POLSKI UNIWERSYTET NA OBCZYŹNIE
W LONDYNIE

ZESZYTY NAUKOWE

SERIA TRZECIA, NR 7, 2019

PAUL LASOK

THREE COINS IN A FOUNTAIN

INTRODUCTION

„Three Coins in a Fountain" is the title of a romantic Hollywood film released in 1954. The title song was memorably performed by Frank Sinatra. The title of the film refers to the practice of throwing a coin into the Trevi fountain in Rome and making a wish (I should note here that, traditionally, people drank the water of the Trevi fountain in order to ensure that they would return one day to Rome; it is sometimes said that a coin is to be thrown into the fountain to the same end). In the film, there are three coins, representing three romantic stories.

My three coins are three legal aspects of the break-up of the current relationship that the UK has with the European Union, a relationship that has had, perhaps, little of the romantic about it but which, for some of us, will be remembered fondly. My intention is to limit my remarks to matters of law; but I hope that I will be forgiven if, on occasion, I stray into making an observation of a non-legal nature.

THE FIRST COIN – ARTICLE 50

Article 50 of the Treaty on the European Union states clearly that a Member State of the EU may decide to withdraw from the EU; and it outlines the procedure for doing so. The procedure starts with a decision to withdraw from

membership of the EU which the seceding State makes in accordance with its own constitutional requirements. After that decision has been notified to the European Council, there is then the negotiation of an agreement setting out the arrangements for the withdrawal of the seceding State from the EU. The EU is obliged to negotiate and conclude that agreement „taking account of the framework for [the seceding State's] future relationship with the EU".

The seceding State effectively ceases to be a Member State as from the entry into force of the withdrawal agreement or, failing that, two years after the decision to withdraw from the EU was notified to the European Council. However, the European Council and the seceding State can agree to an extension of „this period", a phrase that seems to refer only to the two-year period.

It is important to note that, under Article 50, what is to be negotiated immediately after the seceding State has served notice of its decision to withdraw from the EU is an agreement *setting out the arrangements for its withdrawal*. That is an agreement dealing with the untangling of the links between the seceding State and the EU resulting from membership of the EU (other links may exist between the seceding State and the remaining Member States that are independent of membership of the EU, such as those resulting from membership of NATO). It is not an agreement about the future relationship between the seceding State and the EU, after the former's membership of the EU has come to an end. An agreement dealing with that future relationship would be negotiated, if need be, after the Article 50 process had come to an end, with the seceding State negotiating with the EU in the same way as any other country that is not a member of the EU.

Under the Article 50 process, the future relationship between the seceding State and the EU enters the picture in a formal sense only because Article 50 provides that the withdrawal agreement will be negotiated and concluded *taking account of the framework* of that future relationship. The reference to a „framework" is significant: it refers to the broad outlines of that future relationship; and the „framework" is relevant only to the extent that it impinges on the withdrawal agreement. By way of example, if it is common ground that, after leaving the EU, the seceding State will remain in a customs union with the EU, that can be relevant to the withdrawal agreement because any sums of money to be paid to the EU by the seceding State could be paid off over time by the seceding State remitting to the EU the customs duties that it collects (a customs union is simply an arrangement between the states who are parties to the union to apply the same customs rules, and a uniform tariff, to their ex-

ternal trade; it does not mean that the tariffs collected by one of the parties belong to someone else).

Accordingly, once the UK had notified the EU of its intention to withdraw from the EU, the UK negotiators were faced with the task of doing nothing more than sorting out the arrangements for the withdrawal of the UK from the EU, against the backdrop of a general idea of the future relationship that the UK and the EU wish to have with each other, to the extent that that relationship is relevant to the withdrawal arrangements.

That task, while it has its difficulties, is in principle relatively simple. The starting point is the rather obvious proposition that withdrawal from the EU means just that: Brexit means Brexit. Of course, Article 50 does not preclude any discussion between the seceding State and the EU about their future relationship going beyond a working out of the „framework" of the relationship; but any such discussions are not formally part of the withdrawal process.

