TALK FOR COMMERCIAL COURT SEMINAR ON 8 MAY 2025

"Equity's support for commercial bargains"

1. Equity is often said to have a role in mitigating the rigour of the common law. However, it also plays an important part in supporting commercial bargains, and indeed ensuring that they are given full effect. That is the theme of my talk this evening.

2. The categories of equitable intervention I'm going to touch on are a very long way from the "*'formless void' of individual moral opinion*" decried by Deane J of the High Court of Australia in *Muschinski v Dodds*[1] ; and nor does equity function here as some form of "*joker or wild card*", adopting the terminology of Lord Walker in *Cobbe v Yeoman's Row Management*[2]. Rather, as Lord Sales put it at the end of his 2023 talk on "*The Interface Between Contract and Equity*"[3], they involve a degree of confluence between the two, and significant, though nuanced and subtle, interaction.

3. One of the most interesting and topical areas where common law and equity interact is the case law about anti-suit injunctions. Any injunction is, of course, an equitable remedy, but I'll speak in particular about ways in which injunctions in support of a contractual right are supplemented by injunctions related to, but not directly enforcing, contractual rights: an 'equitable equitable remedy', if you like.

4. The first thing is to find the outer limit of the area where a purely contractual right can be enforced by an anti-suit injunction. The applicant has to begin by showing "a high degree of probability" that the clause binds the respondent: see, for example, *Transfield Shipping v Chiping Xinfa Huayu Alumina*.[4]

5. The applicant itself normally needs to be a party to the contract containing the clause, though occasionally a third party may be entitled to an injunction pursuant to the Contracts (Rights of Third Parties) Act 1999. In *Manta Penyez Shipping* earlier this year,[5] the defendant arrested the first claimant's vessel and also a vessel owned by its affiliate, the second claimant. The first claimant provided a bank guarantee in the defendant's favour, containing an arbitration

[1] *Muschinski v Dodds* (1985) 160 CLR 583, 615
[2] *Cobbe v Yeoman's Row Management* [2008] UKHL 55, [2008] 1 WLR 1752 at [46].
[3] Philip Sales, *"The Interface Between Contract and Equity"*, Equity Conference 2023, King's College London, 19 December 2023.
[4] *Transfield Shipping v Chiping Xinfa Huayu Alumina* [2009] EWHC 3629 (Comm) §§ 51-52.
[5] *Manta Penyez Shipping* [2025] EWHC 353 (Comm).

clause. It required the defendant to release both vessels and end the proceedings. It was held that both claimants were entitled to rely on the obligations in guarantee, in the second claimant's case as an identified third party referred to in the contract.

6. At the borderline between the contractual and purely equitable routes to an anti suit injunction, it may well be a breach of a contract between C and D for D to try to litigate a dispute via a claim against one of C's affiliates. An example is the Court of Appeal's decision in *Eurochem North-West-2 v Tecnimont* in 2023.[6] The court, by a majority, held it to be in breach of an arbitration clause between C and D, D being Tecnimont, for D to intervene in a judicial review claim in Italy involving C's affiliate raising the same issue as was in dispute between C and D: namely an issue about whether C was owned or controlled by a sanctioned person. Carr LJ said:

> "At the fundamental core, Tecnimont was seeking to litigate in Italy the very issue that it had agreed with EuroChem NW to address exclusively in London arbitration proceedings." (§ 64)

7. In similar vein, Lewison LJ said, although D did not make an arbitration agreement with regard to disputes with the affiliate, that very strict interpretation of the arbitration agreement ignored the underlying reality. There was no evidence that D had any real dispute with the affiliate. The Italian proceedings were no more than a vehicle by which it hoped to engage in a proxy war with C.

8. A different outcome was reached more recently in *Renaissance Securities (Cyprus) v Chlodwig Enterprises*[7], a case in which *Eurochem v Tecnimont* was not cited The judge refused to extend an anti-suit injunction granted to the claimant so as to require the defendants to withdraw tortious claims issued by them in the Russian courts against the claimant's Russian affiliates.

