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ARTICLE

The Supreme Court and Commercial Law

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1. Introduction

Democratic government and the rule of law are the two principal pillars of a modern civilized country, and it is the courts, and in particular the top court, of any country which embody, or at least should embody, the rule of law. In a common law country, the role of the top court is of course fulfilled by its Supreme Court, and, in contrast with civil law countries (which represent the majority of countries in the world), a common law Supreme Court is particularly important, for two reasons.

First, civil law countries have a Constitutional Court, and sometimes a Supreme Administrative Court, and in one or two cases a Supreme Tax Court[1] as well as a Supreme Court, whereas in common law countries[2] the Supreme Court is the sole top court and performs all the functions of such top civil law courts. This relative importance in common law systems is reinforced by the fact that in most civil law systems, there is a constitutional appeal as of right in the majority of cases to the Supreme Court; accordingly, there are often literally hundreds of Supreme Court Justices who hear many unimportant appeals; this is quite unlike common law Supreme Courts, which tend to hear fewer than 100 appeals a year and have around ten judges.

Secondly, whereas in civil law systems judges effectively simply interpret the law as laid down in civil codes, in a common law system, the judges do not simply interpret the law: they make it. It is true that in what has become an increasingly statutory world,

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[1] For example, the Netherlands.

[2] Singapore has no Supreme Court: the Court of Appeal fulfils that function. In Australia and Hong Kong, the Supreme Court is called the High Court and the Court of Final Appeal respectively.

this role can be said to be rather less extensive than it was 500, or even 100, years ago. However, there are still significant fields where Parliament has largely not yet trespassed, including, in this country, many areas of contract, tort and equity. Further, the judicial law-making role was given a new lease of life in 1966[3] when the House of Lords removed the self-imposed fetter of stare decisis so far as its own decisions were concerned—a ruling which Louis Blom-Cooper memorably described as 'dropp[ing] a pebble into the judicial pool that produced not merely a few ripples but […] a seismic wave in English juridical thinking'.[4] And, in today's fast moving and increasingly global world, with its sometimes bewilderingly speedy and fundamental changes in the political, economic, social and technological arenas, the need for the law to adapt has never been more important.

While the judicial power to adapt the law to meet changes has never been more important, it has, essentially for the same reasons, never been more challenging. Particularly in a fast-changing world, it can be hard to distinguish between a temporary fad and a long-term change, and it can also be hard to adapt the law in a way which one can be reasonably confident will last. More fundamentally, the power to change the law highlights one of the perpetual tensions faced by any common law judge, especially in a Supreme Court, namely the conflict between the need to ensure that the law is predictable and clear, and the need to ensure that the law keeps pace with change. One of the reasons that the common law, and English law in particular, is the law of choice in so many international commercial contracts is that over the years it has managed to reflect commercial reality, while remaining tolerably clear and principled.

We have, of course, Lord Mansfield in the second half of the 18th century to thank for starting English commercial law on its impressive way. It somehow seems appropriate that, although Lord Chief Justice of England (and, in practice if not in title, of Wales[5]) the founder of our modern commercial law was a Scotsman, a countryman

[3] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.
[4] Louis Blom-Cooper, '1966 and All That: The Story of the Practice Statement' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords: 1876-2009* (OUP 2013) 128.
[5] Lord Bingham was the first Lord Chief Justice to arrange to have the words 'and Wales' added to the title of the office.

and contemporary of the equally great Adam Smith, the founder some might say of modern economics. Lord Mansfield's refashioning of English commercial law is one of the more significant examples of two of the common law's great strengths—a readiness to borrow ideas from other systems and an appreciation of the importance of practicality as much as principle. As Lord Mansfield characteristically observed in a judgment, 'the daily negotiations and property of merchants ought not to depend on subtleties and niceties, but on rules, easily learned and easily retained, because they are dictates of common sense drawn from the truth of the case'.[6]

Lord Mansfield's contribution to the global popularity of English commercial law was reinforced by subsequent factors including the UK's trading, shipping and political prominence in the 19th century, London's expertise as a financial and legal services centre over the past 200 years or more, the creation of the specialist Commercial Court in 1895, and more recently the creation of the Business Court and the Financial List in the past few years.

The high international reputation of the Commercial Court, Chancery and Technology and Construction Court Judges is of course fundamental to the continued role of English law in commercial disputes and to the continued role of London as a global centre for dispute resolution. But the reputation and standing of the judiciary does not just depend on first instance judges; it depends just as much on the judges in the courts above them. It is not just that appellate judges can decide a case by upholding or reversing a first instance judge; they can also, indeed they should also, as appropriate, clarify, affirm, develop and even change the law: as the world is constantly changing, commercial law must constantly evolve. The fact that we are in an increasingly globalised world increases the challenge, because of the need to create solutions appropriate for international businesses, but it also can help in that it is increasingly appropriate and increasingly easy to look abroad for assistance in finding a solution.

In its eight and a half years' existence, the UK Supreme Court's diet has notoriously included a substantial number of public and human rights law cases.

[6] *Hamilton v Mendes* [1761] 1 Burr 1198, 1214.

However, the Court has also considered a fair number of significant cases in many different areas in private law, and, in particular, a fair number of different commercial law issues.

What I propose to do is first to discuss commercial law decisions of the Supreme Court which have the connecting thread of resolving the conflict between the concern that the law be certain generally and the desire to produce a just result in the particular case. I shall then discuss cases on two topics which have come to the fore as a result of increasing globalisation, namely arbitration and insolvency.

2. Cases which involve the conflict between certainty and fairness

2.1. Interpretation of contracts

One of the most familiar types of this problem faced by lawyers working with commercial agreements is the tension between the natural meaning of contractual words and their commercially sensible meaning. Three recent Supreme Court cases on contractual interpretation illustrate the problem rather neatly.

In the *Rainy Sky*[7] case, decided in 2011, the dispute concerned the scope of a bank guarantee which was given in connection with a shipbuilding contract. Giving the sole judgment, Lord Clarke said that 'it is not […] necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning',[8] and '[i]f there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other'.[9]

On the facts, he considered that the case was an example of language capable of two meanings, and, even though (in my view at least) it was undoubtedly the less natural

[7] *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.
[8] ibid [20].
[9] ibid [21].

meaning of the relevant words as a matter of ordinary English, the claimants' construction was preferred as it was more consistent with the commercial purpose of the bonds.

