METAPHORS AND LEGAL REASONING

The Chancery Bar Association Lecture 2015

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1. Words are the tools of a lawyer's trade. The Acts of Parliament we apply and the wills and contracts we interpret are all just words. When we seek to persuade, we do almost entirely with words. When we explain our reasons for deciding as we have done, we do so in words. As Tom Stoppard put it in *Rozencrantz and Guildernstern Are Dead*:

> "Words, words. They're all we have to go on."

2. In our use of words we constantly make use of metaphor. A decision one way or another will open the floodgates, or will drive a coach and horses through the legislation. A seeker after disclosure is going on a fishing expedition. We ask whether an inventor has planted his flag at the precise destination claimed by a patent when understood by donning the mantle of the skilled man. We sit in the testator's armchair to interpret his will. These are no more than worn out rhetorical flourishes. But metaphors also occupy a more formal place in our law and legal system. They are used to describe what it is that the court is asked to do, such as grant a freezing order. We use them naturally in attributing responsibility for damage by asking whether the chain of causation has been broken. We even use Latin metaphors, as when we say that in insolvency debts must be paid *pari passu.* So ingrained has the use of metaphor become that we are almost unconscious of its use. Metaphors

undoubtedly have their fans. The great American legal scholar Lon L Fuller said[1]:

> "Metaphor is the traditional device of persuasion. Eliminate metaphor from the law and you have reduced its power to convince and convert."

3. And they are used to great effect in crafting memorable passages in judgments.

4. I am a great admirer of those who use words well. To read a judgment that is well written is a pleasure. To read one that is not can make your eyes glaze over. I am not a subscriber to the Dr Johnson school of thought:

> "Read over your compositions, and where ever you meet with a passage which you think is particularly fine, strike it out."

5. Who can forget Lord Denning in *HP Bulmer v Bollinger*[2] on the impact of EU Law (although to be pedantic it is a simile rather than a metaphor)

> "…when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute."

6. Sometimes, however, the use of a metaphor needs unpacking. Take Lord Hoffmann's statement in *Designers' Guild v Russell Williams Textiles*:[3]

> "Copyright law protects foxes better than hedgehogs."

[1] Legal Fictions, in 25 Illinois Law Review 1930-31, p 363-399, 513-546 and 879-910
[2] [1974] Ch 401
[3] [2001] 1 WLR 2416

7. Much learned ink has been spilled on explaining what Lord Hoffmann meant. Arden LJ's explanation in *L Wooley Jewellers Ltd v A&A Jewellery Ltd* [4] was this:

> "Lord Hoffmann did not elaborate on his reference to hedgehogs and foxes. However, it appears that it is a reference to a fragment of Greek poetry of the seventh century BC, with which the late Sir Isaiah Berlin begins his famous essay on Tolstoy:
>
> "There is a line among the fragments of a Greek poet Archilochus which says 'The fox knows many things, but the hedgehog knows one big thing'." …
>
> Sir Isaiah points out that scholars have differed about the correct interpretation of these "dark" words. They may, on the one hand, mean no more than that the fox, for all his cunning, is defeated by the hedgehog's one defence. But the fragment may also be taken figuratively as contrasting those with a single central vision and organising principle as against those who pursue many ends, often unrelated or contradictory. It was, I think, in the figurative sense that Lord Hoffmann was using his metaphor."

8. On even rarer occasions the use of a metaphor provokes scorn. In *United Scientific Holdings Ltd v Burnley BC* [5] Lord Diplock referred to Prof Ashburner's statement that the two streams of equity and the common law run in the same channel but have not mingled their waters. He continued:

> "My Lords, by 1977 this metaphor has in my view become both mischievous and deceptive. …As at the confluence of the Rhône and Saône, it may be possible for a short distance to discern the source from which each part of the combined stream came, but there comes a point at which this ceases to be possible. If Professor Ashburner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now."

[4] [2003] FSR 15
[5] [1978] AC 904

9. This brought a snort of derision from the eminent Australian authors of Meager Gummow and Lehane on Equity, themselves employing an aqueous metaphor, who described it as the low water-mark of modern English jurisprudence. [6]

10. All that is, in a sense, by way of introduction. What I would like to examine is the way in which metaphor is used to encapsulate substantive principles of law. This is, I believe, often a dangerous way in which to formulate principles which can lead to the wrong result, and often leads to arguments not about the underlying principles, but about what the metaphor itself means. As Lord Hoffmann said in *Serco Ltd v Lawson*:[7]

> "Experience shows that rules formulated in terms of metaphors always cause trouble when it comes to their interpretation and the more striking the metaphor, the more likely it is to distract attention from the real issues in the case."

