

Conforming interpretation: Comments and UK developments

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Leading House of Lords decisions

- *R v A (No. 2)* [2002] 1 AC 45
- *Pickstone v Freemans* [1989] AC 66
- *Litster v Forth Dry Dock* [1990] 1 AC 546
- *Ghaidan v Mendoza* [2004] 2 AC
- *Autologic v Inland Revenue Commrs* [2006] 1 AC 118
- *Fleming and Condé Nast v Revenue and Customs Commrs* [2008] UKHL 2

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Important Court of Appeal decisions

- *Revenue & Customs Commrs v IDT* [2006] EWCA Civ 29
- *Vodafone 2 v Revenue & Customs Commrs* [2009] EWCA Civ 446
- *FII Group Litigation v Revenue and Customs Cmmrs* [2010] EWCA Civ 103

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Far-reaching scope of interpretative obligation (Sir Andrew Morritt C in *Vodafone 2*)

- Not constrained by conventional rules of construction
- Not an exercise in semantics or linguistics
- Permits departure from the strict and literal application of the words which legislature elected to use
- Permits the implication of words necessary to comply with EU law obligations
- Precise form of words to be implied does not matter

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Limits on conforming interpretation (Sir Andrew Morritt)

- Interpretation should go with the grain of the legislation and be compatible with its underlying thrust
- Should not be contrary to a fundamental or cardinal feature as this would cross boundary between interpretation and amendment
- Courts cannot be required to make decisions for which not equipped or which give rise to important practical repercussions which court is not equipped to evaluate

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Overview of House of Lords cases

- *R v A, Pickstone, Litster and Ghaidan*: moulding to give effect to claimant's EU or human rights
- *Autologic*: moulding of statutory remedy to give an effective remedy while preserving jurisdiction of statutory tribunal
- *Fleming*: disapplication of new time limit in absence of transitional period

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Overview of Court of Appeal decisions

- *IDT*: indirect reverse direct effect
- *Vodafone 2* and *FII*: moulding to restrict persons able to recover as a result of breach of Treaty freedoms, the amount of recovery and the remedies available to claimants

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 DORSEY

Extending the limits of interpretation

- *R v A, Pickstone, Litster and Ghaidan*: interpretation squarely within scheme of legislation
- *Vodafone 2* and particularly *FII*: more relaxed approach to the “grain” of the legislation

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Vodafone 2

- *Vodafone 2*: condition imported requiring taxpayer to demonstrate genuine establishment in order to gain exemption from CFC charge
- Sir Andrew Morritt, quoting Lord Walker in *Fleming*: disapplication only appropriate for persons “so circumstanced that the offending provisions must not be invoked against them, either in particular cases or at all”

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 DORSEY

FII Group Litigation

- Condition imported requiring taxpayer to provide evidence of foreign underlying tax attaching to particular dividend payments
- Effectiveness and legal certainty irrelevant at stage of consistent interpretation
- (If necessary) Woolwich to be interpreted to cover all *San Giorgio* claims (thus allowing Parliament to cancel existing *DMG* claims)
- Removing statutory defence to statutory claim for tax, making it an effective remedy (and thereby excluding common law claims)

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Conclusions

- Various factors in play
- Giving indirect horizontal and even reverse direct effect
- "Even where the national legislation does no more than reproduce the Community right, explicit national legislation, with appropriate procedural rules and regulations, can have a practical usefulness for claimants and their advisers not possessed by a directly enforceable Community right which lacks that convenient clothing": Nicholls LJ in *Pickstone v Freemans* (Court of Appeal);
- Limiting recovery by Claimants under ECJ judgments
- Preserving allocation of jurisdiction between courts

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Conclusions

- Freeing courts from the shackles of literal interpretation not objectionable in principle
- But risks to legal certainty and effectiveness through:
 - unduly relaxed approach to the grain and thrust of the legislation, retrospectively imposing unforeseen compliance burdens
 - moulding of remedies (while denying alternative remedies)

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