

Lecture to the Chancery Bar Association

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“Preserving the Integrity of the Common Law”

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Abstract:

In this lecture, the Chancellor will examine some recent examples of divergence between the decisions of the UK Supreme Court and those of the highest courts in other common law jurisdictions. The thesis is that seismic changes and departures from traditional incremental development may damage the integrity of the common law, its consistency and dependable certainty.

Introduction

1. I have recently given a number of talks about the consequences of Brexit from a judicial point of view. I always start by saying that it is no part of a judge’s job to comment on political issues. Indeed, judges should keep entirely away from politics. It is our job to decide cases on the basis of the law and the evidence, fairly and impartially, and without fear or favour. We are, as I often say, there to play the cards we are dealt, not to act as the dealer. This has a resonance with the way in which we deal with cases that we decide in the appellate courts, which is something to which I shall return.
2. One of the things that I can and do, however, say about Brexit is that it will not affect the common law itself or indeed the certainty of the common law, on which so much of our business dispute resolution is based. That is because the common law is a system of basic legal principles established over centuries and developed and matured by

cases raising new factual situations to which established principles and precedents can be applied. This gives the common law an advantage over a system based on any statute or code drafted at a particular point in time, which can respond with less agility and predictability to commercial developments such as fintech, artificial intelligence and digital ledger technology.

3. It is this predictability and certainty of the common law that I want to examine in this lecture, in the context of recent developments in the common law here and elsewhere in other common law jurisdictions.
4. To cut to the chase, I think the integrity of the common law could be at risk if we depart from its traditions. I detect a greater willingness amongst modern judges to throw away the rule book. It is the job of the Supreme Court to develop the common law and sometimes even to depart from its own previous decisions. But such development and such departures need to be cautious and principled. They need to be responsive to changes in society and in business culture, and not simply based upon differences of opinion between successive generations of judges.
5. It is useful first to recall, somewhat anecdotally perhaps, how the approach of the Supreme Court and, before, it, the House of Lords, has changed over recent generations.

A little historical background

6. When I started to learn the law in 1973, Lord Denning had already come into his own. He was battling the conservatism of Viscount Dilhorne (at least between 1969 and when he died in 1980) and some of the other Lords of Appeal in Ordinary of that generation. 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. The *Mareva* injunction introduced in *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1980] 1 All ER 213 was another of Lord Denning's innovations.

7. Apparent orthodoxy was restored by a long-lived House of Lords populated by such giants as Lord Robert Goff, Lord Steyn, Lord Millett and Lord Nicholls. But even in that era, there was the odd departure from the straight and narrow, such as the decision of Lord Browne-Wilkinson in *Target Holdings v. Redferns* [1996] AC 421, which will need to be the subject of another lecture in the light of Rupert Jackson LJ's recent decision in *Main v. Giambrone & Law (a firm)* [2017] EWCA Civ. 1193 – where he distinguished *Target* in interesting circumstances.¹
8. There followed a period of flexibility led by Lord Hoffmann supported variously by Lords Bingham and Phillips amongst others. This period saw, amongst much else, the establishment of a new approach to the interpretation of contracts, loosening of the rules concerning cross-border insolvencies in the form of modified universalism, and the consolidation of the new approach to causation first epitomised in the surveyors' valuation cases (starting with *South Australia Asset Management Corporation v. York Montague Limited* [1997] AC 191).
9. That period ended now about 7 or 8 years ago. Lords Millett, Hoffmann and Phillips retired, and a number of giants joined the Court, such as Lords Neuberger, Sumption and Toulson. From then on, we have seen a number of what

¹ See Paul S. Davies' recent case note entitled "Equitable Compensation and the SAAMCO Principle" at [2018] 134 LQR 165.

may come to be regarded as ground-breaking, even revolutionary, decisions. Of course, the direction of travel indicated by the decisions I am going to mention is not all one way, although a trend can be detected, and it is that trend on which I wish to focus here.

