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cannot, and probably should not attempt to, change the doctrinal understandings of such religious bodies – but nor may it reflect such understandings in its own rules.

In fact, the legal solution is easy. The problem lies in the use of the same word, marriage, to describe two entirely different things: on the one hand marriage as a relationship is a state institution that acts as the legal identifier for various legal rights and obligations; on the other hand marriage as an event is (sometimes) a sacrament, or a contract with God, a religious blessing of a life to be led together. It is the failure to differentiate between the two, exacerbated by the law permitting religious officials to perform the state function of bringing marriage (and, soon, civil partnership) into existence, that is the root of the difficulties. The solution lies in the complete secularisation of all legal relationships: instead of achieving equality by making civil partnership more like marriage, equality should be achieved by making marriage more like civil partnership. Virtually all of the problems discussed in the Consultation Paper would simply evaporate by requiring that the state function of bringing legal relationships into existence is carried out only by state officials (that is to say, in Scotland, District Registrars) applying universally applicable laws. This would leave religious bodies free to perform their sacraments according to whatever principles they wish (and to call them whatever they like).

In other words, I suggest that religious marriage be abolished, and religious civil partnership not be introduced. Religious freedom would be maintained by allowing any religious body to offer – or to withhold – a blessing to the relationship created by the state. I accept that there is little likelihood of the Scottish Government adopting this as a policy, or of conservative religious bodies supporting a reduction in their legal powers. Yet the problem arises only because religious bodies jealously guard their power to exercise state functions, while at the same time being unwilling to give effect to changes in state law. Secularisation would free religious bodies to develop their own practices according to their own doctrinal imperatives; and the law would be free – as it must be – to develop its structures and principles in a way that serves all its citizens, irrespective of their religious beliefs, or their sexual orientation.

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Scottish Share Pledges in the Supreme Court

For the Scottish reader, the interesting aspect of *Farstad Supply A/S v Enviroco Ltd*,¹ is the applicable law. Like that well-known case on mutuality in contract law, *Bank*

¹ [2009] BCC 648 rev [2009] EWCA Civ 1399 affd [2011] UKSC 16, [2011] 1 WLR 921. For the High Court and Court of Appeal proceedings, see R G Anderson, “Subsidiaries and share pledges” 2010 SLT (News) 205.

of *East Asia v Scottish Enterprise*,² the proceedings were conducted through the English courts on the basis of Scots law. As foreign law, Scots law was a question of fact before the High Court and the Court of Appeal. The Supreme Court, by contrast, having judicial knowledge of all the laws of the United Kingdom, was able to consider Scots law as a matter of law rather than fact. An insight into the minds of the English judges is provided by the opening line of the leading opinion in the Supreme Court: “It is not often,” writes Lord Collins, “... that the question of the construction of a charterparty arises in the Chancery Division”.³ The Guildhall, like the Strand, is indeed a different world.

A. THE FACTS

In *Farstad* the Supreme Court was faced, for the second time, with the consequences of an explosion aboard a ship berthed in Peterhead harbour which left one man dead. The initial proceedings concerned issues of contribution, and were litigated to the Supreme Court via the Court of Session.⁴ The proceedings with which this note is concerned arose in respect of a contractual provision – an indemnity – which was governed by English law and litigated through the English courts. Under the indemnity, the owners of the vessel agreed to indemnify the charterers and any “affiliates” of the charterers. The indemnity provision further defined “affiliate” by incorporating by reference the definition of “subsidiary” in the Companies Acts.⁵ Enviroco, having incurred liabilities as a result of the explosion, sought indemnity: it was a subsidiary of the charterers and thus, it argued, an “affiliate” in terms of the indemnity provision.

Difficulty arose because Enviroco’s parent company, as part of its banking arrangements, had executed a package of security documents under Scots law. One of those documents was a share pledge, in terms of which the parent company had pledged its shares in Enviroco to a bank. In order to complete the pledge, the bank was entered in Enviroco’s register of members as holder of the shares.

