Judgments - Wilson and others v. Secretary of State for Trade and Industry (Appellant)

HOUSE OF LORDS

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[2003] UKHL 40
on appeal from: [2001] EWCA Civ 633

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Wilson and others

v.

Secretary of State for Trade and Industry (Appellant)

ON

THURSDAY 10 JULY 2003

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Hope of Craighead

Lord Hobhouse of Woodborough

Lord Scott of Foscote

Lord Rodger of Earlsferry

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OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

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[2003] UKHL 40

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. In January 1999 Penelope Wilson borrowed £5,000 from a pawnbroker for a period of six months. The pawned property was her car, a BMW 318 Convertible. She did not repay the loan. The pawnbroker sought repayment, failing which the car would be sold. Mrs Wilson's response was to commence proceedings in the Kingston upon Thames County Court. She claimed the agreement was unenforceable because it did not contain all the prescribed terms. She sought on order for the return of her car. Alternatively she sought to reopen the agreement as grossly exorbitant. At the trial Mrs Wilson appeared in person. The pawnbroker was a two-man company, First County Trust Ltd. The company was represented in court by its finance director.

2. From these modest beginnings the County Court proceedings burgeoned into a case with wide-ranging implications. Neither Mrs Wilson nor First County Trust appeared before the House. But the Attorney General appeared on behalf of the Secretary of State for Trade and Industry. The Speaker of the House of Commons and the Clerk of the Parliaments intervened. They were represented by leading and junior counsel. The Finance and Leasing Association also intervened, as did four insurance companies which are among the largest providers of motor insurance in this country. And leading and junior counsel also appeared as amicus curi'.

The £250 fee: was it 'credit'?

3. When Mrs Wilson signed her agreement and pawn receipt she was charged a 'document fee' of £250. This was added to the amount of her loan. In the agreement the amount of the loan was stated as £5,250. The amount payable on redemption was £7,327, made up of £5,250 and interest of £1,827. The annual percentage rate of interest was stated to be 94.78%.

4. The agreement was a regulated agreement for the purposes of section 8 of the Consumer Credit Act 1974. A regulated agreement is not properly executed unless the document signed contains all the prescribed terms: section 61(1)(a). One of the prescribed terms is the 'amount of the credit': see the Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553), regulation 6 and Schedule 6, para 2. The consequence of failure to state all

the prescribed terms of the agreement is that the court is precluded, by section 127(3), from enforcing the agreement. In the absence of enforcement by the court the agreement is altogether unenforceable: section 65(1).

5. On 24 September 1999 His Honour Judge Hull QC, in a carefully reasoned judgment, held that the fee of £250 was part of the amount of the credit. So the agreement was enforceable. He reopened the agreement as an extortionate credit bargain and reduced the amount of interest payable by one half. Mrs Wilson appealed to the Court of Appeal. Pending the hearing of her appeal she paid First County Trust £6,900 to redeem her car. That was in December 1999.

6. The appeal was heard in November 2000, shortly after the Human Rights Act 1998 came into force. The Court of Appeal, comprising Sir Andrew Morritt V-C, and Chadwick and Rix LJJ, allowed Mrs Wilson's appeal: see [2001] QB 407. Sir Andrew Morritt V-C recognised there was considerable force in First County Trust's submissions in support of the judge's view. But having analysed the statutory provisions, the court held that the £250 added to the loan to enable Mrs Wilson to pay the document fee was not 'credit' for the purposes of the Consumer Credit Act. So one of the prescribed terms was not correctly stated. In consequence the agreement was unenforceable. So also was the security. First County Trust was ordered to repay the amount of £6,900 Mrs Wilson had paid the company after Judge Hull's judgment together with interest amounting to £662. The overall result was that Mrs Wilson was entitled to keep the amount of her loan, pay no interest and recover her car.

The adjourned hearing

7. Sir Andrew Morritt V-C expressed concern at this outcome. He considered it might be arguable that section 127(3) of the Consumer Credit Act infringes article 6(1) of the European Convention on Human Rights and article 1 of the First Protocol to the Convention. The court adjourned the further hearing of the appeal for notice to be given to the Crown, pursuant to section 5 of the Human Rights Act, that the court was considering whether to make a declaration of incompatibility. The Secretary of State for Trade and Industry was then added as a party to the proceedings.

8. On 2 May 2001 the court gave judgment at the adjourned hearing: see [2001] EWCA Civ 633, [2002] QB 74. The court held that the inflexible exclusion of a judicial remedy by section 127(3), preventing the court from doing what is just in the circumstances of the case, is disproportionate to the legitimate policy objective of ensuring that particular attention is paid to the

inclusion of certain terms in the document signed by the borrower. It is not possible to read and give effect to section 113 or section 127(3) in a way compatible with First County Trust's Convention rights. The court made a declaration, pursuant to section 4 of the Human Rights Act, that section 127(3), in so far as it prevents the court from making an enforcement order under section 65 of the Consumer Credit Act unless a document containing all the prescribed terms of the agreement has been signed by the debtor, is incompatible with the rights guaranteed to the creditor by article 6(1) of the Convention and article 1 of the First Protocol to the Convention.

9. The Secretary of State appealed to your Lordships' House. First County Trust did not. The Secretary of State accepted that Mrs Wilson's agreement was not 'properly executed' within the meaning of section 61 of the Consumer Credit Act. She accepted that, in consequence, no enforcement order could be made under section 65 and that the security over the car was unenforceable. The Secretary of State also accepted it is not possible to 'read down' the relevant provisions of the Consumer Credit Act and thereby save them from any Convention rights incompatibility otherwise existing. But she challenged the decision of the Court of Appeal on several grounds. Her primary submission was that the court has no jurisdiction to make a declaration of incompatibility in relation to events occurring before the Human Rights Act came fully into force on 2 October 2000. Here, the agreement was made in January 1999 for a period of six months. Additionally, the parties' rights were determined before the Human Rights Act came into force. The County Court decision was in September 1999.

Retrospectivity and section 4 of the Human Rights Act

10. As everyone knows, the purpose of the Human Rights Act 1998 was to make the human rights and fundamental freedoms set out in the European Convention on Human Rights directly enforceable in this country as part of its domestic law. The question raised by the Secretary of State's submission is how the Act was intended to operate regarding events occurring before the Act came into force, that is to say, events taking place at a time when these human rights were not as such part of the domestic law of this country.

11. Section 1 of the Act defines 'Convention rights' and states how the relevant articles of the Convention and its Protocols are to have effect for the purposes of the Act. Section 2 provides that when determining a question arising in connection with a Convention right courts must take into account, among other matters, decisions of the European Court of Human Rights and the European Commission of Human Rights. I can put these two introductory sections on one side. Contrary to the submissions of the

Secretary of State, I do not think they assist either way on the point now under consideration. They are neutral.

12. The Act prescribes two principal means whereby it 'brings human rights home' from Strasbourg: first, by making provision for the interpretation and amendment of legislation and, secondly, by making it unlawful for a public authority to act in a way incompatible with a Convention right. Sections 3 to 5 and 10 are concerned with the former of these objectives, sections 6 to 9 with the latter. I shall consider the latter group of sections first. Sections 6 to 9 are forward looking in their reach. Section 6(1) provides that it 'is unlawful for a public authority to act in a way which is incompatible with a Convention right'. On a natural reading this provision is directed at post-Act conduct. The context powerfully supports this interpretation. One would not expect a statute promoting human rights values to render unlawful acts which were lawful when done. That would be to impose liability where none existed at the time the act was done. Sections 7 to 9 are concerned with conduct outlawed by section 6(1). They prescribe remedial consequences which ensue when a public authority has acted, or proposes to act, in a way 'which is made unlawful by section 6(1)': section 7(1). It follows therefore that, like section 6(1), sections 7 to 9 are concerned with post-Act events.

13. Section 22(4) is an exception to this scheme. It is a curious provision. Commentators and judges have spilled much ink in discussing it. Its effect is that in response to proceedings brought by a public authority a victim of an unlawful act may rely on a Convention right 'whenever the act in question took place'. So this provision enables a victim to assert and rely on a Convention right in respect of conduct which was not unlawful when it took place. In circumstances where section 22(4) applies the Human Rights Act gives a remedy in respect of pre-Act conduct. What is not apparent is why, in respect of pre-Act violations of human rights, victims are given a domestic remedy in this one respect but not more widely. What is special about this one particular situation is not clear. But there it is.

14. With these provisions in mind I turn to sections 3 and 4. It can be noted at once that section 4 rides in harness with section 3. Section 4 contains two prerequisites to the court's jurisdiction to make a declaration of incompatibility. First, subsections (2) and (4) of section 4 apply to proceedings in which the court 'determines' whether a legislative provision is compatible with a Convention right. So section 4 does not apply unless the court, in the proceedings in question, actually decides whether the relevant legislation is Convention-compliant. The second prerequisite is that the court must be satisfied the relevant legislative provision is incompatible with a Convention right: section 4(2) and (4). This presupposes that, despite

application of the principle of interpretation stated in section 3, the legislation is non-compliant. In other words, interpretation of the legislation in accordance with section 3 is an essential preliminary step to making a declaration of incompatibility. It is an essential preliminary step because the court cannot be satisfied the legislation is incompatible until effect has been given to the interpretative obligation set out in section 3.

15. This interpretation of section 4 accords with the consequence flowing from a declaration of incompatibility. A declaration of incompatibility triggers the 'fast track' legislative procedures set out in section 10. It would make no sense for these procedures to be set in motion if it remains uncertain whether it is possible to interpret the legislation in a Convention-compliant way.

16. In the ordinary course this sequential approach goes without saying. Courts will interpret legislation, as they are required to do, in accordance with section 3. Only when they have done this will any question of a declaration of incompatibility arise. But the present case is exceptional because of its transitional nature: the agreement was made pre-Act, and the Court of Appeal was interpreting the legislation post-Act. Hence the all-important question: is section 3 applicable in such a case?

17. On its face section 3 is of general application. So far as possible legislation must be read and given effect in a way compatible with the Convention rights. Section 3 is retrospective in the sense that, expressly, it applies to legislation whenever enacted. Thus section 3 may have the effect of changing the interpretation and effect of legislation already in force. An interpretation appropriate before the Act came into force may have to be reconsidered and revised in post-Act proceedings. This effect of section 3(1) is implicit in section 3(2)(a). So much is clear.

18. Considerable difficulties, however, might arise if the new interpretation of legislation, consequent on an application of section 3, were always to apply to pre-Act events. It would mean that parties' rights under existing legislation in respect of a transaction completed before the Act came into force could be changed overnight, to the benefit of one party and the prejudice of the other. This change, moreover, would operate capriciously, with the outcome depending on whether the parties' rights were determined by a court before or after 2 October 2000. The outcome in one case involving pre-Act happenings could differ from the outcome in another comparable case depending solely on when the cases were heard by a court. Parliament cannot have intended section 3(1) should operate in this unfair and arbitrary fashion.

19. The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions but they are vague and imprecise. As Lord Mustill pointed out in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 524-525, the subject matter of statutes is so varied that these generalised maxims are not a reliable guide. As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724:

> 'the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'

Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle.

20. Applying this approach to the Human Rights Act, I agree with Mummery LJ in *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] QB 1334, 1352, para 61, that in general the principle of interpretation set out in section 3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it in such cases, and thereby change the interpretation and effect of existing legislation, might well produce an unfair result for one party or the other. The Human Rights Act was not intended to have this effect.

21. I emphasise that this conclusion does not mean that section 3 never applies to pre-Act events. Whether section 3 applies to pre-Act events depends upon the application of the principle identified by Staughton LJ in the context of the particular issue before the court. To give one important instance: different considerations apply to post-Act criminal trials in respect of pre-Act happenings. The prosecution does not have an accrued or vested right in any relevant sense.

22. In the present case Parliament cannot have intended that application of section 3(1) should have the effect of altering parties' existing rights and obligations under the Consumer Credit Act. For the purpose of identifying the rights of Mrs Wilson and First County Trust under their January 1999

agreement the Consumer Credit Act is to be interpreted without reference to section 3(1).

23. It follows that, in this transitional type of case concerning the Consumer Credit Act, no question can arise of the court making a declaration of incompatibility. For the reasons already considered, it is only when a court is called upon to interpret legislation in accordance with section 3(1) that the court may proceed, where appropriate, to make a declaration of incompatibility. The court can make a declaration of incompatibility only where section 3 is available as an interpretative tool. That is not this case.

The court as a public authority

24. The Court of Appeal reached a contrary conclusion on the applicability of Convention rights by a different route. The court held that the relevant event is not the making of the January 1999 agreement. The relevant event is the Court of Appeal's order. The court is a public authority. The court, required by section 6(1) to act in a way compatible with Convention rights, must have regard to the facts as they are at the time when it makes its order: [2002] QB 74, 87-89, paras 17, 18 and 22. The decision of the Court of Appeal, I should note, was given before the decisions of this House in *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545, and *R v Kansal (No 2)* [2001] UKHL 62, [2002] 2 AC 69.

25. As is well known, the application of section 6(1) to judicial decisions on matters of substantive law is a highly controversial topic. It is not necessary to venture onto this quicksand in the present case. One insuperable difficulty with the Court of Appeal's analysis, as it respectfully seems to me, is that it fails to take into account the mandatory nature of the relevant provisions of the Consumer Credit Act. Let it be assumed, but without deciding, that the court's order in these proceedings is an 'act' by a public authority within the meaning of section 6(1). Even so, there can be no question of the court acting unlawfully. The court's decision in these proceeding gives effect to the mandatory provisions of the Consumer Credit Act. An order giving effect to these provisions of primary legislation is excluded from the scope of section 6(1) by section 6(2)(a). Thus, reference to section 6(1) takes the matter no further forward. The question which remains to be answered is whether, in interpreting and giving effect to the provisions of the Consumer Credit Act in this case, section 3(1) of the Human Rights Act applies. That is the crucial question. That is the question I have already considered.

26. For these reasons the appeal by the Secretary of State must succeed. In this transitional type of case section 3(1) is inapplicable to the

interpretation of the Consumer Credit Act. Consequently, the court has no jurisdiction to make a declaration of incompatibility. The declaration made by the Court of Appeal should be set aside.

27. This conclusion makes it strictly unnecessary for the House to consider the further issues arising out of the judgment of the Court of Appeal. But it would not be satisfactory to leave these other issues unresolved. They have been fully argued by experienced counsel, the House has the benefit of the views of the Court of Appeal, and the issues are of importance to innumerable transactions being entered into every day. I turn, therefore, to consider what the position would be in this case had the Human Rights Act applied.

Whether article 6 of the Convention or article 1 of the First Protocol applies

28. The first of the further issues is whether article 6 of the Convention or article 1 of the First Protocol applies in the present case. Before turning to these articles I should outline the salient provisions of the Consumer Credit Act 1974. Subject to exemptions, a regulated agreement is an agreement between an individual debtor and another person by which the latter provides the former with a cash loan or other financial accommodation not exceeding a specified amount. Currently the amount is £25,000. Section 61(1) sets out conditions which must be satisfied if a regulated agreement is to be treated as properly executed. One of these conditions, in paragraph (a), is that the agreement must be in a prescribed form containing all the prescribed terms. The prescribed terms are the amount of the credit or the credit limit, rate of interest (in some cases), how the borrower is to discharge his obligations, and any power the creditor may have to vary what is payable: Consumer Credit (Agreements) Regulations 1983, Schedule 6. The consequence of improper execution is that the agreement is not enforceable against the debtor save by an order of the court: section 65(1). Section 127(1) provides what is to happen on an application for an enforcement order under section 65. The court 'shall dismiss' the application if, but only if, the court considers it just to do so having regard to the prejudice caused to any person by the contravention in question and the degree of culpability for it. The court may reduce the amount payable by the debtor so as to compensate him for prejudice suffered as a result of the contravention, or impose conditions, or suspend the operation of any term of the order or make consequential changes in the agreement or security.

29. The court's powers under section 127(1) are subject to significant qualification in two types of cases. The first type is where section 61(1)(a), regarding signing of agreements, is not complied with. In such cases the court 'shall not make' an enforcement order unless a document, whether or

not in the prescribed form, containing all the prescribed terms, was signed by the debtor: section 127(3). Thus, signature of a document containing all the prescribed terms is an essential prerequisite to the court's power to make an enforcement order. The second type of case concerns failure to comply with the duty to supply a copy of an executed or unexecuted agreement pursuant to sections 62 and 63, or failure to comply with the duty to give notice of cancellation rights in accordance with section 64(1). Here again, subject to one exception regarding sections 62 and 63, section 127(4) precludes the court from making an enforcement order.

30. These restrictions on enforcement of a regulated agreement cannot be side-stepped by recourse to a pledge or other form of security furnished in support of the debtor's obligations under the agreement. The security is not enforceable to a greater extent than the loan: section 113. Where an application for an enforcement order is dismissed, except on technical grounds only, or the court makes a declaration under section 142 that the agreement is not enforceable, any security provided in relation to a regulated agreement 'shall be treated as never having effect': section 106(a). Property lodged with the creditor by way of security has to be returned by him 'forthwith'.

31. These restrictions on enforcement of a regulated agreement are for the protection of borrowers. They do not deprive a regulated agreement of all legal effect. They do not render a regulated agreement void. A regulated agreement is enforceable by the debtor against the creditor. It seems, for instance, that a borrower may insist on making further drawdowns under a regulated agreement even though the agreement is unenforceable against him. Further, section 173(3) expressly permits consensual enforcement against a borrower. A borrower may consent to the sale of a security or to judgment. Moreover, the creditor is entitled to retain any security lodged until either an application for an enforcement order is dismissed or the court makes a declaration under section 142 that the agreement is not enforceable. That is the effect of sections 113(3) and 106.

32. Against this background I turn to the relevant Convention rights. Article 6(1) of the Convention guarantees everyone a fair, expeditious and public trial of disputes about his civil rights. This guarantee includes an implied right of access to a court: see *Golder v United Kingdom* (1975) EHRR 524, 536, para 36. The scope of this guarantee has been considered on many occasions by the European Court of Human Rights. The relevant principles were explored recently by your Lordships' House in *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 3 WLR 435: see, for instance, the pithy introductory summary by Lord Bingham of Cornhill, at para 3.

33. For present purposes it is sufficient to note that the established case law of the European Court of Human Rights is to the effect that article 6(1) does not itself guarantee any particular content for civil rights and obligations in the substantive law of the Contracting States. Section 6(1) applies only to disputes over what, at least arguably, are recognised under domestic law to be 'rights and obligations': see *Z v United Kingdom* [2001] 2 FLR 612, 634, para 87. Article 6(1) may not be used as a means of creating a substantive civil right having no basis in national law. The content of substantive national law may call for scrutiny under other articles of the Convention or its Protocols, but that is not the target of article 6(1).