Dr Janet O'Sullivan criticised *Rainy Sky* for effectively rewriting the parties' contract, and as the 'latest example' of uncertainty for commercial parties and their advisers.[10]

Four years later, in *Arnold v Britton*,[11] the Court had to consider a service charge clause in a 99-year lease. A literal interpretation of the clause resulted in the annual charge increasing to £3,366 by 2012, and to over £1m by 2072, the final year of the term.

Not without regret, the majority held that the natural meaning of the clause prevailed, despite the 'unattractive consequences'[12] and the 'highly unsatisfactory outcome'[13] for the tenants. There was no ambiguity in the clause and it was not legitimate to find ambiguity or substantially defective drafting where there really was none, simply to justify a departure from the clear meaning of the words.

The decision in *Arnold* was seen by some as a 'rowing back' from *Rainy Sky* or at least as a lessening of the emphasis on commercial context. However, in the 2017 case of *Wood v Capita*,[14] which concerned the scope of an indemnity clause, Lord Hodge stated that, in reality, *Arnold* and *Rainy Sky* were 'saying the same thing'.[15] Textualism and contextualism were not, he said, 'conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation' but 'tools to ascertain the objective meaning' – '[t]he extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements'.[16]

Some academics have criticised this on the basis that the emphasis on the commercial context in *Rainy Sky* was much stronger than that in *Arnold,* saying that the result is that *Wood v Capita* has left a residual issue as to the legitimate scope for business

[10] Janet O'Sullivan, 'Absurdity and Ambiguity – Making Sense of Contractual Construction' [2012] CLJ 34.
[11] *Arnold v Britton* [2015] UKSC 36.
[12] ibid [32].
[13] ibid [66].
[14] *Wood v Capita Insurance Services Ltd* [2017] AC 1173.
[15] ibid [14].
[16] ibid [11-13].

or commercial 'common sense' in interpretation.[17] However, such criticisms gloss over the fact that Lord Clarke in *Rainy Sky* emphasised that 'where the parties have used unambiguous language, the court must apply it'.[18]

Extra-judicially, Lord Sumption has suggested that 'the real distinction […] is not between a literal and a commercial interpretation', but 'between an approach to contractual construction which elucidates the meaning of the words, and an approach which modifies or contradicts the words in pursuit of what appears to a judge to be a reasonable result'.[19] In my view, there is no difference in principle between the approaches of different judges. The emphasis on language in the majority judgments in *Arnold* and on commercial sense in the judgment in *Rainy Sky* is simply attributable to the fact that, when deciding on the meaning of the particular clause, that was, as it were, the trump card. Because interpretation is not a quantitative but an evaluative exercise, and because the competing factors are incommensurate, it is inevitable that different judges will have different predilections and therefore will sometimes come to different conclusions. At a time when we value diversity, we should be grateful not resentful for such differences. Consistently with Oliver Wendell Holmes's view that it is based on experience rather than logic,[20] the law should reflect Immanuel Kant's 'crooked timber of humanity' out of which 'no straight thing was ever made.'[21]

Looking back on those cases, they suggest to me that there are topics on which extensive reasoning may confuse rather than elucidate. In the 1969 *Reardon Smith* case,[22] Lord Wilberforce summarised the proper approach to commercial contract interpretation in a few succinct sentences,[23] and I sometimes wonder whether judges over the past fifty

[17] For example, Rohan Havelock, 'The "Unitary Exercise" of Contractual Interpretation' [2017] CLJ 486.
[18] *Rainy Sky* (n 7) [23].
[19] Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017.
[20] Oliver Wendell Holmes, *The Common Law* (Little, Brown and Company 1881) 1.
[21] Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose* (1784), proposition 6.
[22] *Reardon Smith Line Ltd. v Yngvar Hansen-Tangen* [1976] 1 WLR 989.
[23] 'When one speaks of the intention of the parties to the contract, one is speaking objectively […] and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the

years would have done better to avoid seeking to elaborate or expand on that guidance. As Lord Hodge said in *Wood v Capita*, after referring to 'the guidance given in *Rainy Sky* and *Arnold*', 'the legal profession has sufficient judicial statements of this nature'.[24]

2.2. No oral variation clauses

In the very recent *Rock Advertising* case,[25] the issue was 'whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties (commonly called a 'No Oral Modification' clause) is legally effective'.[26] Based partly on policy considerations, as well as on precedent and principle, the Court of Appeal had held that it was not,[27] in the sense that an oral variation, otherwise binding, was not negatived by a No Oral Modification clause. The Supreme Court disagreed, saying that 'the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation' and that there were no reasons of principle or policy for holding otherwise.[28] Given that the only objections were 'entirely conceptual',[29] the clause should be effective, albeit subject to any estoppel argument which might arise on the facts.[30]

At first sight, it is something of a stretch to include this case in the merits versus certainty argument, but the reasoning of the Court of Appeal in earlier cases to the same effect did rely essentially on the unattractiveness of not holding the parties to their later oral agreement.[31] The more interesting high-level point which can be made about this case is to be found in the first three sentences of Lord Sumption's judgment saying 'Modern litigation rarely raises truly fundamental issues in the law of contract. This

parties': ibid [996]; 'what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were': ibid [997].
[24] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, 1179.
[25] *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.
[26] ibid [1] (Lord Sumption).
[27] *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604.
[28] *Rock Advertising* (n 25) [10], [12].
[29] ibid [13].
[30] ibid [16].
[31] ibid [34] for the reference to policy and *Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd* 168 Con LR 59 [100] and *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413 [10].

appeal is exceptional. It raises two of them.' (The second point was a revival of the issue decided in *Foakes v Beer*,[32] and the Court sadly, but I think correctly, ducked it). The case shows that the courts are still routinely called on to decide or to reconsider fundamental points of law, and, particularly in a fast-changing world, that is as it should be.