11. The first pre-requisite is of course to recognise that a metaphor is being used. Thus my first example illustrates the danger of failing to recognise a metaphor. In *Wadman v Calcraft* [8] in 1803 the Master of the Rolls (Sir William Grant) declared that the purpose of a forfeiture clause in a lease was to secure the payment of the rent. Nothing unexceptionable about this

[6] Meagher JA returned to the attack in *G R Mailman & Associates Pty -v- Wormald (Australia) Pty Limited* (1991) 24 NSWLR 80 at 99D-E, where he referred to Lord Diplock's "remarkable view" that the Judicature Act 1873 "effected a 'fusion' of law and equity so that equity as a distinct jurisprudence disappeared from English law". He continued "That view is so obviously erroneous as to be risible" and went on to give examples of "[t]he absurdities to which it gives rise".
[7] [2006] ICR 250
[8] (1803) 10 Ves Jun 67

statement about the purpose of the clause. The trouble came in *Howard v Fanshawe* [9] when Stirling J turned it into a metaphor. He said:

> "These authorities appear to me to establish that the ground on which Courts of Equity formerly gave relief was that the proviso for re-entry was in the eye of the Court simply a security for the rent…"

12. The metaphor was taken up in *Chandless-Chandless v Nicholson* [10] in which Lord Greene M.R. said:

> "The court, in exercising its jurisdiction to grant relief in cases of non-payment of rent is, of course, proceeding on the old principles of the court of equity which always regarded the condition of re-entry as being merely security for payment of the rent and gave relief if the landlord could get his rent."

13. In *Exchange Travel v Triton Property Trust* [11] Harman J had to decide whether a landlord's right of forfeiture fell within the phrase "any security over the company's property" in section 11 of the Insolvency Act 1986. He held that it did, applying the metaphor to the statutory wording. This interpretation passed without judicial comment for some time; although if I may metaphorically blow my own trumpet I did point out in a footnote in Woodfall that the metaphorical usage of "security" had been overlooked. In *March Estates v Gunmark* [12] Lightman J said:

> "… since the enactment of the 1986 Act there has been a consistent line of authority to the effect that for the purposes of s 4(3) in respect of his right under a lease to re-enter and forfeit the lease for breach of covenant the lessor is a secured creditor (in particular see the cases cited herein). His right of re-entry is security for the performance by the lessee of the

[9] [1892] Ch 581
[10] [1942] 2 K. B. 321
[11] [1991] BCLC 396
[12] [1996] 2 BCLC 1

> covenants on his part contained in the lease and in particular for payment of the rent reserved."

14. In the following year, however, Lightman J realised the error of his ways. In *Razzaq v Pala* [13] he revisited the question and said:

> "Notwithstanding the authorities referred to in *March Estates Plc v Gunmark Ltd*, it is now quite clear to me that the answer to the question is in the negative and that for the purposes of section 383(2) the landlord's right of re-entry does not constitute a security. The scheme of the Act confirms that the word "security" is used in its strict legal sense."

15. Neuberger J agreed with Lightman J's second thoughts in *Re Lomax Leisure Ltd* [14] approving, among other things, the statement in Woodfall that the significance of the metaphor had been overlooked in *Exchange Travel*. Since then the courts have understood that "security" is not used metaphorically in the insolvency legislation. As Lord Bingham pointed out in *R v Bentham* [15] metaphor is not a device that drafters of statutes employ.[16]

16. This then, is a case in which a metaphor was applied literally leading to an erroneous view of the law.

17. My second example comes from contract law, and illustrates a metaphor being used to avoid decision making. One test proposed for deciding whether a contracting party is entitled to terminate the contract on account of a breach by the other party is whether the breach goes to the root of the contract. I believe that this metaphor originates in the judgment of Lord

[13] [1997] 1 WLR 1336
[14] [2000] Ch 502
[15] [2005] 1 WLR 1057
[16] This statement needs a little qualification because, for example, the metaphor of ranking *pari passu* is used in various provisions of the Insolvency Act 1986 (Insolvency Act 1986 s 107), the Companies Act 2006 (Companies Act 2006 s. 543, s. 859B) and elsewhere (Building Societies Act 1986)

Ellenborough in *Davidson v Gwynne* [17] in 1810, although legal historians might be able to trace it back further. The metaphor has been widely used in modern times. Thus in *Woodar v Wimpey* [18] Lord Scarman said:

> "To be repudiatory, the breach, or threatened breach, must go to the root of the contract."

