there should be some protection (para. [47]). This is, after all, a situation where a person either knows or ought to know that the other person can reasonably expect his privacy to be protected. But he refused to grant an injunction, presumably because, although he does not say so, he believed that disclosure would not be "highly offensive".

Lord Woolf's conclusion is not inevitable. Adultery is not virtuous but its disclosure in the press, rather than directly to the victim, is surely "highly offensive to a reasonable person of ordinary sensibilities". Would one wish to have one's spouse's infidelity discussed in the *Sunday People*? Is that the environment one would want for deciding how to deal with a devastating event in one's life? It is a very different situation from that in *Theakston*, in which the claimant was single. Lord Woolf comments only, "The judge should not ... assume that it was in the interests of A's wife to be kept in ignorance of A's relationships". But that is not the point. The point is whether one can assume that it is in A's wife's interest to have the details of her husband's infidelity discussed in the red-tops. A was not seeking an injunction to stop C and D informing his wife. If he had been, the result would have been clear. It is inherently offensive that C and D sold their stories to the press instead of informing A's wife directly. That is why the press should have been restrained.

DAVID HOWARTH

CONTROLLING CONTRACTUAL DISCRETION

IN 1993 Leggatt L.J. said in *Abu Dhabi National Tanker Co.* v. *Product Star Shipping Ltd. (The Product Star)* [1993] 1 Lloyds Rep. 397, 404:

> Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.

This raised many questions, not least regarding the means by which contractual discretion is subjected to control, and the criteria against which discretionary acts are to be assessed. Surprisingly, the question has received little academic attention. Two recent decisions—*Gan Insurance Co. Ltd.* v. *Tai Ping Insurance Co. Ltd.*

(No. 2) [2001] EWCA Civ 1047, [2001] 2 All E.R. (Comm.) 299, and *Nash & others* v. *Paragon Finance plc* [2001] EWCA Civ 1466, [2002] 1 W.L.R. 685—reveal how the Court of Appeal, with reference to *The Product Star*, has sought to answer the questions raised. It is with this aspect of *Gan* and *Nash* that this note is concerned.

In *Gan*, a contract of reinsurance placed by Tai Ping with Gan in respect of an all risks and third party insurance contained the provision that no claim could be settled without the reinsurer's approval. At first instance ([2001] Lloyd's Rep. I.R. 291), Longmore J. held, *inter alia*, that the right arbitrarily to refuse approval would defeat the purpose of the reinsurance contract, and found there to be an implied term that the reinsurer would not unreasonably withhold consent, a term he thought necessary to give business efficacy to the contract. In the Court of Appeal, Mance L.J. (with whom Latham L.J. concurred; Sir Christoper Staughton *dubitante*) accepted that the reinsurer's approval was subject to an implied term governing its exercise but disagreed with Longmore J.'s formulation. The withholding of approval, Mance L.J. observed, should "take place in good faith after consideration of and on the basis of the facts giving rise to the particular claim and not with reference to considerations wholly extraneous to the subject matter of the particular reinsurance" (para. [67]). To this he added that it would be further implied that approval would not be withheld arbitrarily.

A few months after the judgment in *Gan* was given, the Court of Appeal was once again required to consider the issue of discretionary rights, this time in the context of a consumer mortgage. One of the central questions in *Nash* was whether the mortgage lender's contractual right to vary, at its discretion, the interest rate charged was subject to an implied limitation. Dyson L.J. (with whom Thorpe L.J. and Astill J. agreed) rejected the contention that the power to vary the rate of interest was completely unfettered, thereby departing from *Lombard Tricity Finance Ltd.* v. *Paton* [1989] 1 All E.R. 918 (C.A.). He observed that if the power were unfettered, the lender would be "completely free, in theory at least, to specify interest rates at the most exorbitant level" (para. [30]). Paragon's discretion was, he found, subject to an implied term that it would not be exercised "dishonestly, for an improper purpose, capriciously or arbitrarily" (para. [36]). He further held, with reliance upon *Gan* and *The Product Star*, that the lender's discretion was further limited by a test of *Wednesbury* reasonableness, stressing, however, that "[it] is one thing to imply a term that a lender will not exercise its

discretion in a way that no reasonable lender, acting reasonably, would do... It is quite another matter to imply a term that the lender would not impose unreasonable rates" (para. [41]). This limitation, he observed, was necessary in order to give effect to the reasonable expectations of the parties.