9. On appeal, Singh LJ rejected an argument that the tort claims against the affiliates were in breach of the negative obligation inherent in the arbitration clause: he felt the applicant was asking the court to imply a negative obligation that was simply not there (§ 44). Yet the arbitration clause was in fairly standard form: "*If any dispute should arise in relation to the [contract] and it cannot be resolved within thirty (30) Business Days by negotiation between the Parties, such dispute shall be referred to and finally resolved by arbitration under the rules of the London Court of International Arbitration*". I have not encountered an arbitration clause that goes on to say, "*and neither party will bring court proceedings against the other's affiliate which in substance seek to litigate the*

[6] *Eurochem North-West-2 v Tecnimont* [2023] EWCA Civ 688: see, in particular, §§ 62-65 and 127.
[7] *Renaissance Securities (Cyprus) v Chlodwig Enterprises* [2024] EWHC 2843 (Comm) and on appeal [2025] EWCA Civ 359.

dispute in another forum". It would be unfortunate if arbitration clauses had to become more verbose in order to achieve their obvious purpose, rather like US-style settlement clauses. It arguably goes without saying that by agreeing to the resolve any dispute under the contract by arbitration, each party is agreeing not to seek to litigate it in any other forum, including via a claim against one of the contracting party's affiliates.

10. Happily, perhaps, the other two members of the court, Males LJ and Phillips LJ expressly left the point open, though they joined with Singh LJ in dismissing the appeal on the ground that the applicant had not placed the full facts before the court. Males LJ observed that even if the Russian claim was valid under Russian law, its only purpose was to circumvent the arbitration clause, and it was at least arguably necessary for business efficacy, and so obvious that it went without saying, to imply a term that the Respondents would not circumvent the arbitration clause in that way.

11. Also significantly for present purposes, all three members of the court saw a *prima facie* case that the action against affiliates was vexatious, as it appeared to be designed to circumvent the arbitration agreement (§§ 55-62, 76). So an 'equitable equitable' remedy could in principle have been granted.

12. In the converse situation, where one of D's affiliates sues C, it is clear that an injunction cannot be granted on the contractual basis, because the affiliate is not bound by the contract. So it is all down to equity. The affiliate's action may be restrained in equity as being vexatious, especially if there has been collusion between the affiliate and the contracting party, or if a joint tort is alleged. This was the position in *Ingosstrakh Investments v BNP Paribas*, where an anti suit injunction was granted against an affiliate of the contracting party who collusively brought proceedings whose purpose was arguably to act as a 'stalking horse' to outflank the arbitration clause.

13. The non-contracting affiliate or other entity may also be able to obtain an injunction under the equitable jurisdiction in its own right. Prof. Andrew Burrows QC (sitting as a deputy High Court judge) in *Clearlake Shipping v Xiang Da Marine* was willing to grant an injunction to a sub-charterer against a shipowner, with whom it had no direct contract, where both the charter and sub-charter contained English jurisdiction clauses. The owners alleged a joint tort by charterer and sub-charterer. The judge considered that both claims were arguably in breach of the jurisdiction agreement with the charterer.[8] In any event, though, the sub-charterer was entitled to an injunction in its own right

[8] *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 2284 (Comm) at [24] and [36]-[38].

because, in all the circumstances, the claim against it was contrived and vexatious.[9]

14. And returning for a moment to *Manta Penyez Shipping,* Cockerill J made an alternative finding that the affiliate there, as a non-party to the guarantee, was entitled to an injunction on the basis that it was vexatious and oppressive for the defendant to go behind the arbitration clause in the charterparty by in substance seeking to litigate its dispute with the first claimant. She followed a line of cases, including *Dell Emerging Markets v IB Maroc*[10], which as Steven Gee puts it in his book:

> "allow a non-party who is not a contracting party to [an arbitration or exclusive jurisdiction] clause … to enforce the clause against a plaintiff in foreign proceedings who is asserting in those proceedings a claim which is subject to that clause".[11]

That idea is a variant of the so-called 'conditional benefit' principle, which I shall turn to next, by which equity may again intervene to prevent the outflanking of a contractual provision.