18. What does this mean? Clearly it is in some sense a botanical metaphor. Is the underlying idea that a plant cannot survive if its roots are damaged? If so, it is untrue. Many plants survive significant damage to their roots; and indeed in some cases may actually benefit from judicious pruning of them. Or is the underlying idea that the breach of contract must be equivalent to destroying the roots of a plant? If so what is intended by the phrase "go to"?

19. In his seminal judgment in *Hongkong Fir* [19] Diplock LJ said:

> "The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?"

20. "Substantially the whole benefit" sets the bar high. In *Decro Wall* [20]Salmon LJ, said:

> "The contract may state expressly or by necessary implication that the breach of one of its terms will go to the root of the contract and accordingly amount to repudiation. Where it does not do so, the courts must look at the practical results of

[17] (1810) 12 East 381
[18] *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277
[19] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26
[20] *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361

> the breach in order to decide whether or not it does go to the root of the contract."

21. In support of that proposition he referred to Diplock LJ in *Hongkong Fir*, even though Diplock LJ had tried to get away from the metaphor by spelling out what it meant. Sachs LJ also expressed the test as: to constitute repudiation a breach of contract must go to the root of that contract. Buckley LJ said that:

> "To constitute repudiation, the threatened breach must be such as to deprive the injured party of a substantial part of the benefit to which he is entitled under the contract."

22. There is to my mind a significant difference in formulating the test as a breach depriving one party of *substantially the whole* of the benefit, and a breach depriving one party of *a substantial part* of the benefit. Which is right? In *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [21] the House of Lords had the opportunity to decide. Lord Wilberforce, usually the most rigorous of judges, quoted both these formulations (as well as others) and said:

> "The difference in expression between these two last formulations does not, in my opinion, reflect a divergence of principle, but arises from and is related to the particular contract under consideration: they represent, in other words, applications to different contracts, of the common principle that, to amount to repudiation a breach must go to the root of the contract."

23. Far from bringing clarity, this retreat into metaphor prolongs uncertainty. The trouble with expressing important propositions of English law in metaphorical terms is that it is difficult to be sure what they mean. As the High Court of Australia majority judgment pointed out in *Koompahtoo Local Aboriginal*

[21] [1979] AC 757

Land Council v Sanpine Pty Ltd [22] to describe a breach as "going to the root of the contract" is:

> "… a conclusory description that takes account of the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party."

24. I commented on the divergence between the Diplock test and the Buckley test in *Ampurius Nu Homes v Telford*, [23] and proposed a series of questions that one might ask in order to decide whether a breach of contract amounted to a repudiation. But it did not matter on the facts whether the Diplock test or the Buckley test (or indeed some other test) was right. The difference was picked up again by Etherton C in *Urban I (Blonk) Street v Ayres* [24]in which he said that he preferred the Diplock test, but followed Lord Wilberforce in also saying that:

> "the contract-breaker will have repudiated the contract, entitling the other party to terminate it, if and when the delay has been such as in all the circumstances to deprive the other party of substantially the whole benefit it was intended he or she should obtain from the contract, that is to say it has gone to the root of the contract."

25. The Diplock test has been criticised as setting the bar too high, and in some jurisdictions a less stringent test has been applied. In the *Koompahtoo* case the High Court of Australia said that repudiation required "serious and substantial breaches of contract" and if faced with the choice between the Diplock test and the Buckley test seems to have chosen the Buckley test. Thus they concluded that the breaches deprived the injured party of "a substantial

[22] [2007] HCA 61 (2007) 82 AJLR 345 at [54]
[23] [2013] 4 All ER 377
[24] [2014] 1 WLR 756

part of the benefit for which it contracted" and therefore termination of the contract was justified.

26. I think, with all respect, that the difference between the Diplock test and the Buckley test is not merely semantic; and to continue to retreat into metaphor to obscure the difference does no more than postpone the day when someone will have to choose between them.