2.3. Piercing the corporate veil

Another example of certainty versus fairness can be seen in the rather more esoteric topic of piercing the corporate veil. The beginning of this particular story is, of course, *Salomon v Salomon*,[33] where the House of Lords held that the principle that a company is a legal entity distinct from its shareholders and has rights and liabilities of its own applies as much to a company wholly owned and controlled by one man as to any other company. Occasionally, a judge who considers that this principle would lead to an injustice has been prepared to ignore it and to justify his disregard for principle by characterising what he had done as a permissible piercing of the corporate veil.

In 2013, the question of piercing came up for consideration by the Supreme Court in the *VTB* case.[34] It was argued that the court should reject the existence of the principle. In my judgment, I accepted that 'the precise nature, basis and meaning of the principle are all somewhat obscure, as are the precise nature of circumstances in which the principle can apply'.[35] Lord Wilson characterised the submission that English law recognises no principle of piercing as 'highly ambitious.'[36]

Later the same year, the Supreme Court heard the *Prest* case,[37] which concerned ancillary relief proceedings following a divorce. Mr Prest had used a number of offshore companies to hold legal title to properties and Mrs Prest alleged, inter alia, that the court

[32] *Foakes v Beer* (1884) 9 App Cas 605.
[33] *Salomon v Salomon Co Ltd* [1897] AC 22.
[34] *VTB Capital Plc v Nutritek International Corp* [2013] 2 AC 337.
[35] ibid [123].
[36] ibid [158].
[37] *Prest v Petrodel Resources Ltd* [2013] 2 AC 415.

should pierce the corporate veil and treat the properties as belonging to Mr Prest. The Court held that the properties were held on resulting trust for Mr Prest, but we nonetheless considered the piercing issue.

Lord Sumption considered that 'the consensus that there are circumstances in which the court may pierce the corporate veil is impressive' and he 'would not […] be willing to explain that consensus out of existence', but it should be available only in 'limited' circumstances, namely 'to prevent the abuse of corporate legal personality'.[38] I agreed,[39] not least because the doctrine 'ha[d] been generally assumed to exist in all common law jurisdictions' and 'represents a potentially valuable judicial tool to undo wrongdoing in some cases, where no other principle is available'.[40]

Lady Hale (with whom Lord Wilson agreed) suggested that piercing may be permitted when people who run limited companies 'take unconscionable advantage of the people with whom they do business'.[41] Lord Mance thought that the 'situations in which piercing the veil may be relevant […] are likely to be novel and very rare'.[42] Lord Walker considered that piercing 'is not a doctrine at all, in the sense of a coherent principle or rule of law'.[43]

I wonder now whether we should have killed off the doctrine. Some topics, such as contractual interpretation, are based on impression and weighing up factors, and therefore involve an inevitable degree of legal uncertainty. However, other topics are capable of being subjected to hard-edged rules, and when that course is possible, a Supreme Court should be keen to adopt it, given that the law should be as clear and simple as possible. That was certainly my initial instinct, as:

> 'I was initially strongly attracted by the argument that we should decide that a supposed doctrine, which is controversial and uncertain, and which, on analysis, appears never to have been invoked successfully and

[38] ibid [34].
[39] ibid [60].
[40] ibid [80].
[41] ibid [92].
[42] ibid [100].
[43] ibid [106].

> appropriately in its 80 years of supposed existence, should be given its quietus. Such a decision would render the law much clearer than it is now, and in a number of cases it would reduce complications and costs.'[44]

In the end, piercing the veil can be said to be an intriguing expression which masks a complete lack of principle, indeed a breach of a fundamental principle. To quote Oliver Wendell Holmes again, 'a good catchword can obscure analysis for fifty years'.[45] However, even if I had taken that course, I would not have carried my colleagues with me.

2.4. Restitution

A rather broader topic where certainty and fairness collided in the Supreme Court was restitution or unjust enrichment—one of those topics which excite an almost theological passion among academics; indeed, the academics cannot even agree on its name.[46] The Supreme Court initially dipped its toe into this particular water in the 2013 *Benedetti* case,[47] which ultimately involved quantifying a claimant's entitlement in an unjust enrichment case. This decision gave rise to some limited academic discussion.

Two years later in the *Menelaou* case,[48] the Court caused rather greater fluttering in the academic dovecote. Ms Menelaou's parents owned a property which was subject to a charge in favour of a bank, which agreed they could sell, and purchase another property in her name, provided the bank got a charge over the new property. The new charge, though registered, turned out to be defective: Ms Menelaou was unaware of the arrangement with the bank. Ms Menelaou applied to remove the charge, and the bank counterclaimed, contending that Ms Menelaou had been unjustly enriched at the bank's

[44] ibid [79].
[45] Quoted by Wendell Willkie in a broadcast at The Town Hall in New York City (6 January 1938).
[46] The famous work by Goff & Jones started off as *The Law of Restitution*, but the 8th (2011) edition was entitled *The Law of Unjust Enrichment*, so perhaps that problem is solved.
[47] *Benedetti v Sawiris* [2014] 1 AC 938.
[48] *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176.

expense, and, that the bank was accordingly entitled by subrogation to an unpaid vendor's lien.

Lord Clarke, giving the leading judgment, said that it was:

> 'It is now established that, when faced with a claim for unjust enrichment the court must ask itself four questions: whether the defendant has been enriched, whether that enrichment was at the claimant's expense, whether it was unjust and whether there are any defences available to the defendant.'[49]

He held that Ms Menelaou had been unjustly enriched at the bank's expense, and that the bank was entitled to an unpaid vendor's lien. There had been no direct payment by the bank to Ms Menelaou, but he said that there was 'a sufficient causal connection, in the sense of a sufficient nexus or link, between the loss to the bank and the benefit received by [her]'.[50]

In a spirited article, Professor Virgo described the decision as 'arguably the worst decision in the history of the Supreme Court'.[51] He criticised in particular the four questions on the ground that they were 'simply broad headings for ease of exposition',[52] and he considered that accordingly the proprietary remedy of the unpaid vendor's lien was contrary to principle. However, we explained why, on the particular facts of the case, the indirect involvement of Ms Menelaou exceptionally did not prevent the doctrine from applying,[53] and the notion of unpaid vendor's lien coming to the rescue in unjust enrichment cases had earlier House of Lords sanction.[54] Having said that, some of the observations in the judgments of Lord Clarke and myself were too broadly expressed.

