Internationaal Bussum B.V. v Inter-Footwear Ltd. [1984] 1 W.L.R. 776, 794. Both cases were decided correctly on traditional principles: in neither case did the parties *predominantly* intend the termination right merely to secure performance and in neither was the claimant a victim of fraud, accident, mistake or surprise. But the anxiety in each case over equity's reach was misplaced. Trial judges should be trusted to appreciate the forensic difficulty a claimant faces in seeking relief from forfeiture, and the difference between what parties intended and what they might have *predominantly* intended. The Diplock-Templeman dicta have become a distraction.

It is hoped that the appeal to the Supreme Court in *Vauxhall Motors* will walk conventional lines.

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CAKES IN THE SUPREME COURT

MR. and Mrs. McArthur have run Ashers Baking Company Ltd. ("Ashers") since 1992. They are orthodox Christians. Mr. Lee ordered a cake from Ashers for a QueerSpace event. The cake was to be iced with a picture of children's TV characters Bert and Ernie, the QueerSpace logo, and the words "Support Gay Marriage". The order was accepted, but over the weekend, the McArthurs decided that they could not in conscience produce a cake with that message. Consequently, Mrs. McArthur telephoned Mr. Lee and explained that they could not produce the cake. She apologised and gave a full refund. Mr. Lee claimed that he had been discriminated against on grounds of sexual orientation, religious belief and/or political opinion.

At first instance, his claims were upheld. The Court of Appeal upheld his claim of associative direct discrimination on grounds of sexual orientation but did not have to decide the questions arising under political and religious discrimination. So the Supreme Court came to consider cake, with Baroness Hale giving the leading judgment: *Lee v Ashers Baking Company Ltd. and Others* [2018] UKSC 49. She left important questions about references, made by the Attorney General for Northern Ireland, to Lord Mance to give the lead judgment. In the same fashion, these matters are not addressed in this note.

At first instance, the judge found that Ashers had not cancelled the order because of Mr. Lee's actual or perceived sexual orientation but because of the message that he wanted to be iced on to the cake. Ashers would have supplied the cake to him without that message, and they would have refused to supply the cake with that message to a heterosexual customer: "the

objection was to the message, not the messenger" (at [22]). At first instance, the judge considered that the message that was to be iced on to the cake was "indissociable" from the protected characteristic. The Supreme Court disagreed. Baroness Hale emphasised that this was "to misunderstand the role that "indissociability" plays in direct discrimination. It comes into play when the express or overt criterion used as the reason for less favourable treatment is not the protected characteristic itself but some proxy for it" (at [25]). Here, however, the message was not a proxy for sexual orientation because people of all sexual orientations can and do support gay marriage. Thus the claim of direct discrimination because of sexual orientation failed.

This is an important strand within the judgment because it recognises that non-discrimination provisions exist to protect people rather than ideas. Consequently, it seeks to tread a careful line between protecting people from discrimination, while emphasising the fundamental importance of freedom of conscience and of speech. The Supreme Court also restricts the use of such distinction where the criterion for "discrimination" is an express proxy for a protected characteristic. It prevents people trying to have their cake and eat it.

However, did the McArthurs refuse to make the cake because of its "association with the gay and bisexual community and the protected personal characteristic [being] the sexual orientation of that community", as the Court of Appeal upheld (at [58])? No, said Baroness Hale. There was simply no evidence on the facts that the refusal was because Mr. Lee was thought to associate with gay people, nor was there any evidence of the McArthurs discriminating against others on that ground in the past. There could not be any associative discrimination where the reason for the less favourable treatment was said to be "something to do with the sexual orientation of some people …. There must be a closer connection than that" (at [33]). Subsequently, Baroness Hale appeared to suggest that associative discrimination applies only where there is a particular person or persons to whom the discriminator objects. Moreover, she said, the benefit from the slogan on the cake would not only accrue to gay or bisexual people, it could accrue to the families and friends of gay people, and the much wider community who recognise the social benefits of the commitment brought by marriage.

The difficult element in this part of the judgment is the scope of associative discrimination and whether it will apply only where there is a particular person or persons to whom the discriminator objects, rather than a general group of people with a particular protected characteristic. Because this was a case concerning goods and services discrimination, there was no need for the Supreme Court to grapple with the EU jurisprudence on Directive 2000/78 or the detail in Case C-303/06, *Coleman v Attridge Law*, ECLI:EU:C:2008:415, which apply to employment discrimination claims, in any depth. This is likely to be where future challenges lie.