The development of the common law

10. One should not confuse the process of development the common law with the process of interpretation of an ever more complex statutory and regulatory regime. Returning for a moment to our departure from the European Union, people often suggest that the common law will become uncertain, and even unreliable, as a result. They confuse the fact that the UK Government has decided to freeze the European *acquis* into English law, as at the date of the UK's departure, with our approach to the common law. The development of the common law applicable, as it is, to changing commercial situations, will be unaffected by the fact that our regulatory regime may diverge somewhat from the legal order of the European Union. The common law is quite separate from legislation, though it can, of course, be amended by it. It is, however, important to realise, in the context of the subject of this lecture, that different legislative regimes in different common law countries can have an effect on aspects of the common law, though not on its universal foundations.
11. Against this background, one should also distinguish between adventurous decisions reached in the field of Human Rights, administrative law or other areas of the law which involve the interpretation of a vast range of domestic and European legislation, and adventurous decisions taken in relation to the development of the common law. For one thing, the common law is the concern of nations far beyond our borders, and not something that we can, or anyway should, do what we like with. Secondly, the principles which allow the common law to develop slightly differently in different common law jurisdictions do not properly allow

any of those jurisdictions *carte blanche*. Principled variations generally depend on cultural and societal differences between those jurisdictions, but should not, I think, entail a general divergence of the basic principles of the common law between common law jurisdictions. This is what I would call the common law's universal foundations.

12. The reactions of common law courts and our distinguished judicial colleagues in a number of well-regarded common law jurisdictions overseas to the Supreme Court's development of the common-law is, as it seems to me, an important bellwether as to the health of the common law generally.
13. With this in mind, I shall look now at a few of the Supreme Court's recent decisions with a view to evaluating how they have been received elsewhere, to seeing where the Supreme Court may have pushed the boundaries of deciding the strict legal issues in a case, and to consider whether enough attention is always paid to what went on in the courts below, as opposed to starting a final appeal with a clean sheet of paper.
14. I shall conclude by trying to draw some of the threads of this talk together, by considering where the appropriate boundaries of decision-making lie if the certainty and integrity of the common law are to be preserved. I shall consider where the common law can properly be changed, not just because of the application of existing principle to new facts which indicate a need for such change, but because of policy considerations.
15. Let me start then with some cases which have not found universal favour in other Commonwealth common law jurisdictions.

Supreme Court cases which have not found universal favour in other common law jurisdictions

16. I will first mention 4 decisions that have prompted my interest in these issues.

Patel v. Mirza

17. In *Patel v. Mirza* [2016] UKSC 42 (“*Patel v. Mirza*”), the Supreme Court changed the common law approach to the illegality defence. It discarded the ‘reliance test’ from *Tinsley v. Milligan* [1994] 1 AC 340 and introduced a new approach. There are now three clear, but entirely new, stages. First, one asks whether the purpose of the prohibition transgressed will be enhanced by denial of the claim. Secondly, one asks whether denial of the claim may impact on any other relevant public policy. Finally, one asks whether denial of the claim would be a proportionate response to the illegality. I should declare an interest as I was one of the judges in the Court of Appeal, who declined to adopt a similar suggested new approach advocated in that court by Lady Justice Gloster.
18. This new approach has since been applied in a number of cases, including one that Gloster LJ and I were once again involved in, namely: *Singularis Holdings v. Daiwa Capital Markets Europe* [2018] EWCA Civ 84. Plainly, the new approach represents a sea-change, from a series of strict rule-based tests to a series of flexible tests driven by policy considerations.
19. There are, perhaps, 5 reasons why the Supreme Court’s approach in *Patel v. Mirza* was particularly striking. First, it was not necessary to introduce these three new tests in order to reach the conclusion that all the judges in the Supreme Court (and in the Court of Appeal) wished to reach. In the Supreme Court, the judges acknowledged that the case *could* have been decided on established unjust enrichment principles. Secondly, the court had to overrule a previous House of Lords decision in order to establish its new tests.

Thirdly, a substantial minority of the 9 judges (namely Lords Mance, Clarke and Sumption) disagreed with the change of direction. Fourthly, the jurisprudential foundation for the policy tests was slender, in that the majority paid rather less than lip service to 250 years of precedent and primarily relied on McLachlin J's decision in the Supreme Court of Canada's decision in *Hall v. Hebert* [1993] 2 SCR 159. Finally, the legislature had declined to introduce by statute a similar approach proposed by the Law Commission in 2010.