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[49] ibid [18].
[50] ibid [27].
[51] Graham Virgo, 'Restitution and Unjust Enrichment in the Supreme Court: Reflections on *Bank of Cyprus UK Ltd v Menelaou*' University of Cambridge Faculty of Law Research Paper No 10/2016, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724024> accessed 11 March 2019.
[52] *Bank of Cyprus* (n 49) [19].
[53] ibid [26-34], [70], [73].
[54] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, as discussed in *Bank of Cyprus* (n 49) [88-91].

The academic doves resumed cooing following the *ITC* case[55] two years later, which involved claims by a number of investment trust companies for refunds of VAT which they had paid on the supply of investment management services, as the VAT turned out not to be due. One problem for the companies was that the VAT had been paid by them to the investment manager who had paid an equivalent sum, but not the same sum, to the Revenue. Another problem was a possible statutory limitation.

Although the Supreme Court held that even if there was a claim in restitution, it would be excluded by the limitation provision, we considered the merits of the restitution claim. Giving the only reasoned judgment, Lord Reed said that, although 'in economic terms' the Revenue was enriched at the expense of the claimants, this was not sufficient in law for the 'at the expense of' requirement. He stated that '[i]n view of the uncertainty which has resulted from the use of vague and generalised language, this court has a responsibility to establish more precise criteria',[56] and that unjust enrichment 'does not create a judicial licence to meet the perceived requirements of fairness on a case-by-case basis: legal rights arising from unjust enrichment should be determined by rules of law which are ascertainable and consistently applied'.[57] A direct transfer of value from the claimant to the defendant was normally required,[58] and in that case, there was no direct transfer of value or equivalent as the two transactions could not be collapsed into one.[59]

Professor Burrows welcomed the *ITC* judgment as 'a rigorous and sophisticated analysis of 'at the claimant's expense' which tightens up and narrows its scope and, with it, the scope of unjust enrichment'.[60]

In *Lowick Rose*,[61] where judgment was handed down the same day as in the *ITC* case, Lord Sumption, giving the leading judgment, followed the approach of Lord Reed in *ITC*.[62] The failure in *Lowick Rose* of the claim in unjust enrichment was seen by Peter

[55] *Revenue and Customs v The Investment Trust Companies* [2017] 2 WLR 1200.
[56] ibid [38].
[57] ibid [39].
[58] ibid [52].
[59] ibid [67-74].
[60] Andrew Burrows, 'Narrowing the Scope of Unjust Enrichment' [2017] 133 LQR 537.
[61] *Lowick Rose LLP v Swynson Ltd* [2017] 2 WLR 1161.
[62] ibid [56].

Watts QC as the natural consequence of the 'signal to retreat from an open-ended concept of unjust enrichment' given in *ITC*.[63] Nonetheless, Lord Sumption cited the decision in *Menelaou* with apparent approval,[64] perhaps unsurprisingly as Lord Clarke and I were on the panel.

I think that these cases on unjust enrichment establish four propositions. First, when it comes to developing the law, judges, even Supreme Court judges, may not get it quite right first time: like naval guns, they sometimes need to find their precise range. Secondly, when the Court does not get it right first time, it is right to acknowledge it and to do so sooner rather than later. Thirdly, it is good for judges to engage in dialogue with academic lawyers, and that is an important and valuable development compared with fifty years ago.

Fourthly, academic lawyers tend to express themselves in more vehement terms than judges. I think that academic lawyers may feel a degree of frustration compared with judges, especially appellate court judges: when appellate court judges state their views, those views thereby become the law—for better or worse. While I am a strong supporter (within limits) of humour and wit in hearings and judgments, I strongly believe Scalia-type coruscating insults, however funny they may be, should never be part of the judicial repertoire. They undermine mutual respect among the judges of the court and they undermine the authority of the court externally. Judges should be able to produce judgments which convince by their arguments; they should not need to resort to insults.

2.5. Illegality

Patel v Mirza is another example of a case where the Supreme Court had to choose between a clear rule and an approach which involved less certainty and more of a case-by-case, merits approach.[65] It concerned, of course, the question as to how courts should deal with cases where the defendant seeks to raise a defence that the claimant's case rests

[63] Peter Watts, 'Lucky Escapes' [2017] 133 LQR 524.
[64] See *Lowick Rose* (n 61) [29], [30].
[65] *Patel v Mirza* [2016] 3 WLR 399.

on illegality. Lord Toulson, speaking for the majority (which included a somewhat hesitant Lord Neuberger), cited with approval an observation he had made in an earlier case, namely:

> 'Rather than having over-complex rules which are indiscriminate in theory but less so in practice, it is better and more honest that the court should look openly at the underlying policy factors and reach a balanced judgment in each case for reasons articulated by it'.[66]

This appears to conflict sharply with the minority view, which was embodied in the principle expressed by Lord Mance, that 'reliance on illegality remains significant as a bar to relief, but only in so far as it is reliance in order to profit from or otherwise enforce an illegal contract'.[67] In particular, he said, it should not prevent a person from undoing or reversing the effect of an illegal contract.[68] It is fair to say that that is a more principled approach, although I suspect that it can produce some rather quirky results, not least because many contracts are not wholly or fairly reversible. While Lord Mance and the other dissenters sought to explain why their view was different from that in the clear, but much-criticised,[69] decision of the House of Lords in *Tinsley v Milligan*,[70] revisiting the decision in *Patel*, I now wonder whether the Toulson case-by-case approach and the Mance reliance approach will in practice lead to different results very often. If that is right, and it is hard to know whether it is, I must confess that it can be said to support the Mance approach because, provided that it generally leads to just results, it is clearly better to have a clear rule than to deal with each case by reference to its particular facts.

