CHANCELLOR
OF THE HIGH COURT

SAL Distinguished Speaker Lecture

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"Certainty v. Creativity: Some pointers towards the development of the common law"

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Abstract: In an October 2017 lecture entitled "Contractual Interpretation: Do Judges sometimes say one thing and do another?",[2] I pointed out that the law on contractual interpretation as laid down in *ICS v. West Bromwich Building Society* had not survived the two recent UK Supreme Court decisions in *Arnold v. Britton* and *Wood v. Capita*.

In a May 2018 lecture entitled "Preserving the integrity of the Common Law",[3] I gave a number of examples of recent UK Supreme Court decisions, with which the highest courts in other Commonwealth common law jurisdictions had not agreed. I suggested that the development of the common law should be incremental and that judges should be cautious about seismic changes or approaching landmark cases with a blank sheet of paper.

In this lecture, there is a return to the theme of the appropriate development of the common law, to ask how crucial certainty really is to the common law, as compared to impeccably reasoned judicial creativity. The lecture looks at some recent examples including a further consideration of *Patel v. Mirza* and *Ochroid Trading v. Chua Siok Lui*.

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1 The speaker is the Chancellor of the High Court of England and Wales.

2 Now published as an article in [2017] 23 Canterbury Law Review 1. The lecture can also be found at https://zapdoc.tips/contractual-interpretation-do-judges-sometimes-say-one-thing.html.

3 Delivered to the Chancery Bar Association at the Inner Temple on 16th April 2018, found at https://www.chba.org.uk/for-members/library/annual-lectures/preserving-the-integrity-of-the-common-law.

Introduction

1. Whenever you hear English commercial judges talk about the common law, the first thing you will hear them say is that its greatest virtues are its certainty and its predictability. These characteristics are said to place it ahead of any code-based system of law, because its structure of basic principles and rules can more easily be applied to fast changing commercial situations and new technologies such as smart contracts and artificial intelligence. In contrast, any code-based system depends on the interpretation of something written in a past age for the circumstances of that past age, which makes it less predictable and certain when applied to new commercial situations of the kind I have mentioned.

2. What I want to explore in this lecture is how important those qualities of certainty and predictability really are, and whether in the real world they are as ubiquitous as many common law judges suggest. As I said in the second of my three recent lectures (this being the third), certain UK Supreme Court decisions have not always been followed by other Commonwealth common law jurisdictions, the development of the common law has not always been as incremental as it perhaps should be, and judges in the UK at least have been prone to make some over-enthusiastic changes to the common law and to approach some landmark legal situations with a blank sheet of paper.

3. I want to start with an examination of the scope of the common law, since this is an aspect that has not received much recent attention. Then I will look briefly at some of the more striking examples of seismic change, before returning to the question of how important certainty and predictability really are, as compared to more imaginative and case-specific judicial solutions in the resolution of particular disputes.

The scope of the common law

4. When researching this lecture, I was surprised not to be able to find a ready explanation of the scope of the common law. It is frequently contrasted with statutory law or constitutional law, or with equity, or with European law in the modern context of Brexit. But the subject areas in which the common law holds sway are not often defined.

5. Historically, in England since the Norman conquest, the common law has developed in both the public and the private law field. For example, until the last century, most criminal law consisted of common law rather than statutory offences. In private law, in the most general terms, the law developed from actions in debt, trespass and in assumpsit to the action on the case, allowing for the vindication of contractual rights based on specialties and otherwise, and for claims in negligence.

6. Another attempted definition of the common law relates to its incremental development by the process of deciding cases, rather than by the interpretation of statutes. But this does not really do the common law justice, since there are aspects of the process of statutory interpretation that seem to me anyway to be functions of the common law.

7. The areas in which the common law is most obviously engaged are the law of contract, the law of torts, and the law of personal property.[4] The development of the law of restitution and unjust enrichment are further examples. But since the so-called fusion of law and equity in 1875, there are many equitable doctrines that are very much within the ambit of the common law. One can think of the law of estoppel, the law of fiduciary relationships, and of resulting and constructive trusts as examples.

8. Even in the public and administrative law field, there are common law influences in questions of illegality, legitimate expectations, bias, and procedural fairness, to take just a few examples. I recently sat in the Court of Appeal on an important case on legal professional privilege,[5] where the court[6] said expressly that "[i]t is undoubtedly desirable for the common law in different countries to remain aligned so far as its development is not specifically affected by different commercial or cultural environments in those countries". We continued by saying that "legal professional privilege is a classic example of an area where one might expect to see commonality between the laws of common law countries, particularly when so many multinational companies operate across borders and have subsidiaries in numerous common law countries". I will return to this as we progress.

9. So, the tentacles of the common law are rather more far-reaching than one might at first sight think, and this makes it all the more important that we understand what it is about its certainty and predictability that we value, and how that fits into the national and the international context. Apparently, one third of the world's citizens live in common law countries – that is a lot of people, and we should think carefully about the legal approach that underpins their governance.