The CJEU in *Coleman* held that the less favourable treatment by an employer of a woman because she had a disabled child, did constitute direct disability discrimination. There was no requirement that her less favourable treatment related to her own disability. It sufficed that it was because of the disability of her child. The issue that continues to rumble is the scope of associative discrimination. It could be argued that as soon as any element of another person's protected characteristic comes into play, then that is sufficient to ground an associative discrimination claim. This could be achieved by reliance on paragraph [38] of the *Coleman* judgment: "the purpose of the directive, as regards employment and occupation, is to combat all forms of discrimination on grounds of disability. The principle of equal treatment enshrined in the directive in that area applies not to a particular category of person but by reference to the grounds mentioned in Article 1."

This could be read together with paragraph [18] of the Advocate General's opinion:

> the Directive performs an exclusionary function: it excludes religious belief, age, disability and sexual orientation from the range of permissible reasons an employer may legitimately rely upon in order to treat one employee less favourably than another. In other words, after the coming into force of the Directive it is no longer permissible for these considerations to figure in the employer's reasoning when she decides to treat an employee less favourably.

Thus, it could be said that in the employment context, a different outcome would be required because the directive is exclusionary of any reason for treatment based on a protected characteristic. However following *Ashers*, and I would argue on a proper reading of *Coleman* as a whole, the question to ask is what the reason for the conduct was. Where the reason was because of someone else's protected characteristic then it will constitute associative discrimination; if a protected characteristic merely forms the backdrop to the case, then it will not. Once again, this strikes a sensible balance in the scope of protection, requiring a close causal nexus between the treatment and the protected characteristic. Any greater scope would do "no favours" to the "project of equal treatment" (at [35]).

Support for gay marriage was self-evidently a political opinion. However, the Supreme Court rejected the claims of direct discrimination because of religious belief or political opinion because the treatment was meted out due to the McArthurs' beliefs, not because of Mr. Lee's beliefs. To do otherwise conflated motive with the grounds for the treatment.

The difficulty with this part of the Judgment is the very limited reasoning. It is unclear why this was not direct discrimination because of Mr. Lee's *lack* of belief. Moreover, were this situation to arise in the employment context, it raises questions as to the role of Genuine Occupational Requirements ("GOR"): if a discriminator can rely on their own religious belief as the

reason why they have discriminated, it becomes unclear why they would need to rely on a GOR to justify such discrimination.

The Supreme Court went on to find that the criteria of "indissociability" may be met in this context because the message may be a proxy for Mr. Lee's sexual orientation. However, upon consideration of Articles 9 and 10 of the ECHR, Baroness Hale considered that the legislation should not be construed so as to require providers of goods and services "to express a message with which they disagree" unless that could be justified (at [56]). Here there was no justification.

This is a very vexed area, but broadly the judgment represents a careful balancing exercise between protection from discrimination and the rights of religious people not to be compelled to act against their conscience.

The decision of the Supreme Court constitutes a vital affirmation of the fundamental importance of freedom of conscience and of speech. While many would disagree with the stance of the McArthurs, the judgment represents an important waymark in the equality project, achieving a difficult balance between protecting minority groups from discrimination and ensuring religious freedom. This balance is essential if we are to live in a truly plural and diverse society.

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CITIZENSHIP AND INCREMENTAL CONVERGENCE WITH FUNDAMENTAL RIGHTS?

AN EU citizen's lawful marriage must be recognised in all Member States and EU rights granted, even in Member States that do not allow same-sex marriage. The Court of Justice of the EU held in *Coman and Others v Inspectoratul General pentru Imigrări* and *Ministerul Afacerilor Interne*, Case C-673/16, ECLI:EU:C:2018:385, that the term "spouse" in Article 2(2)(a) of Directive 2004/38 on the rights of citizens of the Union and their family members to move freely and reside within the territory of the Member States includes spouses in same-sex marriages.

Adrian Coman, a Romanian citizen established in Belgium, married Robert Claibourne Hamilton, a US Citizen, in 2010 in Brussels. In 2012 the couple decided to move to Romania. Mr. Hamilton was refused a long-term residence permit by Romania, however, because the Romanian Civil Code does not recognise same-sex marriage. The challenge of this decision led to a reference to the CJEU under Article 267 TFEU from the Romanian Constitutional Court, its first ever. This was predominantly concerned with the protection afforded by Articles 7, 9, 21 and 45 of the Charter of