It has long seemed clear to me that there are a number of legal problems to which there is no satisfactory answer, and the illegality issue is a prime example. In cases which raise such a problem, a court is faced with the hardest-edged choice between certainty and fairness, as certainty comes at a relatively high price. As a general (but not universal)

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[66] ibid [69].
[67] ibid [199].
[68] For example, ibid [200-201].
[69] As Lord Toulson said, '*Tinsley v Milligan* has been the subject of much criticism in this and other jurisdictions, for its reasoning rather than its result': ibid [20].
[70] *Tinsley v Milligan* [1993] 3 WLR 126.

proposition, it seems to me that the more certain the law, the greater the risk of individual unfairness, and when it comes to cases on illegality, the factual circumstances can be so variable, tangled and unpredictable, that the risk of a clear law producing an unfair result is particularly great. On the other hand, there is force in the point that, where one is in the realm of criminality, it is particularly important that the law is clear.

Patel raised another interesting point on the need for certainty, and I apologise for quoting from my judgment, but it encapsulates the point as I see it. I acknowledged that there was 'some attraction in the point that the need for certainty in this area is diminished by the fact that parties to an arrangement which is illegal have less cause for complaint if the law is uncertain', but as I went on to say, 'criminals are entitled to certainty in the law just as much as anyone else', and innocent members of the public may also be affected by the law on this topic.[71]

2.6. Penalty clauses

Another area where it can be said that fairness or policy triumphed over certainty is penalty clauses, which can also be seen as a contest between freedom of contract and protectionism. The 2016 joined *Cavendish* and *Parking Eye* cases[72] concerned, respectively, a share sale agreement which restricted competition by the seller and stipulated a severely reduced price in the event of default on his part, and a parking fine of £85 imposed for overstaying the permitted period of free parking. Each provision was unsuccessfully said to be a penalty and therefore unenforceable.

The Court recognised that the 'penalty rule is an interference with freedom of contract'[73] and 'undermines the certainty which parties are entitled to expect of the law'.[74] Further, although the origins of the rule were in 'the concern of the courts to prevent exploitation in an age when credit was scarce and borrowers were particularly vulnerable'

[71] ibid [158].
[72] *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis (Consumers' Association intervening)* [2016] AC 1172.
[73] ibid [33].
[74] ibid [34].

the current rule does not normally depend on a finding that advantage was taken of one party.[75] Nevertheless, the rule was not abrogated. Lord Hodge gave three reasons for this: (1) the continued existence of significant imbalances in negotiating power in contracts, (2) the general approach to penalties both nationally and internationally, and (3) that the rule against penalties would not prevent parties from reaching 'sensible arrangements to fix the consequences of a breach of contract'.[76]

However, the test as to whether a provision was a penalty was reformulated in that the 'unsatisfactory distinction' between a penalty and genuine pre-estimate of loss was discarded, replaced by the test of 'whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'.[77] In other words, rather as with piercing the corporate veil, the Court affirmed the existence of the principle but emphasised the narrowness of its application.

This did not satisfy all commentators. Dr Jonathan Morgan remarked that it was 'disappointing' that the Supreme Court had reaffirmed this 'blatant interference with freedom of contract'. The heart of the new approach—'unconscionability'—was unclear and the concern running through the judgments that the doctrine should not be lightly invoked, in particular in cases of equal bargaining power, was said not to satisfactorily acknowledge this. He considered that none of the arguments for the penalty doctrine's continued utility justified retaining 'this anomalous regulation of freely agreed contracts'.[78]

As Lord Sumption and I said in our joint judgment, the rule 'is an ancient, haphazardly constructed edifice which has not weathered well, and which in the opinion of some should simply be demolished'. (I cannot claim the credit for that vivid metaphor.) Judges should, I think, be very cautious about demolishing well-established structures in the common law territory; it undermines certainty, and, mixing my

[75] ibid [34].
[76] ibid [259-266].
[77] ibid [35].
[78] Jonathan Morgan, 'The Penalty Clause Doctrine: Unlovable but Untouchable' [2016] CLJ 11.

metaphors, the consequences of pulling out one thread of the tapestry can have unpredictable effects on what remains. To revert to the original metaphor, it is normally right to try and repair or refurbish, or even to reconstruct, rather than to demolish. After 21 years as a judge, there are very few laws that I consider to be wholly apt, and one of them is the law of unintended consequences.

As to the point that the rule against penalties applies in other jurisdictions, the Court considered many common law and civil law systems as well as international principles, including the US, Australia, Canada, New Zealand, Singapore, Hong Kong, France, Germany, Switzerland, Belgium, and Italy, and the UNIDROIT Principles of International Commercial Contracts, the UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, and the Principles of European Contract law.[79] *Makdessi* is one of a number of cases that show the Supreme Court consciously seeking to align its thinking with other courts, which is, as I see it, appropriate in an increasingly global world.

In his 1997 Hamlyn lectures,[80] Roy Goode emphasised the judiciary's 'ever-increasing readiness to look to patterns of judicial law-making in other legal systems for solutions to help resolve complex issues of legal policy' but expressed a certain amount of frustration in relation to what he described as our 'complacent belief in the innate superiority of English commercial law'. I hope that the Supreme Court has not disappointed Sir Roy. Thus, on common law topics such as passing off,[81] proprietary interests,[82] equitable compensation,[83] and illegality (in *Patel*),[84] the Court has considered and, where appropriate, adopted, approaches taken by other Commonwealth jurisdictions. And in a number of patent cases,[85] the Court has sought to align its thinking

[79] ibid [37], [264].
[80] Roy Goode, 'Commercial Law in an International Environment: Towards the Next Millennium', Ch 4 in Roy Goode, *Commercial Law in the Next Millenium*, Hamlyn Lectures 1997 (Sweet & Maxwell, 1998) <https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Commercial_law_in_the_next_Millennium.pdf> accessed 11 March 2019.
[81] *Starbucks (HK) Ltd v British Sky Broadcasting Group PLC* [2015] 1 WLR 2628, [38-46], [50].
[82] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] 1 AC 250.
[83] *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] AC 1503, [121-132].
[84] *Patel v Mirza* [2017] AC 467, [50-66].
[85] For example, *Schütz (UK) Limited v Werit (UK) Limited* [2013] RPC 16, [38-46]; and *Human Genome Sciences Inc v Eli Lilly and Company* [2012] RPC 6, [83-88].

with that of other European courts. And, I should add, this is, as it should be, a two-way process.[86]

2.7. The anti-deprivation principle

The anti-deprivation principle is targeted at preventing attempts to withdraw assets on insolvency, thereby reducing the value of the insolvent estate to the detriment of the creditors. The *Belmont Park* case[87] concerned the scope, purpose and effects of the principle and raised a potential conflict between giving effect to bona fide commercial arrangements and creditor protection. Like *Makdessi*, it can be said to represent the triumph, albeit a rather limited triumph, of fairness over certainty and of protectionism over freedom of contract.