Both *Gan* and *Nash* clearly recognise the existence of an implied limitation on the exercise of contractual discretionary rights and, whilst this note does not dispute the outcome in either case, comment must be made on the manner in which the scope of this implied limitation was determined. Mance L.J. rejected an approach based upon balancing the competing interests of the parties (as advanced by Stephen J. in *Distillers Co. Bio-Chemicals (Aust.) Pty. Ltd.* v. *Ajax Insurance Co. Ltd.* (1974) 130 C.L.R. 1), preferring instead one focussing upon the claim as a whole and the purpose for which the discretion to withhold consent is given. In effect, Mance L.J. adopted an approach to the implied limitation of discretionary rights that was both purposive and prescriptive: the party in question is not required to forgo its own commercial interests in favour of the other party, but must ensure that the discretion is used for the purpose for which it was intended, *i.e.*, to make a commercial judgment on the basis of the facts of the claim in question. In *Nash*, the examples given by Dyson L.J. to illustrate behaviour which would amount to a breach of the implied term clearly demonstrate that he was likewise concerned with preventing use of the discretion for an extraneous, and therefore improper, purpose. This concern with purpose must be correct. It maintains the flexibility that the parties agreed to bestow on one of them, while at the same time protecting the other party from abuse of that flexibility exercised for extraneous motives.

However, despite the clear similarity between the illustrations used in both cases, Dyson L.J. did not phrase his judgment in the language adopted by Mance L.J. Instead, he offered a proscriptive interpretation of the implied term and, significantly, he held that the term "reasonableness" in this context was to be interpreted as *Wednesbury* reasonableness. The introduction of this administrative law principle into contract law is neither desirable nor supported convincingly by the authorities on which Dyson L.J. relied. It is likely to confuse and detract attention from the central issue: whether the discretion has been exercised for the purposes for which it was conferred.

It is accepted that *The Product Star* does indeed contain a reference to *Wednesbury* reasonableness, but this point was raised by counsel and, in addressing this submission, Leggatt L.J. crucially stated that "the exercise of judicial control of administrative action is

an analogy which must be applied with caution to the assessment of whether a contractual discretion has been properly exercised". In the light of this clear dictum, it is difficult to see how Dyson L.J. can derive much support from *The Product Star* for his narrow interpretation of reasonableness. Similarly, it is questionable whether *Gan* provides the necessary authority. It is correct that Mance L.J. referred (at para. [73]) to the refusal of consent "in circumstances so extreme that no reasonable company in its position could possibly withhold approval", but he did so obiter. Moreover, Mance L.J. added that this "will not ordinarily add materially to the requirement that the reinsurer should form a genuine view as to the appropriateness of settlement or compromise without taking into account considerations extraneous to the subject-matter of the reinsurance". It therefore seems that Mance L.J. viewed his interpretation of "reasonable" as closely linked to his interpretation of the implied term as a whole, which clearly focused on the prevention of abuse of discretionary rights for an improper purpose.

This is not to deny that Mance L.J.'s interpretation of reasonableness is a narrow one, nor is it questioned that this may well be appropriate in the commercial settings encountered in *Gan* and *The Product Star*. Nevertheless, an interpretation of reasonableness deemed appropriate in a commercial context cannot without question be imposed on a consumer transaction, such as that in *Nash*. In a consumer context, different considerations must surely apply. The law has for some considerable time imposed more extensive burdens on those dealing with consumers. If the scope of the implied limitation is to vary depending on the nature of the transaction involved, then the more narrow interpretation must be reserved for commercial, not consumer, transactions.

The significance of *Gan* and *Nash* cannot be doubted. It is clear that English contract law now recognises an implied restriction on the exercise of contractual discretion, one explicitly drawing upon the concept of good faith. This is to be welcomed. The scope of this restriction and its future development remain, however, unclear. All too easily the restriction's usefulness as a means of preventing the abuse of contractual rights may be limited through restrictive interpretation. In this regard, the appropriateness of the *Wednesbury* analogy must be seriously questioned. It is to be hoped that future courts will follow the purposive interpretation adopted by Mance L.J. in *Gan*, rather than the more restrictive approach of Dyson L.J. in *Nash*.

V.K. Sims
R.J. Goddard