27. My next two examples come from company law. The first shows how the use of metaphor has been almost abandoned, and the second shows an attempt to abandon a metaphor which, so far, has not been entirely successful. The question in *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd*[25] was whether a shipowner could escape liability for fire damage to cargo in the ground that the damage happened without his actual fault or privity. Lord Haldane said that this turned on whether the identified person with the relevant knowledge could be said to be the "directing mind and will" of the company. The anthropomorphic characterisation of corporations was carried further by Lord Denning in *H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham & Sons Ltd* [26] where the question was whether a landlord had established an intention to occupy business premises. He said in a splendid metaphorical flourish, though not quite so extensively anatomical as the description of the Roman polity in the first scene of Coriolanus:

> "A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It

[25] [1915] AC 705
[26] [1957] 1 Q.B. 159

> also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

28. Within a short time this metaphor was already causing trouble, and the House of Lords had to explain it in *Tesco Supermarkets v Nattrass*.[27] Lord Reid said that there have been attempts to apply Lord Denning's words to all servants of a company whose work was brain work, or who exercise some managerial discretion under the direction of superior officers of the company. Lord Reid did not think that was what Lord Denning meant but he reiterated the metaphor of "the directing mind and will of the company".

29. In *Meridian Global Funds Asia v Securities Commission* [28] Lord Hoffmann attempted to replace the metaphor with legal principle. He drew attention to the fact that:

> "…this anthropomorphism, by the very power of the image, distracts attention from the purpose for which Viscount Haldane said he was using the notion of directing mind and will. "

30. He preferred to speak of rules of attribution. How those rules applied depended on the purpose of the legal rule for which they were invoked. These and the general rules of agency and vicarious liability will usually answer the question whether the acts of a human count as the acts of a

[27] [1972] AC 153
[28] [1995] 2 AC 500

company. But in special cases these rules are not enough. In such a case the court must ask:

> "Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

31. This is, perhaps, a more rigorous approach because it requires some real thought about the rule in issue. It is more difficult than applying a cosy metaphor. But even after *Meridian*, some judges have continued to use this misleading metaphor. In *Safeway Stores v Twigger* [29] the question was whether the company could recover fines which it had paid for anti-competitive behaviour from the directors and employees who it said were responsible for its corporate actions. That in turn depended on whether the ex turpi causa principle applied. The judge at first instance held that it did not, because the company would only have been personally at fault if the humans in question were the directing mind and will of the company. His decision was reversed by the Court of Appeal on the ground that the statutory liability was imposed on the company itself and that that made it personally liable. So the question who was the directing mind and will of the company was irrelevant. In other words, what was needed was a more rigorous analysis of the legal rule itself. The reasoning in *Twigger* has been subjected to some obiter criticism by the Supreme Court in *Jetivia SA v Bilta (UK) Ltd* [30] where the rules of attribution were discussed in some detail, but

[29] [2011] Bus. L.R. 1629
[30] [2015] UKSC 23

Lords Toulson and Hodge warned in their joint judgment against the danger of ascribing human attributes to a non-natural person such as a company. For as long as we continue to use the metaphor of directing mind and will the danger will persist.

32. My next example is the case of a metaphor that we have almost succeeded in abandoning as a result of trying to describe the underlying legal concept. It is the metaphor of piercing or lifting the veil of incorporation. Now even to describe the effect of the incorporation of a company as creating a "veil" of itself suggests that the corporators have something to hide. So the choice of metaphor is not a happy one.

33. In some cases judges have distinguished between piercing the corporate veil and lifting it. Thus in *Atlas Maritime Co S.A v Avalon Maritime Ltd* [31] Staughton LJ said:

> ""To *pierce* the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or look behind it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose."

34. Is this a worthwhile distinction? Are we doing more than explaining one metaphor with another? What were the principles on which judges deployed this metaphor? Almost always they are expressed in terms of other

[31] [1991] 4 All ER 769

metaphors. In *Yukong Line Ltd v Rendsberg Investment Corporation* [32] Toulson J said:

> "In a sense, it may not matter what language is used as long as the principle is clear; but there lies the rub. For metaphor can be used to illustrate a principle; it may also be used as a substitute for analysis and may therefore obscure reasoning"

35. In *Gifford Motor Co v Horne* [33] and *Jones v Lipman* [34] the court resorted to the metaphor in justification of its decisions, although as has subsequently been pointed out resort to the metaphor was unnecessary on the facts of those cases.