In *Belmont*, Lehman Brothers Special Financing Inc ('LBSF') had issued a series of loan notes which were taken up by investors, including the respondent. The loan notes contained 'flip clauses' whereby, in an event of default (which included insolvency), the priority in the collateral from LBSF was altered in favour of the respondent. LBSF went into insolvency and challenged the validity of the flip clauses, but the Supreme Court held that they did not breach the anti-deprivation principle.

The Court considered that the principle was too well-established to be discarded but decided that it would not generally apply to commercial transactions (particularly complex ones) concluded in good faith and not for the purpose of evading the insolvency laws. There was a particularly strong case for party autonomy in such cases. A common-sense approach was adopted so that the principle would not apply to bona fide commercial transactions which did not have as their main or predominant purpose the deprivation of the property of one of the parties on bankruptcy.[88] So, once again, a principle is held to be too well-established to be killed off but is narrowed, albeit in a somewhat imprecise way.

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[86] See *Schütz* (n 85) [41], [47].
[87] *Belmont Park Investments Pty Ltd v BNY Corporate* [2012] 1 AC 383.
[88] ibid [79], [102].

Although he raised some questions about the boundaries of the exact test to be applied, Professor Goode noted that this decision showed that the Supreme Court was:

> 'clearly alive to the damage that could be done to a substantial and complex market if legitimate expectations as to the validity of standard types of contractual provision freely entered into were to be frustrated by an over-zealous application of a rule designed to deal with deliberate evasion of the bankruptcy legislation.'[89]

3. Cases related to arbitration and insolvency

3.1. Arbitration

It is no surprise that some commercial law issues before the courts arise out of arbitration awards: it was ever thus, although, in the last thirty years of the 20th century, a number of statutory restrictions on appealing against awards were introduced, culminating in the Arbitration Act 1996. However, the increasing importance of the global context has led to a mushrooming in international arbitrations, and so there are still a fair number of cases arising out of arbitration awards or clauses. Some of those cases have given rise to points of substantive law, and some cases have been more concerned with the process of arbitration.

So far as points of substantive law are concerned, the 2017 *Globalia* case[90] shows that basic questions still arise on the issue of damages. There, charterers repudiated a time charter, and the shipowner subsequently sold the vessel for $23.7 million. If there had been no repudiation and the charter had continued, the owner would have earned €7.5 million in hire, and would have been left with a vessel then worth only $7 million due to a fall in the market. The Court of Appeal, overturning the Judge and agreeing with the arbitrators, held that the owner had suffered no loss because the sale of the vessel had netted him far more than he would have got for the combination of hire and the value of the vessel at the end of the charter. However, the Supreme Court disagreed on the ground

[89] Roy Goode, 'Flip Clauses: the End of the Affair?' [2012] 128 LQR 171, 173.
[90] *Globalia Business Travel SAU of Spain v Fulton Shipping Inc of Panama* [2017] 1 WLR 2581.

that it was not the premature termination of the charterparty that had made it necessary for the owners to sell the vessel; the decision to choose that moment to sell was a 'commercial decision at their own risk'.[91]

Sometimes the Supreme Court is called on to correct a mistake made in earlier judicial decisions. In the 2017 *Taurus Petroleum* case,[92] which involved an application to enforce an arbitration award, the Court was split 3-2 on the interpretation of certain letters of credit. However, the Court also had to decide whether a fairly long-standing decision of the Court of Appeal (where the leading judgment was given by Lord Denning)[93] as to the location of a debt arising under a letter of credit had been correctly decided. We unanimously held that it was wrong: a debt is generally located where it is recoverable, and a debt payable under a letter of credit is no exception.

Limiting myself to the past three years, I note the following further cases which raised significant points of law, all cases arising from arbitration awards. In 2017, the Supreme Court considered the effect of safe port undertakings in the *Gard Marine* case,[94] and the effect of the York Antwerp Rules on general average in relation to the capture and ransom of a vessel was considered in the *Mitsui* case.[95] The previous year, the court had to consider whether a vessel was off-hire during a period of arrest in the *NYK Bulkship* case,[96] and the 2015 *Bunge* case[97] was concerned with the interpretation of GAFTA 49 in relation to the measure of damages.

Turning to cases more concerned with arbitration itself, the key issue in the 2010 *Dallah* case[98] was whether the Government of Pakistan was bound by an arbitration agreement so that an award made against it in Paris could be enforced in the UK. The Government had not signed the agreement. The Supreme Court held unanimously that it

[91] ibid [32].
[92] *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] 3 WLR 1170.
[93] *Power Curber v National Bank of Kuwait SAK* [1981] 1 WLR 1233.
[94] *Gard Marine and Energy Ltd v China National Chartering Company Ltd* [2017] WLR 1793.
[95] *Mitsui & Co Ltd v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG* [2017] Bus LR 1909.
[96] *NYK Bulkship (Atlantic) NV v Cargill International SA* [2016] 1 WLR 1853.
[97] *Bunge SA v Nidera BV* [2015] Bus LR 987.
[98] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763.

was not a party. Despite recognising that an arbitral tribunal has jurisdiction to determine its own jurisdiction, it held that the English court, as the court where an attempt was being made to enforce the award, could and should revisit the question of jurisdiction, as a matter of ordinary judicial determination.[99] The arbitral tribunal could only have jurisdiction by consent, and could not give itself jurisdiction if there was no relevant consent under the applicable law.