34. The basic principle underlying article 6(1) is that 'civil claims must be capable of being submitted to a judge for adjudication': see *Fayed v United Kingdom* (1994) 18 EHRR 393, 429, para 65. Thus a typical case within article 6(1) is where a person enjoys under national law what is arguably a civil right but the only forum for deciding a dispute over the existence or enforcement of the right is a tribunal which is not independent and impartial. So procedural bars on bringing claims to court may fall within article 6(1). So also may procedural bars having the effect of preventing claims being decided on their merits. *Tinnelly & Sons Ltd v United Kingdom* (1998) 27 EHRR 249, 288-292, paras 72 to 79, is an example of the latter. The issue of a 'national security' certificate had the effect of preventing complaints of religious discrimination being considered on their merits by a Fair Employment Tribunal. That was a violation of article 6(1).

35. The distinction between the substantive content of a right and an unacceptable procedural bar to its enforcement by a court can give rise to difficulty in distinguishing the one from the other in a particular case. As a matter of drafting, a restriction on the scope of a right may be framed in several different ways. But the drafting technique chosen by the draftsman cannot be determinative of this issue. Human Rights conventions are concerned with substance, not form, with practicalities and realities, not linguistic niceties. The crucial question in the present context is whether, as a matter of substance, the relevant provision of national law has the effect of preventing an issue which ought to be decided by a court from being so decided. The touchstone in this regard is the proper role of courts in a democratic society. A right of access to a court is one of the checks on the danger of arbitrary power. In *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 3 WLR 435, 477, para 142, Lord Walker of Gestingthorpe noted that article 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system. Lord Hoffmann observed, at p. 447, para 29, that it should not matter how the law is framed, provided one holds onto the underlying principle, which is to maintain the rule of law and the separation of powers.

36. In the present case the essence of the complaint is that section 127(3) of the Consumer Credit Act has the effect that a regulated agreement is not enforceable unless a document containing all the prescribed terms is signed by the debtor. In my view, thus framed, the complaint does not bring article 6(1) into play. In terms of labels, that is a restriction on the scope of the rights a creditor acquires under a regulated agreement. It does not bar access to court to decide whether the case is caught by the restriction. It does bar a court from exercising any discretion over whether to make an enforcement order. But in taking that power away from a court the legislature was not encroaching on territory which ought properly to be the province of the courts in a democratic society.

37. In reaching the opposite conclusion the Court of Appeal focused on the exclusion of any meaningful consideration by the court of the creditor's rights under the agreement in a case where the document signed by the debtor does not include all the prescribed terms. The court held that the exclusion of any judicial remedy in such a case engages article 6(1): [2002] QB 74, 92-93, paras 31, 32. I am unable to agree. The inability of the court to make an enforcement order in such a case, whatever the circumstances, is a limitation on the substantive scope of a creditor's rights. It no more offends the rule of law and the separation of powers than would be the case if Parliament had said that such an agreement is void.

38. In contrast to article 6(1), article 1 of the First Protocol is concerned with the content of substantive national law. Article 1 provides:

> 'Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law … The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest … '

39. On its face article 1 is engaged in this case, most obviously with regard to the BMW car delivered by Mrs Wilson to First County Trust as security. On delivery First County Trust as pawnee acquired a proprietary interest in the car. That was in January 1999. The company's proprietary interest ceased eight months later, in September 1999, when the court refused to make an enforcement order. In addition, both parties acquired contractual rights under the agreement. 'Possessions' in article 1 is apt to embrace contractual rights as much as personal rights. Contractual rights may be more valuable and enduring than proprietary rights. But, by virtue of the statute, the contractual rights acquired by First County Trust were enforceable only with the consent of the borrower pursuant to section 173(3).

40. The response of the Secretary of State and others is that all the rights acquired by First County Trust under the agreement were from their inception subject to the limitations prescribed by the Consumer Credit Act. A restriction on the scope of the rights acquired by a lender under a transaction is not within article 1 of the First Protocol. A person who acquires property subject to limitations under national law which subsequently bite according to their tenor cannot complain that his rights under article 1 of the First Protocol have been infringed.

41. I do not agree. This proposition is stated too widely and too loosely to be acceptable. Clearly, the expiry of a limited interest such as a licence in accordance with its terms does not engage article 1. That is not this case. Here the transaction between the parties provided for repayment of the loan and for the car to be held as security. What is in issue is the 'lawfulness' of overriding legislation. The proposition advanced by the Secretary of State would mean that however arbitrary or discriminatory such legislation might be, if it was in existence when the transaction took place a court enforcing human rights values would be impotent. A Convention right guaranteeing a right of property would have nothing to say. That is not an attractive conclusion.

42. There are of course many circumstances where statutes empower the executive or the courts to make orders depriving a person of some of his possessions. Compulsory acquisition, and property adjustment orders on divorce, are instances. The exercise of powers such as these prima facie engages article 1. This is so irrespective of whether the enabling statute was enacted before or after the property affected by the order was acquired. *Hakansson v Sweden* (1990) 13 EHRR 1 is an example where the law was in place before the property in question was acquired. The law providing for the compulsory resale of the applicants' land within two years existed when they bought the land. Thus a provision in the Consumer Credit Act empowering a court to refuse to enforce a regulated agreement may engage article 1 even though the Act was in force before the agreement was entered into.

43. In the present case the relevant statutory provisions are framed differently. They do not empower the court to refuse to enforce the agreement now in question. They go further. The court is compelled to refuse to make an enforcement order. Is this difference material? I think not. It would be passing strange if article 1 were engaged in the former case but not the latter. A law regulating the effect of a transaction between the parties in the public interest does not always escape review under article 1 of the First Protocol. Such a law may infringe article 1 if it creates an 'imbalance' between the parties which would result in one party being

arbitrarily or unjustly deprived of his possessions for the benefit of the other: see *Bramelid v Sweden* (1983) 5 EHRR 249, 256.

44. Thus the question in the present case is one of characterisation of the nature and effect of the relevant provisions of the Consumer Credit Act, considered as a matter of substance rather than form. In my view, consistently with the underlying objective of article 1 of the First Protocol, the relevant provisions in the Consumer Credit Act are more readily and appropriately characterised as a statutory deprivation of the lender's rights of property in the broadest sense of that expression than as a mere delimitation of the extent of the rights granted by a transaction. The rigid ban on enforcement of security and contractual rights prescribed by section 127(3) alone and in conjunction with sections 106 and 113 engages article 1 of the First Protocol. The lender's rights were extinguished in favour of the borrower by legislation for which the state is responsible. This was a deprivation of possessions within the meaning of article 1: see *James v United Kingdom* (1986) 8 EHRR 123,140, para 38. Whether this statutory interference with First County Trust's peaceful enjoyment of its possessions was justified, and therefore not a breach of article 1, is a separate issue.

45. I do not think there is any inconsistency between this conclusion and the conclusion stated above regarding article 6 (1). A statutory provision may be characterised at one and the same time as a limitation on the scope of a creditor's rights for the purposes of article 6 (1) and as a law depriving a person of his possessions for the (different) purposes of article 1 of the First Protocol.

Restitution

46. Before considering whether section 127(3) is compatible with article 1 of the First Protocol I must digress to deal with two preliminary matters. The first concerns the legal consequences of section 127(3). When a regulated agreement is rendered irredeemably unenforceable by section 127(3), the lender is unable to enforce the agreement. But does he, quite apart from his (unenforceable) rights under the agreement, have a restitutionary claim against the borrower in respect of the money lent? The parties to the agreement intended the money would be repayable in accordance with the terms of the agreement. Inability to enforce the terms of the agreement does not inevitably carry with it the consequence that the borrower may simply keep the money. Retention of the money, it is said, would be unjust enrichment, for which the appropriate remedy would be an order that the borrower repay what was never intended to be other than a loan. Reliance was placed, by way of analogy, on the decision of the Court of Appeal in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*

[1994] 1 WLR 938. There a bank paid money to a local authority under an interest rate swap agreement, which was held later to be outside the local authority's powers. The local authority had been unjustly enriched and the bank was entitled to a restitutionary remedy.

47. A secondary question also arises: if the lender does have a restitutionary claim, is that a matter to be taken into account when considering whether section 127(3) is compatible with article 1 of the First Protocol?

48. I can deal with these two questions quite shortly, starting with the latter. I am in no doubt that a lender's restitutionary remedy, if he has one, is a matter to be taken into account when considering whether section 127(3) is compatible with article 1 of the First Protocol. The adverse consequences of an alleged infringement of a Convention right cannot sensibly be assessed other than in the round. The real position of the claimant is what matters. If in practice a lender can ameliorate the immediate and directly adverse consequence of section 127(3) by resort to some other right or remedy readily available to him, that is a matter to which the court must have regard. I cannot accept the contrary arguments addressed to the House.

49. I consider, however, that there is no relevant restitutionary remedy generally available to a lender in the circumstances now under consideration. The message to be gleaned from sections 65, 106, 113 and 127 of the Consumer Credit Act is that where a court dismisses an application for an enforcement order under section 65 the lender is intended by Parliament to be left without recourse against the borrower in respect of the loan. That being the consequence intended by Parliament, the lender cannot assert at common law that the borrower has been unjustly enriched. That would be inconsistent with the parliamentary intention in rendering the entire agreement unenforceable. True, the Consumer Credit Act does not expressly negative any other remedy available to the lender, nor does it render an improperly executed agreement unlawful. But when legislation renders the entire agreement inoperative, to use a neutral word, for failure to comply with prescribed formalities the legislation itself is the primary source of guidance on what are the legal consequences. Here the intention of Parliament is clear.

50. This interpretation of the Consumer Credit Act accords with the approach adopted by the House in *Orakpo v Manson Investments Ltd* [1978] AC 95, regarding section 6 of the Moneylenders Act 1927 and, more recently, in *Dimond v Lovell* [2002] 1 AC 384, another case where section 127(3) precluded the making of an enforcement order. In *Dimond's* case the

restitutionary remedy sought was payment of the hire charge for a replacement car used by Mrs Dimond. The House rejected a claim advanced on the basis of unjust enrichment. Lord Hoffmann observed that Parliament contemplated that a debtor might be enriched consequential upon non-enforcement of an agreement pursuant to the statutory provisions. It was not open to the court to say this consequence is unjust and should be reversed by a remedy at common law: [2002] 1 AC 384, 397-398.

Use of Hansard in compatibility cases

51. The second preliminary matter concerns the Court of Appeal's use of Hansard in the present case. When considering whether this was a case where the courts should be ready to defer to the considered opinion of elected representatives, the Court of Appeal, at [2002] QB 74, 93-94, para 33, pointed to the need for the court to identify the social policy issue which the legislature or the executive thought it necessary to address and 'the thinking which led to that issue being dealt with in the way that it was':

> 'It is one thing to accept the need to defer to an opinion which can be seen to be the product of reasoned consideration based on policy; it is quite another thing to be required to accept, without question, an opinion for which no reason of policy is advanced.'

52. In this connection the Court of Appeal considered the 'lengthy gestation' of the Consumer Credit Act. The court referred to parliamentary debates on the Bill, not as an aid to interpretation, but on the reason which led Parliament to enact section 127(3). The Court of Appeal concluded that the debates provide no answer to this issue: such references as there are 'tend to confuse rather than to illuminate' (para 36). The court added, in para 37:

> 'In the present case, therefore, we are left without the assistance which examination of reports, preparatory material and debates in Parliament might have been expected to provide on the question: "why was it thought necessary to deny to the courts the power to do what was just in those cases in which there was no document signed by the debtor which contained terms which would or might, at some future date, be prescribed by the Secretary of State?" … We have been shown no material which helps us to understand why the executive thought it necessary to propose, or why Parliament thought it necessary to enact, section 127(3) of the 1974 Act in the form which it takes.'

53. Although the references to Hansard in the present case were inconclusive, Mr Sumption QC expressed to your Lordships' House the concern of the Speaker of the House of Commons and of the Clerk of the Parliaments at the 'wider significance' of the exercise undertaken by the Court of Appeal. This exercise, he submitted, involved measuring against standards derived from the Convention the acceptability of Parliament's

reasons for legislating in a particular way, and doing so by reference to the 'thinking' apparent from the record of debates. Further, it involved treating the absence of expressed reasons, acceptable or otherwise, as a factor making it more difficult to justify the enactment in Convention terms. The courts should not treat speeches made in Parliament, whether by ministers or others, as evidence of the policy considerations which led to legislation taking a particular form. The exercise on which the Court of Appeal engaged is not an appropriate exercise for a court. There are no circumstances in which it is appropriate for a court to refer to the record of parliamentary debates in order to decide whether an enactment is compatible with the Convention. The policy and objects of a statute must by determined by interpreting its language, which alone represents Parliament's intention. Reference to debates for the purpose of determining whether the policy considerations put forward by those participating in debates in either House were justifiable in Convention terms and proportionate to the remedy proposed would involve 'questioning' what is said in Parliament contrary to article 9 of the Bill of Rights 1689. That is a different exercise from the one undertaken in *Pepper v Hart* [1993] AC 593, and it is an exercise essentially adverse to Parliament's intention, not supportive of it.

54. These submissions raise a point of constitutional importance. This House sitting in its judicial capacity is keenly aware, as indeed are all courts, of the importance of the legislature and the judiciary discharging their own constitutional roles and not trespassing inadvertently into the other's province. Thus, in resolving any question which may arise on the practical application of this principle in a particular case, the courts welcome the participation of the Speaker of the House of Commons and the Clerk of the Parliaments in the proceedings. The House has been much assisted by the submissions made on their behalf by Mr Sumption. The present case is in fact the first time the authorities of Parliament have sought to be heard on the use of Hansard by the courts.

55. The starting point for any consideration of the matters raised by these submissions is, indeed, the respective roles of Parliament and the courts. Parliament enacts legislation, the courts interpret and apply it. The enactment of legislation, and the process by which legislation is enacted, are matters for Parliament, not the courts. Thus, article 9 of the Bill of Rights 1689 provides, in modern spelling, that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.' This provision is part of the wider principle that the courts and Parliament are both astute to recognise their constitutional roles: Lord Browne-Wilkinson in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 332. These distinct roles reflect one aspect of the separation of powers under this country's constitution.

56. The decision in *Pepper v Hart* [1993] AC 593 removed from the law an irrational exception. When a court is carrying out its constitutional task of interpreting legislation it is seeking to identify the intention of Parliament expressed in the language used. This is an objective concept. In this context the intention of Parliament is the intention the court reasonably imputes to Parliament in respect of the language used. In seeking this intention the courts have recourse to recognised principles of interpretation and also a variety of aids, some internal, found within the statute itself, some external, found outside the statute. External aids include the background to the legislation, because no legislation is enacted in a vacuum. It has long been established that the courts may look outside a statute in order to identify the 'mischief' Parliament was seeking to remedy. Lord Simon of Glaisdale noted it is 'rare indeed' that a statute can be properly interpreted without knowing the legislative object: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 647. Reports of the Law Commission or advisory committees, and government white papers, are everyday examples of background material which may assist in understanding the purpose and scope of legislation.

57. Before the decision in *Pepper v Hart* a self-imposed judicial rule excluded use of parliamentary materials as an external aid. The courts drew a veil around everything said in Parliament. This had the consequence that a statement made in a government white paper, issued by the relevant government department before legislation was introduced, could be used as an external aid. But if the same statement were made by a minister of the department in Parliament when promoting the Bill in one or other House, the courts were strictly unable to take cognisance of the minister's statement.

58. In relaxing this self-imposed rule the House enunciated some practical safeguards in *Pepper v Hart*. These were intended to keep references to Hansard within reasonable bounds. One of these safeguards is that the parliamentary statement must be made by the minister or other promoter of the Bill. In imposing this cautionary limitation the House was not, I believe, intending to attribute to ministerial statements some special status, thereby encroaching upon the court's constitutional task of determining objectively what was the intention of Parliament in using the language in question. A clear and unambiguous ministerial statement is part of the background to the legislation. In the words of Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593, 635, such statements 'are as much background to the enactment of legislation as white papers and Parliamentary reports'. But they are no more than part of the background. As I emphasised in *R v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 399, however such statements are made

and however explicit they may be, they cannot control the meaning of an Act of Parliament.

59. Suggestions have been made that unequivocal ministerial statements made in Parliament regarding an ambiguous provision in a Bill may have a more exalted role. In his influential article 'Pepper v Hart; A Re-examination' (2001) 21 OJLS 59, Lord Steyn noted it may be unobjectionable for a judge to use Hansard to identify the mischief at which a statute is aimed. But he rightly drew attention to the conceptual and constitutional difficulties in treating the intentions of the government revealed in debates as reflecting the will of Parliament, as distinct from the possibility that they may give rise to an estoppel or the like against the government.

60. In the present case Mr Sumption did not submit that *Pepper v Hart* was wrongly decided. Nor is it necessary to decide whether *Pepper v Hart* does more than permit courts, when ascertaining the intention of Parliament, to have regard to ministerial statements made in Parliament in the same way as they may have regard to ministerial statements made outside Parliament. What is important is to recognise there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative of the will of Parliament, and without in any other way encroaching upon parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone. The use by courts of ministerial and other promoters' statements as part of the background of legislation, pursuant to *Pepper v Hart*, is one instance. Another instance is the established practice by which courts, when adjudicating upon an application for judicial review of a ministerial decision, may have regard to a ministerial statement made in Parliament. The decision of your Lordships' House in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 is an example of this. I now turn to consider whether a challenge to the compatibility of legislation with Convention rights may be a further instance of the innocuous use by courts of statements made in Parliament.

61. The Human Rights Act 1998 requires the court to exercise a new role in respect of primary legislation. This new role is fundamentally different from interpreting and applying legislation. The courts are now required to evaluate the effect of primary legislation in terms of Convention rights and, where appropriate, make a formal declaration of incompatibility. In carrying out this evaluation the court has to compare the effect of the legislation with the Convention right. If the legislation impinges upon a Convention right the court must then compare the policy objective of the legislation with the

policy objective which under the Convention may justify a prima facie infringement of the Convention right. When making these two comparisons the court will look primarily at the legislation, but not exclusively so. Convention rights are concerned with practicalities. When identifying the practical effect of an impugned statutory provision the court may need to look outside the statute in order to see the complete picture, as already instanced in the present case regarding the possible availability of a restitutionary remedy. As to the objective of the statute, at one level this will be coincident with its effect. At this level, the object of section 127(3) is to prevent an enforcement order being made when the circumstances specified in that provision apply. But that is not the relevant level for Convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision. Frequently that purpose will be self-evident, but this will not always be so.