36. In *Woolfson v Strathclyde Regional Council* [35] the question was whether the owner of a shop in Glasgow was entitled to compensation for disturbance on the compulsory acquisition of the shop. The business carried on in the shop was in fact carried on by a company. The House of Lords held that the answer was no. Lord Keith said that there were no grounds for treating:

> ""the company structure as a mere façade."

37. Which appears to be the test he preferred. Does this help? What is a façade except a more solid veil?

38. From time to time judges have expressed disquiet at the uncertainty of the principle. In *VTB Capital v Nutritek International* [36]Lord Neuberger said:

> "Words such as "façade", and other expressions found in the cases, such as "the true facts", "sham", "mask", "cloak",

[32] [1998] 1 WLR 294
[33] [1933] Ch 935
[34] [1962] 1 WLR 832
[35] (1978) 38 P & CR 521
[36] [2013] 2 AC 337

> "device", or "puppet" may be useful metaphors. However, such pejorative expressions are often dangerous, as they risk assisting moral indignation to triumph over legal principle, and, while they may enable the court to arrive at a result which seems fair in the case in question, they can also risk causing confusion and uncertainty in the law."

39. I agree that these metaphors risk causing confusion and uncertainty, but I respectfully doubt their utility. In *VTB* the Supreme Court evidently found the whole subject too difficult to decide. Fortunately a few months later the Supreme Court tried to express the principles without much recourse to metaphor. In *Prest v Petrodel Resources Ltd* [37] the question arose in the context of a dispute about matrimonial finance. Put shortly the wife alleged that the husband was the ultimate owner of a number of companies through an elaborate offshore structure. The companies owned property in England and the question was whether the companies could be ordered to transfer properties to the wife. Lord Sumption also said that references to a façade or sham beg too many questions to provide a satisfactory answer. He derived two principles from the cases which he described as follows:

> "It seems to me that two distinct principles lie behind these protean terms, and that much confusion has been caused by failing to distinguish between them. They can conveniently be called the concealment principle and the evasion principle. The concealment principle is legally banal and does not involve piercing the corporate veil at all. It is that the interposition of a company or perhaps several companies so as to conceal the identity of the real actors will not deter the courts from identifying them, assuming that their identity is legally relevant. In these cases the court is not disregarding the "facade", but only looking behind it to discover the facts which the corporate structure is concealing. The evasion principle is different. It is that the court may disregard the corporate veil if there is a legal right against the person in control of it which

[37] [2013] 2 AC 415

> exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement. Many cases will fall into both categories, but in some circumstances the difference between them may be critical."

40. After a review of the authorities Lord Sumption concluded:

> "I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. The principle is properly described as a limited one, because in almost every case where the test is satisfied, the facts will in practice disclose a legal relationship between the company and its controller which will make it unnecessary to pierce the corporate veil."

41. In the same case Lord Neuberger collected a world-wide anthology of criticisms about the uncertainty of the principle. He said that he had been attracted to the idea that a doctrine (if that is what it can be called) that had been subjected to so much criticism both academic and judicial should be given its quietus. But he did not take that last step. He agreed with Lord Sumption that:

> "… the doctrine should only be invoked where "a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control."

42. But Lord Neuberger seems to have thought that the principle was not one restricted to cases involving companies; so that it would apply where, for example, a person's spouse or civil partner had been interposed. On this

approach it could be that the evasion principle is a cousin of the *Ramsay* principle.[38] If that is right, then the evasion principle has nothing to do with veils of incorporation at all, and the metaphor ought to be dropped. Lady Hale, with whom Lord Wilson agreed, saw the principle as an aspect of preventing a company from being used as "an engine of fraud": a principle which underpins a number of approaches in the law, not least the invention of the principle of part performance of contracts for the sale of land. She was also sceptical about classifying the cases into the two categories of concealment and evasion. She was more attracted to the idea that the cases were examples of a more general principle that the individuals who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business. This comes close to a general principle of abuse of rights, such as exists in EU law, but which Lord Sumption rejected. Lord Mance agreed with Lord Sumption subject to the caveat that he did not wish to foreclose all possible future situations that might arise. Lord Clarke was also wary of Lord Sumption's binary classification, which he thought should not be definitively adopted.