20. In *Ochroid Trading v. Chua Siok Lui* [2018] SGCA 5 (“*Ochroid*”), the Singapore Court of Appeal declined to follow *Patel v. Mirza*. It endorsed that country's existing approach to the illegality doctrine. They have retained the reliance test, subject to established exceptions, which is similar, though not identical to the pre-*Patel v. Mirza* position in England and Wales. The difference is broadly that the test is applied in a normative rather than procedural way, meaning that claims for restitution do not generally fall foul of it because they are not seeking to enforce the contract. In Singapore also, courts may only apply the proportionality principle to contracts, which are not themselves illegal, but are entered into with the object of committing an illegal act. These differences together explain the first reason why the Singapore court refused to follow the majority approach in *Patel v. Mirza*, namely that such a broad recasting of the law was “unnecessary to achieve remedial justice in the Singapore context”.
21. The second reason that the Singapore court gave was that it would have created an “unprincipled distinction” between contracts prohibited by the common law, which the court would have a discretion to enforce, and contracts prohibited by statute, which it would have no discretion to enforce. As the Singapore Court said at paragraph 115 of its judgment:-

“... it is ... no answer to state that *the courts* are masters of *the common law*. That the courts are, in fact, masters of the common law which they oversee as well as develop does *not* mean that they can (or ought to) develop any particular branch of the

common law (here, the law relating to contractual illegality) *arbitrarily* – for that would be the *very antithesis* of how the common law has developed throughout the centuries”.

22. The Singapore court’s third, and perhaps most important, reason was that the new approach in *Patel v. Mirza* involved “a significant measure of uncertainty not only because of the actual process of balancing, which leaves much room for debate, but also because the list of factors is itself an open one, with no single factor being determinative”. The Singapore court agreed with Lord Sumption in his minority judgment that the majority approach leaves “a great deal to the judges’ visceral reaction to particular facts”.² It saw this criticism as particularly pertinent in the field of contract law, which demands certainty, and considered that the majority had failed properly to address it.
23. The Singapore court also expressed the view that such a sweeping reform of the illegality defence would have to be introduced by the legislature. It noted in this regard Professor Goudkamp’s “perceptive observation” that the Supreme Court had “in essence” given effect to proposals advanced by the Law Commission on which the UK Parliament had declined to act, and that this represented “one of the most controversial aspects of *Patel*”.³

Singularis

24. In the Privy Council case of *Singularis Holdings v. Pricewaterhouse Coopers* [2014] UKPC 36 (“*Singularis*”), Lord Sumption departed from the principles of modified universalism developed by Lord Hoffmann in *Cambridge*

² At paragraph 263.

³ See James Goudkamp on “The End of An Era? Illegality in Private Law in the Supreme Court” (2017) 133 LQR 14.

Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc [2007] 1 AC 508 (“*Cambridge Gas*”), and in *In re HIH Casualty and General Insurance* [2008] 1 WLR 852 (“*HIH*”). In *HIH*, Lord Hoffmann described the principle at paragraph 30 as requiring that the “[local] courts should, so far as is consistent with justice and [local] public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company’s assets are distributed to its creditors under a single system of distribution”.

25. In *Singularis*, Lord Sumption explained why Lord Hoffmann had been wrong in *Cambridge Gas* to say that (a) the court’s common law power to assist foreign winding up proceedings so far as it properly can includes doing whatever it could properly have done in a domestic insolvency, subject to its own law and public policy, and (b) this power is itself the source of its jurisdiction over those affected, and that the absence of jurisdiction *in rem* or *in personam* according to ordinary common law principles is irrelevant. He gave his reasons at paragraph 19 of his judgment where he said that “although statute law may influence the policy of the common law, it cannot be assumed, simply because there would be a statutory power to make a particular order in the case of domestic insolvency, that a similar power must exist at common law”.⁴
26. Lord Sumption also said *obiter* in *Singularis* at paragraph 25 that although there was “a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up”, the Privy Council “would not wish to encourage the promiscuous creation of other common law powers to compel the production of information”, and that such a power was “available only to assist the officers of a

⁴ See my lecture of 26th October 2017 to the Singapore Supreme Court, entitled “Modified Universalism: Do we now know what it means?”

foreign court of insolvency jurisdiction or equivalent public officers”. The power was not “available to assist a voluntary winding up, which is essentially a private arrangement and although subject to the directions of the court is not conducted by or on behalf of an officer of the court”.

27. The Singapore Court of Appeal’s decision in *Beluga Chartering GmbH v. Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 recognised the court’s inherent discretion to assist foreign liquidation proceedings, following Lord Hoffmann’s approach in *HIH*. But in two recent cases in each of Singapore and Hong Kong in *In Re Gulf Pacific Shipping Limited* [2016] SGHC 287 and *Re Supreme Tycoon Limited* [2018] HKCFI 277, these courts specifically declined to follow Lord Sumption’s *dictum* in *Singularis* that the common law power to recognise and assist foreign insolvency proceedings does not extend to voluntary liquidations. Both courts reasoned that the principle of modified universalism exists for the purpose of overcoming practical problems that the territorial limits of the powers of each country’s court would otherwise pose for the global winding up of companies. It was said that this purpose does not require a distinction to be made between compulsory and voluntary liquidations, and that it would be arbitrary and unduly restrictive to deny assistance to foreign liquidators in collective insolvency proceedings merely because they were not appointed by the foreign court.