10. Sir Edward Coke said in the early 17th century that "the common law is the best and most common birth-right that the subject hath for the safeguard and defence not onely of his goods, lands and revenues, but of his wife and children, his body, fame and life also". The extent of its reach was clear even then.

Some striking examples

11. In the second lecture to which I have referred, I took a number of examples of UK Supreme Court decisions which had not been followed in Singapore and elsewhere. I don't want to dwell on the fact of these departures today. Rather, I want to look at some examples of the reasons that common law courts have expressed for declining to follow their colleagues in other common law jurisdictions or their own previous determinations in important cases.

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[4] The law of real property, whilst originally entirely a function of the common law, is now dominated by the statutes that were introduced first between 1832 and 1845, then between 1881 and 1890, and finally between 1922 and 1925, though there have been many significant amendments since then. Much of the law of intellectual property is also now enshrined in statutes and treaties.

[5] *ENRC v. The Serious Fraud Office* [2018] EWCA Civ. 2006.

[6] I was sitting with Sir Brian Leveson, President of the Queen's Bench Division and Lord Justice McCombe.

12. We can look first at the most celebrated of these recent decisions, namely *Patel v. Mirza*[7] ("*Patel v. Mirza*"), where the Supreme Court changed the common law approach to the illegality defence. Instead of the 'reliance test' adumbrated in *Tinsley v. Milligan*,[8] and in place of the old rule-based approach, the Supreme Court introduced a three-stage test. That involves, first, asking whether the purpose of the prohibition transgressed would be enhanced by denial of the claim. The second stage is to ask whether denial of the claim might impact on any other relevant public policy. The final question is whether denial of the claim would be a proportionate response to the illegality.

13. When I said about *Patel v. Mirza* that the new approach represented a sea-change "from a series of strict rule-based tests to a series of flexible tests driven by policy considerations",[9] I was met with the retort that the UK Supreme Court had in fact founded its new approach on two Commonwealth cases, *Hall v. Hebert* in the Supreme Court of Canada in 1993,[10] and *Nelson v. Nelson* in the High Court of Australia in 1995.[11] Whilst there was indeed support for a policy-driven approach to the resolution of illegality issues in these earlier Commonwealth cases, it would hardly be right to say that they justified the introduction of an entirely discretionary series of tests across the law of illegality.[12] But that aspect of what is undoubtedly an interesting debate is not the primary focus of this lecture. I am content to refer to what Lord Sumption (who was in the minority of three judges in the Supreme Court in *Patel v. Mirza*) said about the question of certainty.

14. Lord Sumption said that the appeal exposed "a long-standing schism between those judges and writers who regard the law of illegality as calling for the application of clear rules, and those who would wish to address the equities of each case as it arises".[13] It raised, he said, "one of the most basic problems of a system of judge-made customary law such as the common law". The common law, said Lord Sumption, was "not an uninhabited island on which judges are at liberty to plant whatever suits their personal tastes. It is a body of instincts and principles which … is developed organically, building on what was there before".

15. Lord Sumption then explained that there was a price to be paid for the common law's greater inherent flexibility and greater capacity to develop independently of legislation than codified systems. That price included "pragmatic limits to what law can achieve without becoming arbitrary, incoherent and unpredictable".[14] He said

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7 [2016] UKSC 42.

8 [1994] 1 A.C. 340.

9 Paragraph 18 of the published text of the lecture "Preserving the Integrity of the Common Law" *supra*.

10 [1993] 2 SCR 159.

11 184 CLR 538.

12 Indeed, it could be argued that these cases do not entirely support the new approach at all – see Lords Mance, Clarke and Sumption at paragraphs 191, 215 and 257 in *Patel v. Mirza*.

13 Paragraph 226.

14 Paragraph 226.

that it would be wrong for the Supreme Court to "transform the policy factors which have gone into the development of the current rules, into factors influencing an essentially discretionary decision about whether those rules should be applied". He rejected the 'range of factors' test as "unprincipled" pointing to its devaluation of the "principle of consistency, by relegating it to the status of one of a number of evaluative factors, entitled to no more weight than the judge chooses to give it in the particular case". As he pointed out, "the criminal law [which] … is in almost every case the source of the relevant illegality, is a critical source of public policy", and, in the criminal law, knowledge of the illegality is of no relevance. It was, therefore, "difficult to see why it should be any more relevant in a civil one". It would be wrong to leave so much "to a judge's visceral reaction to particular facts". Lord Sumption concluded by saying that the majority's approach would "[f]ar from resolving the uncertainties created by recent differences of judicial opinion … open a new era in this part of the law". He warned that "[a] new body of jurisprudence would be gradually built up to identify which of a large range of factors should be regarded as relevant and what considerations should determine the weight that they should receive".[15]

16. A consideration in Singapore of *Patel v. Mirza* would not be complete without a mention of the Singapore Court of Appeal's decision in *Ochroid Trading Company v. Chua Suok Lui*,[16] rejecting the 'range of factors' approach in *Patel v. Mirza*, and broadly endorsing the approach of the minority in that case. Paragraphs 123 and 124 of the judgment of the court in that case are an illuminating treatment of the issue of uncertainty. They endorse Professor Goudkamp's view that "the policy-based test … requires the courts to weigh incommensurable factors" i.e. to weigh factors that have no common standard of measurement,[17] and criticised *Patel v. Mirza* for allowing the adoption of an essentially open list of factors.