B. THE SUPREME COURT DECISION

In English law, as was pointed out at various stages in the litigation, it would be “highly unusual” to take security over shares by way of a legal mortgage, namely transfer of title to the shares to the security taker. In the ordinary course of things, security would be constituted by a fixed charge. To their credit, their Lordships made no attempt

² 1997 SLT 1213. In *Bank of East Asia*, the House of Lords had the assistance of Scottish counsel; the Supreme Court in *Farstad* did not.

³ Para 1.

⁴ [2009] CSIH 35, 2009 SC 489 rev [2010] UKSC 18, 2010 SC (UKSC) 87. See generally E J Russell, “Contribution causes confusion” 2010 SLT (News) 169 and G W Gordon, “Contribution and indemnification: *Farstad Supply AS v Enviroco Ltd*” (2010) 14 EdinLR 102.

⁵ Companies Act 1985 s 736. The equivalent provision under the Companies Act 2006 is s 1159(1).

to impose the English law of equitable charges on Scots law. Indeed, Lord Collins recognises that:⁶

... under Scots law the only way in which a fixed security over shares can be taken is by fiduciary transfer of the shares to the creditor (*fiducia cum creditore*). The security is known as a share pledge, under which registration of the creditor as holder of the shares constitutes the security.

Not only was there no attempt to impose English law, Lord Collins' statement represents, in one respect, a reception of Civil Law principles, for the passage quoted contains the first reference in any modern Scottish case to the overarching Civilian principle of fiduciary transfer of title to the creditor (*fiducia cum creditore*).⁷ Lord Rodger, by contrast, observed that⁸ "[t]he security was to be created by transferring title in the shares to the Bank's nominees." Apparently oblivious to the subtleties of the *rechtswissenschaftliche Gretton-Theorie* (that only physical things, not rights, may be the objects of ownership),⁹ he noted that the effect of this transfer of title "would give the Bank's nominees a real right in the shares in the event of [the security giver's] insolvency."¹⁰

The differing analyses of Lord Collins and Lord Rodger provide a curious and rare example of an English judge providing the better Civilian analysis: the effect of a pledge in Scots law is, as Lord Collins holds, a fiduciary transfer of the shares and not, as Lord Rodger appears to have it, a transfer of real rights in the shares. But it might also be fair to remark that it is unlikely that either judge was even aware of the controversy.

After some concerted reflection on the legislative history of the relevant provisions,¹¹ their Lordships in the Supreme Court came to the conclusion that, as a result of the share pledge, the company in which the shares were held could no longer be described as a "subsidiary" of the security giver.

C. FARSTAD IN CONTEXT

Farstad was a "hard" case. Arguments could be made, with force, either way. What is of interest is the Supreme Court's preference for form over substance: for a legalistic

6 Para 6.

7 For *fiducia cum creditore* as a security device, see G L Gretton, "Financial collateral and the fundamentals of secured transactions" (2006) 10 EdinLR 209. For a South African perspective on the use of *fiducia cum creditore* for corporeal moveables (a structure difficult, but not impossible, in Scotland as a result of Sale of Goods Act 1979 s 62(4)), see C G van der Merwe and L Smith, "Financing the purchase of stock by the transfer of ownership as security: a simulated transaction?" (1999) 10 Stellenbosch LR 303; also C G van der Merwe, "Modern Application of the Roman Institution of *Fiducia Cum Creditore Contracta*", in L Vacca (ed) *La Garanzia nella prospettiva storico-comparatista* (2003) 327.

8 Para 62.

9 G L Gretton, "Ownership and its objects" (2007) 71 *Rabels Zeitschrift* 802. Subordinate real rights have two objects: they are held *over* the owner's right and *in* the physical thing. Personal rights, like real rights, are *held* rather than owned.

10 Para 62 (emphasis added).

11 The complex provisions cannot be set out here, but they are analysed in Anderson (n 1).

interpretation of the relevant provisions which was divined only after considerable research into the legislative history. Little heed was taken of the practical implications of the decision. Nor is *Farstad* an isolated case. Another recent example is *Royal Bank of Scotland v Wilson*,¹² where a practice that had been pursued for almost forty years by a considerable body of Scottish solicitors exercising ordinary care and skill¹³ was dispatched as incompetent.