15. In its more common form, the conditional benefit principle was recently illustrated by the long-running *Prestige* litigation arising from claims against insurers, a Protection and Indemnity Club, arising from oil pollution in the Mediterranean. The contracts of insurance contained, substantively, a 'pay to be paid' clause, and an arbitration agreement. Spain, France and non-state claimants sued the insurers under local statutes in Spain and France. That was contrary to the conditional benefit principle, under which *"If a party, X, acquires rights arising under a contract between A and B, X can only enforce those rights consistently with the terms of that contract ..."*: see, for example, *Aspen Underwriting (The "Atlantik Confidence")*[12]. The relevant terms include any jurisdiction or arbitration clause.

16. As a result, the third party's right to proceed against the insurer is conditional on its complying with the arbitration clause, although the third party never becomes a party to the contract or bound by it in the normal sense: see the classic case *The 'Jay Bola'*[13], where an anti suit injunction was granted on this basis. That was a claim by cargo insurers subrogated to the voyage charterer's rights

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[9] Ibid., at [33]-[35].
[10] *The Sea Premium* (11 April 2001, unreported); *The MD Gemini* [2012] EWHC 2850, [2012] 2 Lloyd's Rep 672; *Dell Emerging Markets (EMEA) Ltd v IB Maroc SA* [2017] EWHC 2397 (Comm), [2017] 2 CLC 417; Gee on *Commercial Injunctions* (7th edn) at §14-029.
[11] Gee on *Commercial Injunctions* (7th edn) at §14-029.
[12] *Aspen Underwriting Ltd v Credit Europe Bank (The "Atlantik Confidence")* [2018] EWCA Civ 2590, [2019] 1 Lloyd's Rep. 231 § 56 per Gross LJ
[13] *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH (The "Jay Bola")* [1997] 2 Lloyd's Rep 279.

against the owner and time charterer, where the charterparty contained an arbitration clause. Hobhouse LJ said *"[t]he right to apply for an injunction is not a "cause of action" of the same character as the right to sue for damages for breach of contract or tort or to collect a legal debt. It is an application for an equitable remedy to protect the plaintiff against the consequences of unconscionable conduct"*.[14] He also stated that *"[t]he insurance company is failing to recognise the equitable rights of the time charterers. The equitable remedy for such an infringement is the grant of an injunction."* Using Males LJ's terminology in *Airbus v Generali Italia*, the claimant third party to the contract was in breach *"not of the contract, but of an equivalent equitable obligation which the English court will protect"*.[15]

17. The imposition of this equitable obligation, enforceable by the equitable remedy of an injunction, is an example of what the Supreme Court in the *Wolverhampton City Council* case[16] described as equity perceiving common law remedies to be inadequate to protect or enforce the claimant's rights.[17] The Supreme Court also referred to equity's readiness to change and adapt its principles for the grant of equitable relief,[18] and the underlying principle *ubi ius, ibi remedium*, where there is a right, there should be remedy. The court cited with approval Lady Hale's observation in *Meier*[19] that *"[t]he fact that 'this has never been done before' is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted".*

18. With that in mind, what happens if the equitable obligation is breached but no injunction can be granted, for example because the defendant is a State and (as the Court of Appeal recently held in the latest episode of the *Prestige* litigation[20]) that means neither the court nor the arbitrator can grant an injunction? The inability to grant an injunction also means, the court held, that damages in lieu of an injunction are unavailable. However, there is another potential remedy in the form of equitable compensation: see, for example, Sir Michael Burton GBE's decision in *The Frio Dolphin* awarding compensation on that basis for irrecoverable costs in the overseas court.[21] The Court of Appeal in *The Prestige*, though, considered that no such compensation was available to the Club, for a number of reasons.