17. The Singapore Court of Appeal justified the engagement of the balancing approach that it had itself adopted in 2014 in *Ting Siew May v. Boon Lay Choo*[18] in respect of contracts tainted by illegality, but which were neither prohibited by statute nor contrary to one of the established heads of common law public policy. It did so on the basis that the "balancing approach" reduced the scope and ambit of uncertainty,[19] because it was confined to "*only a residuary area of common law illegality*", and

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15 Paragraph 263. Indeed, I understand that the Supreme Court has already given permission to appeal on this very point in *Singularis Holdings Limited v. Daiwa Capital Markets Europe Limited* [2018] EWCA Civ 84.

16 [2018] SGCA 5.

17 See James Goudkamp on "The End of An Era? Illegality in Private Law in the Supreme Court" (2017) 133 LQR 14 at paragraphs 18-19.

18 [2014] 3 SLR 609.

19 See paragraph 70 of the Singaporean Court of Appeal's decision in *Ochroid*: "We would summarise the general factors which the courts should look at in assessing proportionality in the context of contracts entered into with the object of committing an illegal act as including the following: (a) whether allowing the claim would undermine the purpose of the prohibiting rule; (b) the nature and gravity of the illegality; (c) the remoteness or centrality of the illegality to the contract; (d) the object, intent, and conduct of the parties; and (e) the consequences of denying the claim".

because it was anchored to the overarching principle of proportionality which was a well-established legal principle that the courts regularly apply in other areas.[20]

18. It is interesting to note that each of the three commercial judges in the minority in *Patel v. Mirza*, Lords Mance, Clarke, and Sumption valued legal certainty in the law of contract. The common law principles of illegality have repercussions, of course, in tort and in the law of property and trusts as well, and it is the way in which the principles find their application in distinct legal areas that has caused some of the confusion. It could very well be said, however, that certainty is as much required in the law of property and trusts, and indeed in the law of unjust enrichment, as it is in the law of contract, since business people are governed as much by these aspects of the law in their dealings as they are by the law of contract.

19. The Singapore court also expressed the view that such a sweeping reform of the illegality defence would have to be introduced by the legislature, but even that would not cure the problems of uncertainty.

20. I will return to *Patel v. Mirza*, but let me turn now to my second example.

Actavis v. Eli Lilly

21. The starting point was *Kirin-Amgen Inc v. Hoechst Marion Roussel Ltd*,[21] in which Lord Hoffmann held, it might be said in pursuance of interpretative orthodoxy, that the scope of a claim in a patent is solely a matter of purposive construction.[22] The court must ask what a person skilled in the art would have understood the patentee to mean by the language of the claim, but need ask nothing more.[23] The American "doctrine of equivalents" was rejected. That doctrine allows for the infringement of a patent where the defendant's product performs substantially the same function in substantially the same way as the invention so as to achieve the same results. The UK courts had previously rejected the doctrine of equivalents as impermissibly extending the protection conferred by a patent beyond its claims.

22. In *Actavis UK Limited v. Eli Lilly & Co* [2017] UKSC 48, Lord Neuberger held that this was merely the first stage in a two-part test. If the variant does not infringe any of the claims as a matter of normal interpretation, the court must go on to ask whether it nonetheless infringes because it varies from the invention in a way that is immaterial. This was a reintroduction of the doctrine of equivalents into English patent law, bringing it more into line with the United States and continental Europe. It is said that the *Actavis v. Eli Lilly* approach is overly favourable to patentees, allows elastic claims and undermines the established view that the construction of a claim is the same whether validity or infringement is to be considered.

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[20] See also *Parking Eye Ltd v. Somerfield Stores Ltd* [2013] QB 840.

[21] [2004] UKHL 46; [2005] RPC 9.

[22] And the test for patent infringement was to ask what the person skilled in the art would have understood the patentee to mean by the language of the patent claim, and whether the accused product falls within the scope of the claim as purposively construed.

[23] See also *Catnic Components Limited v. Hill & Smith Limited* [1982] RPC 183 and *Improver Corporation and others v. Remington Consumer Products Limited* [1990] FSR 181.