This is not to say that we should criticise their Lordships for daring to doubt legal practice. As it happens, I think the decision in *Wilson* was correct. Their Lordships are primarily concerned with the law, not the view of the law as practitioners might wish it to be. But in cases of statutory interpretation, where a responsible body of opinion has developed about the interpretation of the provisions, I would merely observe that the Supreme Court, geographically divorced from Scotland as it is, may need to give counsel a better opportunity to address them on the implications of overturning an accepted view. I cannot improve on the observations of George Gretton and Kenneth Reid:¹⁴

... *error communis facit jus*, that is to say, an interpretation of the law that is universally shared is itself law even if it ought not to have been adopted in the first place. Like most such tags, it is less a rule than a thought for the day, but like other thoughts for the day it has some force... Might there not be a case for saying that the entrenched view, even if originally wrong, must now be considered right? An argument of that kind succeeded in, for example, *Rhone v Stephens*,¹⁵ an English conveyancing case where the House of Lords decided not to overturn a long-established view of the law.

Moving forward, however, the signals from the Supreme Court are clear: practice cannot make or change law, nor can it even inform the interpretation of statutory provisions. On one view, therefore, lawyers must think for themselves and consider whether, in their own view, the responsible body of opinion is correct. On another view, however, and one which is more likely to prevail, the solicitor advising on how security over shares can be taken will continue to follow the responsible body of opinion. If the Supreme Court some years later decides that opinion was wrong, it is the client's problem, not the solicitor's. Such a situation is less than satisfactory. For, as solicitors well know, the majority of law actually practiced has hardly ever been the subject of a judicial decision that is helpful. Far less may there be any legislative basis for what they do. Instead much of what is practised is, as David Daube called it,

12 [2010] UKSC 50, 2011 SC (UKSC) 66. Another is *Cadder v HM Advocate* [2010] UKSC 43, 2011 SC (UKSC) 13.

13 This is important because it means that solicitors who previously adhered to the view discredited by the Supreme Court cannot normally be considered to have been careless, far less negligent, see *Hunter v Hanley* 1955 SC 200. But there is an important caveat to the normal case, namely where the body of opinion is considered by the court not to withstand logical analysis, see *Bolitho v City and Hackney Health Authority* [1998] AC 232 at 242A per Lord Browne-Wilkinson. For an interesting Court of Session opinion (dealing primarily with causation in a case for allegedly negligent actuarial advice), see *Blower v Edwards and Scottish Widows plc* [2010] CSOH 34.

14 K G C Reid and G L Gretton, *Conveyancing 2010* (2011) 138. See also G L Gretton, "Upsetting the applecart: standard securities in the Supreme Court" (2011) 15 *EdinLR* 251.

15 [1994] 2 AC 310.

“law as self-understood”.¹⁶ This important source of law – on reflection, perhaps *the* most important source – is too much neglected. It is, of course, right and proper that the Court of Session or the Supreme Court has the power to scrutinise and review the profession’s opinion of the law and, if necessary, to hold the prevailing view to be wrong. But consideration should be given to the reasons underlying that opinion and to whether it is justifiable. And where there are two possible interpretations of a statutory provision, that which is consistent with how it has always been interpreted should be preferred.

D. LEGISLATIVE REFORM

Their Lordships’ analysis in *Farstad* is, in my view, less persuasive than that provided by the deputy judge of the High Court (Gabriel Moss QC, hardly a novice in these matters). It is, however, difficult to fault the Supreme Court’s impeccable legal reasoning: the somewhat convoluted statutory provisions are the source of the problem. One is struck by their Lordships’ blunt acknowledgment that on their preferred interpretation “the legislation does lead to a result with is certainly odd and possibly absurd”.¹⁷ It is questionable whether the Supreme Court would have accepted such a result in a corporate law case governed by English law.¹⁸ Indeed, in cases where the English courts are perceived to have strayed too far – for instance, the decisions in *Powdrill v Watson*¹⁹ and *Buchler v Talbot*²⁰ – legislative reform was swift. The outcry following the Court of Appeal’s decision in *Powdrill*, in particular, was such that Parliament acted “with almost unprecedented speed”: primary legislation reversing the decision was drafted, laid before Parliament, passed and given Royal Assent in little over a month from the Court of Appeal’s decision.²¹