Anyone who has been listening attentively to what the UK Government and leading politicians have been saying over the last two years would not have realised that the Article 50 process is as I have described it. Instead of pursuing the Article 50 procedure, the UK has effectively combined the negotiation of the withdrawal agreement with attempts at detailed discussions on the post-withdrawal relationship between the UK and the EU. It might be thought that that indicates that the UK does not understand the legal nature of the process in which it is currently engaged. However, the confusion between the withdrawal agreement and the post-withdrawal relationship actually reflects the tenor of the debate before the EU referendum. Prominent figures in the Brexit campaign were not proposing to the British people what has come to be known as a „hard" Brexit but a reorganisation of the relationship between the UK and the EU under which the UK would dispense with all the aspects of membership of the EU that were regarded as objectionable, while retaining at the same time all the benefits of membership. The British people were told by such luminaries as David Davis, later the Government minister in charge of the Brexit negotiations, that the EU would fall over itself to make with the UK an agreement that met all the UK's demands.

Unfortunately, that did not happen. To make matters worse, once the UK Government had actually begun to think about the consequences of Brexit, it discovered that certain consequences, such as the ending of the UK's involvement in the EU's arrangements for cooperation on police and security matters, were very unpalatable.

It seems to have become apparent to the UK Government that it is essential to maintain legal continuity between the current position – the UK's membership of the EU – and what is to follow after Brexit, which is not to be a so-called „hard" Brexit. Behind that lies a realisation that Brexit is not a good idea unless effective arrangements are put in place in order to minimise as much as possible the consequences of withdrawal from the EU (which are adverse).

That state of affairs has produced two consequences. First, it has given rise to considerable confusion and misunderstandings. For example, the EU has been accused of „bullying" the UK and of trying to keep the UK a prisoner within the EU, statements that reflect in part a misunderstanding about how the legal mechanism in Article 50 works and in part frustration that the EU is not behaving as those who support Brexit insist that it should behave. Secondly, that state of affairs places considerable strain on the mechanism in Article 50, which proceeds on the basis that a Member State which decides to withdraw from the EU actually knows what it is doing.

It is also important to note that whatever emerges from the Article 50 process will be a withdrawal agreement and a high-level understanding between the EU and the UK about the framework of their future relationship. The working out of that relationship will be negotiated on another occasion; and that means that it could differ in material respects from interpretations that may be placed on the high-level understanding of the relationship reached in the context of the withdrawal agreement.

Since the date on which this paper was presented to the PUNO conference on 13th October 2018, the remarks set out above were confirmed: the UK succeeded in agreeing with the EU a Withdrawal Agreement setting out in detail provisions for untangling the UK's relationship with the EU; and a Political Declaration was published, setting out the general form of the post-Brexit relationship. The Withdrawal Agreement proved to be highly controversial because of what is occasionally known as the „Northern Ireland Backstop", which reflects the need for the UK to secede from the EU without at the same time breaching its commitments under what is often known as the „Good Friday Agreement", which is a package of measures that includes an international agreement made between the UK and Ireland.

THE SECOND COIN – CAN THE UK REVERSE ITS POSITION?

In my view, there is no real doubt about the fact that the UK can unilaterally change its mind about leaving the EU and withdraw the notification that it gave under Article 50. The more difficult question concerns the precise point in time at which the UK *ceases* to be able to do so.

In principle, there appear to be four points in time at which a Member State leaving the EU ceases to be able to withdraw its Article 50 notification unilaterally: the date on which the withdrawal agreement is made; the date on which it is ratified; the date on which it comes into effect; and two years after the date of the Article 50 notification (unless that period has been extended pursuant to Article 50 (3) of the Treaty on European Union). The two year period is relevant in the event that there is no withdrawal agreement.

In my view, if the seceding State changed its mind after either of the last two dates, it could return to the EU only if it applied, as a non-Member State, for membership of the EU because, by those dates, the seceding State will have withdrawn from the EU (cf. Article 50 (3) and (5) of the Treaty on European Union).

So far as the first two dates are concerned (the date on which a withdrawal agreement is made and the date on which it is ratified), there are arguments for and against accepting them as dates after which the seceding State's ability to reverse its position unilaterally comes to an end. My own view, for what it is worth, is that neither date has that effect and that the seceding State can change its mind about leaving the EU and withdraw unilaterally its Article 50 notification at any time while it is still a Member State of the EU.

I should emphasise that I am here talking about a unilateral withdrawal of the Article 50 notification while the Member State concerned is still, formally, a Member State of the EU. It is in principle possible for the seceding State to reverse back into membership of the EU, after it has ceased to be a Member State, with the consent of the EU.