62. The legislation must not only have a legitimate policy objective. It must also satisfy a 'proportionality' test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a 'value judgment' by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force. (I interpose that in the present case no suggestion was made that there has been any relevant change of circumstances since the Consumer Credit Act was enacted.)

63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of the statutory measure and why the course adopted by the legislature is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the 'mischief') at which the legislation is aimed. This may throw light on the rationale underlying the legislation.

64. This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to

exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the court would not be 'questioning' proceedings in Parliament or intruding improperly into the legislative process or ascribing to Parliament the views expressed by a minister. The court would merely be placing itself in a better position to understand the legislation.

65. To that limited extent there may be occasion for the courts, when conducting the statutory 'compatibility' exercise, to have regard to matters stated in Parliament. It is a consequence flowing from the Human Rights Act. The constitutionally unexceptionable nature of this consequence receives some confirmation from the view expressed in the unanimous report of the parliamentary Joint Committee on Parliamentary Privilege (1999) (HL Paper 43-I, HC 214-I), p 28, para 86, that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability.

66. I expect that occasions when resort to Hansard is necessary as part of the statutory 'compatibility' exercise will seldom arise. The present case is not such an occasion. Should such an occasion arise the courts must be careful not to treat the ministerial or other statement as indicative of the objective intention of Parliament. Nor should the courts give a ministerial statement, whether made inside or outside Parliament, determinative weight. It should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions.

67. Beyond this use of Hansard as a source of background information, the content of parliamentary debates has no direct relevance to the issues the court is called upon to decide in compatibility cases and, hence, these debates are not a proper matter for investigation or consideration by the courts. In particular, it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the

legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which 'counts against' the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute. I agree with Laws LJ's observations on this in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] 3 WLR 344, 386, paras 113-114.

Article 1 of the First Protocol and proportionality

68. I turn now to consider whether section 127(3) of the Consumer Credit Act is compatible with the rights guaranteed by article 1 of the First Protocol. Inherent in article 1 is the need to hold a fair balance between the public interest and the protection of the fundamental rights of creditors such as First County Trust. It is common ground that section 127(3) pursues a legitimate aim. The fairness of a system of law governing the contractual or property rights of private persons is a matter of public concern. Legislative provisions intended to bring about such fairness are capable of being in the public interest, even if they involve the compulsory transfer of property from one person to another: see the leasehold enfranchisement case of *James v United Kingdom* (1986) 8 EHRR 123, 141, para 41. More specifically, persons wishing to borrow money are often vulnerable. There is a public interest in protecting such persons from exploitation.

69. There must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The means chosen to cure the social mischief must be appropriate and not disproportionate in its adverse impact. Whether that relationship exists in the case of section 127(3) is the key issue.

70. In approaching this issue, as noted in *R v Johnstone* [2003] UKHL 28 para 51, courts should have in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified: see the Rent Act case of *Mellacher v Austria* (1989) 12 EHRR 391, 411, para 53. The court will reach a different conclusion from

the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.

71. I turn to the statutory setting of section 127(3). The Consumer Credit Act contains many requirements about the form and contents of regulated agreements. Parliament has singled out some obligations as having such importance that non-compliance leads automatically and inflexibly to a ban on the making of an enforcement order whatever the circumstances. These obligations are specified in section 127(3) and (4). In these two subsections Parliament has chosen, deliberately, to exclude consideration of what is just and equitable in the particular case. The latter approach, enabling the court to consider the circumstances of the particular case, was adopted as the general rule in section 127(1). Section 127(3) and (4) are, expressly, exceptions to the general rule. In prescribing these two exceptions Parliament must be taken to have considered that the sanction generally attaching to non-compliance with the statutory requirements was not sufficient to achieve compliance with the duty to include all the prescribed terms in the agreement (section 61(1)(a)) or the duties to provide copies and notice of cancellation rights (sections 62 to 64). Something more drastic was needed in order to focus attention on the need for lenders to comply strictly with these particular obligations.

72. Undoubtedly, as illustrated by the facts of the present case, section 127(3) may be drastic, even harsh, in its adverse consequences for a lender. He loses all his rights under the agreement, including his rights to any security which has been lodged. Conversely, the borrower acquires what can only be described as a windfall. He keeps the money and recovers his security. These consequences apply just as much where the lender was acting in good faith throughout and the error was due to a mistaken reading of the complex statutory requirements as in cases of deliberate non-compliance. These consequences also apply where, as in the present case, the borrower suffered no prejudice as a result of the non-compliance as they do where the borrower was misled. Parliament was painting here with a broad brush.

73. The unattractive feature of this approach is that it will sometimes involve punishing the blameless pour encourager les autres. On its face, *considered in the context of one particular case*, a sanction having this effect is difficult to justify. The Moneylenders Act 1927 adopted a similarly severe approach. Infringement of statutory requirements rendered the loan and any

security unenforceable. So did the Hire Purchase Act 1965, although to a lesser extent. This approach was roundly condemned in the Crowther report (Report of the Committee on Consumer Credit, under the presidency of Lord Crowther, March 1971) (Cmnd 4596), vol 1, p 311, para 6.11.4:

> 'It offends every notion of justice or fairness that because of some technical slip which in no way prejudices him, a borrower, having received a substantial sum of money, should be entitled to retain or spend it without any obligation to repay a single penny.'

74. Despite this criticism I have no difficulty in accepting that in suitable instances it is open to Parliament, when Parliament considers the public interest so requires, to decide that failure to comply with certain formalities is an essential prerequisite to enforcement of certain types of agreements. This course is open to Parliament even though this will sometimes yield a seemingly unreasonable result in a particular case. Considered overall, this course may well be a proportionate response in practice to a perceived social problem. Parliament may consider the response should be a uniform solution across the board. A tailor-made response, fitting the facts of each case as decided in an application to the court, may not be appropriate. This may be considered an insufficient incentive and insufficient deterrent. And it may fail to protect consumers adequately. Persons most in need of protection are perhaps the least likely to participate in court proceedings. They may well let proceedings go by default: see, in relation to money lending agreements, the Crowther report, p 236, para 6.1.19.

75. Nor do I have any difficulty in accepting that money lending transactions as a class give rise to significant social problems. Bargaining power lies with the lender, and the social evils flowing from this are notorious. The activities of some lenders have long given the business of money lending a bad reputation. Nor, becoming more specific, do I have any difficulty in accepting, in principle, that Parliament may properly make compliance with the formalities required by the Consumer Credit Act regarding 'prescribed terms' an essential prerequisite to enforcement. In principle that course must be open to Parliament. It must be open to Parliament to decide that, severe though this sanction may be, it is an appropriate way of protecting consumers as a matter of social policy. In making its decision in the present case Parliament had the benefit of experience gained over many years in the working of the Moneylenders Act 1927 and the hire purchase legislation, and also the views of the Crowther committee. Further, it must be open to Parliament so to decide even though the lender's inability to enforce an agreement will not assist a borrower who consents to the enforcement of the agreement in ignorance of the true legal position.

76. The one point which has caused me difficulty is whether the requirement to state the amount of 'credit' is sufficiently clear and certain. The more severe the sanction, the more important it is that the law should be unambiguous. In the present case the confusion over the treatment of the document fee of £250 as 'credit' may have been due to a widespread misunderstanding within the trade. Certainly it was shared by an experienced trial judge. Mr Hibbert on behalf of the Finance and Leasing Association submitted it is sometimes far from easy to apply the complex provisions of the Consumer Credit Act and the ancillary regulations. He gave examples of types of cases where, he said, identifying the amount of 'credit' is fraught with difficulty.

77. That there was genuine confusion in the present case is admitted. But I am not persuaded the degree of uncertainty involved in identifying the amount of 'credit' is unacceptably high. The consumer credit legislation has to cope with a wide range of types of transactions. It is not surprising that now and again problems of definition will arise. With the assistance of court decisions points of uncertainty, when they occur, can be clarified. The mere fact that a legal provision is capable of more than one interpretation does not mean that it fails to meet the requirement implied in the Convention concept of 'prescribed by law': *Vogt v Germany* (1995) 21 EHRR 205, para 48. Moreover, I have in mind that the statutory provisions apply only to loans up to a prescribed financial limit, currently £25,000. So the exposure of a creditor in any one case is confined. The burden imposed on him is not excessive.

78. Accordingly, in my view section 127(3) is compatible with article 1 of the First Protocol.

79. The Court of Appeal reached the opposite conclusion. In doing so the court approached the matter from a slightly different angle. The effect of the court's judgment was to treat section 127(1) as the touchstone for proportionality and then require positive justification for any more draconian provision: see [2002] QB 74, 95-96, paras 38-39. I respectfully consider this is an erroneous approach. Section 127(3) is one provision in an overall package of measures, some more severe than others, approved by the legislature in response to a perennial social problem. In this type of case the court should approach the relevant statutory provision without any preconceptions of the requirements of proportionality based on other provisions of the statute. The court should simply have regard to the relevant statutory provision and its policy objective and consider whether the provision bears so unfairly on the applicant that it was not open to Parliament to adopt this provision, even as part of an overall package, in response to the social problem in question. In other words, is it apparent

that Parliament must have attached insufficient importance to the applicant's Convention right? As I have indicated, I would answer 'no' to this question in the present case.

80. As a footnote I should add that in stating this conclusion I am not to be taken as expressing a view on what would be the position if, as is now under consideration, the current limit of £25,000 were removed and the Consumer Credit Act were to apply to loans regardless of their amount. An adverse consequence, acceptable for a loan of £25,000, may not be acceptable when applied to a loan of £250,000.

LORD HOPE OF CRAIGHEAD

My Lords,

81. It is a mark of the importance of the issues which have been raised by the case that neither of the parties to the dispute which have given rise to it have taken any part in the appeal to this House. It has been brought by the Secretary of State for Trade and Industry, who was joined as a party to the proceedings in the Court of Appeal in response to a notice which was served on her under section 5(1) of the Human Rights Act 1998 ("the 1998 Act"). It has been responded to by four providers of motor insurance to the general pubic in the United Kingdom, by the Speaker of the House of Commons and the Clerk of the Parliaments ("the House Authorities") and by the Finance and Leasing Association which is the leading trade association representing the consumer finance industry. Your Lordships have also had the benefit of helpful submissions by an amicus curi' appointed by the Attorney General. In this situation the facts of the case may seem to be of little importance. But they cannot be overlooked entirely, as they provide the context for an examination of the wider issues that need to be dealt with.

82. My noble and learned friend, Lord Nicholls of Birkenhead, has set out the underlying facts. I am happy to adopt what he has said about them and confine myself to what I see as the essential details. The first point is that the transaction between Mrs Wilson and First County Trust ("FCT") was entered into, was acted upon by both sides and was the subject of proceedings in the County Court all before the relevant provisions of the 1998 Act were brought into force on 2 October 2000 by the Human Rights Act (Commencement No 2) Order 2000 (SI 2000/1851).

83. The loan agreement was signed on 22 January 1999. The loan was for a period of six months. It was due to be repaid, together with interest, on 21 July 1999. Mrs Wilson did not repay the loan on that date. On 23 July 1999 FCT sought payment of the amount due under the agreement. Mrs Wilson

then instituted proceedings against FCT in the county court. She sought a declaration under the Consumer Credit Act 1974 ("the 1974 Act") that the agreement was unenforceable, its reopening on the ground that the rate of interest at 94.78 % was grossly excessive and an injunction forbidding FCT from disposing of the motor car which it taken from Mrs Wilson in pawn as security for the loan. An interim injunction was granted on 12 August 1999. On 24 September 1999 the District Judge refused Mrs Wilson's application for a declaration that the agreement was void and unenforceable. But he granted a declaration that the credit agreement was extortionate, substituted a monthly interest charge at an agreed rate and permitted Mrs Wilson to redeem the motor car on payment of the loan with interest on or before 1 October 1999. On 18 October 1999 she gave notice of an appeal against the rejection of her claim that the agreement was unenforceable. But on 17 December 1999 she redeemed her car by paying the whole of the sum that was then due to FCT.

84. Mrs Wilson's appeal against FCT came before the Court of Appeal for hearing on 9 November 2000. By that date the 1998 Act had come into force. As Sir Andrew Morritt V-C observed when judgment was given on 23 November, neither party relied on it: [2001] QB 407, 417F-G, para 25. But he said that that did not absolve the court from considering its application. So it was that the court, having concluded that it was barred by section 127(3) of the 1974 Act from enforcing the agreement and that Mrs Wilson was entitled to repayment of the sum which she had paid to redeem her motor car, decided to adjourn the appeal to enable further consideration to be given to the question whether the bar on its enforcement infringed FCT's Convention rights and, if so, whether it should make a declaration of incompatibility under section 4 of the 1998 Act.

85. This brief history shows that the transaction which has given rise to this appeal was over and done with before the relevant provisions of the 1998 Act were brought into force, subject only to the question whether Mrs Wilson is entitled to repayment of the sum which she paid over to redeem her motor car. This raises a difficult and important question about the extent to which the 1998 Act can be relied upon so as to affect rights and obligations arising from previous transactions ("the retrospectivity issue"). Then there is the question whether, if the 1998 Act can be relied upon in these circumstances, the effect of section 127(3) of the 1974 Act in the events which have happened is to engage any of FCT's Convention rights ("the Convention rights issue").

86. The second point is that, in the course of its discussion in the judgment which was delivered on 2 May 2001 of the question whether the provisions of section 127(3) of the 1984 Act were incompatible with FCT's

Convention rights, the Court of Appeal examined the content of the debates on the Consumer Credit Bill in Parliament as reported in Hansard in order to identify the aims and issues of social policy which led to its enactment: [2001 EWCA Civ 633, [2002] QB 74, 94D-95F, paras 35-37. In the Court of Appeal the Secretary of State submitted that an attempt to do this was illegitimate. Her position before your Lordships was, as the learned Attorney General put it on her behalf, more moderate. But he urged caution in the use of this material and criticised the way it had been used by the Court of Appeal. The argument that its use is illegitimate has not gone away, however. It was the subject of submissions made by Mr Sumption QC on behalf of the House Authorities, and it is plain in view of its importance that we must deal with it: ("the reference to Hansard issue").

87. There is one other issue which has to be addressed. As has already mentioned, the Court of Appeal held in its first judgment that the effect of section 127(3) of the 1984 Act was that the agreement between Mrs Wilson and FCT was unenforceable and that she was entitled to repayment of the sum which she paid over to redeem her motor car. Sir Andrew Morritt V-C said that he would not wish to arrive at a conclusion which permitted Mrs Wilson both to retain her car and to recover the money which she paid to redeem it unless the statutory provisions left no alternative: [2001] QB 407, 416D, para 20. Having considered the decision of your Lordships' House in *Dimond v Lovell* [2000] 1 AC 384 however he concluded that prima facie she was entitled to the orders which she sought: para 25. FCT have not sought to appeal against this decision, and it will not be disturbed. But the Secretary of State submits that the decision in *Dimond v Lovell* is distinguishable and that, if the agreement is unenforceable, FCT is entitled to a restitutionary remedy against Mrs Wilson ("the *Dimond v Lovell* issue").

The retrospectivity issue

88. The Court of Appeal decided that it would be appropriate to declare that, having regard to the terms prescribed by regulation 6(1) of and Schedule 6 to the Consumer Credit (Agreements) Regulations 1983 (SI 1983/1553), the provisions of section 127(3) of the 1974 Act, in so far as they prevent the court from making an enforcement order under section 6(1) of that Act unless a document containing all the prescribed forms of the agreement has been signed by the debtor or hirer are incompatible with the rights guaranteed to the creditor or hirer by article 6(1) of the Convention and article 1 of the First Protocol:[2002] QB 74, 99B-C, para 50. The issue is whether it was open to the Court of Appeal to make this declaration.

89. The Secretary of State submits that it was not open to the Court of Appeal to do so, as sections 1 and 4 of the 1998 Act came into force after

the agreement was made, after the due date for payment under that agreement and after judgment had been pronounced in the County Court on Mrs Wilson's application for a declaration that the agreement was void and unenforceable. Her argument is that FCT had at the relevant times no Convention rights under the 1998 Act that were capable of being infringed by the operation of section 127(3) of the 1974 Act. In short, as the declaration was made in relation to events which occurred before the 1998 Act fully came into force, it offends against the general principle that legislation does not have effect retrospectively: Bennion, *Statutory Interpretation*, 4th ed (2002), pp 265-269, 689-690.

90. The only provision in the 1998 Act which gives retrospective effect to any of its provisions is section 22(4). It directs attention exclusively to that part of the Act which deals with the acts of public authorities: see sections 6 to 9. What it says is that section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place. I do not think that there is any mystery as to why this provision was included in the 1998 Act, although the consequences that flow from it are much less certain. The explanation lies in the fact that the purpose of sections 6 to 9 of the Act is to provide a remedial structure in domestic law for the rights guaranteed by the Convention. As article 13 of the Convention makes clear, it is the obligation of states which have ratified the Convention to provide everyone within their jurisdiction with an effective remedy if the rights or freedoms which it protects are violated. The scheme of the Act is to give effect in domestic law to the obligation which is set out in article 13. If that scheme was to be followed through, victims had to be given an effective remedy in domestic law for a violation by the state of their Convention rights. The principle upon which the Act proceeds is that actions by public authorities are unlawful if they are in breach of Convention rights: section 6(1). Effect is given to that principle in section 7. But it was appreciated that victims of a violation by the state of their Convention rights were already entitled to obtain a remedy in the European Court of Human Rights under article 41 of the Convention. In that context it made sense for the provisions of section 6(1) to be made available for use defensively where proceedings are brought against the victim by or at the instigation of a public authority, whenever the violation took place. That is what section 22(4) achieves by enabling section 7(1)(b) to be given effect retrospectively.

91. But we are not concerned with the acts of public authorities in this case or with proceedings brought by or at the instigation of a public authority. There is no claim by a victim that a public authority has acted in a way that is made unlawful by section 6(1) of the Act.