A few months later, the Paris Court of Appeal held that the arbitral tribunal had correctly founded its jurisdiction over Pakistan even though it had not signed the original agreement, thus leading to a different conclusion from the Supreme Court despite the fact that both had applied French law.[100] Whereas the UK Supreme Court thought the crucial issue was whether Pakistan had intended to be bound by the contract, the Paris Court considered that the real issue was whether Pakistan had behaved as the 'true party' to the economic transaction.[101]

In the 2011 *Hashwani* case,[102] the question was whether an arbitration agreement, which required that each of the arbitrators should be a respected member of the Ismaili community, had become void by virtue of the 2003 Employment Equality Regulations,[103] which made unlawful any discrimination on grounds of religion in connection with personal services. Reversing the Court of Appeal, the Supreme Court held that an arbitrator was not 'employed' by the parties, and, even if he had been, the stipulation would have fallen within an exception as being a 'genuine occupational requirement'. As Rhodri Davies QC pointed out, had it been decided that clauses imposing religious qualifications were unlawful, this would have had wide-ranging implications for arbitration. Although religious qualifications are relatively rare, clauses imposing nationality qualifications are very common.[104]

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[99] ibid [83], [104].
[100] *Gouvernement du Pakistan, Ministère des Affaires Religieuses v Société Dallah Real Estate & Tourism Holding Company*, Paris Court of Appeal, No 09-28533, 17 February 2011.
[101] Gary B. Born and Michal Jorek, 'Dallah and the New York Convention' (Kluwer Arbitration Blog, 7 April 2011) <http://arbitrationblog.kluwerarbitration.com/2011/04/07/dallah-and-the-new-york-convention/> accessed 11 March 2019.
[102] *Hashwani v Jivraj* (LCIA and others intervening) [2011] 1 WLR 1872.
[103] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660.
[104] Rhodri Davies, 'A Line Drawn in the Right Place' [2013] LQR 1.

In 2013, in *AES Ust-Kamenogorsk*,[105] the Supreme Court held that it had power to grant an anti-suit injunction to enforce the negative obligation contained in an arbitration agreement not to commence proceedings in any other forum, notwithstanding that there was no existing or proposed arbitration. The contract in question was governed by Kazakh law but provided for arbitration in London. The owner commenced proceedings in the Kazakh courts and the operator applied for an anti-suit injunction in London. The Kazakh court had declared the arbitration agreement invalid, but the English courts enforced the agreement. As Professor Fentiman wrote, the decision shows that injunctions of this nature are not simply concerned with the allocation of jurisdiction but also with the vindication of contractual rights.[106]

In the 2017 *IPCO* decision, the Supreme Court underlined the importance of adhering to the New York Convention on enforcement of arbitration awards. The Court of Appeal had held[107] that an appellant against an arbitration award to which the Convention applied could be required to provide security for its appeal, on the basis that this is a well-established power which an English court always has and not infrequently exercises. However, showing international awareness, the Supreme Court reversed this decision on two grounds.[108] First, the Convention was intended to establish a common international approach, and, as it expressly provides for security in one specific circumstance, it must be assumed to exclude it in all other circumstances. Secondly, the Convention did not intend any right of appeal to enable a creditor to improve its prospects of enabling an award to be satisfied.

3.2. International insolvency

Over the past twelve years, the Supreme Court and the Judicial Committee of the Privy Council ('JCPC') have been struggling with the question of how far it is appropriate

[105] *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] 1 WLR 1889.
[106] Richard Fentiman, 'Antisuit Injunctions and Arbitration Agreements' [2013] CLJ 521.
[107] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2015] EWCA Civ 1145.
[108] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation* [2017] 1 WLR 970.

for common law judges to develop the notion of a universalist approach to insolvencies with a cross-border character.

In the 2006 Isle of Man *Cambridge Gas* case,[109] Lord Hoffmann described universality as having 'long been an aspiration, if not always fully achieved' of the common law, partly because 'a good deal of the ground has been occupied by statutory provisions', domestic, EU, and international. However, he said, the issue in that case was not covered by any such legislation, so the JCPC held that it could give effect to a New York-based Chapter 11 order so as to give effect to the enforcement of collective rights. The New York order vested in the insolvent company's creditors' committee shares in an Isle of Man company owned by a Cayman Islands company, and, even though the Cayman Islands company had not submitted to the New York jurisdiction, the JCPC held that the Isle of Man courts could and should give effect to that order.

In the subsequent 2008 House of Lords decision in the *HIH* case,[110] common law universalism suffered a bit of a setback. Lord Hoffmann, basing his conclusion on the 'general principle of private international law, namely that bankruptcy […] should be unitary and universal' followed his previous line and invoked universalism in order to remit to New South Wales English assets owned by an Australian insurance company, which had UK-based creditors, to enable New South Wales court-appointed liquidators to sell those assets and distribute the proceeds in accordance with Australian insolvency law, which was different from UK law. Lord Walker agreed. Lord Scott and I arrived at the same conclusion, but by applying section 426 of the Insolvency Act 1986, which only applied to designated countries, including Australia. While accepting that it was 'desirable as a general proposition that there should be one universally applicable scheme of distribution of the assets of an insolvent company',[111] we considered that a common law power did not exist because (i) it would deprive creditors in the UK jurisdiction of their statutory rights, and (ii) as section 426 could be invoked, to apply the principle of universalism would 'constitut[e] the usurpation by the judiciary of a role expressly

[109] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508, [17-18].
[110] *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852.
[111] ibid [61].

conferred by Parliament on the Secretary of State'.[112] We therefore all agreed on the existence of the principle of universalism, but we were split 2-2 as to whether it could be invoked in that case. The fifth member of the court, Lord Phillips, while agreeing with all four of us in the result, rather hedged his bets on universalism, so I suppose we were 2½-2½.

Four years later, in the *Rubin* case,[113] universalism suffered a more severe setback in the Supreme Court. Liquidators were seeking to enforce a default judgment made by a foreign insolvency court (New York in one case, New South Wales in the other) setting aside a prior transaction entered into by an insolvent company. Lord Collins, with whom Lord Walker and Lord Sumption agreed, held that the normal private international law conflict rules applied, and, as the foreign court order operated in personam, it could only be enforced against a person who had submitted to the foreign court's jurisdiction. Lord Collins considered it inappropriate to invent a new rule that a foreign court insolvency-related judgment should be enforceable in the UK, if well-established general principles meant it would be unenforceable. Such a course, said Lord Collins, 'would not be an incremental development of existing principles, but a radical departure from substantially settled law'.[114] He said that it followed from this that *Cambridge Gas* had been wrongly decided, although Lord Clarke dissented.