Jogee

28. Decisions in the category that I am concerned with are not confined to the civil law. The trend can also be observed in the criminal law. In *R v. Jogee* [2016] UKSC 8 (“*Jogee*”), the Supreme Court recast the rules on joint enterprise liability. This concerns the situation where D1 and D2 set out to commit a particular crime (“crime A”, for example a burglary) and, in the course of doing so, D1 commits another crime (“crime B”, for example murdering the householder). Since the Privy Council’s decision in *Chan Wing-Siu v. The*

Queen [1985] AC 168 (“*Chan Wing-Siu*”), it had been necessary, in order to find D2 guilty of crime B, only to prove that D2 had the foresight that D1 might commit crime B, coupled with D2’s continued participation in crime A. This kind of liability had become known as “parasitic accessory liability”, after an article by Professor J.C. Smith published in 1997.⁵

29. In *Jogee*, the Supreme Court characterised *Chan Wing-Sui* as a “wrong turn” and brought the rules back into line with traditional accessory liability principles. It held that D2’s foresight alone was insufficient. Instead, D2 must have *intended* to encourage or assist D1 in the commission of crime B. Such intent may be conditional, for example to use a weapon if any resistance is encountered. One of the main reasons for this change of approach was a perceived anomaly in the previous law, whereby a lower *mens rea* was typically required for a secondary participant (foresight) than for the principal offender (intention).
30. In *Miller v. The Queen* [2016] HCA 30, the High Court of Australia (Gageler J dissenting) chose not to follow *Jogee*, and maintained the country’s existing approach to joint enterprise liability, which is broadly in line with the principles set out in *Chan Wing-Siu*. It provided essentially four reasons. First, the Supreme Court in *Jogee* was wrong to consider that *Chan Wing-Siu* produced an anomaly between the *mens rea* required for principal and secondary offenders. This is because a party to a joint criminal enterprise is not a secondary offender at all. Their liability arises on an entirely different basis, namely from participation *as a principal* in the enterprise knowing that another crime might be committed. Secondly, there was no evidence that the Australian approach had produced injustice or made criminal trials unduly complex, and there was, therefore, no reason to change it. Thirdly, changing it might cause considerable inconvenience because, unlike in

⁵ JC Smith on “Criminal Liability of Accessories: Law and Law Reform”, (1997) 113 LQR 453 at 455.

England and Wales, it is not settled law in Australia that substantial injustice is required for a grant of leave to appeal out of time. Finally, any change to the law on joint enterprise liability should be undertaken by Parliament following a broader review of the law on secondary liability. Such a review had been performed by the New South Wales Law Reform Commission, and the Parliament of New South Wales had decided not to act upon its recommendations.

31. *Jogee* has also failed to find favour also with the Hong Kong Court of Final Appeal (with Lord Hoffman sitting as the Non-Permanent Judge), which refused to follow it in *HKSAR v. Chan Kam Shing* (2016) 19 HCKFAR 640. Three reasons were given. The first echoes the Australian court's view that joint enterprise liability is normatively distinct from traditional accessory liability, so the anomaly perceived by the Supreme Court does not in fact exist. Secondly, the Supreme Court's decision leaves a gap in the law, in that traditional accessory liability rules are ill-adapted to deal with "dynamic situations involving evidential and situational uncertainties". This is because they require proof of intention, which is often near impossible in joint enterprise cases, and because they lack the flexibility to independently assess the participants' liability and convict them of different crimes. Finally, the concept of conditional intent introduced by the Supreme Court was said to be highly problematic: it does not properly fit with traditional secondary liability principles, is hard to distinguish from foresight and, to the extent that it does differ, imposes an unjustifiably high burden of proof on the prosecution.

Mohamud

32. In *Mohamud v. Wm Morrison Plc* [2016] UKSC 11 ("*Mohamud*"), one of Morrison's petrol station attendants quarrelled with a customer, chased him outside onto the forecourt and assaulted him. In holding that Morrison was vicariously liable for its employee's actions, the Supreme Court seems to have expanded the scope of the doctrine,

whilst refuting the suggestion that it might be doing so.⁶ The ‘close connection test’ derived from the House of Lords in *Lister v. Helsey Hall* [2002] 1 AC 215 (“*Lister*”), which was the case where the owners of a school were held to be vicariously liable for sexual assaults perpetrated by the warden of a boarding house on boys in his care. *Mohamud* said that *Lister* remained good law, but the way in which it was applied, and the outcome it produced, are hard to reconcile with previous authority.