23. In Singapore in *Lee Tat Cheng v. Maka GPS Technologies* in 2018,[24] the Singapore Court of Appeal declined to follow *Actavis v. Eli Lilly* citing three main reasons including, once again, the certainty of the common law. They said[25] that if they were to apply *Actavis v. Eli Lilly*, and to import the doctrine of equivalents, it might "give rise to undue uncertainty". They continued by endorsing what Lord Hoffmann had said in *Kirin-Amgen*[26] to the effect that the doctrine of equivalents allowed the monopoly conferred by a patent to extend beyond the terms of the claims, and "once the monopoly has been allowed to escape from the terms of the claims, it is not easy to know where its limits should be drawn". They said that "[d]etermining the scope of the monopoly conferred by a patent based on a purposive interpretation of the patent claims [gives] rise to greater certainty because it is aimed at determining what, based on the language of the claims, the patentee would have objectively meant to include within the scope of his monopoly *at the time of the patent application*".[27] Conversely, incorporating the doctrine of equivalents would, they said, bring with it "an element of *ex post facto* analysis" focusing on "how the patented invention works in practice based on the state of developing scientific knowledge *at the date of the alleged infringement*".[28] The Singapore Court of Appeal concluded by saying that such an approach had a "material impact on the protection afforded to the patentee" which was a change which was a matter for Parliament rather than for the court.

24. It is hard to see any cultural context for this difference of approach, and it might be said that it would be desirable for the common law approach to the interpretation of patents to be in harmony across the common law world.

Willers v. Joyce

25. My third example is the case of *Willers v. Joyce*[29] in 2016 that has engendered much disagreement. It was itself a decision by a majority of 5 to 4 in the UK Supreme Court upholding the decision of the Privy Council in *Crawford Adjusters v. Sagicor General Insurance (Cayman) Limited*,[30] which was decided by a majority of 3 to 2. The main import of these decisions was to extend the tort of malicious prosecution to civil proceedings generally.

26. Just last month, the Singapore Court of Appeal declined to follow *Willers v. Joyce* in *Lee Tat Development Pte Ltd v. Management Corporation of Grange Heights Strata Title Plan No. 301*.[31] This is an area where different routes have been followed in different common law jurisdictions, so the Singaporean decision not to follow the UK

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24 [2018] SGCA 18.

25 at paragraph 53.

26 at paragraph 39.

27 emphasis in original.

28 emphasis in original.

29 [2016] UKSC 43.

30 [2013] UKPC 17.

31 [2018] SGCA 50.

Supreme Court's lead is not a criticism of its decision. It is interesting to note, however, in general terms that the arguments for the extension of the tort of malicious prosecution to civil proceedings are pretty well identical in all common law jurisdictions, namely deterring abusive litigation and historical arguments based on some pretty old cases and sporadic precedential examples. The argument against extension of the tort includes the likelihood of opening the floodgates to satellite litigation.

27. Once again, it is hard to see any cultural context justifying a difference of approach, saving perhaps a greater emphasis on the importance of the finality of litigation in different places. What is emerging, therefore, is a difference of cultural disposition between those courts willing to consider significant changes to the common law, and those resistant to it.

Armes v. Nottinghamshire County Council

28. Fourthly, I want to mention, but only briefly, the vexed subject of vicarious liability. In a very recent article entitled "Fostering Uncertainty in the Law of Tort",[32] Professor Andrew Dickinson concluded that the law on vicarious liability was "now no more than a blunt tool for giving effect to judicial instincts for social justice". He was referring, of course, to the Supreme Court's decision in *Armes v Nottinghamshire County Council*[33] to make a local authority vicariously liable for physical, sexual and emotional abuse by foster parents to whom it had entrusted a child's care.

29. *Armes* was concerned with the first of the two questions that need to be asked in order to establish vicarious liability, namely the "relationship" question, rather than the "conduct" question. I commented on the Supreme Court's decision in *Mohamud v. Wm Morrison Plc*[34] in my second lecture, where I noted that that decision had not found favour with the High Court of Australia in *Prince Alfred College Inc v. ADC*.[35]

30. Lord Hughes, who dissented in *Armes*, made clear that "[v]icarious liability is strict liability, imposed on a party which has been in no sense at fault", and that "the extension of strict liability needs careful justification". The law should, as Professor Dickinson said, "resort to it … in a manner that is both predictable and justified as a matter of principle". Indeed, even Lord Reed, giving the majority judgment in *Armes* acknowledged that it had been made clear in *Cox v Ministry of Justice*[36] that having recourse to a separate inquiry into what is fair, just and reasonable in relation to vicarious liability was "apt to give rise to uncertainty and inconsistency". Professor Dickinson thought that judges of this century had relied on "a casserole of incommensurable policy reasons and general resort to notions of what is "fair" and "just" to support the doctrine, making its operation "highly unpredictable"".