92. It has been held that acts of courts or tribunals which took place before 2 October 2000 which they were required to do by primary legislation and were done according to the meaning which was to be given to the legislation at that time are not affected by section 22(4): see *R v Kansal* [2001] UKHL 62, [2002] 2 AC 69, 112F-113A, para 84; *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] QB 1334, 1346A-1347C, paras 29-36. It has also been held that the Act cannot be relied upon retrospectively to make unlawful conduct which was lawful at the time when it took place: *Wainwright v Home Office* [2002] QB 1334, 1337G-H para 40. The effect of these decisions is that the 1998 Act cannot be applied retroactively so as to deem the law to have been different from what it was when these acts were done. But we are not concerned in this case with the lawfulness of acts done or the lawfulness of conduct which took place before the Act was brought fully into force. The question in this case is whether the rights and obligations of parties to an agreement made before 2 October 2000 are, as a result of the coming into force of the relevant provisions of the 1998 Act, different now from what they were when the agreement was entered into.

93. The approach which the Court of Appeal took to this problem was to apply section 6(1) of the 1998 Act to the facts of this case, as the court was required by that subsection to act in a way which was compatible with Convention rights, and then to ask itself whether the order which it was about to make was or was not compatible with Convention rights. Its conclusion was that, approached in this way, the relevant event was not the making of the agreement on 22 January 1999 but the making of its order on the appeal. Section 22(4) had no relevance, as the court had had to have regard to the facts as they were at the time when it made its order: [2002] QB 74, 88B, para 17, 89G-H, para 22.

94. While it is true that the court is required by section 6(1) of the 1998 Act to act in a way that is compatible with Convention rights, the issue in this case relates to the meaning and effect of legislation. The first task which confronts the court in a case of this kind is to construe the provisions of the statute which it is being asked to apply. The question which the Court of Appeal posed for itself in November 2000 was whether it was possible to read and give effect to section 127(3) of the 1974 Act in a way that was compatible with FCT's rights under article 6(1) of the Convention and article 1 of the First Protocol.

95. But one does not need to go to section 6(1) of the 1998 Act to discover the obligation which the court had to fulfil in these circumstances. Its obligation is to be found in section 3(1). That subsection provides that, so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way that is compatible with Convention rights. A

person who claims that a court or tribunal has acted in a way that is made unlawful by section 6(1) may bring proceedings under section 7(1)(a) in the manner provided for by section 9(1) and, if compensation is required under article 5(5), may be awarded damages under section 9(3). But a person who claims that a court or tribunal has failed to fulfil the interpretative obligation laid down by section 3(1) has no need to go to section 7(1)(a) for his remedy. The meaning and effect of legislation is a question of law, so if an error is made about this the ordinary avenues of appeal are available.

96. In my opinion the issue about retrospectivity in this case resolves itself into a question as to whether section 3(1) permits the court, when it is determining after 2 October 2000 whether section 127(3) of the 1974 Act is compatible with FCT's Convention rights, to hold that the rights and obligations of parties to the agreement are, as a result of the coming into force of the relevant provisions of the 1998 Act on that date, different now from what they were at the time when the agreement was entered into in January 1999.

97. The first thing to notice about section 3(1) of the 1998 Act is that, as to its temporal effect, it is entirely general and unqualified. But some guidance can be found in section 3(2)(a), which says that section 3 applies to primary and secondary legislation "whenever enacted". So at least it can be said that it was plainly not the intention that legislation which was enacted before 2 October 2000 should be immune from the interpretative obligation which section 3(1) lays down. It would have been surprising if the Act had that effect. It would have greatly emasculated the underlying concept of bringing human rights home.

98. Then there is the general presumption that legislation is not intended to operate retrospectively. That presumption is based on concepts of fairness and legal certainty. These concepts require that accrued rights and the legal effect of past acts should not be altered by subsequent legislation. But the mere fact that a statute depends for its application in the future on events that have happened in the past does not offend against the presumption. For a recent example of this point reference may be made to *R v Field* [2002] EWCA Crim 2913; [2003] 1 WLR 882 (CA). In that case it was held that the making of a disqualification order under section 28 of the Criminal Justice and Court Services Act 2000 against a defendant from working with children in the future did not offend against the presumption where the offending behaviour had occurred before that Act came into force. It illustrates the point that there is an important distinction to be made between legislation which affects transactions that have created rights and obligations which the parties seek to enforce against each other and legislation which affects transactions that have resulted in the bringing of proceedings in the public

interest by a public authority. The concepts of fairness and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2 October 2000 should be altered retrospectively.

99. Account may also be taken of the purpose of the 1998 Act. Its long title states that it was intended to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights. The rights to which the Act gives effect are rights guaranteed by the Convention which the United Kingdom has already signed and ratified. In *R v Field* [2003] 1 WLR 882, 896E-F, para 61 the Court of Appeal accepted a submission by the Secretary of State for the Home Department that the court should take a more relaxed approach to a potentially retroactive element in legislation where its intended purpose was, as it clearly was in the case of section 28 of the Criminal Justice and Court Services Act 2000, to protect children. I would apply the same reasoning to section 3 of the 1998 Act. Its purpose is to ensure that legislation is read and given effect in a way that is compatible with Convention rights, so far as it is possible to do so, whenever the legislation was enacted. To restrict the application of the interpretative obligation, without exception, to "events" that happened or "transactions" entered into on or after 2 October 2000 would be to introduce a restriction which is not stated expressly anywhere in the 1998 Act. A restriction in such absolute and all-embracing terms would seem to be contrary to the intention of the legislation and incapable of being read into it by necessary implication.

100. But the consequence of reading section 127(3) of the 1974 Act in a way that is compatible with FCT's Convention rights cannot be looked at without taking account of the effects of doing so on the other party to the transaction, Mrs Wilson. She too acquired rights as a result of the transaction, as well as FCT. The set of provisions of which it forms part, and on which she relies, were enacted for the protection of consumers. Section 61(1) provides that a regulated agreement is not properly executed unless it satisfies certain requirements. It must include a statement of all the prescribed terms, which include a term stating the amount of the credit: paragraph 2 of Schedule 6 to the Consumer Credit (Agreements) Regulations 1983. Section 65(1) provides that an improperly executed agreement is enforceable against the debtor or the hirer on an order of the court only. The amount of the credit in this agreement was incorrectly stated, so Mrs Wilson became entitled to the protection of section 65(1) as soon as it was entered into. What this right meant in her case was spelled out in section 127(3), which provides:

> "The court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner)."

101. Let it be assumed, then, that the effect of section 127(3) is to engage FCT's Convention rights and that it is possible to read and give effect to the subsection in a way that is compatible with them. This will, inevitably, have the consequence of removing from Mrs Wilson the protection which sections 61(1)(a), 65(1) and 127(3) were designed to give her when the agreement was entered into. It seems to me that the presumption against the retrospective effect of legislation ought to be given its full weight in these circumstances. The case may be regarded as a typical example of the situation where legislation in question affects transactions that have created rights and obligations which the parties to it seek to enforce against each other. I recognise that there may be cases (and I have referred to *R v Field* [2003] 1 WLR 882 as an example) where a more relaxed approach will be appropriate. There is an obvious attraction in a solution to the application of the presumption to the obligation in section 3(1) which depends on clear, bright line rules which do not admit of any exceptions. But rules of that kind would be bound to lead to unfairness in some cases or to have consequences that could not have been intended for other reasons. So I would prefer to base my decision in this case on the particular facts and circumstances. I would hold that the presumption would be violated in this case if section 127(3) were to be construed in FCT's favour in a way that deprived Mrs Wilson of the protection which it was designed to give her when she entered into the agreement on 22 January 1999.

102. It follows that, as a determination of the question whether section 127(3) of the 1974 Act could be read and given effect in a way that was compatible with FCT's Convention rights would offend against the principle that legislation does not have effect retrospectively, it was not open to the Court of Appeal in these proceedings to make a declaration of incompatibility.

The Convention rights issue

103. The question is whether the effect of section 127(3) of the 1974 Act in the events which have happened is to engage any of FCT's Convention rights. If I am right on the retrospectivity issue this question does not arise. But the Court of Appeal dealt with the question, so I should like to make these brief observations about it. The Convention rights that are in issue are those which are set out in article 6(1) of the Convention and article 1 of the

First Protocol. The Court of Appeal asked itself whether the exclusion of what it described as "any meaningful consideration by the court" of the creditor's rights under an improperly executed agreement was legitimate, having regard to the fundamental nature of the right guaranteed by article 6(1), and it held that the exclusion of any judicial remedy engaged that article and also article 1 of the First Protocol: [2002] QB 74, 92B- 93F, paras 31, 32.

104. Article 6(1) of the Convention provides a guarantee to everyone of access to the court for the determination of his or her civil rights and obligations. As the European Court of Human Rights has explained, this provision must be read in the light of the rule of law referred to in the preamble to the Convention of which an integral part is the principle that a civil claim must be capable of being submitted to a judge: *Golder v United Kingdom* (1975) 1 EHRR 524, paras 35, 36. A provision which operated as a procedural bar to access to the court for the enforcement of a civil right would be engaged by this article. But it is for domestic law to determine the extent and content of a person's civil rights: *H v Belgium* (1987) 10 EHRR 339, para 40. The rights which article 6(1) guarantees are rights of procedural fairness. They do not guarantee that a person's substantive civil rights are of any particular character.

105. As the European Court said in *Powell v United Kingdom*, application no 45305/99,4 May 2000, unreported:

> "For the Court, it still remains the case that an applicant must be able to demonstrate an arguable claim under domestic law that there has been a breach of a civil right actionable in law. It is still impermissible for the Court to arrogate to itself the task of creating in favour of an individual a substantive right where none is recognised under domestic law."

What article 6(1) seeks to do, then, is to protect the individual against anything which restricts or impairs his access to the courts for the determination of a civil right whose existence is at least arguable. But the precise scope and content of the individual's civil rights is a matter for each state party to determine: see also *Matthews v Ministry of Defence* [2002] UKHL 4, [2003] 2 WLR 435, 452-543, paras 49-53.

106. Article 1 of the First Protocol has a similar character. It does not confer a right of property as such nor does it guarantee the content of any rights in property. What it does instead is to guarantee the peaceful enjoyment of the possessions that a person already owns, of which a person cannot be deprived except in the public interest and subject to the conditions provided for by law: *Marckx v Belgium* (1979) 2 EHRR 330, para 50. Here too it is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the

transactions which he or she enters into. One must, of course, distinguish carefully between cases where the effect of the relevant law is to deprive a person of something that he already owns and those where its effect is to subject his right from the outset to the reservation or qualification which is now being enforced against him. The making of a compulsory order or of an order for the division of property on divorce are examples of the former category. In those cases it is the making of the order, not the existence of the law under which the order is made, that interrupts the peaceful enjoyment by the owner of his property. The fact that the relevant law was already in force when the right of property was acquired is immaterial, if it did not have the effect of qualifying the right from the moment when it was acquired.

107. The rights of property which are in issue in this case are those set in an agreement which is regulated by the 1974 Act. The Act subjects the rights of the creditor to restrictions in some circumstances. Section 65 declares that a regulated agreement which is improperly executed cannot be enforced by the creditor except by means of an order of the court, and section 127(3) declares that it is not to be enforceable at all except upon the condition which it lays down. The agreement which was entered into in this case was from the outset an agreement which was improperly executed. So it was always subject to the restrictions on its execution which sections 65(1) and 127(3) of the 1974 Act set out. I would hold that FCT's Convention rights under article 1 of the First Protocol are not engaged in these circumstances.

108. The Court of Appeal said that the effect of sections 65(1) and 127(3) was to deprive the pawnbroker of its ability to enjoy benefit from the contractual rights arising from the agreement or from the rights arising from the delivery of the pawn: para 32. But the fact is that FCT never had an absolute and unqualified right to enforce this agreement or to enforce the rights arising from the delivery of the motor car. Article 6(1) of the Convention and article 1 of the First Protocol cannot be used to confer absolute and unqualified rights on FCT which, having regard to the terms of the statute by which agreements of this kind are regulated, it never had at any time under the improperly executed agreement which it entered into.

109. As I would hold that article 1 of the First Protocol is not engaged in this case, I do not need to examine the question whether section 127(3) is compatible with the rights guaranteed by that article. Had it been necessary for me to do so, I would have reached the same conclusion as Lord Nicholls has done for the reasons he gives.

The reference to Hansard issue

110. One of the happy characteristics of the Human Rights Act 1998 is that it did not attempt to solve all the problems that were bound to arise as a result of giving effect in domestic law to Convention rights. Among these problems was the effect which its provisions would be likely to have on the relationship between the courts and Parliament. This was left to be worked out in accordance with familiar constitutional principles.

111. One of these principles, which has repeatedly been emphasised, is that legislation is the exclusive responsibility of Parliament. The judges' task is to interpret, not to legislate: *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, 72-73, para 75, per Lord Woolf CJ; R *v Lambert* [2001] UKHL 37, [2002] 2 AC 545, 585C-D, para 79; *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10, [2002] 2 AC 291, 313E, para 39, per Lord Nicholls of Birkenhead. Another is that it is the intention of Parliament that defines the policy and objects of its enactments, not the purpose or intention of the executive. The courts for their part must respect this principle, which means that the legislative function belongs to Parliament not to the executive. Then there is the rule which article 9 of the Bill of Rights 1689 lays down that proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament. For their part both Houses of Parliament abstain from discussing the merits of disputes that are about to be tried and adjudicated on by the courts: *Erskine May*, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament,* 22nd ed (1997), pp 383-384, 452-453. As Lord Nicholls has said, all courts are keenly aware of the importance of the legislature and the judiciary each discharging their own constitutional roles and not trespassing into functions that belong to the other.

112. The question which the House Authorities have raised is therefore an important one, and the position needs to be clarified. It has been prompted by the use which the Court of Appeal made of Hansard in its examination of the question whether this was a case where it should defer, on democratic grounds, to the considered opinion of the legislature: [2002] QB 74, 94A-95D, paras 34-36. The Court of Appeal rejected the Secretary of State's submission that, because the legislation had been enacted, it must be taken to represent the considered opinion of the elected body and that it was not for the courts to question the basis upon which that opinion was reached: para 34. Having done so, it embarked upon an examination of the parliamentary debates on the Bill. It did this not as an aid to construction of the legislation as its meaning was not in doubt, but to discover the reason which led Parliament to think that it was necessary to enact section 127(3) and thus to deny to the courts the power to do what was just in the cases to which it refers: paras 35-36.

113. Mr Sumption QC for the House Authorities did not seek to question the use of Hansard for the limited purpose described in *Pepper v Hart* [1993] AC 593, although he drew attention to some of the conceptual difficulties. As I understand that decision, it recognised a limited exception to the general rule that resort to Hansard was inadmissible. Its purpose is to prevent the executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to those words when promoting the legislation in Parliament: *R v Secretary of State for the Environment, Ex p Spath Holme Ltd* [2001] 2 AC 349, 407-408. Mr Sumption recognised that the exception thus stated has commanded broad acceptance where it has operated as a kind of quasi-estoppel against the executive. He also recognised that Hansard might be referred to where a statement made by a Minister in Parliament was relevant to a challenge by way of judicial review to what he had done: see, for example, R *v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696. This was because what the Minister said in Parliament was evidence of why he acted as he did. The position was no different from what it would have been if his statement had been recorded in a letter. But Mr Sumption stressed that any such exceptions should be clearly defined and that they should be based on principle.

114. The concern which he expressed was directed to the use of Hansard in this case for the purpose of seeking to discover from debates in Parliament the reasons which Parliament had for making the enactment. He said that this was quite different from seeking to discover what words mean. It was one thing to refer to Hansard to ensure that legislation was not misconstrued in favour of the executive. That use could be said to be in support of the principle of Parliamentary sovereignty. It was another to refer to it in order to form a view as to whether Parliament had given sufficient reasons for doing what it did and, if not, whether the legislation was incompatible with Convention rights. To use Hansard in this way was to use it for a purpose which was adverse to the intention of Parliament.

115. Mr Sumption put forward two objections to this use of Hansard on grounds of principle. The first was that it involved examining the nature and quality of Parliament's reasoning in a case where there was no doubt about what Parliament had enacted. Where it was used for the purpose explained in *Pepper v Hart* there was a threshold that had to be satisfied - the test of ambiguity. Here there was no such threshold, as the suggestion was that Hansard could be resorted to however clear were the provisions set out in the enactment. The second was that its object was not to give effect to the will of Parliament but to measure the sufficiency of reasons given for the legislation against standards derived from the Convention. He said that this was contrary to article 9 of the Bill of Rights. It was not for the courts to

consider whether speeches made during debates in Parliament had put forward Convention-compliant reasons for supporting it.

116. I think that there is much force in these criticisms of the approach which the Court of Appeal took to this issue. But it would be going too far to say, as Mr Sumption did, that there are no circumstances where use may be made of Hansard where the purpose of doing so is to answer the question whether legislation is compatible with Convention rights. The boundaries between the respective powers and functions of the courts and of Parliament must, of course, be respected. It is no part of the court's function to determine whether sufficient reasons were given by Parliament for passing the enactment. On the other hand it has to perform the tasks which have been given to it by Parliament. Among those tasks is that to which section 4(1) refers. It has the task of determining, if the issue is raised, whether a provision of primary legislation is compatible with a Convention right. It does not follow from recognition that there is an area of judgment within which the judiciary will defer to the elected body on democratic grounds that the court is absolutely disabled from forming its own view in these cases as to whether or not the legislation is compatible. That question is ultimately for the court not for Parliament, as Parliament itself has enacted. The harder that question is to answer, the more important it is that the court is equipped with the information that it needs to perform its task.

117. This, then, is the justification for resorting to Hansard in cases where the question at issue is not one of interpretation but whether the legislation is compatible. A cautious approach is needed, and particular care must be taken not to stray beyond the search for material that will simply inform the court into the forbidden territory of questioning the proceedings in Parliament. To suggest, as the Court of Appeal did at [2002] QB 74, para 36, that what was said in debate tends to confuse rather than illuminate would be to cross that boundary. It is for Parliament alone to decide what reasons, if any, need to be given for the legislation that it enacts. The quality or sufficiency of reasons given by the promoter of the legislation is a matter for Parliament to determine, not the court.

118. But proceedings in Parliament are replete with information from a whole variety of sources. It appears in a variety of forms also, all of which are made public. Ministers make statements, members ask questions or propose amendments based on information which they have obtained from their constituencies, answers are given to written questions, issues are explored by select committees by examining witnesses and explanatory notes are provided with Bills to assist members in their consideration of it. Resort to information of this kind may cast light on what Parliament's aim was when it passed the provision which is in question or it may not. If it

does not this cannot, and must not, be a ground for criticism. But if it does, the court would be unduly inhibited if it were to be disabled from obtaining and using this information for the strictly limited purpose of considering whether legislation is compatible with Convention rights. This is an exercise which the European Court may wish to perform in order to determine, for example, whether the aim of the contested legislation was a legitimate one or whether an interference with the peaceful enjoyment of possession was justified: see *James v United Kingdom* (1986) 8 EHRR 123, 143, para 48; *Mellacher v Austria* (1989) 12 EHRR 391, 409, para 47; *Ambruosi v Italy* (2002) 35 EHRR 125, 131, para 28. It is an exercise which the domestic court too may perform when it is carrying out the task under section 4(1) of the 1998 Act which has been entrusted to it by Parliament.