After 13th October 2018, the views set out above were endorsed by the Court of Justice of the EU in its judgment in Case C-621/18 „Wightman and others versus Secretary of State for Exiting the EU", 10 December 2018. The Court held that a seceding Member State may unilaterally withdraw its notice of its intention to leave the EU at any time before the Article 50 withdrawal agreement comes into force or, in the absence of such an agreement, any time before the expiry of the two year period provided for in Article 50 (as extended, if that is the case).

THE THIRD COIN – REFERENDUMS AND FAKE NEWS

There is currently talk of a second referendum – or People's Vote – about membership of the EU (in reality it would be the third on that subject, the first being in the 1970s). There is, of course, no legal impediment to the holding of another referendum. Indeed, from the perspective of legal policy, that might well be regarded as entirely appropriate. For example, in the case of certain complicated consumer transactions, the law requires there to be a cooling-off period so that the consumer can consider the merits of the transaction and, perhaps, decide after a period of reflection not to proceed with it. Brexit is clearly a complicated transaction; and it is significant that what Brexit would actually involve was not known at the time of the 2016 referendum. Hence, one would have supposed that sensible people would consider a second referendum allowing a choice between the Brexit deal (even if known only in terms of its framework – which in any event will not resemble what people were told before the referendum) and abandoning the Brexit idea was both fair and reasonable.

However, the possibility of a second referendum raises another current issue: the distorting of the democratic process caused by what is often called, now, „fake news" but which is more conventionally known as lying and deception.

Although lawyers have, popularly, a rather mixed reputation, one thing that lawyers and judges are very clear about is the distinction between honesty and dishonesty. A legal act can normally be revoked where it has been obtained by fraud or deception. Hence, if a lawyer is presented with a situation in which a person's decision has been influenced by fraud or deception, his instinctive reaction is to say that the decision cannot be regarded as valid and binding because the decision cannot be assumed to be one that that person would have made in the absence of the dishonest statement or information. As a matter of common sense, if a person goes to the lengths of lying to you, instead of telling you the truth, that tells you that he does not believe that he can persuade you by the merits of his case.

The importance of honesty in the decision-making process is carried over into the UK's electoral system by the Representation of the People Act 1983, which provides in section 106 that the making or publishing of a false statement in relation to the personal character or conduct of a candidate for election is an illegal practice. Such an illegal practice is a criminal offence and carries with it

certain consequences for the offender. Under section 164, the election result can be set aside if it may be reasonably supposed that the illegal practice affected the result of the election. It is interesting to note that the prohibition on making false statements is limited to false statements about a candidate for election. It does not extend to false statements about other matters. The likely explanation is that the prohibition reflects a traditional view of an election as an occasion on which people choose between different *individual* candidates, not parties; and therefore the primary factors influencing that choice are the personal characteristics of the candidates.

In the context of a referendum, of course, voters elect a proposition, not a candidate. Had the principle set out in the Representation of the People Act – which is that you don't lie about what the people are being asked to vote on – been carried across to referendums, it is not difficult to see that the result of the 2016 EU referendum would probably have been set aside.

However, for reasons which remain obscure, the Parliament has not included in the legislation dealing with referendums all the normal protections of the democratic process that apply to the election of a candidate for public office. In the case of the EU referendum, we know from the debates in the House of Commons that certain safeguards were not thought necessary because the EU referendum was not intended to be binding. It was just consultative. Accordingly, in strictly legal terms, the EU referendum has no legal effect. However, it certainly has a political effect; and one would have supposed that, when the Parliament considered what account to take of the result in the EU referendum, the Parliament would have looked at the narrowness of the majority in favour of Brexit and at the shenanigans that went on during the referendum campaign before coming to a common sense conclusion as to the reliability of the result. Regrettably, that was not done.

As is well known, the 2016 referendum was characterised by the repeated making of false and misleading statements designed to persuade voters to vote for Brexit; and, after the referendum, some of those engaged in the campaign for Brexit were reported as saying that the referendum result endorsed the effectiveness of that type of campaigning and that it should be used in other political campaigns. And then we had the contest between Hillary Clinton and Donald Trump.

The experience of the EU referendum has led to the drawing up of proposals for reforming UK legislation so as to turn the making of false statements about

the subject-matter of a referendum into an illegal practice. The Minister for Constitutional Affairs before the last general election rejected those proposals on the curious ground that they had not been raised before the EU referendum. It is like saying that, if you have made a mistake once, you must be condemned to repeat it for ever.

