perpetrators continue to reside in the same household the threshold should be crossed. Here, as Lord Wilson puts it, "the fact is that somebody in the child's proposed home did perpetrate injuries to another child".

From a policy perspective, does this decision strike the necessary balance between the conflicting considerations of protecting the family from unwarranted intrusion while protecting children from harm? A strong case can be made for saying that it does. First, it is unacceptable in a democratic society that children should be removed in the longer term, as opposed to the interim, on the basis only of suspicion rather than proof. Otherwise, no parents under previous suspicion would ever feel able to have another child or rebuild their family lives without the spectre of local authority involvement hanging over them and their partners. Where, as will almost invariably be the case, there are present concerns relating to the current family situation, there is nothing in this decision which remotely prevents the appropriate protective action being taken. It is right that the state should demonstrate that it has real concerns which are not solely historical.

There is perhaps one reservation which should be expressed. It has been suggested that the threshold conditions might be less exacting for supervision orders than they are for care orders. For reasons which today look largely ideological, the DHSS *Review of Child Care Law* in 1985 recommended that the threshold should be the same for both forms of intervention. Yet there is a great deal of difference between merely monitoring the well-being of a child left at home under a supervision order and actually removing the child from home under a care order. In a case like *Re J.*, where on any view the history was serious, there might appear to be a case for compulsory supervision. But any such change in the law would require Parliament to intervene.

ANDREW BAINHAM

UNCERTAIN JUNCTURES BETWEEN EMPLOYMENT AND CONTRACT LAW

THE common law of contract is a key foundation of employment law. However, the peculiar nature of the employment relationship can make this a slightly uneasy fit. In the case of *Geys v Société Générale* [2012] UKSC 63 (*Geys*), the UK Supreme Court was asked to reconcile general contractual principles with the rules surrounding contracts of employment by determining whether the "automatic" or "elective" theories of termination of contract applied in the employment context, finally resolving a long-running debate in employment law.

In *Geys*, the court considered the appeal of a former banker who was summarily dismissed by his employer (the Bank) on 29 November 2007 in breach of the terms of his employment contract. The Bank later deposited a payment in lieu of notice (PILON) in Mr Geys's bank account, but only notified Mr Geys of the purpose of the payment in a letter deemed to be received on 6 January 2008. If the summary dismissal was effective in ending Mr Geys's employment, his ultimate termination payment would be around €5.5 million less than if he was dismissed on 6 January 2008. The members of the court (with Lord Sumption dissenting) held that Mr Geys had been dismissed on 6 January 2008, confirming his entitlement to the higher termination payment and allowing the appeal.

In reaching its determination, the Supreme Court was asked to address four questions: (1) whether repudiation of a contract of employment by an express and immediate dismissal automatically terminates the contract or whether the repudiation must be accepted by the other party before the contract is terminated ("the repudiation issue"); (2) when Mr Geys's contract of employment was terminated ("the termination issue"); (3) whether there was any conflict between a contractual term allowing termination on three months' notice and an employee handbook provision allowing for immediate termination with PILON (the majority of the court found there was not); and (4) whether Mr Geys was entitled to maintain a claim for damages and breach of contract despite a contractual requirement for him to enter into a "termination agreement" waiving those rights (the majority found he was).

In relation to point (1), the court was effectively asked to choose between the "automatic" and "elective" theories of contractual repudiation in relation to contracts of employment. According to the automatic theory, repudiation of a contract results in its automatic termination. In contrast, the elective theory states that repudiation will only terminate a contract if the other party elects to accept the repudiation. Lord Wilson (with whom the majority of the court agreed) declined to turn "basic principles of the law of contract upon their head" by adopting the automatic theory in the context of the employment relationship (at [66]), instead preferring the elective theory.

As a consequence, a contract of employment may only be terminated once the other party elects to accept the repudiation.

The repudiation issue was clearly the most contentious for the court, and it was on this point that Lord Sumption dissented. As Lord Carnwath noted, Lords Sumption and Wilson used the same judicial precedents to create "equally powerful", yet diametrically opposed, historical analyses of the law (at [99]). According to Lord Wilson, the elective theory was more successful at justifying and explaining

previous judicial decisions and was most consistent with established contractual and employment law principles. In contrast, Lord Sumption viewed the automatic theory as a settled rule based on "the weight of [judicial] authority" (at [139]). In Lord Hope's more balanced view, "[the] fact has to be faced that there is still a degree of oscillation between the two theories", meaning the court ultimately had to make a decision based on which theory was more "desirable" (at [17]).

However, Lords Wilson and Sumption were similarly divided on the relative merits of the two theories. Lord Wilson held that the overall effect of the automatic theory was to "reward the wrongful repudiator … with a date of termination which he [sic] has chosen", in all likelihood disadvantaging the other, innocent party (at [66]). In contrast, Lord Sumption identified a number of practical issues facing the elective theory, including the notion that an employment contract which endures without an obligation to work or pay salary, being "dead for all practical purposes", could "[limp] on as a formal 'shell' or husk'" for an undefined period (at [110]), raising issues as to when a subsisting contract would actually be terminated. However, assuming employment contracts (like other contracts) cannot endure where a party has "no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages" (*White and Carter (Councils) Ltd. v McGregor* [1962] A.C. 413, 431 *per* Lord Reid), the elective theory will only allow employment contracts to subsist where there is some meaningful contractual term to be enforced. As a result, Lord Sumption's concerns are likely to be of minimal import in practice.