The Dimond v Lovell issue

119. The Court of Appeal made it clear in its first judgment that it did not wish to arrive at a conclusion which permitted Mrs Wilson both to retain the car and to recover the £6,900 unless the statutory provisions left no alternative: [2001] QB 407, para 20, per Sir Andrew Morritt V-C. But it held, following Lord Hoffmann's observations in *Dimond v Lovell* [2002] 1 AC 384, 397-398, that the effect of section 127(3) of the 1974 Act was to render the agreement irredeemably unenforceable and that a claim for unjust enrichment must fail because this was precisely the consequence prescribed by Parliament.

120. Mr Crow for the Secretary of State submitted that *Dimond v Lovell* [2002] 1 AC 384 was distinguishable and that it should not be applied in this case. He pointed out that the transaction in that case was different from that which Mrs Wilson had entered into with FCT. In *Dimond* the payments which were in issue were the cost of hiring the replacement car. It was held that those payments were not recoverable as a matter of contract, and there was no basis for implying an obligation to pay which was contrary to the provisions of the statute. In this case Mrs Wilson's enrichment was not limited to the cost of the loan. It was not just that she was being relieved of the obligation of paying interest on it. Her enrichment extended to the principal of the loan itself, because the effect of section 127(3) was that she kept the sum of £5,000 as well as the motor car. He submitted that, while exoneration of the obligation to pay interest was plainly within the contemplation of the statute, retention of the principal sum which had been lent to her under the agreement was not.

121. At first sight there is, to say the least, something odd about the result that Mrs Wilson has achieved in this case. But the effect of the failure to comply with the requirements of the Consumer Credit (Agreements)

Regulations 1983 was that the entire agreement under which FCT provided the loan to Mrs Wilson, having taken possession of her car in pawn, was unenforceable. The statutory bar on its enforcement extended to FCT's right to recover the total sum payable on redemption, which included the principal as well as interest. That is what the statute provides. I do not think that it is open to us to say that Parliament did not contemplate that the effect of this provision, which was to disable the creditor from recovering the principal of the sum lent as well as the interest on it, might be to enrich the borrower. Once that position is reached, the position is clear. The court cannot override the statutory provision by substituting a common law remedy.

122. As Lord Hoffmann pointed out in *Dimond* at p 398, the conclusion which he reached in that case was consistent with previous authority. In *Orakpo v Manson Investments Ltd* [1978] AC 95 the transaction entered into under which loans were made to enable the borrower to acquire and develop certain properties were held to be unenforceable under sections 6 and 13(1) of the Moneylenders Act 1927. The effect was to enrich the borrower, who had fallen into arrears of payments of interest and moneys due but was successful in his defence that all the transactions including those which provided security rights to the creditor were unenforceable. Lord Diplock observed that, while the Moneylenders' Acts were designed to protect unsophisticated borrowers from being overreached by unscrupulous moneylenders, they were capable of being used by unscrupulous borrowers to avoid paying their just debts to moneylenders. He considered whether a remedy in subrogation to redress the unjust enrichment might be available. But he concluded that, much as he should have liked to have done so, it was not open to him to mitigate the harshness to the moneylender and the undeserved enrichment of the borrower which had resulted from the technical failure to observe the provisions of the Act.

123. In my opinion the same result must follow in this case. I would be reluctant to say that the enrichment of Mrs Wilson was an unjustified enrichment. There is no doubt that she has received a benefit which cannot be justified on legal grounds at the expense of the creditor. But section 127(3) of the 1974 Act too, like sections 6 and 13(1) of the 1927 Act, was designed to protect unsophisticated borrowers. There is no doubt that they would be exposed to the risk of harassment by unscrupulous creditors if creditors could override the statute by appealing to the common law. I would prefer to say that it would be inconsistent with the statute to provide FCT with a common law remedy to redress the enrichment which Mrs Wilson has received at its expense.

Conclusion

124. I would allow the appeal and set aside the declaration of incompatibility.

LORD HOBHOUSE OF WOODBOROUGH

My Lords,

125. This exceptional appeal raises important questions under two distinct heads, the first relating to the proper construction of the Human Rights Act 1998 and the second regarding the use of parliamentary materials, specifically Hansard, in relation to questions arising under the provisions contained in Schedule 1 to the Act defining the Convention rights. The facts which gave rise to the original litigation have been set out in the Opinion of my noble and learned friend Lord Nicholls of Birkenhead as have the relevant dates and the unusual procedural history leading to this appeal which has been argued not by either of the original parties but by other interests. The House has also had the valuable assistance of counsel acting as amici curi'.

The Human Rights Act 1988:

126. Although the main question of construction is to decide to what extent (if at all) the Act has retrospective effect, the first task is to examine the structure of the Act. The Act does not simply say, as do some comparable Acts (*eg* s.1(2) of the Carriage of Goods by Sea Act 1971), that the provisions of the European Convention "shall have the force of law". Its approach is more subtle. It has a limited definition of 'Convention rights': s.1. It requires courts in determining a question in connection with a Convention right to "take into account" judgments of the European Court of Human Rights and other cognate material: s.2. It thus, at the outset, draws a distinction between the international obligations of the United Kingdom under the Convention and what are to be the municipal law obligations of the three organs of the state, the Executive, the Legislature and the Judiciary. So far as the Convention is concerned such distinctions are in principle irrelevant. If the provisions of the Convention have been broken, the relevant state is in breach and no further analysis is required. The Act, on the other hand, follows a scheme which recognises that the role of the Judiciary is to apply and enforce the 'Convention rights' municipally, treats the executive branch of government, in the form of any public authority, as being civilly liable for any breach of the 'Convention rights' on its part and makes their offending conduct unlawful, and recognises that laws passed by the Legislature may be incompatible with a 'Convention right'. Each of the three aspects of government are treated differently in the Act (though not in

the Convention). But there is one complicating factor to which I must return later - the inclusion of courts in the definition of "public authority": s.6(3)(a).

127.

The Legislature, s.4: In order to preserve the traditional supremacy of Parliament in the constitution of the United Kingdom, legislation cannot be invalidated by the Act even if it is incompatible with the Convention. This involves a recognition that the United Kingdom can, by reason of legislation on the statute book, be in breach of the Convention if Parliament should so choose and it is the statute which must be upheld and applied by the Judiciary. This situation is further confirmed by s.4(6) and s.6(2). A declaration of incompatibility under s.4 is thus unique. It has no effect in law except to provide a minister with the opportunity, by way of delegated legislation, to use the powers conferred by s.10 and Schedule 2. Section 4 is different in character from any of the other provisions of the Act. It does not have as its subject matter the rights or obligations of any person in municipal law. It does not even affect the rights of the parties before the court at the time: s.4(6). It merely contains a provision enabling - the word used is "may" - the court, should it think fit, to make a declaration about the current state of the statute law of this country. The declaration applies only to the present: s.4(2) and s.4(4). If the legislation in question has been amended or repealed no question of a declaration under s.4 can arise. Section 4 involves no retrospectivity and there is therefore always jurisdiction to make a declaration. But it is unlikely that a court will make a declaration when it would be wholly gratuitous and, in such a case, the point probably would not have been argued and s.4(1) probably would not be satisfied. The course adopted by the Court of Appeal in the present case, raising the question of incompatibility of its own motion when the parties had not, was in my view a work of supererogation and improper.

128.

The Legislature, s.3: Section 3 has a different character although it again deals with legislation. It does change the law. It does change the parties' rights and obligations. Before the 1998 Act came into force, legislation had to be construed applying the ordinary canons of construction: the legislation would therefore have the legal effect '*x*'. After the 1998 Act came into force, the same legislation may, because of the requirement that "so far as it is possible" the legislation "must be read and given effect in a way which is compatible with the Convention rights", have legal effect '*y*'. Conduct that was lawful before may become unlawful and unlawful conduct may become lawful. A right or liberty that someone did not have before may be granted to them by the operation of s.3(1) when it came into force. Section 3

therefore has raised a question of retrospectivity answered in *R v Lambert* [2001] UKHL 62, [2002] AC 545 and *R v Kansal (No.2)* [2001] UKHL 62, [2002] AC 69, per Lord Hope at p.112.

129. But confusion has been created by the dual relevance of s.3. As well as the effect which I have explained in the preceding paragraph, it has a relevance to s.4. Sections 3 and 4 are both sections which came into effect on the same day, appointed under s.22(3). Therefore no question of incompatibility can arise under s.4 without the relevant legislation being construed in accordance with s.3. If s.3 provides the answer there is no incompatibility. But this is not to give a retrospective effect to s.3 any more than it is to give a retrospective effect to s.4.

130.

The Executive, sections 6 and 7: Subject to certain qualifications, s.6(1) makes it unlawful for the Executive to act in a way that is incompatible with a 'Convention right' and s.7(1) empowers any victim of such unlawful conduct (or the threat of it) to take civil proceedings against the relevant authority or rely upon the 'Convention right' in legal proceedings. This, as regards the emanations of the Executive, *ie* public authorities, creates legal liabilities and, for the citizen, legal rights. These provisions therefore do raise a potential question of retrospectivity. S.22(4) makes express provision answering this question: as regards the victim defending himself against the authority in proceedings brought by the authority, the victim can rely upon his 'Convention rights' whenever the act in question took place, but otherwise s.7(1) only applies to acts occurring after s.7 came into force. Two consequences flow from this express provision. First it expressly provides a limited retrospective effect to part of s.7(1). Secondly, it carries with it the clear implication that the Act in general does not have retrospective effect. Thus, far from permitting a view that the Act should in general be construed so as to have a retrospective effect, the conclusion is confirmed that the Act should not (save for the limited exception in s.22(4)) be construed so as to have any retrospective effect.

131.

The Judiciary, the basic principle: The Judiciary is the part of Government which has the responsibility for applying the law. The Convention and the decisions of the European Court of Human Rights recognise this, affirming the principles of certainty and 'legality'. There is nothing in the Convention which requires the Judiciary to do anything else. But, if, in complying with and applying the municipal law, the Judiciary do not provide an outcome which is compliant with the rights of victims under the Convention, for

example, by failing to recognise a right or grant an adequate remedy, the State is in breach of its Convention obligations and should change its municipal law. For a court, its duty in the determination of any dispute is to determine it in accordance with the municipal law applicable to the issue. This may include the duty to consider whether a particular statute or statutory provision has retrospective effect or not. If it does have retrospective effect, then that effect must be recognised but, if it does not, it must not be treated as determinative of the legality or legal result of earlier events or conduct, earlier, that is, than the date upon which the relevant change in the law came into effect. The duty I have described is the same for both the original trial court and any appeal court. Just as in a case with a foreign element, it may be necessary to apply the choice of laws rules of private international law, so, in another case when there has been a change in the municipal law between the time of the relevant events or conduct and the time of trial, it may be necessary to decide whether that change had retrospective effect or not. If the answer is that it did not then the change is irrelevant to the rights and liabilities of the parties (save possibly as relevant factual evidence on, say, a question of assessment of damages or causation of loss) and the position in an appellate court is the same. Article 7.1 of the Convention provides an illustration of the need to apply the municipal law as it stood at the time of the relevant conduct and the objection to later making illegal conduct which was legal at the time.

132.

The Judiciary, Article 6: Most of the other Articles are substantive and, in so far as they affect remedies or procedures, are dependent upon the engagement of the substantive provision. But Article 6 comes into a different category: it provides a right to a fair trial. This is a freestanding right and applies directly to the legal process and therefore (*inter alia*) directly to the conduct of the Judiciary. But the Article is drafted so as expressly to require that the proceedings be conducted in accordance with the law, that is to say the municipal law, in force at the relevant time - "an independent and impartial tribunal established by law" - "innocent until proved guilty according to law". These phrases correspond to those used in other Articles - "prescribed by law" - "in accordance with the law". Thus, once the Human Rights Act had been brought into effect, the litigant could call upon the tribunal before whom he is appearing to grant him the rights stated in Article 6. But it does not follow from this that he can claim a right under the Act in respect of earlier events or conduct or hearings. It is a question of the construction of the Act and whether it is to be given a retrospective effect. It certainly does not follow that merely because he is before a court on a later occasion, he can claim Article 6 rights in respect of some earlier hearing which took place before the Act came into force or require that the court

apply s.3 of the Act in relation to something which occurred before it came into effect. In any event, in the present case there has been no denial to either party of their 'Convention rights' under Article 6.

133.

The Judiciary, sections 6 to 8: The inclusion of provisions relating to the Executive and to the Judiciary all under the heading 'Public authorities' and the unqualified inclusion of courts in the definition of the term 'public authority' do not assist the reader in making the necessary distinction between the Executive and the Judiciary and their different constitutional functions. However, for present purposes and the consideration of what substantive rights were available to the original parties under the Act, the position is tolerably clear. The retrospective effect of sections 6 and 7 are dictated by s.22(4): no retrospective effect is available in the present case. Section 8 makes provision governing the remedies that a court may grant for a breach of a 'Convention right'. One can conceive of exceptional circumstances where Article 6 might apply and might therefore give rise to a liability without more under s.8 such as the summary committal of a person for contempt in the face of the court without a fair hearing. But, where a 'judicial act' is concerned, s.9 provides that the remedy is to be by way of appeal. In other words any substantive breach or any failure to provide a fair hearing or to provide an adequate remedy within the confines of s.8, must be challenged by appealing the decision complained about. On the appeal, the substantive question will remain as it was in the lower court applying, in accordance with the basic principle I have identified earlier, the municipal law in force at the time of the events or conduct complained of or to be applied to it by reason of some later statutory provision having retrospective effect. The time at which the appeal is heard is irrelevant; equally irrelevant is which of the parties it is that has appealed.

134. On this point as well the Court of Appeal was mistaken. The fact that the appeal was being heard after the Act had come into force did not alter what they had to decide or the municipal law which governed the dispute between the parties.

135. Under these circumstances I will take the remaining points argued on the appeal relatively shortly.

Incompatibility:

136. The relevant Article is Article 1 of the First Protocol. The complaint of those arguing for incompatibility is that the provisions of the Consumer Credit Act 1974 denied the lender its 'Convention rights' under this Article. I

agree with your Lordships that they did not but my reasoning is not wholly the same. The evidence of what really happened in the material transaction is exiguous and I recognise that the Article may have been engaged. The transaction purported to be a transaction of pledge, that is to say, a transaction where the possession of a chattel of the borrower is given to and retained by the lender as security for the repayment of the money lent together with agreed interest. So long as the loan has not been repaid the pledgee has a special title in the chattel which is in his possession, by virtue of that possession. At common law the pledgee can thus sue if his possession is wrongfully interfered with, even by the owner. Dishonestly to deprive the pledgee of the possession of the chattel is theft (formerly larceny). Therefore, s.65 of the 1974 Act has the potential to deprive the pledgee of his special property in the pledged chattel. It follows that s.65 may deprive the pledgee of one of its possessions.

137. Whether or not this is what actually occurred in the instant case is, for me at least, still not clear but I will proceed on the assumption that there was a true pledge involving a transfer of the possession of the motor car from the borrower to the lenders. The documentation purported to evidence a contract of pledge. On this basis, the lenders were seeking to exercise the rights of a person in possession of a chattel and were being prevented from doing so by s.65 so as, in effect, to deprive them of their possession of the motor car and there would be the basis for an Article 1 complaint. If, on the other hand, she actually remained in possession of the motor car throughout, the complaint of the lenders would be that they should have been allowed to seize the motor car from her after she defaulted and sell it to reduce or discharge her indebtedness to them. This would have been merely the purported enforcement of a claimed contractual right which the lenders had never in truth validly acquired, Article 1 would never have been engaged and that would be the short answer to the complaint.

138. On the basis that Article 1 was engaged, does the Consumer Credit Act 1974 go beyond what is justifiable under that Article? For the reasons already given by your Lordships, I consider that it did not. The relevant provisions of the Act are a legitimate exercise in consumer protection. Borrowers are vulnerable and not on an equal footing with lenders. The Act legitimately regulates the transparency and recording of the terms of the loan transaction and makes provision for the clear obtaining of the borrower's informed consent to those terms. Any such Act would have to provide effective sanctions against the lender for any failure to comply with the requirements of the Act otherwise they will be liable to be flouted, as occurred in the instant case. The values to which the legislative provisions were applied were appropriate to consumer legislation, indeed arguably low, and the rates of interest chargeable, so far as your Lordships were told,

unlimited. (In the instant case - a secured loan of some £5,000 - the rate of interest claimed worked out at 99.66% pa.) The Act, as a matter of policy, places a strong emphasis on the clarity and transparency of the actual transaction and, although in respect of other infringements a degree of latitude is allowed and the sanctions are discretionary, for the infringement involved in the instant case the sanction is automatic, as the statute makes plain. It is argued that the legislature could have made the sanction discretionary. Maybe. But it does not follow that the view that the sanction should here be automatic was not a permissible view. There was no breach of Article 1. The Court of Appeal was wrong to hold the contrary.

The 'Hansard' Point:

139. In *Pepper v Hart* [1993] AC 593, the House of Lords permitted the reference to Parliamentary material, specifically Hansard, as an aid to the construction of an ambiguous, obscure or absurd statutory provision, if it would provide an authoritative and clear guide to the intended meaning. Even the majority accepted that the liberty so permitted needed to be specifically confined and recognised the potential adverse consequences if it were not strictly limited. Lord Mackay of Clashfern in his dissent was primarily influenced by the practical considerations (pp.614-5) and the cost and waste of resources that the proposed liberty would entail. In this he followed the view adopted 25 years earlier by Lord Reid in *Beswick v Beswick* [1968] AC at p.74. But, as is recognised by the passages quoted by Lord Browne-Wilkinson in *Pepper v Hart* at p.632, there are further objections to the liberty. One is that the constitutional means by which laws are made is by the entry of a statute in the statute book. The source of the new law is the document itself not what anyone may have said about it or some earlier form of it. Still less is it what the Executive says about it or some individual member of a House of Parliament may have said about it in the course of its passage through Parliament. As Mr Sumption QC pointed out in his submissions, it is a fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself. Likewise, it is another fundamental principle that the verbal expression of the law be certain, whatever difficulties in interpretation the words used may cause. Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the Legislature but that of some other source with no constitutional power to make law. The process of statutory construction/interpretation is objective not subjective. These points are clearly made in the citations made by Lord-Browne-Wilkinson (*vs*) from Lord Wilberforce, Lord Diplock and Lord Scarman. The principles are also fully familiar (*mutatis mutandis*) to commercial lawyers in deciding what was the bargain struck between two

commercial parties by a written agreement: see, for example, Lord Wilberforce in *Reardon Smith v Hansen-Tangen* [1976] 1 WLR 789.

