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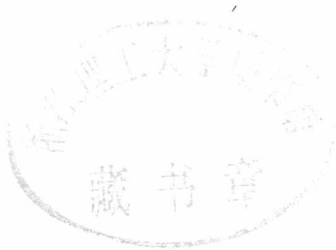
THE  
ALL ENGLAND  
LAW REPORTS  
2008

European Cases

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*Editor*

KAREN WIDDICOMBE, Solicitor



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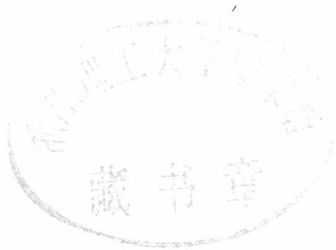
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### **Halsbury's Laws of England**

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

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- Freedom of movement – Concept of 'normal residence' – Member of armed forces posted temporarily to another member state for official task of definite duration – Tax exemptions applicable to permanent importation of personal property from another member state where normal residence transferred to that member state – Excise duties and registration tax imposed on importation of private vehicle from other member state – Whether 'normal residence' transferred to other member state for duration of task

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- Freedom of movement – Frontier workers – German national residing in Austria with family but working in Germany – Social and tax advantages in Germany for migrant workers – Whether worker being entitled to claim status as migrant worker

**Hartmann v Freistaat Bayern (Case C-212/05) ..... ECJ 1166**

- Freedom of movement – Provision of child-raising allowance subject to conditions of residency and hours worked – National residing in the Netherlands undertaking minor employment in Germany – Refusal of German child-raising allowance on grounds of not having permanent or ordinary residence in Germany – Whether residence criteria compatible with Community law – Whether refusal justifiable on grounds of minor employment and lack of connection with German society

**Geven v Land Nordrhein-Westfalen (Case C-213/05) ..... ECJ 1196**

- Freedom of movement – Right of residence for child who is a third country national – Child residing with Community worker in member state of employment – Community national returning to member state where he is national – Child being refused residence permit – Whether obligation for worker's member state of origin to grant right of residence to family member who is a third country national – Whether such obligation where worker does not carry on any effective and genuine activities

**Minister voor Vreemdelingenzaken en Integratie v Eind (Case C-291/05) ..... ECJ 371**

- Freedom of movement – Rights of dependants – Non-working Austrian wife living with German husband in Austria – Husband migrant worker working in Germany – Wife being refused German child-raising allowance as not residing in that member state – Whether national legislation discriminating against non-working spouse of migrant worker

**Hartmann v Freistaat Bayern (Case C-212/05) ..... ECJ 1166**

- Freedom of movement – Social security – Incapacity benefit to disabled young people – Provision of benefit subject to condition that person receiving benefit resident in member state paying allowance – Dutch national taking up residency in Belgium – Whether special non-contributory benefit with result that benefit could not be paid to person residing outside member state

**Hendrix v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen (Case C-287/05) ..... ECJ 286**

*a*      **Akzo Nobel Chemicals Ltd and  
another (supported by the Council of  
the Bars and Law Societies of the  
*b*      European Union (CCBE) and others,  
intervening) v European Commission**  
(Joined cases T-125/03 and T-253/03)

*c*      COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (FIRST CHAMBER,  
EXTENDED COMPOSITION)  
JUDGES COOKE (PRESIDENT), GARCÍA-VALDECASAS, LABUCKA, PREK AND CIUCA  
*d*      28 JUNE, 17 SEPTEMBER 2007

*e*      *European Community – Restrictive trade practices – Investigation of undertakings –  
Investigation into anti-competitive practices – Documents being seized – Documents  
containing communications between lawyer and client – Legal professional privilege  
being claimed in respect of documents – Communications between in-house lawyer and  
its employer – Difference in treatment between internal and external lawyers –  
Whether legal professional privilege protecting communications between in-house  
lawyers and internal clients.*

*f*      The Commission of the European Communities adopted a decision whereby  
they ordered the applicants to submit to an investigation that sought evidence  
of any anti-competitive practices. That investigation was carried out by  
Commission officials on the basis of the decision that ordered the investigation  
at the applicants' premises. During the investigation the Commission officials  
took copies of a considerable number of documents. In the course of those  
*g*      operations, the applicants' representatives informed the Commission officials  
that certain documents were likely to be covered by the protection of  
confidentiality of communications between lawyers and their clients, legal  
professional privilege (LPP). The leader of the investigating team briefly  
examined the documents in question, with a representative at their side.  
During the examination of the documents in question, a dispute arose in  
*h*      relation to five documents. Some of the documents were exchanges between  
the general manager of one of the applicants and one of its co-ordinators for  
competition law, who was enrolled as an Advocaat of the Netherlands Bar and  
was a member of the applicants' legal department, employed by that  
undertaking on a permanent basis. The applicants claimed that those  
documents were covered by LPP because the lawyer involved was a member of  
*i*      the Bar even though he was a salaried employee of the company. After  
obtaining the applicants' observations concerning the first two documents, the  
Commission officials were not in a position to reach an immediate final  
conclusion as to whether the documents should be privileged. They therefore  
took copies of them, and placed them in a sealed envelope which they took  
away on completion of the investigation. The applicants identified those two