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[14] Ibid., p,286, referring to the analogy to a claim by an assignee in a jurisdiction not recognising an equity possessed by the debtor.
[15] *Airbus SAS v Generali Italia SpA* [2019] EWCA Civ 805 at [95]-[96] *per* Males LJ.
[16] *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47
[17] Ibid., at [50].
[18] Ibid., at [147].
[19] *Meier* [2009] 1 WLR 2780 at [25], quoted at § [150] of *Wolverhampton City Council.*
[20] *The M/T Prestige v The Kingdom of Spain, The London Steam-ship Owners' Mutual Insurance Association Limited v The Kingdom of Spain* [2024] EWCA Civ 1536.
[21] *Argos Pereira Espana SL v Athenian Marine Ltd, The 'Frio Dolphin'*, [2021] EWHC 554 (Comm).

19. One was a causation point: that any substantive court award in, say, Spain would flow from other causes, such as the Club's failure to appear in the Spanish court or to persuade it to apply the pay to be paid clause[22]. It is notable, though, that a common law claim for direct breach of a jurisdiction clause at least arguably covers the loss resulting from the overseas court's substantive decision being made at all: see e.g. Flaux J's reference in *West Tankers*[23] *("The Front Comor")* to *"a claim to be put in the same position as if the Italian court had not ruled against the appellant on the merits"* and § 14-073 of Gee's textbook.[24] One may wonder why equity would approach the matter any differently.

20. The court in *The Prestige* was also concerned about the Spanish court being deprived of the benefit of arguments about the arbitration clause and the pay to be paid clause[25]: though that that presupposes that the overseas court has any real business adjudicating on those matters at all, given the existence of the arbitration clause. After all, any remedy – whether injunctive or monetary – will naturally operate only *in personam* against the foreign claimant; and the English applicant has a legitimate claim not to have to be troubled by, still less have to actively defend, any proceedings brought in breach of the arbitration clause.

21. Substantively, the Court of Appeal referred to the grant of an injunction as the 'primary, 'natural' or 'key' remedy for breach of the equitable obligation to respect the arbitration clause, noting that the court in *The Jay Bola* referred to an injunction as being the claimant's 'only' remedy[26]. The Court of Appeal did not consider that equitable compensation could be used as a 'short cut' through damages in lieu or to 'subvert' privity of contract.[27] However, equitable compensation was not under consideration in *The Jay Bola,* and arguably did not need to be, as an injunction could be granted. It is not obvious why equitable compensation should be regarded as 'subverting' privity of contract, any more than an anti-suit injunction granted on a non-contractual basis in the situations I have described. Such compensation could instead be regarded as upholding contractual rights, consistently with the flexibility referred to in *Wolverhampton City Council*, and as amounting to what Butcher J at first instance in *The Prestige* referred to as "*sensible incremental development*"[28].

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[22] Ibid. at [208]-[209], [220]-[221] and [267].
[23] *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm) ("*The Front Comor*").
[24] Gee on *Commercial Injunctions* (7th edn) at §14-073: *"Where proceedings are brought in breach of contract damages can be recovered for the loss caused by that breach of contract. This loss can include costs of defending the foreign proceedings or costs resisting enforcement of a foreign judgment. It may also include, depending on the facts, damages for loss for what would have been a better outcome on the merits had the case been determined in accordance with the clause, as contrasted with what was the outcome of the foreign proceedings."*
[25] Ibid. at [266].
[26] Ibid., at [175], [176], [199], [216], [221] and [261].
[27] Ibid. at [218]-[219] and [251].
[28] [2023] EWHC 2473 (Comm) at [336(2)].

22. My third and fourth topics are much shorter: rectification and mistake in equity.

23. Rectification too is essentially supportive of the parties' bargain: as distinct from the document incorrectly purporting to record it. Equity's intervention is needed here: one cannot coherently collapse the problem into one of contract interpretation, as Lord Sales pointed out in his 2023 talk.