140. Mr Sumption did not seek to challenge the authority of the *Pepper v Hart* decision nor did he found upon any argument of breach of Parliamentary privilege. He founded upon two criticisms of the Court of Appeal's approach to the Parliamentary material and the use they made of it. He criticised the confusion of the intention of individual members of Parliament with the intention of Parliament. He was quite right to do so and I need add nothing to what I have already said. He also criticised what he submitted was an extension of the application of the *Pepper v Hart* decision from a narrowly defined matter of statutory construction to an investigation of the justification for the inclusion of a particular provision in an Act. He submitted that *Pepper v Hart* should be confined to its actual subject matter, a taxation statute where, as he put it, the Executive had made statements about what use they would make of the relevant provisions and so gave rise to a quasi-estoppel (*sic*) by which they would be bound. Perhaps a better way of making the point would be to say that the executive had created a legitimate expectation which they must honour. Insofar as Mr Sumption argues against making any extension to the *Pepper v Hart* decision or relaxing the strict observation of the safeguards which it included, I need no persuasion. Judicial experience has taught me, particularly since I was appointed a member of this House, that the attempt by advocates to use Parliamentary material from Hansard as an aid to statutory construction has not proved helpful and the fears of those pessimists who saw it as simply a cause of additional expense in the conduct of litigation have been proved correct.

141. But on the directly pertinent question of what material it is proper for a Court to be referred to when it has to decide a question of proportionality or justification in relation the 'Convention rights' scheduled to the Human Rights Act 1998, it is necessary to consider what his argument really amounts to. On this I agree wholly with your Lordships and will take the point more shortly than would otherwise be the case. Whether a particular statutory provision offends against any of the 'Convention rights' is an objective question to be answered having regard to all relevant evidence. It is a task which Parliament itself has by the 1998 Act required the courts to perform. It involves no breach of Parliamentary privilege or protocol even if it leads to a declaration that the legislation is incompatible under s.4. The argument that the courts when they apply and give effect to the 1998 Act are frustrating the will of Parliament is a travesty of the true position: they are giving effect to the will of Parliament expressed in the 1998 Act.

142. The questions of justification and proportionality involve a sociological assessment - an assessment of what are the needs of society. This in part involves a legal examination of the content and legal effect of the relevant provision. But it also involves consideration of what is the mischief, social evil, danger etc which it is designed to deal with. Often these matters may already be within the knowledge of the court. But equally there will almost always be other evidentially valuable material which can be placed before the court which is relevant, such as reports that have been made, statistics that have been collected, and so on. Oral witnesses may have important evidence to give. To exclude such evidential material from the case merely because it is to be found in some statement made in Parliament is clearly wrong, particularly if ministerial statements made outside Parliament were already being relied on. This has nothing to do with investigating or questioning the will of Parliament. Parliament has spoken by passing the relevant Act. The evidence is admitted because it relates to making the required sociological assessment. It has long been the case that ministerial statements made in the House may be referred to when they are relevant to a question to be determined by a court. An example which immediately comes to mind is the ministerial statements concerning immigration policy which used to be made at the time when immigration law was largely extra-statutory. So the broader submission of Mr Sumption which would exclude access to any such material must be rejected.

143. But it is easy to understand why it was that Mr Sumption's clients thought it necessary to intervene. The Court of Appeal, having decided that they must consider s.4 and that Article 1 was engaged, then entered upon a process of scrutinising what had been said in Parliament as reported in Hansard to see whether it disclosed any justification they were prepare to accept for the relevant provisions of the 1974 Act at the time they were enacted. This was an unacceptable approach and likely to give rise to abuse. It is not part of the duty of any member of Parliament to provide or state definitively in Parliament the justification for legislation which the Legislature is content to pass. Still less was it the duty of anyone in 1974 to anticipate the passing of the 1998 Act twenty four years later. I agree that that use of Hansard for that purpose has been rightly objected to.

144. There is a further important error in the Court of Appeal's approach which may be of greater significance in other cases. The question of justification and proportionality has to be answered by reference to the time the events took place to which the statutory provision is being applied. The person claiming to be a victim has to show how he has been affected by the provision he complains about. Those who are seeking to justify the use of the statutory provision have to do so as at the time of that use. If they cannot justify it at that time, their use of it is a breach of the victim's

'Convention rights'. That is how the European Court would decide the question and it is also how the municipal court is required to look at it. In most cases the difference will probably be academic and it no doubt was so regarded in the present case. But as circumstances change so the justification or the absence of it may change. Merely to examine the situation at the time the Act in question was passed and treat that as decisive is wrong in principle. The same point can be seen equally clearly in relation to a question of compatibility arising under s.4. As I have explained earlier, the decision under s.4 has to be made as at the time of the decision; just as the current state of the legislation at that time is what has to be the subject matter of the decision so also the circumstances and social needs existing at that time are what is relevant, not those existing at some earlier or different time. To look for justification only in the Parliamentary debates at the time the statute was originally passed invites error.

145. For these reasons and, subject to what I have said, the substance of those given by my noble and learned friends Lord Nicholls of Birkenhead and Lord Hope of Craighead, I too would make the orders proposed. I should also add that I agree with and gratefully adopt what my noble and learned friend Lord Rodger of Earlsferry is to say about the various usages of the word 'retrospective'.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

146. This appeal is brought by the Secretary of State. She appeals against the declaration of incompatibility contained in the order of the Court of Appeal dated 2 May 2001 (as amended on 12 June 2001). Neither the claimant in the litigation, Mrs Penelope Wilson, nor the defendant, First County Trust Ltd ("FCT") has taken any part in this appeal. Nonetheless an array of counsel have appeared before your Lordships representing the Secretary of State, the Finance and Leasing Association, three leading insurance companies, the Speaker of the House of Commons and the Clerk of the Parliaments and, in addition, an amicus curi'. The circumstances in which this has come about are set out in the opinions of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead, and I need not repeat them. The issues which have necessitated this appeal and have led to the representation to which I have referred include issues of commercial and of constitutional importance.

147. The issues have arisen out of a simple moneylending transaction. Under an agreement made in January 1999 FCT lent Mrs Wilson £5000 for six months on the security of her motor car. The agreement was a 'regulated agreement' within the meaning of section 8 of the Consumer Credit Act 1974. Section 61 of the Act requires a document containing all the "prescribed terms" of a regulated agreement to be signed by the debtor. One of the prescribed terms is "the amount of the credit". FCT charged Mrs Wilson, inter alia, a £250 fee but, by agreement between them, the £250 was not paid by Mrs Wilson but instead was added to the £5000 to be repaid by her. In the document presented by FCT to Mrs Wilson for signing, and signed by her accordingly, "the amount of the credit" was stated to be £5250. But the £250 was "an item entering into the total charge for credit" (see section 9(4) of the Act) and, accordingly, was not part of "the amount of the credit" (see Schedule 6 to the 1983 Regulations: SI 1983 No 1553). In short, the document signed by Mrs Wilson did not, in the respect I have mentioned, contain the prescribed terms.

148. Mrs Wilson did not repay the loan, or pay the £250 fee, and claimed back her car which she had deposited with FCT as security. She contended that the loan agreement was unenforceable against her and that under section 113 of the Act she was entitled to have her car back. The case was heard in the county court and on 14 September 1999 judgment was given in favour of FCT. Mrs Wilson then appealed to the Court of Appeal.

149. The events to which I have referred took place after the Human Rights Act 1998 had been enacted but before the Act had come into force. The Act came into force on 2 October 2000. Mrs Wilson's appeal was heard in November 2000 and was successful. She obtained a declaration that the loan agreement with FCT under which she had received £5000 was unenforceable by FCT and an order for repayment by FCT, with interest, of the sum of £6900 that she had paid to redeem her car. But the Court of Appeal took the view that this result of the application of the relevant provisions of the 1974 Act might arguably be incompatible with the rights of FCT under Article 6 of the European Convention on Human Rights or under Article 1 of the 1st Protocol to the Convention. So they directed the requisite notice to be given to the Secretary of State (see section 5 of the 1998 Act) and adjourned the appeal in order for the point to be argued. An amicus curi' was appointed.

150. The renewed hearing of the appeal took place in March 2001 and in a judgment given on 2 May 2001 the Court of Appeal concluded that section 127(3) of the 1974 Act, which prevented the court from enforcing a loan agreement unless a document containing all the prescribed terms had been signed by the debtor, was incompatible with FCT's rights under Article 6 of

the Convention and Article 1 of the 1st Protocol to the Convention. In reaching this conclusion the Court of Appeal examined and commented upon the contents of the Hansard reports of the deliberations in Parliament during the progress of the Bill.

151. On this appeal the following broad issues arise —

1.

Can the court make a declaration of incompatibility under section 4 of the 1998 Act in relation to events which pre-dated 2 October 2000, the date on which the Act came into force?

2.

If it can, were FCT's Convention rights under article 6 or under article 1 of the First Protocol infringed by the relevant provisions of the 1974 Act?

3.

Was the use made by the Court of Appeal of the Hansard reports permissible?

Retrospectivity

152. The Attorney General, Lord Goldsmith QC, appearing on behalf of the Secretary of State, based his submissions on this issue on a simple, and plainly correct, proposition, namely, that prior to 2 October 2000 FCT had had no Convention rights. The 1998 Act, under which Convention rights became rights enforceable under domestic law, was not yet in force. The loan transaction between FCT and Mrs Wilson had taken place in 1999. So, at the time the loan was made and at the time Mrs Wilson's claim for a declaration that the loan was unenforceable against her and for the return of her car (or repayment of the sum she had had to pay FCT to get it back) was tried in the county court, the 1998 Act and Convention rights were irrelevant. They could not affect the rights and liabilities of FCT and Mrs Wilson respectively under the loan agreement. There can be no dispute but that this was the position prior to 2 October 2000.

153. It is, of course, open to Parliament, if it chooses to do so, to enact legislation which alters the mutual rights and obligations of citizens arising out of events which predate the enactment. But in general Parliament does not choose to do so for the reason that to legislate so as to alter the legal consequences of events that have already taken place is likely to produce

unfair or unjust results. Unfairness or injustice may be produced if persons who have acquired rights in consequence of past events are deprived of those rights by subsequent legislation; or it may be produced if persons are subjected on account of those past events to liabilities that they were not previously subject to. There is, therefore, a common law presumption that a statute is not intended to have a retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect (see Maxwell on Statutes, 12th edition p 215 and Bennion's Statutory Interpretation, 4th edition pp 265-266 and 689-690). The presumption can be rebutted if it sufficiently clearly appears that it was indeed the intention of Parliament to produce the result in question. The presumption is no more than a starting point.

154. The question, therefore, is whether Parliament intended the 1998 Act and the Convention rights thereby incorporated into domestic law to be applied to transactions and events predating the coming into force of the Act and so as to alter the legal consequences of those transactions and events?

155. Sections 3 and 4 of the 1998 Act are, in my opinion, neutral. Section 3 requires that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". The 1974 Act must be so read. Section 4(2) says that "If the court is satisfied that the provision [of primary legislation] is incompatible with a Convention right, it may make a declaration of that incompatibility". These statutory provisions do not, in my opinion, assist one way or the other in answering the question whether Parliament intended the Act to be applicable to past transactions and events. At the least it may be said that they contain nothing to displace the presumption that Parliament did not so intend.

156. Section 6(1) of the Act says that "It is unlawful for a public authority to act in a way which is incompatible with a Convention right". And sub-section (3) says that a "public authority" includes "a court or tribunal". It is plain that section 6 is looking to the future. It is not purporting to make unlawful a pre 2 October 2000 act of a public authority. It was section 6(1) on which the Court of Appeal relied in the present case. The reasoning proceeded like this—

> (i) the Court of Appeal is a public authority (see sub-section (3));
> (ii) it is unlawful for a public authority, and therefore for the Court of Appeal, to act in a way incompatible with a Convention right;
> (iii) if the relevant provisions of the 1974 Act are incompatible with a Convention right it is therefore unlawful for the Court of Appeal to give effect to them;

> (iv) the Court of Appeal is bound, by section 3, to try to read down the relevant provisions of the 1974 Act so as to render them compatible with the Convention; and
> (v) if that reading down is not possible, the Court of Appeal may make a declaration of incompatibility (see section 4).

This reasoning does not confront the issue of retrospectivity. It avoids it by concluding that if the trial, or, as in the present case, the appeal, takes place after 2 October 2000, the court is bound by section 6(1) to apply the 1998 Act without regard to whether the transactions or events in question predate or postdate the coming into force of the Act.

157. My Lords, in my opinion, this conclusion cannot be accepted. The function of the court in civil litigation between private citizens is to adjudicate on their rights and obligations in issue in the case and to grant the relief, if any, requisite to reflect those rights and obligations. If the rights and obligations of the parties require a particular result to be reached, whether by dismissal of the action, an award of damages, the making of a declaration, the grant of an injunction, or otherwise, it is the duty of the court to deal with the case accordingly. For the court to do so cannot be an unlawful act under section 6(1).

158. The retrospectivity issue in this case is whether the coming into force of the 1998 Act on 2 October 2000 has altered the rights and obligations inter se of FCT and Mrs Wilson arising out of their loan transaction in 1999. Let it be supposed that the relevant provisions of the 1974 Act are, prima facie, inconsistent with the Convention rights of moneylenders; but let it be supposed also that the inconsistent provisions can be read down so as to give the court a discretion to enforce a loan agreement notwithstanding that a document containing the prescribed terms had not been signed by the borrower. On that footing, a loan agreement post-dating 2 October 2000 would, subject to the court's discretion under section 127(1), be enforceable. But would a loan agreement pre-dating 2 October 2000 be similarly enforceable? Only if the Act were to be given a retrospective effect would that be so. If the Act is not to be given a retrospective effect, if the pre 2 October 2000 rights and liabilities of lender and borrower are not altered by the coming into effect of the Act, then it would be the duty of the court, post 2 October 2000 as before, to hold the loan agreement to be unenforceable. In so holding the court would not be committing an unlawful act under section 6(1) for in relation to the pre-2 October 2000 transaction the parties would have no Convention rights.

159. Section 7(1)(a) of the 1998 Act says that a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may bring proceedings against the authority. Section 9 says that

proceedings under section 7(1)(a) in respect of a judicial act may be brought only by exercising a right of appeal. But every appeal court, including your Lordship's House, must, in dealing with an appeal, give effect to the rights and obligations of the parties in issue on the appeal. If these rights and obligations arise out of pre 2 October 2000 events, the appeal court is no more entitled than the court below to alter the parties' rights and obligations in order to give effect to a reading down of some relevant statutory provision unless the conclusion is justified that the 1998 Act was intended to have that retrospective effect.

160. The only positive indication as to whether or not the 1998 Act was intended to have retrospective effect is to be found in section 22(4) of the Act. Section 22(4) says that section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place but that otherwise sub-section (1) does not apply to acts taking place before 2 October 2000. This express indication of a specific retrospective effect that the Act was to have in relation to proceedings brought by a public authority is, in my opinion, a fair indication that in no other respect was the Act intended to have a retrospective effect.

161. The arguments against allowing the Act to have a general retrospective effect seem to me very powerful. The legal consequences under the civil law of a transaction or of events ought to be established by reference to the law at the time they take place. When events apt to create rights or obligations take place citizens affected by the events need to be able to ascertain the extent of their rights or obligations. They cannot do so if subsequent legislation may add to or diminish those rights or obligations. Where transactions calculated to continue for some considerable period are entered into, intervening legislation may in some respect or other affect the rights and obligations that accrue under the transaction after the legislation has come into force. Landlord and tenant legislation is a good example. If a lease is granted for, say, 99 years, there might well be intervening legislation capable of affecting the ability of the landlord to forfeit the lease, to operate a rent review clause, to claim damages for dilapidations or to recover possession on the expiry of the term. But it would be unusual for the legislation to alter the rights and obligations of the parties resulting from events that had already taken place, such as a forfeiture notice already served, a damages claim already instituted, rent review machinery already in train, and so on. However, whatever may be the position where there is an on-going transaction and intervening legislation, the present case involves a simple six-month loan transaction. All the relevant events, bar the completion of the appeal process, pre-dated the coming into effect of the 1998 Act. There is nothing to rebut the presumption that Parliament did not

intend the Act to operate retrospectively so as to alter accrued rights or to impose obligations where none previously existed.

162. In my opinion, therefore, the Court of Appeal were in error in endeavouring to apply the 1998 Act to the loan transaction between FCT and Mrs Wilson. There was no occasion to attempt to read down the 1974 Act under section 3 and no occasion to make a section 4 declaration of incompatibility. I would accordingly allow the Secretary of State's appeal on this ground. My reasons are, I believe, substantially the same as those expressed by my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hope of Craighead and Lord Rodger of Earlsferry, with which I respectfully agree.

Is section 127(3) of the 1974 Act compatible with the Convention?

163. The loan agreement between FCT and Mrs Wilson was an "improperly executed regulated agreement" because the document signed by Mrs Wilson misstated the amount of the credit and so did not contain all the prescribed terms. That is common ground.

164. Section 65(1) of the 1974 Act says that an "improperly executed regulated agreement is enforceable against the debtor … on an order of the court only". It is to be noted that the agreement is not void or unlawful. It is merely unenforceable except on an order of the court. Section 127(1) of the Act says, inter alia, that in the case of an application for an enforcement order under section 65(1) the court "shall dismiss the application if, but (subject to subsections (3) and (4)) only if, it considers it just to do so …." Subsection (3) bars the court from making an enforcement order under section 65(1) in a case where there is no document containing all the prescribed terms that has been signed by the debtor. So, in the present case, the court was barred by section 127(3) from making an enforcement order in favour of FCT. Its discretionary power to make an enforcement order which otherwise would have been conferred by subsection (1) had been excluded by subsection (3).