But common law universalism was resuscitated, albeit to something of a shadow of its former *Cambridge Gas* glory, when two of its apparent assassins in *Rubin*, Lord Collins and Lord Sumption, joined its champion, Lord Clarke, in the most recent instalment of this saga, the 2014 JCPC Bermuda *Singularis* case.[115] The issue was whether the Bermuda court could order the former auditors of a Cayman company in liquidation to give information to the Cayman liquidators. All five members of the JCPC agreed that the court could not, but only a minority (Lord Mance and myself) thought that the Bermuda Court had no common law universalist-type power to make such an

[112] ibid.
[113] *Rubin v Eurofinance SA* [2013] 1 AC 236.
[114] ibid [128].
[115] *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2015] 1 AC 1675.

order. The majority thought that it did, but that it could not be exercised. For the majority, Lord Sumption reiterated that *Cambridge Gas* was wrongly decided, but re-affirmed that:

> 'the principle of modified universalism is part of the common law, but it is necessary to bear in mind, first, that it is subject to local law and local public policy and, secondly, that the court can only ever act within the limits of its own statutory and common law powers.'[116]

So, having started with relatively broad common law universalism in *Cambridge Gas* and flirted with no common law universalism through the minority in *Singularis*, we seem to have ended up with modified universalism, as exemplified by the majority view in *Singularis*. As Lord Collins pointed out in *Singularis*, Lord Bingham had written that '[o]n the whole, the law advances in small steps, not by giant bounds', and Oliver Wendell Holmes had observed that 'judges do and must legislate, but they can do so only interstitially'.

I believe that there are lessons which can be learned from this history. First, judges should try and develop the law so that it keeps pace with commercial, social and technological changes, but they should do so in a cautious and principled way, and consistently with legislation. If there are no applicable legislative or treaty provisions, judges should not be frightened of developing the law, but they must be suitably diffident.

Secondly, however, in highly technical fields, and where cross-border issues are involved, judicial development of the law presents obvious difficulties, when compared with domestic and cross-border law-making by governments and legislators. I did not dissent in *Singularis* because I am a little Englander. *Au contraire*: universalism is a noble aim, but I believe it is normally better achieved by legislation and treaty-making.

Thirdly, despite this, there must be room for judicial law-making, as judges can react more quickly to specific and urgent problems, and, however well-drafted they are, legislation and treaties cannot cover every eventuality or development. Indeed, the very

[116] ibid [19].

fast changing world in which we live calls for interstitial judicial law-making in some areas more than ever.

Fourthly, it follows that, as far as possible, legislation and treaties, while being as clear and complete as possible, should be drafted so as to allow for such interstitial judicial law-making. Easier said than done I accept, but a worthwhile aim to bear in mind.

Fifthly, international consistency is very important, so dialogue between judges of different jurisdictions, and even sitting together, is desirable. I do not see why judges of different jurisdictions should not be able to communicate with each other in cases which involve both jurisdictions. Indeed, this already happens from time to time.

4. Conclusion

I hope that I have shown that, even in the present time when so much focus, among lawyers and non-lawyers, is on human rights and public law cases, the Supreme Court is very much open for business and playing its part when it comes to commercial law. I must admit that when I agreed to write this article, I had assumed that I would need to concentrate on the detail of a few cases to fill up my allotted space. Somewhat embarrassingly, I had not realised just how many commercially significant cases the Supreme Court (and indeed the JCPC) had decided. In the event, although this article is longer than I wished, I have not covered any case very fully and I have not even mentioned some significant cases. Thus, I have not even mentioned important cases on insolvency law such as the three cases arising out of the Lehman insolvency.[117] Nor, limiting myself to the past three or four years, have I referred to two cases on company law issues, namely when the conduct of directors can be attributed to the company,[118]

[117] *Re Lehman Brothers International (Europe)* [2012] 3 All ER 1; *Re Nortel Companies & Ors* [2014] 1 AC 209; *The Joint Administrators of LB Holdings Intermediate 2 Ltd, v Lehman Brothers International (Europe)* [2017] 2 WLR 1497.
[118] *Jetivia SA v Bilta (UK) Ltd* [2016] AC 1.

and the question of directors' powers being used for improper purposes,[119] and a case on when an agency was irrevocable.[120] And there have been a number of other important JCPC cases in the past three years, including (but not limited to) a very recent decision on important principles relating to trusts,[121] a decision last year on share redemption rights,[122] in 2016 a shipping case[123] on internationally agreed limits on damages for collisions, in 2015 cases on rectification of share registers[124] and on what constitutes notice of a proprietary interest,[125] and on the law of tracing.[126]

And I have only allusively referred to the Supreme Court *FHR* case,[127] which concerned the issue of whether a bribe received by an agent is held on trust for his principal, when I had the twin embarrassments of (i) overruling a conclusion I had reached three years earlier in the Court of Appeal[128] and (ii) disagreeing with Roy Goode[129] (although in my defence on both counts I should add that I believe that he changed his view over time too, but in the opposite direction).

[119] *Eclairs Group Ltd and Glengary Overseas Ltd v JKX Oil & Gas plc* [2016] 3 All ER 641.
[120] *Bailey v Angove's PTY Ltd* [2016] 1 WLR 3179.
[121] *Investec Trust (Guernsey) Ltd v Glenalla Properties Ltd* [2018] 2 WLR 1465.
[122] *Pearson v Primeo Fund* [2017] UKPC 19.
[123] *Bahamas Oil Refining Company International Ltd v The Owners of the Cape Bari Tankschiffahrts GMBH & Co KG* [2016] UKPC 20.
[124] *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2.
[125] *Credit Agricole Corporation and Investment Bank v Papadimitriou* [2015] 1 WLR 4265.
[126] *The Federal Republic of Brazil v Durant International Corporation* [2016] AC 297.
[127] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] 1 AC 250.
[128] *Sinclair Investments Ltd v Versailles Trade Finance Ltd* [2012] Ch 453.
[129] Roy Goode, 'Ownership and Obligation in Commercial Transactions' [1997] LQR 433; Roy Goode, 'Proprietary Liability for Secret profits - a Reply' [2011] LQR 493.