33. It is worth comparing *Mohamud* to *Warren v. Henlys Ltd* [1948] 2 All ER 935 (“*Warren*”), which also involved a petrol station attendant punching a customer. But in *Warren*, the employer was not held to be vicariously liable. The Supreme Court in *Mohamud* distinguished *Warren* on the basis that the customer had there left the petrol station after the quarrel, breaking the sequence of events, and was only assaulted after he returned. This was a different distinction to that made by Lord Millett, when he explained *Warren* in *Lister*. Lord Millett said that there would have been no vicarious liability in *Warren* under the “close connection test” he was adumbrating, not because of a break in the chain of events, but because the attendant was under no obligation to keep order and so the assault was not sufficiently connected to his duties. This reasoning might be said to be equally applicable to *Mohamud*.⁷
34. So, what is going on? It seems that the Supreme Court’s reasoning in *Mohamud* equiparated the previous “close connection test” with a “causal connection” test requiring an unbroken causal chain between the role and the tort, because of the way it distinguished *Warren*. Moreover, the *Mohamud* approach does not seemingly exclude vicarious liability however outlandish the conduct for which vicarious liability is claimed.

⁶ See paragraph 46 of Lord Toulson’s majority judgment in *Mohamud*.

⁷ See Philip Morgan’s article: “Certainty in vicarious liability: a quest for a chimaera?” [2016] CLJ 202.

35. Both *Lister* itself and *Mattis v. Pollock* [2003] EWCA Civ 887 (“*Mattis*”) made clear how important it was to consider the functions entrusted to the employee by the employer. Lords Hobhouse and Millett⁸ in *Lister* considered that the employer would not have been vicariously liable had the sexual assaults been committed by a groundsman rather than the warden, because only the latter was responsible for the boys’ welfare. The torts were closely connected to the warden’s duties. Likewise in *Mattis*, the Court of Appeal held that a nightclub owner was vicariously liable for an assault on a customer by its doorman, because it was the doorman’s job to keep order using physical force (see paragraph 30).
36. It has been argued with some force that the effect of *Mohamud* is potentially to impose vicarious liability wherever there is a causal connection between the employee’s job and the tort, whatever the nature of the wrong.
37. Lord Toulson in *Mohamud* appears to have justified this conclusion on a philosophical basis by referring to Immanuel Kant’s statement that “[o]ut of the crooked timber of humanity, no straight thing was ever made”, so that “[t]he risk of an employee misusing his position [was] one of life’s unavoidable facts”. Lord Dyson concurred suggesting that it was “true that the test is imprecise. But this is an area of the law in which ... imprecision is inevitable. To search for certainty and precision in vicarious liability is to undertake a quest for chimaera”.
38. In *Prince Alfred College Inc v. ADC* [2016] HCA 37, the High Court of Australia disagreed with *Mohamud*. It considered the Supreme Court’s approach to have effectively abandoned the long-standing principle that vicarious liability may not be imposed where the employment provides no more than an “**opportunity**” to commit the wrongful act. It

⁸ Paragraphs 62 and 82 in *Lister*.

was therefore concerned that the doctrine would be expanded into one “unconstrained by the outer limits of the course or scope of employment”. To avoid this result in Australia, it introduced a new test, whereby the employee’s duties must give the “**occasion**” for the wrongful act. In order to determine whether this is the case, the employee’s authority, power, trust, control and ability to achieve intimacy with the victim should be taken into account. Applying this test to the facts of *Mohamud* would apparently have led to a different outcome from that reached by the Supreme Court. There were no special features of the employee’s employment which would be associated with the assault. In particular, the employee’s absence of authority, power or control over customers was confirmed by the fact that he was clearly subject to supervision. His role was therefore said to have provided not the occasion, but merely the opportunity, for the wrongful acts he committed on the petrol station forecourt.

39. Dr. Desmond Ryan has stoutly defended *Mohamud* in the Cambridge Law Journal,⁹ and cast doubt on the High Court’s reasoning. Ryan concluded by saying:-

“It is not at all easy to discern any meaningful difference between the employment providing the *occasion* for the wrongdoing and the *opportunity* for it. Even in ordinary parlance, the two terms are frequently used interchangeably: each is a matter of degree; and each could be said to be entirely open-ended ...