165. It was contended before your Lordships that section 127(3) infringed article 6 of the Convention in that FCT was denied recourse to the court for the determination of the question whether the loan agreement should be enforced. This, in my opinion, is an impossible contention. Article 6, as each of my noble and learned friends has observed, provides a procedural guarantee of the right to have issues judicially determined. Article 6 is not concerned with the substantive law. True it is that the loan agreement between FCT and Mrs Wilson was a valid, lawful agreement. But the 1974 Act declared it to be unenforceable. Whatever the divide between

substantive law and procedural law, and I respectfully agree that the line is sometimes difficult to draw, there is no doubt at all but that section 127(3) is a provision of substantive law denying the loan agreement the quality of enforceability.

166. Mr Hibbert counsel for the Finance and Leasing Association submitted that any statutory provision that rendered a valid agreement unenforceable infringed article 6 of the Convention. The extravagance of this submission became apparent when he extended it to contracts for the sale of land. If his submission were right it would follow that the familiar statutory provisions rendering contracts for the sale of land unenforceable unless in writing would be incompatible with article 6 Convention rights. In agreement with all of your Lordships I would reject the article 6 submissions.

167. Reliance was placed, in the alternative, on article 1 of the First Protocol. Section 127(3), it was submitted, deprived FCT of its right to enforce repayment of the £5000 loan and thereby deprived it of its "possessions". The deprivation was, it was argued, disproportionate. I would, for my part, reject the article 1 of the First Protocol point on two grounds.

168. First, article 1 of the First Protocol is directed to interference with existing possessions or property rights. FCT never had, at any stage in the history of the loan agreement, the right to enforce against Mrs Wilson the repayment of the £5000. Neither the 1974 Act as a whole nor section 127(3) in particular constituted an interference with a pre-existing right of FCT to enforce repayment by Mrs Wilson of the £5000. The Act, and section 127(3) prevented FCT from ever possessing that right. No authority has been cited to your Lordships for the proposition that a statutory provision which prevents a transaction from having the quality of legal enforceability can be regarded as an interference for article 1 purposes with the possessions of the party who would have benefited if the transaction had had that quality. In my opinion, the proposition should be rejected.

169. Second, the purpose or policy underlying the statutory bar on enforceability of a regulated loan agreement where no document containing all the prescribed terms has been signed by the debtor cannot, in my opinion, be categorised as disproportionate. The need to control moneylending transactions is as old as our civilization and I know of no legal system that has not imposed such controls. Indeed in some legal systems any lending of money on interest terms is barred. In this country there were strict statutory controls under the Moneylenders Acts 1900 to 1927. The 1974 Act represented a relaxation of the rigidity of the controls. The discretion allowed to the courts by section 127(1) of the Act was not to be found in its predecessors (see section 6 of the 1927 Act). These controls

recognise the vulnerability of those members of the public who resort to pawnbrokers and moneylenders when in dire need of funds to make ends meet. They are open to exploitation; their bargaining power is minimal; their understanding of legal procedures and remedies is likely to be sparse. They need protection and part of the protection is the insistence by the Act that the "prescribed terms", representing the important terms of the loan transaction, must be set out in a document to be signed by the debtor if the repayment of the loan is to be enforceable. I do not accept that this protection, harshly though it may in some cases bear upon lenders, is disproportionate.

170. In my opinion, even if the 1998 Act were applicable to the loan transaction between FCT and Mrs Wilson there would have been no infringement of FCT's Convention rights.

171. One of the sub-issues argued before your Lordships was whether, when considering whether the provisions of the 1974 Act infringed FCT's Convention rights, the court should take into account other legal remedies which might be available to FCT. It was argued that under the general law a restitutionary remedy was available to FCT enabling recovery of at least the £5000. I am not clear whether the proposed remedy would be a common law remedy for money had and received or an equitable remedy based on Mrs Wilson's unjust enrichment, but identifying the correct description of the remedy is not for present purposes important.

172. My Lords there can, in my opinion, be no doubt at all but that in considering whether section 127(3), in rendering the £5000 loan unenforceable, constitutes an infringement of FCT's Convention rights, FCT's remedies in the round must be taken into account. If FCT is able under the general law to recover the £5000 by some means other than suing on the debt, the 1974 Act provisions preventing FCT from suing on the debt could not on any argument constitute an infringement of FCT's Article 1 rights. But it is, in my opinion, equally clear that no such alternative means of recovery are available to FCT. The decisions of this House in *Orakpo v Manson Investments Ltd* [1978] AC 95 and, more recently, *Dimond v Lovell* [2002] AC 384 stand in the way. Parliament's intention in enacting section 127(3) of the 1974 Act was to make a loan, made under a regulated agreement, unenforceable in certain events. The courts cannot defeat that intention by allowing some alternative means of recovery.

Use of Hansard

173. On this issue I am in complete agreement with, and cannot usefully add anything to, what has been said by my noble and learned friend, Lord Nicholls of Birkenhead.

LORD RODGER OF EARLSFERRY

My Lords,

174. On 9 November 1998 the Human Rights Act 1998 ("the 1998 Act") received the Royal Assent and, some twenty-three months later, on 2 October 2000 it came into force. The Act was intended to "bring home" rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") (1953) (Cmnd 8969). In terms of section 1(2), the Convention rights listed in the schedule have effect for the purposes of the Act. The main effect is to give people remedies in the domestic law of the United Kingdom if public authorities infringe their Convention rights - the so-called "vertical effect". The extent to which the Act also operates between private individuals - the so-called "horizontal effect" - is controversial. But it is recognised that, since courts are public authorities for purposes of the Act, a court order pronounced against one private party at the instigation of another may potentially infringe the first party's Convention rights. If giving effect to a Convention right under the Act means that the order has to be refused or modified, then that affects the rights of the party who sought it.

The Facts

175. The present is said to be an example of that kind of case. Since my noble and learned friend Lord Nicholls of Birkenhead has given a full account of the facts, I need mention only the most important. In 1999 Mrs Wilson entered into a loan agreement with First County Trust Ltd ("First County"). The agreement was regulated by the Consumer Credit Act 1974 ("the 1974 Act"). Mrs Wilson pawned her BMW car as security. Under section 61(1)(a), if the debtor has not signed a document in the prescribed form containing all the prescribed terms, the agreement is "not properly executed", with the result that it "is enforceable against the debtor or hirer on an order of the court only": section 65(1). More particularly, in terms of section 127(3), if an agreement does not contain all the prescribed terms, the court is not to make an enforcement order unless the debtor has signed a document which does contain all the prescribed terms. Mrs Wilson's position was that the document in the prescribed form which she signed did not show the correct "amount of the credit", one of the prescribed terms. Moreover, she had signed no other document containing the prescribed terms. As a result, by

reason of section 127(3) the court would not be able to make an enforcement order.

176. Section 142(1)(b) provides that, where a thing can be done by a creditor on an enforcement order only and the creditor has not made an application for such an order, an interested party may apply to the court for a declaration and

> "the court may if it thinks just make a declaration that the creditor or owner is not entitled to do that thing, and thereafter no application for an enforcement order in respect of it shall be entertained."

Where the court makes such a declaration, by section 113(3)(d), section 106 is to apply to any security provided in relation to the agreement. As a result, inter alia the security is to be treated as never having effect and any property lodged with the creditor solely for the purposes of the security is to be returned forthwith. Mrs Wilson sought a declaration which would have these effects.

177. The county court judge held that the loan agreement contained all the prescribed terms and he therefore refused to make the declaration which Mrs Wilson sought. She appealed, but in the meantime paid the necessary sum to recover her car. Mrs Wilson's appeal was heard after the 1998 Act had come into force. Reversing the county court judge, the Court of Appeal held that the agreement did not contain the prescribed term in question, the "amount of the credit". The agreement was therefore unenforceable by reason of section 127(3). See [2001] EWCA Civ 633; [2001] QB 407. The Court of Appeal eventually went on to hold, however, that section 127(3) infringed First County's rights under article 6(1) of the Convention and article 1 of the First Protocol ("article 6(1)" and "article 1" respectively). Since it was not possible to "read down" section 127(3) under section 3 of the 1998 Act so as to make it compatible with First County's Convention rights, the Court of Appeal gave effect to it by ordering First County to pay back the sum which Mrs Wilson had earlier paid to them to get her car back. But the Court of Appeal also made a declaration under section 4 of the 1998 Act that section 127(3) of the 1974 Act is incompatible with the rights guaranteed to the creditor by article 6(1) and article 1. See [2002] QB 74.

178. First County did not appeal, but the Secretary of State appealed, on a number of grounds, against the Court of Appeal's order making the declaration of incompatibility. I respectfully agree with Lord Nicholls of Birkenhead as to the disposal of all these grounds of appeal and, in particular, with what my noble and learned friend, Lord Hobhouse of Woodborough, has said on the use of Hansard. I confine my observations

accordingly to the one matter, "retrospectivity". At the outset, it may be useful to recall some general features of the 1998 Act.

General features of the 1998 Act

179. The 1998 Act is beautifully drafted. Its structure is tight and elegant, being marred only by the obvious interpolation of sections 12 and 13 as a result of amendments made while the Bill was passing through Parliament. The presence or absence of particular features in the Act is therefore unlikely to be due to oversight.

180. Although the Act is not entrenched, the Convention rights that it confers have a peculiar potency. Enforcing them may require a court to modify the common law. So far as possible, a court must read and give effect to statutory provisions in a way that is compatible with them. Rights that can produce such results are clearly of a higher order than the rights which people enjoy at common law or under most other statutes.

181. It is well recognised, however, that Convention rights are to be seen as an expression of fundamental principles rather than as a set of mere rules. In applying the principles the courts must balance competing interests. So much was made clear, for example, by my noble and learned friend, Lord Hope of Craighead, in *R v DPP, Ex p Kebilene* [2000] 2 AC 326, 384B - C. Therefore, when deciding whether the order sought by one private party would infringe a Convention right of the other, a court must balance the interests of both parties. If the court finds that the order would infringe the Convention right of the party against whom it would be made, this can only be because the court has concluded that his interests are to be preferred to any competing interests of the party seeking the order. In particular, the court must have concluded that the Convention right of the party resisting the order is to be preferred to the other party's common law or statutory right to obtain it.

182. The 1998 Act is unusual - perhaps unique - in its range. While most statutes apply to one particular topic or area of law, the 1998 Act works as a catalyst across the board, wherever a Convention right is engaged. It may affect matters of substance in such areas as the law of property, the law of marriage and the law of torts. Or else it may affect civil and criminal procedure, or the procedure of administrative tribunals.

183. Unlike some statutes, the 1998 Act did not arrive on the scene unheralded. The Bill embodied a flagship policy of the government and the date for the commencement of the Act was announced well in advance. During the long period between Royal Assent and commencement, not only

the legal profession but public authorities also could prepare for the day when people would enjoy Convention rights within the three domestic legal systems and when public authorities would have to respond to that new situation.

184. When the 1998 Act did eventually come into force, inevitably it was in a world where events and transactions had been taking place and legal proceedings of various kinds were in progress. Naturally, questions arose as to how the new Act fitted into this world. For all but two of these questions, the draftsman has, deliberately, left it to the courts to supply the answers. Although counsel confined their argument to sections 3 and 4, for reasons which will become apparent, I consider that the issues relating to the application of these sections are best considered in the context of the 1998 Act as a whole.

185. In dealing with the more general aspects of the difficult topic of "retrospectivity", I have derived particular benefit from studying P-A Côté, *The Interpretation of Legislation in Canada,* 3rd ed (2000), Chapter 2, section 1, and the literature cited there.

The presumption against the retroactive operation of legislation

186. At common law there is a presumption that a statute does not have "retrospective" effect. The statement in *Maxwell on The Interpretation of Statutes,* 12th ed (1969), p 215 is frequently quoted:

> "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

The very generality of this statement rather obscures the fact that it uses the term "retrospective" to describe a range of different effects, some more and some less extreme. It is therefore important to identify what it is about any particular provision that is said to be "retrospective".

187. So far as matters of substance are concerned, the essence of the core common law rule is conveniently stated by Sir Owen Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261, 267:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or

> events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

In *Wainwright v Home Office* [2002] QB 1334, 1345F, at para 27, Lord Woolf LCJ referred succinctly to:

> "the general presumption that legislation should not be treated as changing the substantive law in relation to events taking place prior to legislation coming into force."

Since statutes which change the substantive law in relation to events in the past can obviously cause serious injustice, the presumption against a statute being intended to have such an effect is powerful - so powerful indeed that any statutory provision, such as section 1 of the War Damage Act 1965, which is intended to apply in this way can be expected to say so expressly. Because such provisions do actually affect the position before the legislation came into force, they can conveniently be described as "retroactive".

Statutes making prospective changes to existing rights

188. Retroactive provisions alter the existing rights and duties of those whom they affect. But not all provisions which alter existing rights and duties are retroactive. The statute book contains many statutes which are not retroactive but alter existing rights and duties - only prospectively, with effect from the date of commencement. Although such provisions are often referred to as "retrospective", Viscount Simonds rightly cast doubt on that description in *Attorney General v Vernazza* [1960] AC 965, 975.

189. The distinction between the two kinds of provision, and the need to have regard to that distinction, were spelled out by the Court of Appeal long ago in *West v Gwynne* [1911] 2 Ch 1. In that case the plaintiffs were assignees of a lease dating from 1874. The lease contained a covenant by the lessees against underletting the premises or any part thereof without the consent in writing of the landlord. Section 3 of the Conveyancing and Law of Property Act 1892 provided that

> "In all leases containing a covenant … against … underletting … the land or property leased without licence or consent, such covenant … shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent…."

In 1909 the plaintiffs applied to the defendant landlord for his consent to a proposed underlease of part of the premises but he replied that he was prepared to grant a licence only on condition that he should receive for himself half of the sum by which the rent of the underlease exceeded the

rent payable under the lease. The plaintiffs sought a declaration that the defendant was not entitled to impose the condition. The question was whether section 3 of the 1892 Act applied to a lease executed before the commencement of the Act. The Court of Appeal held that it did.

190. Cozens-Hardy MR said this, [1911] 2 Ch 1, 11:

> "It was forcibly argued by Mr Hughes that a statute is presumed not to have a retrospective operation unless the contrary appears by express language or by necessary implication. I assent to this general proposition, but I fail to appreciate its application to the present case. 'Retrospective operation' is an inaccurate term. Almost every statute affects rights which would have been in existence but for the statute. Section 46 of the Settled Estates Act 1877 … is a good example of this. Section 3 does not annul or make void any existing contract; it only provides that in the future, unless there is found an express provision authorizing it, there shall be no right to exact a fine. I doubt whether the power to refuse consent to an assignment except upon the terms of paying a fine can fairly be called a vested right or interest. Upon the whole I think section 3 is a general enactment based on grounds of public policy, and I decline to construe it in such a way as to render it inoperative for many years wherever leases for 99 years, or it may be for 999 years, are in existence."

Buckley LJ observed, [1911] 2 Ch 1, 11 - 12:

> "During the argument the words 'retrospective' and 'retroactive' have been repeatedly used, and the question has been stated to be whether section 3 of the Conveyancing Act 1892, is retrospective. To my mind the word 'retrospective' is inappropriate, and the question is not whether the section is retrospective.
> Retrospective operation is one matter. Interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective. That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law.
> Numerous authorities have been cited to us. I shall not travel through them. To my mind they have but little bearing upon this case. Suppose that by contract between A and B there is in an event to arise a debt from B to A, and suppose that an Act is passed which provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager, or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if the event has happened before the Act is passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective. Such was the point which arose in *Moon v Durden* (1848) 2 Ex 22 and in *Knight v Lee* [1893] 1 QB 41. But if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding

> the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's right in an event to become a creditor of B. As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, do interfere with existing rights. To construe this section I have simply to read it, and, looking at the Act in which it is contained, to say what is its fair meaning."

191. Similarly - simplifying the complexities - in *Gustavson Drilling (1964) Ltd v Minister of National Revenue* [1977] 1 SCR 271 an oil exploration company was entitled to deduct certain drilling and exploration expenses when computing its income for tax purposes, but it did not do so. In 1962 the legislation was changed to disallow such deductions. Subsequently, a successor company none the less sought to deduct those accumulated expenses and invoked the presumption against legislation having retrospective effect. The majority of the Supreme Court of Canada rejected the argument. Dickson J said, at pp 279 - 280:

> "The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates retrospectively. Superficially the present case may seem akin to the second instance but I think the true view to be that the repealing enactment in the present case, although undoubtedly affecting past transactions, does not operate retrospectively in the sense that it alters rights as of a past time. The section as amended by the repeal does not purport to deal with taxation years prior to the date of the amendment; it does not reach into the past and declare that the law or the rights of parties as of an earlier date shall be taken to be something other than they were as of that earlier date. The effect, so far as the appellant is concerned, is to deny for the future a right to deduct enjoyed in the past but the right is not affected as of a time prior to enactment of the amending statute."

192. Since provisions which affect existing rights prospectively are not retroactive, the presumption against retroactivity does not apply. Nor is there any general presumption that legislation does not alter the existing legal situation or existing rights: the very purpose of Acts of Parliament is to alter the existing legal situation and this will often involve altering existing rights for the future. So, as Dickson J went on to point out in *Gustavson Drilling* [1977] 1 SCR 271, 282 - 283, with special reference to tax legislation:

> "No one has a vested right to continuance of the law as it stood in the past; in tax law it is imperative that legislation conform to changing social needs and governmental policy. A

> taxpayer may plan his financial affairs in reliance on the tax laws remaining the same; he takes the risk that the legislation may be changed."

As the sparks fly upward, individuals and businesses run the risk that Parliament may change the law governing their affairs.

Presumption against interference with vested rights

193. Often, however, a sudden change in existing rights would be so unfair to certain individuals or businesses in their particular predicament that it is to be presumed that Parliament did not intend the new legislation to affect them in that respect. If undue weight is not given to his use of the term "retrospective", Wright J gives a strong statement of the presumption in *In re Athlumney* [1898] 2 QB 547, 551-552:

> "Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

Another statement of the presumption is to be found in the judgment of Dickson J in *Gustavson Drilling* [1977] 1 SCR 271, 282:

> "The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: *Spooner Oils Ltd v Turner Valley Gas Conservation Board* [1933] SCR 629, 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions."

194. Dickson J here makes the important point that this presumption applies to all legislation which affects vested rights, whether the legislation affects them retroactively or only prospectively. The decision of the Privy Council in *Zainal bin Hashim v Government of Malaysia* [1980] AC 734 is an example of the presumption being considered in relation to a retroactive statute.

195. More often, the presumption falls to be considered in relation to legislation which alters rights only for the future. Since it is more likely that Parliament intended to alter vested rights in this way than that it intended to make a retroactive change, in practice the presumption against legislation altering vested rights is regarded as weaker than the presumption against legislation having retroactive effect.