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32 (2018) 134 L.Q.R. 359.

33 [2017] UKSC 60.

34 [2016] UKSC 11.

35 [2016] HCA 37.

36 [2016] UKSC 10; [2016] AC 660, at paragraph 41.

31. The UK Supreme Court disapproved the Court of Appeal's reliance on the reasoning of the majority of the Supreme Court of Canada in *KLB v. British Columbia*,[37] preferring instead the decision of the New Zealand Court of Appeal's decision in *S v. Attorney General*.[38]

32. My point here is not so much as to the detail of the decision in *Armes*, but more about what it says about the predictability of the law of tort. Whilst the facts make it look as if there is nothing commercial about the decision, much of the reasoning is about the commercial elements of the 5 factors enunciated in *Cox*.[39] The two main commercial factors are that the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability, and that the employee's activity is likely to be part of the business activity of the employer.

33. Once again, it would be a mistake, I think, to take too narrow a view of the commercial ramifications of decisions in the law of tort. In my view, the business consequences of decisions about liability of public authorities both in tort and in public law are almost as important as the consequences of decisions about purely contractual issues.

ENRC v. The Serious Fraud Office

34. Next, I want to mention briefly again *ENRC v. the Serious Fraud Office*,[40] where we had cause to consider a number of Commonwealth decisions on legal advice privilege, which had distinguished or declined to follow the English Court of Appeal's decision in *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No. 5)*.[41] *Three Rivers (No. 5)* had confined the scope of legal advice privilege to communications with an employee who was specifically tasked to seek and obtain legal advice (described as the "client" for these purposes), rather than including communications with a company's lawyer, whenever the employee communicating was authorised by the corporate client to provide the information to the lawyer.

35. In Singapore, *Skandinaviska Enskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd.*[42] decided that the *ratio* of *Three Rivers (No. 5)* was more

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37 [2003] 2 SCR 403.

38 [2003] NZCA 149; [2003] 3 NZLR 450.

39 The five factors were summarised in paragraph 55 of *Armes* as: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; and (v) the employee will, to a greater or lesser degree, have been under the control of the employer.

40 [2018] EWCA Civ. 2006.

41 [2003] QB 1556.

42 [2007] 2 SLR 367.

limited than we decided in *ENRC*. But in *Citic Pacific Ltd v. Secretary for Justice*,[43] the Hong Kong Court of Appeal concluded that legal advice privilege should exist wherever the dominant purpose of the communication was to obtain legal advice, and that the narrow definition of the "client" adopted in *Three Rivers (No. 5)* was not appropriate.

36. In the English Court of Appeal, we felt bound by the previous Court of Appeal decision in *Three Rivers (No. 5)*, and suggested that overruling it was a matter for the UK Supreme Court. But, as I have already said, we drew attention to the desirability of a consistent approach to legal professional privilege in common law countries generally, pointing to the multinational companies that operate across many borders. This is something that I think is of particular significance when we come to consider whether certainty, predictability and consistency are really important.

37. There are many more cases that I could have included, but I don't want to take time with multiplying examples. Rather, I want to try to draw some conclusions, or at least to point out some things that may worthy of further consideration in the future.

The meaning of judicial certainty

38. I have already alluded to the difference of approach between judges emanating from a commercial or chancery background and those trained, for example, in public, family or criminal law. The commercial judges place great store by certainty in the law because that is what attracts business people across the world to make use of common law systems and common law jurisdictions. Public lawyers sometimes place greater emphasis on the justice of the outcome in the particular case, not being overly concerned by the possibility that the outcome is less predictable when it turns on judicial discretion.

39. Once one accepts that certainty is important for commercial life, then one needs to explore which aspects of the common law affect commerce. As I have already suggested, rather more aspects of the law affect commercial life than might immediately be apparent.

40. There are certain basic parameters to the context in which one asks what areas of the common law affect business.

41. First, business and therefore legal relationships are more global and borderless than ever before. Many corporations have no meaningful home jurisdiction. They operate internationally. Amazon, Google and Apple are the classic examples, but there are many others. Whilst business is becoming more international, domestic politics is, on one analysis, becoming more parochial. This trend seems to have examples on every continent, but it has not yet had a real impact on the cross-border nature of almost every major modern industry.

42. Secondly, the new technologies that will undoubtedly infiltrate every aspect of our domestic and business lives are entirely borderless. It is, for example, a contradiction in terms to talk about UK or Singaporean digital ledger technology. A digital ledger is by definition cross-border since any node can join the network provided it meets the stated criteria. Smart contracts operated on the blockchain are likewise borderless.

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[43] [2016] 1 HKC 157.

We can expect digital ledger technology to find applications across the gamut of business life in the coming months and years.