In this respect, it is noteworthy that the majority in *Prince Alfred College* propounded the “occasion test” at such length with the express aim of providing clarity to lower courts and thus minimising future appeals. Consider, then, the ominous comment of Gageler and Gordon JJ. in their short concurring

⁹ [2017] CLJ 14.

opinion (at [131]) when their Honours state that “[t]he Court cannot and does not mark out the exact boundaries of any principle of vicarious liability in this case”.

40. In this situation at least, it seems the common law does not speak with one voice.

Other cases where the Supreme Court has been out of step

41. I come now to some cases where the Supreme Court has put itself in a position where it has moved the common law rather more quickly than might have been expected.

Rainy Sky and *Chartbrook*

42. In *Rainy Sky v. Kookmin Bank* [2011] UKSC 50 (“*Rainy Sky*”), a two-step approach to contractual construction was introduced – first, the court must identify what constructions of the actual words are possible, and secondly it must determine which of them is most consistent with business common sense. In *Wood v. Capita Insurance Services* [2017] UKSC 24 (“*Wood v. Capita*”), this approach was said to represent “continuity rather than change”, which I found somewhat surprising for reasons that I recently explained in detail in an article entitled “Contractual Interpretation: Do judges sometimes say one thing and do another?”¹⁰
43. The reason for my surprise was that *Rainy Sky*, as approved in both *Arnold v. Britton* [2015] UKSC 36 and *Wood v. Capita*, seemingly has the effect of bypassing Lord Hoffmann’s decisions in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 (“*ICS*”) and *Mannai Investments Co Ltd v. Eagle Star Life Assurance*

¹⁰ [2018] Canterbury Law Review 1.

Co Ltd [1997] AC 749 (“*Mannai*”). I say that because the constructions adopted in those two cases were avowedly not possible as a matter of interpreting the actual words used, and thus would, if decided again on the basis of *Rainy Sky*, appear to have fallen foul of the first step in the new approach, regardless of how much they chimed with business common sense. I should also say that a similar stricter approach to construction has recently found favour with the High Court of Australia in *Simic v. South Wales Land and Housing Corporation* [2016] HCA 47 (“*Simic*”), which was a case rather like *Mannai*. There the error was in the name of the entity entitled to payment under a performance bond rather than in the date shown in notice to terminate a lease. The High Court held that the error could only be cured by a successful claim for rectification.

44. Incidentally, the High Court of Australia in *Simic* also rejected Lord Hoffmann’s *dicta* about mutual mistake rectification in *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38 (“*Chartbrook*”), suggesting that “the terms of the contract to which the subsequent instrument must conform must be objectively determined in the same way as any other contract”. The High Court rejected the proposition that the question should be “what an objective observer would have thought the intentions of the parties to be”, in favour of a rule requiring the claimant to show what the parties’ actual intentions were.
45. The High Court of Australia also doubted the approach of the Court of Appeal in *Daventry District Council v. Daventry and District Housing Ltd* [2011] EWCA Civ. 1153 following *Chartbrook*, suggesting that construction and rectification are different processes. The test adumbrated by Etherton LJ at paragraph 80 and Lord Neuberger MR’s exposition at paragraph 225 accepted in *Daventry* that “[i]t may appear counter-intuitive to describe the parties as having signed the contract under a common mistake, as the board of [the defendant] intended to agree what it provides; accordingly any claim for rectification by [the claimant] might appear to the uninitiated to be more appropriately

based on unilateral mistake”. Nonetheless, the court in *Daventry* declined to depart from Lord Hoffmann.¹¹

46. This remains a highly controversial area with competing opinions being expressed by common law courts elsewhere. It may not be the best example of the thesis in this lecture, but one may note that the Hong Kong Court of Final Appeal appears to endorse the *ICS* approach in *Fully Profit (Asia) Ltd v. Secretary for Justice* (2013) 16 HKCFAR 351 and earlier in *Jumbo King Ltd v. Faithful Properties Ltd* (1999) 2 HKCFAR 279.