Westminster is notoriously reluctant to legislate on Scots private law.²² And yet, where private law touches on reserved matters – and company law is a reserved matter – the Scottish Parliament has no power to legislate at all.²³ Therefore, whereas Holyrood could provide a legislative solution to clarify the meaning of the legislation

16 D Daube, “Self-Understood in legal history” 1973 JR 126, recently reproduced in the United States at (1999) 2 Green Bag (2d) 413; and in German as “Das Selbstverständlich in der Rechtsgeschichte” (1973) 90 ZSS (RA) 1. This paper also has an unmistakable influence on the speech of his doctoral pupil, the late Lord Rodger of Earlsferry, in *A v Secretary of State for the Home Department* [2005] UKHL 71, [2006] 2 AC 221 at para 129.

17 Para 47.

18 Indeed, in two recent corporate and financial cases the Supreme Court preferred substance to form: *Progress Property Co Ltd v Moore* [2010] UKSC 55, [2011] 1 WLR 1 (for capital maintenance purposes); and *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38 at para 107 per Lord Collins (on the “anti-deprivation” principle).

19 [1994] ICR 395 .

20 [2004] 2 AC 298. The decision, which turned on the peculiar characterisation of a floating charge under English law, was reversed by s 1282 of the Companies Act 2006, inserting s 176ZA into the Insolvency Act 1986.

21 *Powdrill v Watson* [1995] 2 AC 394 at 443 per Lord Browne-Wilkinson.

22 For instance, *Lee v Alexander* (1883) 10R (HL) 91 (followed in *Winston v Patrick* 1980 SC 246) had to wait over a century for its legislative quietus in the Contract (Scotland) Act 1997.

23 Scotland Act 1998 Sch 5 part II head C1.

on enforcement of standard securities,²⁴ in the case of rights in security in company shares there may be no practical legislative solution.²⁵

Enviroco is, therefore, a rather unsatisfactory case for Scots lawyers and it highlights three general points: first, some of the difficulties arising from the present constitutional arrangements; secondly, the need for practitioners to remember that blindly following an irrational market practice is fraught with risk; thirdly, and perhaps most importantly, there are serious practical difficulties with the present law. The Scottish Law Commission's proposals for reform set out in its excellent Discussion Paper on *Moveable Transactions*²⁶ are thus, subject to issues of legislative competence, of considerable importance.

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Long-Term Contracts, the Rules of Interpretation and “Equitable Adjustment”

In recent times there has been a wealth of analysis of the principles of interpretation of contract. Most of the cases in question, including the recent Scottish appeal to the Supreme Court, *Multi-Link Leisure Developments Ltd v North Lanarkshire Council*,¹ have concerned drafting errors. The controversial question tends to be the extent to which the court can either ignore words contained in the contract or read words into the contract in order for the contract to make sense.² A recent decision from the Outer House, *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc*,³ sheds light on an issue which has not received much consideration. This is the way in which the rules of interpretation should be applied to a long-term contract which has, arguably, been affected by changed circumstances. Should the interpretative rules be amended to take into account unanticipated changes in circumstances which have an impact on the way the contract operates?

24 As it happens, the Scottish Government's position is that no legislation is required.

25 The Scottish Law Commission considers that law reforms which have only an “incidental” effect on company law are within the legislative competence of the Scottish Parliament, Scottish Law Commission, Discussion Paper on *Moveable Transactions* (Scot Law Com DP No 151, 2011) para 1.33.

26 *Ibid.*

1 [2010] UKSC 47, 2011 SC 53.

2 See Lord Hope's explanation of this exercise in *Multi-Link* at para 11.

3 [2011] CSOH 105. The outcome of an appeal to the Inner House was awaited at the time of writing.