.B* where it was invited to consider its 2015 decision in *Taricco and Others*.[13] The cases concern rather technical details about whether the operation of limitation periods in the prosecution of VAT frauds prevented the Member State from fulfilling its obligation to impose effective and dissuasive penalties for such frauds. The Court in the earlier case *Taricco* seemed to hold that it did and that the limitation period for prosecutions had to be disapplied. This, the Italian Court worried, might be at variance with the overriding principles of the Italian constitution and indeed of the Charter of Fundamental Rights as regards the non-retroactivity of criminal penalties.
19. Well, the CJEU saw the point but noted that those fundamental principles were not drawn to its attention in *Taricco*. It went on to clarify the interpretation of the Treaty provision that had been given in the earlier case.
20. Again, this seems to illustrate the CJEU's willingness to alter its previous decisions when it realises it got it wrong, even if it is often too shy to say so.
21. So where does this leave the Supreme Court and the Court of Appeal in deciding whether to depart, applying the 1966 Practice Direction to CJEU case law?
22. Let me look at two of the different factors that the Supreme Court has said are relevant to the decision whether rely on the 1966 Practice Direction to depart from an earlier ruling. Let's think about how they might be transposed to a decision whether or not to depart from retained EU law.
23. The first factor is a negative indicator in applying the 1966 Practice Direction. It is not considered a good enough reason that the earlier decision is simply wrong. That is a necessary condition of course, but it is not a sufficient one.

[13] Case C-105/14 *Taricco and Others* EU:C:2015:555 and Case C-42/17 *M.A.S and M.B.* EU:C:2017:936.

24. The cautionary approach was explained by Lord Diplock in the Privy Council case of *Geelong Harbor Trust Commissioners v Gibbs Bright & Co*:[14]

> "The law laid down by a judicial decision, even though erroneous, may work in practice to the satisfaction of those who are affected by it, particularly where it concerns the allocation of the burden of unavoidable risks between parties engaged in trade or commerce and their insurers. If it has given general satisfaction and caused no difficulties in practice, this is an important factor to be weighed against the more theoretical interests of legal science in determining whether the law so laid down ought now to be changed by judicial decision."

25. Fast forwarding to the present day, one might have thought that in fact if the Supreme Court comes to the conclusion that the CJEU was wrong in its earlier decision, that would be a very good reason for the UK Supreme Court now to be able to depart from a decision of the CJEU. One must bear in mind that we do not now have the opportunity to refer a question to the CJEU like the Italian Constitutional Court did in *Taricco* to sort out a problem with applying an earlier decision. It might be thought useful to be able to make the change ourselves. The dangers of the UK adopting a different answer from that given by the Court are much reduced now that we are no longer a Member State. One might have thought that as long as it is made clear in the judgment that we are using our new found power this would be unobjectionable.

26. Certainly, Baroness Deech in a debate occasioned by the amendments to section 6 in the European Union (Withdrawal Agreement) Act 2020 said that there were many instances where the CJEU had not produced good law. She went on to say some rather unkind things about the judges on the court as a possible reason why.[15]

27. There is also this point to consider. One reason why the Practice Direction test has been applied so sparingly by the Supreme Court is because the court recognises that if there is a general unhappiness with an earlier judgment, it can be reversed through legislation. The situation may be reversed either by Parliament if primary legislation is needed or by the relevant department if secondary legislation is needed.

28. This also links in with the concern that the 1966 Practice Direction should not be used where it would upset the legitimate expectations of people who have arranged their affairs in reliance on it. The legislature is in a better position to consult interested parties so as to gain a fuller understanding of the scale of the problems that might be caused by overturning previous law. If Parliament decides to change the law, it can legislate in a way that will mitigate those problems by introducing transitional provisions or providing for any consequential changes that will minimise uncertainty. It can also limit the changes so that they apply prospectively only whereas the UK Supreme Court's decision on the declaratory theory of the law applies retrospectively.

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[14] *The Geelong Harbour Trust Commissioners v Gibb Bright & Co (a firm) (Australian)* [1974] UKPC 2 considering the Australian equivalent of the 1966 Practice Direction test.
[15] Hansard House of Lords 15 January 2020 column 682.