Akers

47. *Akers v. Samba Financial Group* [2017] UKSC 6 (“*Akers*”) concerned section 127 of the Insolvency Act 1986, which provides that “any disposition of the company’s property ... made after the commencement of the winding up is, unless the court otherwise orders, void”. I am sure that most of you will be familiar with the facts, if only because the case was the subject of this very lecture to this very association given by Briggs LJ in May 2017. But for those that are not, a trustee, in breach of trust, transferred legal title to shares forming the subject matter of a trust fund to a *bona fide* purchaser for value without notice. The Supreme Court held that the trust’s corporate beneficiary, which was the subject of winding up proceedings, could not claim that the resulting loss of its equitable interest was a void disposition for the purposes of section 127 of the Insolvency Act 1986, because it was not a ‘disposition’ at all.
48. There were two unusual aspects to this case. First, the issue raised by section 127 was not argued by the parties at any stage of the case, through to the end of the argument in the Supreme Court. It was raised by the Supreme Court of its

¹¹ See also in the connection, Paul S Davies’ case note entitled “Interpretation and Rectification in Australia” at [2017] CLJ 483.

own motion after the formal argument had concluded. Secondly, as Briggs LJ pointed out, the Supreme Court's approach may render section 127 "inapplicable to all transfers of company property by trustees, including nominees, regardless of breach of trust", thereby reducing the provision to the status of a "very old, toothless, domestic pet", which would require "fairly urgent attention".

49. *Akers* has not yet been considered by any other common law jurisdiction with similar companies' legislation, but I am sure that this will happen before too long.

Actavis

50. In *Kirin-Amgen Inc v. Transkaryotic Therapies Inc (No.2)* [2004] UKHL 46, Lord Hoffman had held that the scope of a claim in a patent is solely a matter of purposive construction. 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.
51. In *Actavis UK Limited v. Eli Lilly & Co* [2017] UKSC 48 ("*Actavis*"), 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. Put another way, he re-introduced a doctrine of equivalents into English patent law, bringing our law more into line with that of the United States and much of continental Europe. However, the decision did not do the same with respect to file history, which still may only be checked in very limited circumstances. In the US, by contrast, the rule of file history estoppel acts as a check on the doctrine of equivalents, preventing patentees acting like the Angora cat to which Jacob LJ memorably referred in *European Central Bank v. Document Security Systems* [2008] EWCA Civ 192: "When validity is challenged, the patentee says his patent is very small: the cat with its fur

smoothed down, cuddly and sleepy. But when the patentee goes on the attack, the fur bristles, the cat is twice the size with teeth bared and eyes ablaze” (paragraph 5). On this basis, it has been argued by various practitioners and commentators that the new approach in *Actavis* is overly favourable to patentees, opening the door to ‘elastic’ claims and potentially undermining the established tenet of English patent law that the construction of a claim is the same whether validity or infringement is to be considered.

Lehman

52. In *Re Lehman Bros International (Europe) (in administration)* [2017] UKSC 38 (“*Lehman*”), a dispute had arisen as to the distribution of the estimated £8 billion surplus of assets in Lehman Brothers’ main European operating company, which was an unlimited company. The case raised 6 issues. The Supreme Court overturned the Court of Appeal, to varying degrees, on each issue, substituting its own reasoning, often by a majority. Some have commented that this is an example of the extent to which the Supreme Court is now willing to tinker with the reasoning of the lower courts, even where it takes the view that the correct decision had been reached.

Ivey v. Genting

53. My last example is *Ivey v. Genting Casinos UK Ltd* [2017] UKSC 67 (“*Ivey v. Genting*”), a civil case which the Supreme Court chose as the vehicle to amend the well-known test for criminal dishonesty established in *R v. Ghosh* [1982] QB 1053 (“*Ghosh*”). The Supreme Court held that the second limb of that test (whether the defendant realised that his conduct was dishonest according to the standards of ordinary and reasonable people) did not represent the law, and that directions to juries based upon it ought no longer to be given. Instead, the test should be as set out in *Royal Brunei Airlines v. Tan* [1995] 2 AC 378 and *Barlow Clowes*

v. Eurotrust [2006] 1 WLR 1476, namely that if an ordinary and reasonable person, possessing the defendant's knowledge and beliefs as to the facts, would consider the defendant's conduct dishonest, then the defendant is dishonest. Consequently, the same test for dishonesty will now be applied across both civil and criminal law matters.

54. Whilst this seems a desirable outcome, and whilst the second limb of the *Ghosh* test was certainly open to criticism (if only because, as Lord Hughes said, it meant that the more warped a defendant's view of what normal standards were, the less likely he or she was to be found dishonest), it nonetheless represents a significant change in the common law. Further, it was unnecessary to reach this conclusion in *Ivey v. Genting*, since the statutory offence of cheating under section 42 of the Gambling Act 2005 has previously been held not itself to require dishonesty.