Lords Wilson and Sumption also displayed fundamentally different understandings of the law of repudiation. Unlike the majority, Lord Sumption gave weight to a general contractual rule that an innocent party could not treat a repudiated contract as subsisting unless (i) they could perform their contractual obligations without the cooperation of the other party; or (ii) they could compel the cooperation of the other party by specific performance. Given that employment contracts are generally not capable of specific performance, it is not possible for a party to treat a repudiated employment contract as subsisting if (like most employment relationships) the performance of their obligations requires the other party's cooperation. As a result, for Lord Sumption it would be meaningless to require that the other party accept the repudiation of an employment contract before the contract is terminated. Lord Wilson described this reasoning as a "jump from the absence of some remedies to the absence of all rights, heedless in particular of contractual rights other than to payment of wages or salary" (at [89]). It is arguable that Lord Sumption's reasoning fails to give sufficient weight to the contractual nature of the employment relationship, which

"remains at the core" of modern labour law, instead conceiving employment in status terms (see Deakin and Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (2005), at p. 108).

Despite the strong disagreement between Lords Wilson and Sumption, the majority of the Supreme Court have now clearly endorsed the elective theory as that which is to be preferred in employment contracts, including in cases of outright wrongful dismissal. However, it appears that the Supreme Court has not adopted a "genuine form of the elective theory", as there is no indication that the decision will make it any easier to obtain an equitable remedy (such as an injunction) to keep a repudiated employment contract on foot (see Cabrelli and Zahn (2012) 41 I.L.J. 346, at p. 356).

In relation to (2), the termination issue, Lady Hale (with whom the majority of the court agreed) held that a term should be implied as a necessary incident of the employment relationship that the parties would notify each other in "clear and unambiguous terms" when a right to terminate the contract was exercised, and that the party exercising the right would specify how and when the right was intended to operate (at [57]). While a "wise employer" would provide such notice in writing, it was not strictly necessary to do so unless provided for by the contract itself (at [60]). As a result, the conduct of the Bank was "not good enough", as it failed to provide clear notice to Mr Geys that it was exercising its right to terminate under the PILON provision until 6 January 2008 (at [59]).

It is interesting to note how readily the majority created a new implied term in employment contracts in response to the termination issue. While an implied notice requirement is unlikely to have significant practical repercussions for the majority of employers and is not particularly revolutionary (as Lady Hale notes, her formulation reflects "general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts" (at ([57])), the ready use of implied terms to achieve instrumental ends is an interesting prospect for the future development of employment law.

This case is, to some extent, symptomatic of our times: a wealthy banker seeking legal recompense from a (then) struggling bank. In his judgment, Lord Sumption displays minimal sympathy for Mr Geys, describing him somewhat sardonically as a "lucky man" (at [108]) who was in line to receive "a windfall amounting to several million euros" as a result of the court's decision and the Bank's failure to follow proper termination processes (at [110]). However, the court's decision could equally benefit other employees, with potential significance for the amount of an employee's final pension, entitlement to holiday pay

and/or a salary increase (at [64]). As with all areas of employment law, it remains to be seen whether less wealthy employees are able to take advantage of these legal developments.

ALYSIA BLACKHAM

LEADING BY EXAMPLE: PRIVATE COMPETITION ENFORCEMENT BY THE EUROPEAN COMMISSION

THE right of private parties to claim damages for losses suffered due to breaches of European Union (EU) competition law has been well established since *Courage and Crehan* (Case C-453/99, [2001] E.C.R. I-6297). Article 16(1) of Regulation 1/2003 (OJ L 1, 4.1.2003, p. 1) further facilitates private enforcement by rendering infringement decisions taken by the European Commission binding on national courts, thus assisting follow-on actions. Although the Commission itself has spent the past decade attempting to encourage a culture of private enforcement, a harmonised EU-wide regime remains elusive. Levels of private enforcement lag far behind those of the United States, while, across the EU, national procedures remain disparate and often highly unfavourable to private litigants.

With the domestic proceedings that underpin the preliminary ruling of the Grand Chamber of the Court of Justice in *Europese Gemeenschap v Otis NV and others* (C-199/11, Judgment of 6 November 2012, not yet reported), the Commission hit upon a novel mechanism to advance private damages actions in Europe: namely, leading by example. The *Otis* judgment stems from Commission Decision C(2007) 512 of 21 February 2007 in *Elevators and Escalators* (Case COMP/E-1/38.823), which determined that four European manufacturers of elevators and escalators participated in a secret cartel, contrary to what is now Article 101(1) TFEU. Fines totalling over €990 million were imposed on the undertakings concerned. These fines, although high in absolute terms, are increasingly commonplace in EU competition law enforcement. More unusually, the EU was also an alleged victim of the cartel, because cartelised escalator and elevator products are installed in numerous EU institution buildings. Accordingly, the Commission brought follow-on proceedings in Belgium, to recover €7 million in damages on behalf of the EU. In so doing, the Commission sought to rely upon its own infringement decision as binding proof of breach of Article 101(1) TFEU.

At this juncture, a familiar objection to public competition enforcement in the EU came into focus. Enforcement proceedings are administrative in nature: the Commission acts as investigator,