43. Against this background, one can ask what aspects of the common law need to be certain to facilitate the legal foundation for the activities of international business? What parts of the common law particularly require to be easily intelligible, predictable and certain? The law of contracts is the starting point. But international corporations have to be certain also that their cross-border activities do not infringe criminal laws, the law of tort, and the requirements for the registration and transfer of intellectual, personal and real property in any host nation. The laws of bribery are a classic example, and they immediately take us back to the common law of illegality which I was speaking about earlier. But product liability in tort, corporate governance, the law of insolvency, and the law of competition and financial regulation provide further examples, all demonstrating the wide range of legal areas in which there is a need for certainty. Even the liability of public authorities has commercial ramifications as one can see from my earlier reference to *Armes*.

44. It is for these reasons that I would suggest that we cannot draw a meaningful line between the need for certainty in the law of commercial contracts, on the one hand and the need for certainty in the numerous other areas of law affecting international business activity, on the other hand. Nor should we seek to do so.

45. Moreover, cross-border business and the new borderless financial service technologies mean that our common law jurisdictions bear a heavy responsibility for ensuring that the common law is not arbitrarily different in different places or indeed an instrument of discretion. In the modern commercial environment, I would suggest that we cannot afford the fragmentation caused by non-aligned common laws and judicial systems. It causes added legal costs and expenses, and unaffordable delays in securing reliable legal advice and effective dispute resolution.

46. What then does this line of thought mean for the rational development of the common law? It means that certainty has two facets. The internal certainty, consistency and predictability of a single common law system, and the consistency of common law systems across jurisdictions. Let me look briefly at each of these in turn.

<u>Internal consistency in the common law</u>

47. In my view, judges need to pay greater attention to the ramifications of their decision-making. It is perhaps easier to create new and imaginative legal principles than to rely on the traditional development of the common law. The traditional incremental process of changing the common law on a case by case basis does not always seem very exciting. But it has a long history and, more importantly throughout that history, it has served the commercial community well. One recent example of this incremental process in England was the decision of Stephen Males J (as he then was) in *Golden Belt Sukuk Company B.S.C. v. BNP Paribas*,[44] where the judge decided that the bank arranging the issue of an Islamic financing bond owed a duty to subsequent holders of the bonds to take reasonable care to ensure that the promissory note had been properly executed. Such a duty had never been recognised before. In fact, a facsimile rather than a real signature, had been attached to the promissory note. Whatever can be said about the actual decision in that case, it

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[44] [2017] EWHC 3182 (Comm).

provides a good example of the way in which the question of whether a duty of care exists can develop incrementally from one specific situation to another.

48. The incremental process has not satisfied all judges. The most adventurous or creative judges have sometimes achieved popularity in their day by disregarding it. But the products of their legal creativity have not always been so well-regarded with the benefit of hindsight. I referred in my second lecture to Lord Denning and to some of his adventures with the law that were unpicked once he had retired. As I said there,[45] Lord Denning's watchword was the justice of the case. His approach has echoes in some of the decisions that I have mentioned this afternoon. This applies to *Patel v. Mirza*, where the test for enforceability of contracts and the restitution of monies paid away is made subject, in effect, to the discretion of the court. It applies also to *Armes* where it has been suggested, as I have explained, that the decision was dictated more by a desire to achieve social justice than by a principled application of established legal rules.

49. I wonder whether we need to be willing a little more often to accept a less desirable outcome in a particular case in order to ensure the certainty that the users of our private law need. It is noteworthy, nonetheless, that all the judges in *Patel v. Mirza*, in both the Court of Appeal and the Supreme Court, reached the same result. Thus, all that was in issue was the legal theory. The old rule-based law of illegality allowed the minority judges to reach the outcome that all 12 judges in the Court of Appeal and the Supreme Court wanted. One may ask rhetorically why it was necessary to attempt a rationalisation of the entire law of illegality in that particular situation, when the incremental approach dealt satisfactorily with the case in point. I understand that the majority in *Patel v. Mirza* was able to point to potential illogical outcomes that would be created by the application of, for example, the reliance principle and the *locus poenitentiae*,[46] but that did not necessitate an entire re-write of the law without either any degree of unanimity across common law jurisdictions, or perhaps more importantly, legislative change.

50. The ever-increasing complexity of the facts and the arguments advanced in modern cases should not alter the task of the judge. The complexity may be in part due to the proliferation of written and electronic documentation, and in part to the ingenuity of the modern legal professions. It may also, in some measure, be due to the complexity of financial instruments and arrangements. But none of that means, in general terms, that the essential core issues in any particular case are generally more complex than they used to be. It may take longer to distil the case down to its essential components, but once done, what has to be resolved is more often than not fairly straightforward. Judges should continue to work hard to achieve this

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[45] I said this at paragraph 6 of my second lecture: "Lord Denning had decided that justice was to be the watchword, even if that involved changes to a rule book that others had thought was clear. He was responsible for numerous departures from established norms, and law students and the less privileged loved him for it. Even now, we can recall some examples in a few moments' thought: amongst the more eyebrow-raising were the unequal bargain doctrine applied in *Lloyd's Bank v. Bundy* [1975] QB 326 (but since disapproved in *National Westminster Bank v. Morgan* [1985] AC 686), and the principle of proprietary estoppel established in *Central London Property Trust v. High Trees House* [1947] KB 130".