29. That may explain why the CJEU is more relaxed about departing from its own previous case law and is prepared to do so even if they draw less attention to it when it happens. If that Court has made a misstep, there is no realistic possibility of amending the Treaty or even an EU Regulation or Directive. If it is going to be put right, then it has to be put right by a change of mind by the Court or not at all.

30. When considering whether to depart from CJEU law, then, should the Supreme Court examine what powers Parliament or Ministers have to make the changes themselves? What are the available legislative routes for changing retained EU law to correct bad CJEU case law, taking that responsibility off the shoulders of the Supreme Court and the Court of Appeal? The broad powers that the Government has conferred on Ministers in the EU Withdrawal Act to legislate to change retained law have been and are currently the subject of much debate. The power contained in section 8 of the EU (Withdrawal) Act permits ministers to make regulations as they "consider appropriate" in order to prevent, remedy or mitigate any failure of retained EU law to operate effectively or to put right "any other deficiency in retained EU law" arising from the withdrawal of the United Kingdom from the EU. Regulations can, according to section 8 subsection (5) make any provision that could be made by an Act of Parliament.

31. However, the Government's explanatory notes to the 2018 Act stress that the problems or deficiencies must arise from the UK's withdrawal from the EU. The Explanatory Note states that "The law is not deficient merely because a minister considers that EU law was flawed prior to exit".[16] This limited intention is supported by the fact that the clause can only be used in the two years following IP completion day so its usefulness will be up at the end of 2022.

32. Things have moved on since then. In its policy paper published in January 2022 to mark the second anniversary of Brexit, the Government referred to the ongoing review of retained EU law and delays caused by the need for primary legislation to make changes in many cases.[17] One proposed solution to this perceived problem is what is described as a targeted power to allow retained EU law to be amended in a more sustainable way by secondary legislation. This is not the occasion to discuss the issues raised by any Brexit Freedoms Bill proposed. My point is rather that the difficulty or ease with which the Government or Parliament can change retained EU law may be a factor for the Supreme Court and the Court of Appeal to take into account when invited to use the 1966 Practice Direction in order to achieve the same thing.

33. Turning to a situation where the 1966 PD **should** be used, - it ought to be used to overrule a decision that is not in keeping with some broad consideration of justice or with contemporary social conditions or modern perceptions of public policy. *Herrington v British Railways Board* which I referred to earlier is an interesting case in which changes to so-called "social conditions" justified the power being used. As Lord Pearson rather

[16] See para 124 of the Explanatory Notes.
[17] *The Benefits of Brexit: How the UK is taking advantage of leaving the EU* (pubd January 2022).

elegiacally explained, the rule that there was no duty of care to trespassers had been rendered obsolete by changes in physical and social conditions:

> "With the increase of the population and the larger proportion living in cities and towns and the extensive substitution of blocks of flats for rows of houses with gardens or back yards and quiet streets, there is less playing space for children and so a greater temptation to trespass."

34. The question that arises now in considering how this factor applies in the context of departing from retained EU law is – **whose** contemporary social conditions or **whose** perceptions of public policy should be relevant now when the Supreme Court is considering whether to depart from a ruling of the CJEU? Given that the departure from EU retained law will apply only in the UK, should the consideration of social conditions be limited to those in the UK?

35. This was an interesting point raised by Lord Neuberger in one of the House of Lords debates on what became section 6. He queried whether the application of the Practice Direction test was the right test for the Supreme Court in deciding whether to adhere to pre-Brexit CJEU decisions or whether new principles of interpretation should apply. He commented that the principles of the need to sustain an "ever closer union" or to promote single market freedoms underlay much of what became retained EU law. These principles may no longer be so relevant as interpretative considerations in the UK.[18] It is true that in my own specialist area of competition law, much of the law about, for example, the treatment of vertical agreement export bans as object infringements under Article 101 has aimed to promote the movement of goods between member states. The policy behind the exhaustion of intellectual property rights from *Consten & Grundig*[19] to the *Football Premier League* decoder card cases[20] has been to prevent IP rights holders from using that right to stop the importation of a product into another member state. It is perhaps for this reason why the UK has adopted into the Competition Act 1998 a specific set of six bases on which English law may depart from pre-Brexit EU precedent in future. These include differences between markets in the UK and the EU and developments in forms of economic activity since the relevant EU principle or decision was made.[21]