Some tentative conclusions

55. It is possible that cases of the kind I have mentioned could have been extracted and written up in a similar way in any generation. But, for my part, I detect, as I have said, a greater willingness on the part of our present day Supreme Court to make more abrupt judicial interventions in the well-established common law than we have previously experienced.
56. This may in some respects be a healthy approach by our highest court, but it has, it seems to me, some dangers. The Supreme Court, and the House of Lords before it, have, for many generations, been well regarded by supreme courts across the Commonwealth world. I hope that will always be the case. Those other courts have tended only to depart from the common law of England & Wales where local conditions indicated it was necessary or, at least, appropriate. The duo of decisions in *Patel v. Mirza* and *Ochroid* are an example of something rather different. There, the Supreme Court discarded the developmental approach to the defence of

illegality, something that is at the heart of the common law. They called on the demands of ‘policy’ to justify a rewriting of a central feature of the common law. Of course, what is or is not ‘illegal’ will vary according to the statute books of each common law country, but the situations in which a defendant to an action can successfully engage the defence of illegality in contract and in unjust enrichment have generally been the same across the common law world. It is basic principles of this kind that one would wish to be cautious about changing in one common law country without a compelling necessity arising from one of the ways in which the common law normally develops. The Singapore Court of Appeal’s trenchant refusal to follow *Patel v. Mirza* should operate as a warning to judges contemplating future abrupt changes to areas of the common law that we share with our Commonwealth *confrères* and *consoeurs*.

57. I freely accept that the law in relation to contractual interpretation, implied terms, and rectification has been in rather greater flux for more than a generation. It is, therefore, harder to criticise the kinds of generational change that are frequently observed. For example, Viscount Dilhorne’s generation would very likely have been as horrified by the decisions in *Mannai* and *ICS*, as Lord Sumption is today.¹²
58. A part, however, of the trend that I have described, is the approach to decision-making by lower courts. At High Court and Court of Appeal level, it is an important mantra that the court should limit itself to deciding the case. We should, in my view, be cautious of grand statements as to how we might like the law to be. Such statements have a habit of coming back to haunt those who make them. The

¹² Lord Sumption: “A Question of Taste: The Supreme Court and the Interpretation of Contracts” (Harris Society Annual Lecture, 8th May 2017, at <https://www.supremecourt.uk/docs/speech-170508.pdf>). “Just as *ICS* changed the judicial mood about language and tended to encourage the view that it was basically unimportant, so the more recent cases may in due course be seen to have changed it back again, at least to some degree”.

common law develops incrementally, and that has been a successful *modus operandi* for hundreds of years. It is still an approach that I, at least, think has merit, and is worthy of very close attention. It develops, as I have said, because new commercial situations will always arise, so as to provide the courts at all levels with the ability to allow incremental developments in the common law. There is very rarely a need for a clean sheet of paper. Cases like *Lehman* and *Akers* give rise to a concern that the Supreme Court does not see itself as governed by any of the same strictures as the lower courts from which their cases originate. One wonders what is the societal or commercial change that has given rise to the need for a new approach to the law of vicarious liability. Whilst one can see more compelling policy imperatives in the crucial aspects of the criminal law that I have mentioned, they represented significant, even radical, changes of direction.

59. I started by saying that I would consider when it was appropriate for the highest courts to change the law on the grounds of policy. The normal approach in situations where the law is thought to be unsatisfactory is to seek the intervention of the legislature after detailed academic and professional input from the Law Commission. This remains a desirable way of dealing with perceived inadequacies even in the common law. It is, however, notable that not all the legislative changes to the common law that one can think of have been conspicuously successful. That too might be the appropriate subject for another lecture.
60. I can close, then, by making clear that my thesis is not about whether or not these cases were or were not correctly decided. My point is a more subtle one. I think the integrity of the common law would be better preserved and enhanced if all our courts were to allow it to develop in the ways that it always has. I am not counselling some form of extreme judicial conservatism – far from it. But nonetheless, a measure of judicial restraint remains, I think, desirable. By adopting a tried and tested approach, we would have a better chance of securing the accord of the highest courts in other Commonwealth jurisdictions when necessary changes

occasioned by new commercial situations dictate incremental changes in the common law.

61. This, as it seems to me at least, is all the more important as we leave 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. We are the custodians of a precious commodity, and should exercise caution and restraint in the way we treat it.
62. I am sure that this debate will continue for many years to come. I am very grateful for your attention tonight.

GV