43. Speaking for myself I have considerable sympathy with Lord Walker who said:

> "I consider that "piercing the corporate veil" is not a doctrine at all, in the sense of a coherent principle or rule of law. It is simply a label—often, as Lord Sumption observes, used indiscriminately—to describe the disparate occasions on which some rule of law produces apparent exceptions to the principle of the separate juristic personality of a body corporate."

[38] *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300

44. After two outings in the Supreme Court are we any further forward? In *R v Sale*[39] and *R v McDowell*[40], two criminal cases involving the Proceeds of Crime Act 2002, the Court of Appeal has applied *Prest* in finding that the concealment principle applied, but nevertheless in each case using the metaphor. But as Lord Sumption explained in *Prest*, the concealment principle does not involve any piercing of the veil at all. I think also that these cases can be explained by saying that for the purposes of the particular statute a human defendant is treated as acquiring a benefit from criminal conduct if his company does so. It is in a sense the obverse of the rules of attribution discussed in *Meridian*.

45. This is illustrated by *Daimler Co Ltd v Continental Tyre & Rubber* [41] decided in the middle of the First World War, in which the question was whether Daimler Co Ltd, a company registered and trading in England, but whose shareholders and directors were German, was an enemy alien. Lord Parker gave the leading speech. He began by reaffirming the general proposition that a company has legal personality separate from its corporators. But he then went on to point out that an artificial person, such as a company, can have no natural allegiance (as opposed to residence). What the court had to do was to transpose the criteria that applied to natural persons to artificial persons such as companies. Applying that approach he considered that the acts of the directors and corporators were those of the company. Since

[39] [2014] 1 WLR 663
[40] [2015] EWCA Crim 173
[41] [1916] 2 AC 307

control of the company was in German hands, the English company must be regarded as an enemy alien. He continued:

> "What is involved in the decision of the Court of Appeal is that, for all purposes to which the character and not merely the rights and powers of an artificial person are material, the personalities of the natural persons, who are its corporators, are to be ignored. An impassable line is drawn between the one person and the others. When the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it. In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby, this may be always true. Certainly it is so for the most part. But the character in which property is held, and the character in which the capacity to act is enjoyed and acts are done, are not in *pari materia*. The latter character is a quality of the company itself, and conditions its capacities and its acts. It is not a mere part of its energies or acquisitions, and if that character must be derivable not from the circumstances of its incorporation which arises once for all, but from qualities of enmity and amity, which are dependent on the chances of peace or war and are attributable only to human beings, I know not from what human beings that character should be derived, in cases where the active conduct of the company's officers has not already decided the matter, if resort is not to be had to the predominant character of its shareholders and corporators."

46. In other words Lord Parker considered the purpose of the rule, and that enabled him to decide what acts and attributes of the corporators counted as acts and attributes of the company. *Daimler* was not cited in *Prest*, although it was briefly referred to in *VTB* as an example of statutory construction. But as in *Meridian* it seems to me that the approach adopted by the House of Lords in *Daimler* is a sound approach to the question.

47. I began by saying that the first pre-requisite is to recognise that a metaphor is being used. My last example is in my view a case of a metaphor, not always recognised as such, but requiring so much qualification that it is of very little

practical utility. I take as representative *Lysaght v Edwards* [42] in which Sir George Jessel MR said:

> "It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession."

48. Statements to similar effect have been made by distinguished judges over the years. One hopes, of course, that the law broadly reflects the realities of the world. But I think that the average householder who has agreed to sell his home would be astonished to learn that it was no longer his in equity, even though he was still living in it and the buyer had paid no more than a deposit which in all probability was being held by the seller's solicitor as a stakeholder. Moreover no sooner have judges proclaimed that the vendor is a trustee for the purchaser than they have to qualify that statement. In *Englewood Properties Ltd v Patel* [43] Lawrence Collins J collected an anthology of such qualifications. Thus the vendor has been described as "something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate"; as "a constructive trustee"; as "trustee in a qualified sense only"; as "a quasi-trustee".

[42] (1876) 2 Ch 499
[43] [2005] 1 WLR 1961

49. Now a trustee is the paradigm example of a fiduciary. And what is a fiduciary? Millett LJ tells us [44]:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary."