36. There are other cases where the CJEU has in the past had to balance the imperative of market access with social policy controls. An example which comes to mind is *Ker-Optika* in 2010.[22] In that case Ker-Optika brought an action challenging an order of the Ministry of Health in Hungary prohibiting the sale of contact lens over the internet by limiting their sale to premises with a specialist optometrist or ophthalmologist qualified in the field of contact lenses. A question was referred to the CJEU whether the ban was contrary to the principle of free movement of goods. The Court held that the prohibition on selling contact lenses by mail order deprived traders from other Member States of a

[18] Hansard vol 789 European Union (Withdrawal) Bill HL debate 7 March 2018, Column 1094.
[19] Cases 56&58/64 *Consten and Grundig v Commission* [1966] ECR 299.
[20] Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-9083.
[21] S.60A of Competition Act 1998 inserted as from 31.12.2020 by The Competition (Amendment etc.) (EU Exit) Regulations 2019 (S.I. 2019/93),
[22] Case C-108/09 *Ker-Optika* [2010] ECR I-12213.

particularly effective means of selling those products and thus significantly impeded access of those traders to the market of the Member State concerned. It was therefore a measure having equivalent effect to a quantitative restriction. The Court went on to find that it was not justified so that the ban was an infringement of the free movement provisions.

37. These cases clearly show the importance placed by the CJEU on internet sales to promote competition between retailers in different member states, such that even justifications based on healthcare concerns were not sufficient. It is an interesting question how the legality of business practices that have been held to be illegal by the CJEU should be treated going forward where the main policy driver behind the CJEU's decisions is one that is no longer an imperative for the UK.

38. We have had our first glimpse of how courts will approach came in Court of Appeal – *Warner v TuneIn*.[23] The case concerned a rather technical area of copyright law concerning when including a hyperlink in your webpage that takes the user who clicks on the link to another site on which music is played amounts to new communication of that music to the public and therefore requires a separate licence from the holders of rights in the music. TuneIn asked the court to depart from a whole body of CJEU case law regarding communications to the public. The Court, of which I was a member with the Master of the Rolls and Arnold LJ was very clear that this was not an appropriate case to depart. Several reasons were given why not to depart. One was that Parliament can step in and change the law if it is unhappy with where the law has arrived at under the CJEU jurisprudence. Another was that the topic raised a conflict between the territorial nature of copyrights exploited on a territorial basis on the one hand, and the global and interconnected nature of the internet on the other hand. The CJEU, Arnold LJ said, has unrivalled experience in confronting this issue in a variety of factual scenarios. He noted that the jurisprudence is not free from difficulty or criticism, but it does not follow that better solutions are readily to hand. The invitation of the appellant that the Court of Appeal should in effect return to the drawing board and start all over again, would create considerable legal uncertainty.

39. The doctrine of precedent has been described as reflecting "respect for the accumulated wisdom of judges who have previously tried to solve the same problem."[24] But as a counter to that let me close with a different well known quote. It is the opening line of a quintessentially English novel and it seems particularly apposite as we work out how the case law of the CJEU will apply going forward in post-Brexit Britain: "The past is a foreign country, they do things differently there".[25]

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[23] *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, paras 73 onwards. See also the interesting discussion per Warby LJ regarding the power of domestic courts to delay or suspend the implementation of a dominant rule of retained EU law overriding an inconsistent domestic provision: *R (oao Open Rights Group and another) v The Secretary of State for the Home Department* [2021] EWCA Civ 1573.
[24] *Evangelisto Ramos v Louisiana* 590 U.S. (2020) per Justice Kavanaugh.
[25] *The Go-Between* by L P Hartley.