24. How is the actual bargain to be identified? The law took something of a detour after Lord Hoffman suggested in *Chartbrook v Persimmon Homes*[29] that the search was not for the parties' actual continuing common intention but for the deemed common intention derived from an objective construction of their last expression of accord[30], a suggestion which the Court of Appeal then took up in *Daventry District Council v Daventry & District Housing*[31]. As Lord Briggs pointed out in his 2018 paper on *"Equity in Business"*[32], one result of that was that a party could now obtain rectification where previously they could not, in particular in a case where (as in *Chartbrook* itself) the parties were never truly in agreement about the matter in question: the party with the final draft in his favour would now prevail over the party with the signed document in his favour.

25. The Court of Appeal later restored the law to its former state in *FSHC Group Holdings Ltd. v Glas Trust Corporation Ltd*.[33] As Lord Sales pointed out in his paper, the best evidence of parties' objective intention is the final contract. If equity is to intervene by rectification, the parties must actually have made a mistake, and the equitable doctrine of rectification is most suitable for undertaking that analysis.[34]

26. Finally, a brief word about mistake in equity. That may a misnomer, since the tendency in years in England & Wales has been for equity to support bargains where mistake is alleged by standing back and not intervening. Indeed, Chitty on Contracts no longer has a chapter on 'Mistake in Equity'.[35] Nonetheless there are one or two areas at the margins where equity might be thought to retain a useful role. Some of these are illustrated by the decision of the Singapore Court of Appeal in *Quoine*.[36] Algorithms were being used for automated trading in crypto-currencies. An input failure caused the program to make trades at what appeared to be the best available price but was actually 250 times the market price. The majority of the court held there to be no mistake about

[29] *Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] AC 1101.
[30] Ibid. at [59]-[65].
[31] *Daventry District Council v Daventry & District Housing Ltd.* [2011] EWCA Civ 1153.
[32] Lord Briggs, *"Equity in Business"*, The Denning Society Annual Lecture, Lincoln's Inn, London, 8 November 2018.
[33] *FSHC Group Holdings Ltd. v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361.
[34] *"The Interface Between Contract and Equity"*, supra, p.14.
[35] As noted in § 5-011 of the current 35th edition.
[36] *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02.

the terms of the contract: the algorithm was supposed to sell at the best available price, and the mistake was about what that price was.[37]

27. Had there been a mistake about the contract terms, it would have been necessary to consider knowledge. Singapore has a doctrine of unilateral mistake in equity, which applies where the non-mistaken party has constructive knowledge of the mistake and has engaged in unconscionable or sharp practice about it. There is lingering uncertainty about the position in English law, as dicta in *Centrovincial Estates*[38]and *O.T. Africa Line*[39] seem to suggest that constructive knowledge may be enough.

28. In England there is no equitable jurisdiction to set the contract aside where one party has made a unilateral mistake as to a fact or state of affairs which is the basis upon which the contract terms were agreed, but is not itself a term of the contract.[40] The majority in *Quoine* left open whether Singapore's equitable doctrine based on unconscionability can cover fundamental mistakes not going to the terms of the contract.[41] (§ 92).

29. Justice Mance, in a minority judgment in *Quoine*, considered that it can.[42] In the course of propounding that view, he cited two judicial statements reaching back to the late 18th century, both by the great Lord Mansfield. First, in *Vallejo v Wheeler* (1774) 1 Cowp 143, 153, where he said *"In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other."* Secondly, though, in *Alderson v Temple* (1768) 4 Burr 2235, 2239, Lord Mansfield said *"...the most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of the law,) is to do substantial justice. ..."*

30. It remains to be seen to which of these approaches will be taken in the law of mistake, both here and particularly in Singapore. However, the broader theme of my talk has been that contract and equity are usually not competing philosophies. Equity's major role in modern commercial litigation is not to derogate from commercial bargains, but to help give them full effect in accordance with the parties' actual or presumed intentions.

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[37] [114].
[38] *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd* [1983] Com. L.R. 158.
[39] *O.T. Africa Line Ltd v Vickers Plc* [1996] 1 Lloyd's Rep. 700, 703.
[40] Smith v Hughes (1870-71) L.R. 6 Q.B. 597; Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N) [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685.
[41] [92].
[42] [169] and [183].

Mr Justice (Andrew) Henshaw
8 May 2025