More recently, in July 2018, the House of Commons Digital, Culture, Media and Sport Committee published an Interim Report focusing on the „fake news" issue and, more particularly, on the influence of electronic communications and social media on political campaigns. The Interim Report sets out very general recommendations but contains no specific proposals for reforming the law so as to prohibit lying in the course of a political campaign.

The University College London Constitution Unit formed an Independent Commission on Referendums to consider the role of referendums; and that Commission published a report in 2018 which touched on the question of lying in the course of a referendum campaign. The Commission's observations on that question are not particularly satisfactory because it concluded, with an insufficiency of reasoning, that there should be no prohibition of lying but that members of the public who are interested in following up on the factual issues raised by the referendum in question should not be impeded in doing so. At a meeting on 15 September 2018, Dr. Renwick, the Deputy Director of the UCL Constitution Unit put forward three reasons in support of the Independent Commission's conclusion.

The first reason was that a prohibition on lying can easily be circumvented because the false statement can be altered by removing the false elements in it, and turning the statement into a true one, or else it can be re-expressed as a statement of opinion or belief. To a lawyer, that is extremely strange reasoning. It is like saying that there should be no offence of dangerous driving on a road because drivers could easily avoid committing an offence by driving safely.

The second reason was that, under the similar provision in the Representation of the People Act, an election has been set aside only once in the last century. To a lawyer, that, too, is extremely strange reasoning. Quite apart from the fact that this reason fails to take into account the possibility that the prohibition on the making of false statements has had a deterrent effect (a conclusion that experience in the last century would appear to endorse), it is based on a misunderstanding of the purposes served by legal prohibitions. A legal prohibition

marks out the difference between right (or acceptable) and wrong (or unacceptable) conduct; and it is usually backed up by appropriate machinery designed to enforce the prohibition when the need arises. That is particularly important in a culture where people are free to do whatever is *not* prohibited because, if conduct is not prohibited, then it is legitimate. The fact (if it be so) that wrong or unacceptable conduct happens infrequently does not mean that it should be regarded as legitimate.

The third reason was that, instead of prohibiting lying, a better solution would be to ensure that members of the public have access to correct information, should they wish to take advantage of that opportunity. Again, to a lawyer, that is a very odd reason and is quite unreal. If a fraudster steals someone's life savings by lying to him, it is no defence for the fraudster to say that his victim could have detected the lie by carrying out an investigation into the truth of the fact asserted by the fraudster. In the context of a political campaign, in which voters are bombarded by conflicting assertions of fact made by the contending parties, it is unreal to suppose that voters will be immune to the effects of the attractively expressed lie; and the idea that voters should make their own enquiries into the facts ignores the point that what is really at issue is the integrity of the democratic process. If lying in the course of a political campaign is a legitimate campaign tool, then the democratic process is itself corrupted.

Accordingly, the problem posed by a second referendum is that, if it happens, it will be before there is any change in the law outlawing lying as a campaign tool.

CONCLUSION

Having cast my three coins into the fountain, you might think that my wish is to return to Rome – the Treaty of Rome that the UK signed when it became a Member State of the EU. However, the fountain that I have in mind is the fountain of democracy; and the need is to keep it pure.

Paul Lasok

TRZY MONETY W FONTANNIE

STRESZCZENIE

Artykuł ilustruje za pomocą motywu z filmu „Trzy monety w fontannie" trzy prawne aspekty brexitu. Pierwsza moneta obrazuje odniesienie do artykułu 50, który określa warunki, na jakich kraj opuszcza wspólnotę europejską. Autor szczegółowo omawia procedurę zastosowania tego przepisu w odniesieniu do brexitu. Moneta druga – możliwość odwrotu. Tu autor opisuje konsekwencje i możliwości ewentualnej zmiany decyzji w sprawie wyjścia kraju z Unii. Ostatnia część artykułu odkrywa trzecią monetę – referendum i „fake newsy" – medialne przedstawienie brexitu i próby manipulacji opinią publiczną. W podsumowaniu autor porównuje demokrację do fontanny, do której wrzuca się monety, wypowiadając życzenie, oraz odnosi metaforę do sytuacji, w jakiej znalazła się Wielka Brytania w przedbrexitowej rzeczywistości.

Słowa klucze: brexit, „Trzy monety w fontannie", prawo unijne