196. The presumption is against legislation impairing rights that are described as "vested". The courts have tried, without conspicuous success, to define what is meant by "vested rights" for this purpose. Although it concerned a statutory rule resembling section 16(1)(c) of the Interpretation Act 1978, the decision of the Privy Council in *Abbott v Minister for Lands* [1895] AC 425 is often regarded as a starting-point for considering this point. There Lord Herschell LC indicated, at p 431, that, to convert a mere right existing in the members of the community or any class of them into an accrued or vested right to which the presumption applies, the particular beneficiary of the right must have done something to avail himself of it before the law is changed. The courts have grappled with this idea in a series of cases which Simon Brown LJ surveyed in *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778. It is not easy to reconcile all the decisions. This lends weight to the criticism that the reasoning in them is essentially circular: the courts have tended to attach the somewhat woolly label "vested" to those rights which they conclude should be protected from the effect of the new legislation. If that is indeed so, then it is perhaps only to be expected since, as Lord Mustill observed in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co* [1994] 1 AC 486, 525A, the basis of any presumption in this area of the law "is no more than simple fairness, which ought to be the basis of every general rule."

197. A caveat should be entered. In *Hedderwick v The Federal Commissioner of Land Tax* (1913) 16 CLR 27, 37 Griffith CJ said:

> "It is hardly necessary to remark that the Crown's vested rights are to be respected as much as are the rights of private persons."

There is no suggestion in the present case that the application of the 1998 Act would affect any vested rights of the Crown or of any other public authority. It is not therefore necessary to decide whether the observation of the Chief Justice is sound as a general proposition or whether, if it is, the presumption would prevail in the case of the 1998 Act, given its objectives.

Presumption that legislation does not affect pending proceedings

198. The authorities refer to a further presumption, that legislation does not apply to actions which are pending at the time when it comes into force unless the language of the legislation compels the conclusion that Parliament intended that it should. A well-known statement of this rule of construction is to be found in the judgment of Sir George Jessel MR in *In re Joseph Suche & Co Ltd* (1875) 1 Ch D 48, 50 where he referred to:

> "a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

In *Zainal bin Hashim v Government of Malaysia* [1980] AC 734, 742C the Board deliberately modified this rule and slightly reduced its force:

> "for pending actions to be affected by retrospective legislation, the language of the enactment must be such that no other conclusion is possible than that that was the intention of the legislature."

The rule applies, of course, to all legislation, not just to legislation with retroactive effect. Indeed this particular presumption is a more limited version of the general presumption that legislation is not intended to affect vested rights. Since the potential injustice of interfering with the rights of parties to actual proceedings is particularly obvious, this narrower presumption will be that much harder to displace. In *Zainal bin Hashim v Government of Malaysia*, however, the Privy Council held that the language of the provision in question compelled the conclusion that it was intended to apply even to pending proceedings.

Statutes altering matters of pure procedure

199. So far I have been dealing with changes in substantive law. As can be seen from the statement of Wright J in *In re Athlumney* [1898] 2 QB 547, 552 which I quoted above, changes in matters of pure procedure have been treated differently. Wilde B stated the position most starkly in *Wright v Hale* (1860) 6 H & N 227, 232:

> "where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act."

The justification for treating matters of pure procedure differently was stated by Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62, 69:

> "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done."

200. Although, at a general level, the distinction between matters of substance and matters of pure procedure is readily understandable, in practice it has not always proved easy to apply, especially in relation to legislation on limitation or prescription. For that reason, in *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553, 558H - 559A Lord Brightman cautioned

against the potential dangers lurking in the description of a measure as "procedural". In *L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 527G - 528C Lord Mustill went further and suggested that a single criterion of fairness should be applied to all provisions. He added, at pp 525F - H:

> "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by parliament cannot have been intended to mean what they might appear to say."

This is an application of the "true principle" identified by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724f -g:

> "that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

201. On Lord Mustill's approach an appropriate test might be formulated along these lines: Would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be "so unfair" that Parliament could not have intended it to be applied in these ways? In answering that question, a court would rightly have regard to the way the courts have applied the criterion of fairness when embodied in the various presumptions.

202. In these proceedings your Lordships are called on to consider the application of the 1998 Act in civil proceedings. The language of "vested rights" does not translate altogether easily into the language of the criminal law. For that reason any views that I express are confined to civil proceedings.

The operative provisions of the 1998 Act to be considered together

203. The argument at the hearing concentrated on sections 3 and 4 of the 1998 Act and, more particularly, on whether section 3 had "retrospective" effect. In the light of the foregoing discussion even that argument requires to be broken down into two parts. The first is whether section 3 is retroactive. The second is whether section 3 applies generally or only in such a way as not to affect rights that were vested, or proceedings that were pending, on 2 October 2000. Those issues relating to section 3 cannot be resolved in isolation, however, but only by looking at the 1998 Act as a whole.

204. A single statute may contain some provisions which are retroactive and some which affect existing rights only for the future. Similarly, some provisions may apply generally on commencement and others only without prejudice to vested rights or without affecting pending proceedings. But, having regard to the purpose and structure of the 1998 Act, and subject to any express provisions to the contrary, Parliament must have intended all the operative provisions of this particular statute to take effect in the same way in respect of any given Convention right.

205. Section 1(1) defines the expression "the Convention rights" as the rights and fundamental freedoms set out in certain specific articles of the Convention. The Act then goes on to provide the two mechanisms by which they are to have effect in the domestic law of the United Kingdom. First, under the appropriate cross-heading, in sections 3 to 5 - later complemented by section 10 - the Act provides a mechanism for giving effect to Convention rights in relation to legislation. Secondly, again under an appropriate cross-heading, in sections 6 to 9 it contains a mechanism for giving effect to Convention rights in relation to the acts of public authorities.

206. These are the operative sections of the Act for present purposes and they all came into force on 2 October 2000. Subject to the specific régime in section 22(4), there is nothing to suggest that Parliament intended that there should be any difference in the way that they were to be applied on commencement. And, indeed, it would be surprising if there had been a difference, precisely because the two groups of sections constitute different, but complementary, mechanisms for giving effect to the same underlying Convention rights. It is a matter of chance whether the relevant act of a public authority occurs in an area covered by the common law or by statute, or by a mixture of both. In that sense, it is equally a matter of chance whether sections 6 and 7 only, or sections 3 to 5 also, are in play. For instance, a party enjoying a right to equality of arms under article 6(1) can rely on that right, if appropriate, to challenge the way court proceedings are conducted: section 7(1)(b). If the relevant aspect of the proceedings is regulated, in whole or in part, by a statutory provision, he must be equally

able to deal with it by invoking the court's obligation under section 3 to read and give effect to the statutory provision compatibly with article 6(1). If appropriate, section 4 also comes into play. So far as any given Convention right is concerned, it would make no sense for some of these sections to apply retroactively or to apply generally to the situation on commencement and for others not to apply in these ways. They must all apply in the same way or else the 1998 Act would not work smoothly.

207. The Court of Appeal rightly saw that the various operative provisions of the 1998 Act are interlinked and based part of their argument for applying sections 3 and 4 on section 6(1) which makes it unlawful for a public authority, including a court, to act incompatibly with Convention rights: [2002] QB 74, 86, paras 10 - 12. Since the issue was not raised before the Court of Appeal, that passage in their judgment naturally proceeds on the assumption that section 6(1) itself applies in all cases from the date of commencement of the Act. That is not, however, something that can simply be assumed.

208. The issue which the House has to decide transcends sections 3 and 4. It relates to the intention of Parliament when incorporating the Convention rights and enacting the operative provisions to give effect to them. Were those rights and provisions to apply retroactively? Or generally from the date of commencement? Or only so as not to affect vested rights or pending proceedings? In terms of the test as formulated in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co* [1994] 1 AC 486, 525H, the answer is to be found by considering whether the consequences of applying the operative provisions retroactively or so as to affect vested rights or pending proceedings would be "so unfair" that Parliament could not have intended them to be applied in these ways. In fact, the question does not admit of a single answer.

Application of the 1998 Act in relation to different articles of the Convention

209. The operative provisions of the 1998 Act must all apply in the same way when used to give effect to the same Convention right. But they may apply differently when used to give effect to different Convention rights. Article 6 embodies rights in relation to matters of procedure. When the 1998 Act is used to give effect to those article 6 rights in our domestic law, it provides remedies for defects in procedure. There is no presumption against purely procedural statutory provisions applying generally on commencement since no-one has a vested right to any particular form of procedure. It follows that, given its unqualified language, the 1998 Act applies generally from the date of commencement in so far as it gives effect to article 6 rights. That is only what one would expect. Suppose, for instance, that

during the hearing of the appeal in this case the Court of Appeal had done something - such as refusing to listen to submissions on behalf of First County - which was incompatible with their rights under article 6(1). There can be no doubt that section 6(1) would have applied and that the Court of Appeal would have acted unlawfully in terms of it. Similarly, section 7(1)(b) would have applied and under it First County could have relied on their article 6(1) rights. Sections 3 to 5 would also have applied to the appeal for this purpose. So, if the alleged infringement of First County's article 6(1) rights had arisen out of a statutory provision regulating the procedure in the appeal, section 3 would have bound the Court of Appeal. Depending on how the statutory provision could be read under section 3, the Court of Appeal could also have used the mechanism in sections 4 and 5 to make a declaration of the incompatibility of the provision with article 6(1) rights.

210. In so far as articles of the Convention contain substantive rather than procedural rights, the presumption would be that Parliament did not intend that, when used to give effect to them, the operative provisions should interfere with vested rights or pending actions. It is, however, unnecessary, and would be unwise, to go through the various articles with a view to identifying those Convention rights in respect of which Parliament would or would not have intended the 1998 Act to apply generally on commencement. For example, I reserve my opinion on whether, because of the overwhelming importance and the absolute nature of articles 2, 3 and 4, Parliament would have intended that on commencement the Act would apply generally for the purpose of giving effect to them.

The 1998 Act, including section 3, not retroactive

211. It is convenient first to consider whether the 1998 Act, including section 3, is retroactive.

212. Subject to one exception, there is nothing in the language of any of the sections in the Act to suggest that they are meant to be retroactive. The exception is section 22(4) which, expressly, gives retroactive effect to section (7)(1)(b) in one particular situation. The proper inference is that none of the other provisions is intended to apply retroactively. This inference is corroborated by the obvious, and potentially far-reaching, unfairness of unsettling the law relating to past events and transactions in different areas of the law. In these circumstances, applying the powerful presumption against retroactivity, I readily conclude that, subject to section 22(4), none of the operative provisions of the Act, including section 3, is retroactive.

213. In the particular context of criminal proceedings this conclusion is fortified by the observations of Lord Clyde on section 3 in *R v Lambert* [2002] 2 AC 545, 604, at para 142:

> "The usual understanding of the appeal process is that the correctness of the decision appealed against should be determined in accordance with the law as it stood when the case was decided by the lower court. But on the appellant's approach it would seem that any case either of a civil or a criminal nature, decided according to the law as construed in the ordinary way prior to 2 October 2000, if an appeal was brought so as to be heard on or after 2 October 2000, would require to be decided by the application of a rule of construction, namely section 3 of the 1998 Act, which was not obligatory on the lower court. But that involves giving an undue extension to the effect of section 3. In my view section 3 only became obligatory on courts on 2 October 2000. The rule of construction which it expresses applies to all legislation whenever enacted. But there is nothing to show that it was intended by section 3 that the meaning given to a statutory provision by a court prior to 2 October 2000 should be changed in the event of an appeal against that decision being heard on or after that date."

The same thinking is to be found in the comment of Lord Hope of Craighead in *R v Kansal (No 2)* [2002] 2 AC 69, 112, at para 83

> "the interpretative obligation in section 3(1) cannot be applied so as to change retrospectively the meaning which was previously given to a provision in primary legislation. It does not make unlawful acts of courts or tribunals or other public authorities, which, as a result of provisions in primary legislation, could not at the time when the acts were done have been done differently: see section 6(2)(a)."

In a very different civil context Lord Wright MR had said much the same in *In re a Debtor* [1936] Ch 237, 243:

> "Thus while an appellate court is able, and bound, to give effect to new remedies which have been introduced by enactments passed after the order appealed from was made by the court of first instance, yet with regard to substantive rights it is well established that the appellate court must give effect to the same law as that which was in force at the date of the earlier proceeding…. A matter of substantive right which has become res judicata cannot be upset by a subsequent general change of the law, in the absence of precise intention to make the change so retrospective being evidenced in the Act."

214. Although counsel referred to the passages from *R v Lambert* and *R v Kansal (No 2)* during argument, in the present case that particular kind of problem does not arise. Because of his decision on the prior point of interpretation, the county court judge did not consider or apply section 127(3). The first court to consider and apply it was the Court of Appeal. Accordingly, the danger of an appeal court using section 3 to make a retroactive change in the law applied by a lower court, which was identified in *R v Lambert* and *R v Kansal (No 2)*, simply did not present itself in this

case. None the less, the remarks of the Master of the Rolls in *In re a Debtor* suggest that this is merely one aspect of a wider question about the application of new statutory provisions to pending proceedings.

The application of the operative provisions of the 1998 Act when used to give effect to article 1

215. For the reasons given by Lord Nicholls of Birkenhead, article 6(1) is not engaged in this case. The only live question relates to the application of the operative provisions when used to give effect to the right in article 1. It is crucially important to bear in mind that this is not a question about the application of section 127(3) of the 1974 Act, as potentially modified by section 3 of the 1998 Act, so as to affect vested rights or pending actions. Rather, it is a general question about the application of the operative provisions of the 1998 Act, when used to give effect to the article 1 right, so as to affect vested rights or pending proceedings. That question admits of only a single answer in regard to vested rights and pending proceedings respectively. And that answer cannot be found by examining the circumstances of particular cases and then applying a more or less flexible test in the light of those circumstances. This is just an aspect of the point emphasised by Lord Mustill in *L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 528C, when he said that a court which sets out to apply the test of fairness is concerned

> "not with the merits of the particular case but with the generality of rights which Parliament must have contemplated would suffer if the section took effect retrospectively."

Furthermore, in the words of Isaacs J in *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413, 434, the whole circumstances must be considered:

> "that is to say, the whole of the circumstances which the legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side."

So in this case the single answer to the broadly conceived question is to be found by considering how Parliament intended the operative provisions of the 1998 Act to apply in relation to the generality of vested rights or pending proceedings - not in relation to vested rights or pending proceedings under the 1974 Act, far less in relation to the individual plight of Mrs Wilson and First County. To descend to those levels of particularity would not only result in a myriad of single decisions but would be to attribute to Parliament the

implausible intention that the meticulously drawn 1998 Act, embodying a landmark reform, was to apply in a piecemeal and haphazard fashion.

216. Indeed, it is only by taking that broad general view of the application of the 1998 Act that a puzzle at the heart of this case can be solved. Depending on the particular legislative provision to be read through its prism, section 3 either results in the provision being modified and vested rights being affected, or else it leaves the provision unmodified and any vested rights intact. So, if the application of section 3 depended on the terms of the individual statutory provision to be read and given effect, it would be impossible to tell whether vested rights were affected, and so whether section 3 applied, without first applying it. That vicious circle is avoided if section 3 is regarded as part of a package of operative provisions whose application falls to be determined by judging the consequences of applying the provisions so as to affect the generality of vested rights and pending proceedings.

217. In considering how the package of provisions in the 1998 Act is to be applied, it would be pointless to scour them in the hope of finding clues in the minutiae of the language. Section 3(2)(a), which says that the section applies to primary and subordinate legislation whenever enacted, is one of the two express indications which the Act contains as to its application. The other is in subsection (4) of section 22, the minimalist application section, which makes section 7(1)(b) apply retroactively in certain defined circumstances. It is unnecessary to decide in this case whether section 22(4) applies to pending proceedings or so as to affect vested rights. For the rest, there is nothing in the operative provisions of the Act to show whether, in the case of substantive Convention rights, they are to apply generally or only so as not to affect vested rights or pending proceedings. In that sense, they are ambiguous and so the presumption against them applying to pending proceedings, in particular, comes into play. But it is necessary to consider whether that presumption is displaced by other relevant considerations.

The application of the operative provisions of the 1998 Act in the present case

218. In deciding how the operative sections of the 1998 Act should be applied when used to give effect to the substantive right in article 1, I would attach significance to the importance, in general terms, of the rights which the 1998 Act incorporates into our domestic law. It could be argued that, because of their importance, Parliament would have intended all of them to take immediate effect for all purposes. Since article 6 rights, for instance, would clearly take immediate effect for all purposes, in the interests of

uniformity the other rights - including the right under article 1 - should do so too. That argument could be reinforced by noticing the peculiar potency of the Convention rights by comparison with other rights under domestic law, which could therefore be expected to give way to them. Moreover, it might be said that, since a court applying article 1 must always balance competing interests, there would be no risk of the rights of parties to pending proceedings being crushed willy-nilly by the new Convention right. Parliament could therefore have been satisfied that, when giving effect to the article 1 right, the Act could apply generally on commencement without there being any unacceptable risk of injustice. Finally, and less importantly, it could be argued that the long interval between Royal Assent and commencement was an indication that, once the delay was over, the 1998 Act when used to give effect to article 1 was to have general effect: *Craies on Statute Law*,7th ed (1971), pp 393 - 395.

219. The last line of argument has rarely been accepted and I would not accept it in this case. The other arguments carry more weight, but against them it can be said that the very importance and potency of the article 1 right make it all the less likely that Parliament would have intended that it should suddenly descend as a deus ex machina into pending proceedings. Moreover, not only is the unfairness of interfering with the rights of parties to pending proceedings very considerable but it is distinct and different in kind from the unfairness which may have to be balanced as one of the competing interests whenever article 1 is given effect. For these reasons I would conclude that there is no sufficient reason to hold that the presumption is displaced. Applying the relevant rule of construction, since the language of the operative provisions admits another conclusion, they must be taken not to affect pending proceedings. To put the matter another way, in the case of article 1, the consequences of applying the operative provisions of the 1998 Act to pending proceedings would be so unfair that Parliament could not have intended it to apply to them.

220. The present action was in progress when the 1998 Act came into force on 2 October 2000. So, for the purposes of article 1, the operative provisions of the 1998 Act, including sections 3 to 5, do not apply to this action. I am content to rest my decision on that narrow ground. It follows that the Court of Appeal had no power to make the declaration of incompatibility that they did - and, indeed, that the Secretary of State had no right to be joined as a party under section 5(3). Despite this technical quirk, I would allow her appeal and make the order proposed by Lord Nicholls of Birkenhead.