50. The vendor under an uncompleted contract is entitled to a number of rights and obligations which one would not normally associate with a trustee. He is entitled to enjoy the land and its income at least until the contractual completion date. He is liable for outgoings, such as rates, without any right of indemnity from the buyer. If the contract goes off any trusteeship disappears. None of this is compatible with the ordinary relation between trustee and beneficiary.

51. In *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* [45] Deane J in the High Court of Australia said:

> "it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser … [T]he ordinary unpaid vendor of land is not a trustee of the land for the purchaser. Nor is it accurate to refer to such a vendor as a 'trustee sub modo' unless the disarming mystique of the added Latin is treated as a warrant for essential misdescription."

52. The Supreme Court has recently revisited this topic in *Scott v Southern Pacific Mortgages Ltd*. [46] Lord Collins gave the leading judgment on this point, with which the other justices all agreed. The defendant home owners were

[44] *Mothew (t/a Stapley & Co) v Bristol & West Building Society* [1998] Ch 1
[45] (1987) 163 CLR 164, 191
[46] [2014] 3 WLR 1163

persuaded to sell their properties to purchasers who promised the vendors the right to remain in their homes after the sale. The purchasers bought the homes with the assistance of mortgages from lenders, who were not given notice of the promises to the home owners. The question was whether the lenders were bound to give effect to those promises. The first question was whether the promised right to remain was a proprietary right which the vendors acquired on exchange of contracts. This in turn depended on whether the buyers had power to grant proprietary rights enforceable in equity or whether such rights as they acquired were personal only. Lord Collins referred to a number of cases in which it was said that a vendor is a trustee of a kind, without expressly dissenting from any of them. But he concluded that:

> "the vendors acquired no more than personal rights against the purchasers when they agreed to sell their properties on the basis of the purchasers' promises that they would be entitled to remain in occupation. Those rights would only become proprietary and capable of taking priority over a mortgage when they were fed by the purchasers' acquisition of the legal estate on completion."

53. Although he did not say so in terms I think that one can discern some approval in his citation from the decision of the High Court of Australia in *Chang v Registrar of Titles* [47] that:

> "where there are rights outstanding on both sides, the description of the vendor as a trustee tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the respective parties"

[47] (1976) 137 CLR 177, 190

54. I am not arguing that a buyer of land under an uncompleted contract of sale acquires no rights in equity. Many rights enforceable in equity can be created without giving rise to a relation of trustee and beneficiary. Even where a fiduciary relationship does exist equity imposes duties which are not fiduciary duties. In *Mothew* Millett LJ instanced the duty of a trustee to act with skill and care. In the case of a seller of property he has a duty in equity to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made. [48] I wonder whether the intervention of equity is necessary to impose this duty or whether it would be better to characterise it as an implied term arising out of the relation of seller and buyer. But be that as it may, there is no reason why equity cannot impose duties without at the same time labelling someone as a trustee. Equally, a person may acquire rights proprietary equitable rights over land without the land owner becoming a trustee of the land.

55. In a thoughtful article in the LQR [49] to which Lord Collins referred Mr PG Turner defends the constructive trust between vendor and purchaser. But his analysis proceeds on the basis that the buyer has four distinct equities which make up the aggregate of his rights. They come into existence at different time and protect different interests. He recognises that "trust" and "constructive" trust in this context bear meanings that differ from their ordinary meanings, but argues that this is no more than a question of linguistic propriety.

[48] *Clarke v Ramuz* [1891] 2 QB 456
[49] (2102) LQR 582

56. My thesis this evening is that linguistic propriety is important. What I think has happened here is that the description of the seller as a trustee is actually the application of a metaphor. The seller is not a trustee, although he has equitable duties which, to some extent, resemble those of a trustee. The vice of this metaphor is that judges have to perform mental gymnastics to explain what exactly they mean. It would in my view make for greater clarity in the law if we now abandoned this nomenclature.

57. All this was pointed out over 150 years ago by Lord Westbury in *Knox v Gye*:[50]

> I remember to have seen singularly illustrated in a case that occurred some years ago in a Court of Law, where the Court of Law was told that in an agreement for the sale of a house the vendor was trustee for the purchaser, and the Judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the *cestui que trust*, but quite wrong where the vendor is called a trustee only by a metaphor, and by an improper use of the term; and it required some trouble to convince them that though the vendor might be called a trustee he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser….It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord *Mansfield*, that nothing in law is so apt to mislead as a metaphor.

[50] (1872) LR 5 HL 656