documents as 'Set A'. After examining the last three documents and obtaining the applicants' observations, the head of the investigating team took the view that they were definitely not privileged. Consequently, the investigator took copies of them and placed the copies with the rest of the file, without isolating them in a sealed envelope. The applicants identified the three documents as 'Set B'. The applicants sent the Commission a letter setting out the reasons why, in their view, the documents in Set A and Set B were protected by LPP. The Commission informed the applicants that their arguments were insufficient to show that the documents in question were covered by LPP. The applicants brought an action seeking, *inter alia*, the annulment of the Commission's decision that ordered the applicants to submit to an investigation; and the return of the disputed documents. The Commission rejected the applicants' request for the return of the documents, and gave notice of its intention to open the sealed envelope containing the documents of Set A. The applicants brought an action for the annulment of that rejection. The Court of First Instance of the European Communities decided to open the oral procedure where all parties presented oral arguments and answers to oral questions put by the Court of First Instance. The applicants claimed, *inter alia*, that the court should annul the rejection decision and return the disputed documents and not use their content in any way. Moreover, the applicants alleged, *inter alia*: (i) that the procedures relating to the application of LPP had been infringed; and (ii) that LPP had been unjustifiably refused in relation to the five documents in question.

**Held** – The argument concerning the extension of the personal scope of protection of LPP between lawyers and their clients to include in-house counsel was rejected. The court refused to go beyond the limits that had already been laid down in previous case law which expressly held that the protection accorded to LPP only applied to the extent that the lawyer was independent, *ie* not bound to his client by a relationship of employment and expressly excluded communications with in-house lawyers. The requirement as to the position and status as an independent lawyer, which must be met by the legal adviser from whom the written communications which might be protected emanate, was based on a concept of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs, a third party in relation to the undertaking that received the advice. The court pointed out that an examination of the laws of the member states showed that, even though it was the case that specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under LPP was relatively more common today than when the judgment in earlier cases were handed down, it was not possible to identify tendencies which were uniform or had clear majority support in that regard in the laws of the member states. A comparative examination of laws showed that a large number of member states still excluded in-house lawyers from protection under LPP. In addition, in certain member states, the issue seemed not to have been decided unequivocally or definitively. Furthermore, a considerable number of member states did not allow in-house lawyers to be admitted to the Bar or Law Society and, accordingly, did not recognise them as lawyers established in private practice. Moreover, even in countries which did permit that possibility, the fact

- a* that in-house lawyers were admitted to a Bar or Law Society and were subject to professional ethical rules did not always mean that communications with such persons were protected under LPP. The evolution of competition law since those earlier judgments did not justify an alteration of that case law, it was not contrary to the principle of equal treatment or the free movement of services. Furthermore, it was held that the Commission had infringed the
- b* procedure for protection under LPP by having forced the applicants to allow a cursory look at the documents in Set A and the manuscript notes in Set B and by reading the documents in Set B without having given the applicants the opportunity to have contested the rejection of their claim to protection in respect of those documents before the court. The undertaking concerned was
- c* not bound to reveal the contents of the documents when presenting the Commission officials with relevant material of such a nature as to demonstrate that the documents fulfil the conditions for being granted LPP. Accordingly, an undertaking subject to an investigation was entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claimed to be covered by LPP, provided that the
- d* undertaking considered that such a cursory look was impossible without revealing the content of those documents and that it gave the Commission officials appropriate reasons for its view. Where the Commission considered that the material presented by the undertaking was not of such a nature as to prove that the documents in question were confidential, the Commission officials may place a copy of the document or documents in question in a
- e* sealed envelope and then remove it. That procedure enabled risks of a breach of legal professional privilege to be avoided while at the same time it enabled the Commission to retain a certain control over the documents forming the subject matter of the investigation and avoiding the risk that the documents would subsequently disappear or be manipulated. Furthermore, where the
- f* Commission was not satisfied with the material and explanations provided by representatives of the undertaking for the purposes of proving that the documents concerned were covered by LPP, the Commission should not read the contents of the documents before it had adopted a decision that allowed the undertaking to refer the matter to the Court of First Instance or to make an application for interim relief. Having regard to the particular nature of the
- g* principle of LPP, the purpose of which was both to guarantee the full exercise of individuals' rights of defence and to safeguard the requirement that any person must be able, without constraint, to consult his lawyer, the court considered that the fact that the Commission read the content of a confidential document was in itself a breach of this principle. The protection of LPP went beyond the requirement that information provided by an undertaking to its
- h* lawyer or the content of the advice given by that lawyer could not be used against it in a decision which penalised a breach of the competition rules (see paras 82, 83, 85, 86, 95, 101, 166, 167, 170, 171, 177, below); *AM & S Europe Ltd v EC Commission* Case 155/79 [1983] 1 All ER 705 applied.

*i* **Notes**

For legal privilege, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) para 380.

**Cases cited**

*AKZO Chemie BV v EC Commission* Case 53/85 [1986] ECR 1965, ECJ.