[46] John Gray's *vade-mecum* on Lawyers' Latin 2002 defines the *locus poenitentiae* as "'a place of repentance'. Used in the law to denote a breathing space, a time before legal obligation operates; or during which the law affords an opportunity for change of mind".

distillation quickly and effectively. One can only understand the real importance of the decision that is being made, and its ramifications for the common law, once this exercise has been properly undertaken.

Consistency across common law jurisdictions

51. I come then to what is perhaps the most difficult aspect of my subject. That is how far common law jurisdictions should feel constrained by the approach that is followed in other common law jurisdictions? My answer to that question, put briefly, is "quite a bit". And I think that answer is becoming more, not less, important as the world becomes smaller and as more and more businesses operate globally. The consistency of the common law across jurisdictions is a great benefit not only to international companies, but also to the populations that they serve. It allows them to take a holistic view of their business and its performance without the need to seek legal advice in multiple jurisdictions, and to take a different legal approach to each of the areas of their operations.

52. Consistency across common law jurisdictions is one facet of the certainty and predictability of the common law. And it is one that is very much part of the expectation of the international business community. The questions that arise are first, whether it can realistically be achieved and, secondly, when it is acceptable for the highest court in one common law jurisdiction entirely to disregard the highest court in another of those jurisdictions.

53. Lord Neuberger touched on this subject in *Starbucks (HK) Ltd v. British Sky Broadcasting Group PLC*,[47] where the Supreme Court considered whether to change the common law of passing off. The specific issue was whether to do away with the requirement for a trading business to exist within the jurisdiction in question. Lord Neuberger said that it was obviously open to the Supreme Court "to develop or even to change the law in relation to a common law principle, when it has become archaic or unsuited to current practices or beliefs". He said that it was "one of the great virtues of the common law that it [could] adapt itself to practical and commercial realities, which is particularly important in a world which is fast changing in terms of electronic processes, travel and societal values". I interpose that that is a sentiment with which I entirely agree. He continued by saying that they "should bear in mind that changing the common law sometimes risks undermining legal certainty, both because a change in itself can sometimes generate uncertainty and because change can sometimes lead to other actual or suggested consequential changes". Again, I respectfully agree. He concluded by pointing out that it was "both important and helpful to consider how the law has developed in other common law jurisdictions – important because it is desirable that the common law jurisdictions have a consistent approach, and helpful because every national common law judiciary can benefit from the experiences and thoughts of other common law judges". I concur. The question is whether these words have always been sufficiently carefully heeded.

54. In my second lecture, I gave a number of examples of where other Commonwealth courts had declined to follow the UK's Supreme Court, and there are, of course, a commensurate number of examples the other way around. But there is little insight into when these disagreements are principled and when they are not.

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[47] [2015] UKSC 31, [2015] 1 WLR 2628 at paragraphs 49-50.

55. We can start with the easy cases. If a national Supreme Court is dealing with a local cultural issue, it is hardly likely that it will feel itself bound by a decision elsewhere. That is the purpose of having our own court systems – so as to deal with essentially parochial issues. The classic example is the case of Maori questions in New Zealand, where decisions as to the common law frequently take into account national cultural factors. For example in *Takamore v. Clarke*,[48] where the majority thought that there was a common law rule in New Zealand under which personal representatives had both rights and duties as to the disposal of the body of a deceased.

56. It is, however, much harder to see why the common law on, for example, contractual interpretation should differ from one common law jurisdiction to another. Yet, as I pointed out in my first lecture, it does. I drew attention these to the differences between common law jurisdictions in, for example, allowing reference to pre-contractual negotiations in determining questions of construction, and on the question of whether ambiguity has to be established before contextual and business common sense construction is permissible.[49]

57. There are other even more important areas where one would have thought that consistency would be a good thing. Take, for example, the definition of dishonesty, which is an old chestnut, but an important one. In *Ivey v. Genting Casinos UK Ltd*[50], the UK Supreme Court amended the test for criminal dishonesty established in *R v. Ghosh*.[51] It, perhaps sensibly, aligned the criminal test with the civil test established in *Royal Brunei Airlines v. Tan*[52] and *Barlow Clowes v. Eurotrust*,[53] abrogating the subjective element, namely whether the defendant realised that his conduct was dishonest according to the standards of ordinary and reasonable people. This left the test in English law as being simply whether an ordinary and reasonable person, possessing the defendant's knowledge and beliefs as to the facts, would consider the defendant's conduct dishonest.[54] I need not dwell on the disagreements across the Commonwealth about these tests. It is perhaps sufficient to quote one academic article by David Lusty on the "Meaning of dishonesty in Australia: rejection and resurrection of the discredited *Ghosh* test", who started his treatment of the subject by quoting these words: "[f]or many years criminal law in Australia was bedevilled by the so-called *Ghosh* test".

58. So, let me step back for a moment from the detail. These kinds of basic common law principles are not generally affected by parochial factors, and should probably, therefore, as a matter of logic and good sense, be consistent across common law jurisdictions. Those businesses operating cross-jurisdictionally will find it far more difficult to manage their overseas subsidiaries if there are inconsistencies in basic

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48 [2012] NZSC 116.

49 See section VI of the article in Canterbury Law Review *supra*.

50 [2017] UKSC 67.

51 [1982] QB 1053.

52 [1995] 2 AC 378.

53 [2006] 1 WLR 1476.

54 See my second lecture at paragraphs 53-54.

common law principles. It is one thing to cope with statutory variations but another to find that the basic building blocks of the common law vary from jurisdiction to jurisdiction.

The case for creative judicial solutions

59. I have explained why certainty is important to the business community and the considerable extent of the legal areas in which certainty may be valued. It is time to look at the other side of the coin. The judges in the majority in *Patel v. Mirza* undoubtedly thought that justice could not be achieved, at least in future cases, without a rationalisation of the law, and a recognition of the public policy underpinning to the law of illegality. In *Armes*, there was a strong case in justice for the liability of the local authority. In *Actavis v. Eli Lilly*, the change in the law effected a harmonisation with a number of European and US laws. And in *Willers v. Joyce*, the acceptance of an extended cause of action in malicious prosecution certainly filled an apparently illogical gap in the common law.

60. One can see from these few cases, therefore, that there are always two sides to the story. The divide is not always commercial certainty versus public law justice. It is more nuanced than that. But it is, as I have already said, possible to discern a difference of cultural disposition between those courts willing to consider significant changes to the common law, and those resistant to it. And, of course, as the composition of these courts change, so their cultural disposition itself sometimes also changes. We have certainly seen that over recent generations in the House of Lords and then the UK Supreme Court.

61. Philosophically, one can see very strong arguments for any approach that achieves a just outcome in all cases, whether that outcome is or is not entirely predictable in advance. A lack of predictability does, however, tend to increase appeals mounted in the hope that the highest courts will be more willing to countenance a departure from the received position. It probably also tends to increase expenditure on legal costs as a result.

62. I come then to try to draw some tentative conclusions.

Some tentative conclusions

63. We will not advance the cause of certainty and consistency by jingoism. Rather, we should, I think, be advocating considered judicial restraint. We should be looking to revert more closely to what I would like to regard as the best traditions of the incremental development of the common law. The decisions of an earlier generation of judges were shorter, because they were genuinely confined to a resolution of the facts of the case and the relevant applicable law. Courts in the late 19th and early 20th centuries generally eschewed wide-ranging treatises.

64. I believe that judges in our highest courts should consider carefully in every case how the common law is developing in different jurisdictions, with a view to seeing whether consistency can be achieved. There may even be a case for more cross-jurisdictional debate between senior courts on specific topics. On a municipal basis, the development of the common law should be on a genuinely incremental basis. Seismic changes should, I think, be avoided where possible. The blank sheet of paper should be abandoned in favour of the principled application of authority. Where authority diverges, an attempt should be made to choose the stream that is most consistent and predictable. Judicial creativity has its place, but when it intervenes, it should do so incrementally rather than in great strides.

65. If these principles are followed, I believe that all our courts will better serve not just the commercial community, but also the consumers and other elements of our societies that seek the protection of the common law. Law is rightly sometimes regarded as slow to change. It does not need to emulate populism. Its slow pace of change enhances its certainty and its predictability and should not be hastily condemned.

66. In conclusion, I would like to repeat two points I made at the end of my second lecture. I should not be taken as counselling some form of extreme change to our judicial process, let alone judicial conservatism. Instead, I am suggesting that a measure of judicial restraint remains highly desirable. By adopting the tried and tested approach of the common law, we will have a better chance of securing the accord of the highest courts across our common law jurisdictions when necessary changes, occasioned by new commercial situations, dictate incremental changes in the common law.

67. The second point was that all this is even more important as the UK leaves the European Union. Our courts need to continue to demonstrate to the world that English law can safely be relied upon by the international business community for its certainty and dependability. As I said before, and I am not ashamed to repeat, "[w]e are the custodians of a precious commodity, and should exercise caution and restraint in the way we treat it".

68. I hope that my thoughts this evening will provoke some informed debate. I am sure that they will not be able overnight to harmonise the common law applicable in all our influential common law jurisdictions. That may, at least, require yet another lecture.

69. I am very grateful for your courteous attention.