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Doctrine and Discretion in the Law of Contract Revisited

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Abstract

Professor Sir Guenter Treitel has been one of the most influential scholars in the recent history of English contract law. This article revisits his inaugural lecture at the University of Oxford in which he discerned a movement from doctrine to discretion in the English law of contract. It concludes, by reference to issues considered by Professor Treitel in his lecture and to subsequent developments in the law of contract, that the courts continue to grapple with the difficulty of striking an appropriate balance between doctrine and discretion, although Professor Treitel's fear that English contract law is moving from doctrine to discretion has been largely unrealized. English contract law continues to place a strong emphasis on the importance of certainty in contract law, particularly commercial contract law, but, at the same time, the courts recognize that the law has to contain an element of flexibility if it is to adapt to the changing needs of society and of contracting parties.

In his inaugural lecture given at the University of Oxford in 1980,[1] Professor Treitel examined what he termed a movement from doctrine to discretion in the English law of contract—a process that he described 'in broad terms as a process by which reasonably precise rules are replaced by others, which either in so many words confer a discretion on the courts, or which have much the same effect by reason of the vague or open-textured terms in which they are expressed'.[2] While he accepted that, within proper limits, 'judicial discretion has a necessary and important part to play in the development of the law of contract'[3] (for example, in modifying common law rules that are

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1 GH Treitel, 'Doctrine and Discretion in the Law of Contract' Clarendon Press, Oxford 1981 (ISBN 0-19-951527-1). The lecture was delivered on 7 March 1980.

2 Ibid 2.

3 Ibid.

recognized as being defective), he was more critical of the role played by 'apparently free discretions' in some modern statutes,[4] such as the Unfair Contract Terms Act 1977[5], which he described as 'reforming statutes'.[6] One of the central arguments in his lecture was that more should be done to reconcile these discretionary rules with the requirements of certainty—a commodity that he believed to be a particularly important aspect of English contract law, especially for parties at the planning stage of their relationship.

The principal aim of this article is to re-examine some of the issues raised by Professor Treitel in the light of developments that have occurred in the law of contract since that lecture was given. The focus is principally, but not exclusively, on the role that discretion plays in English contract law. The article will proceed in three principal stages. The first section will consist of a brief summary of the essence of the arguments advanced by Professor Treitel in his inaugural lecture. The second section will seek to update the analysis of the particular examples given by Professor Treitel in his lecture. The third section will consider subsequent developments in a number of areas of contract law that were not considered by Professor Treitel in his lecture for the purpose of assessing his claim that there can be seen in the English law of contract a movement from doctrine to discretion.

Professor Treitel's analysis

There are four features of Professor Treitel's analysis to which attention should be drawn at the outset. The first is that he adopts a 'broad' approach to the definition of discretion and so eschews the adoption of a tight or prescriptive definition.[7] Thus, he includes within the scope of his analysis rules that are 'vague' or 'open-textured'.[8] In relation to statutes, he distinguishes between 'apparently free discretions, and those which are subject to legislative guidelines'[9] and, in the concluding section of his lecture, draws a distinction between two techniques—namely, 'the discretion subject to guidelines, and second, the rule subject, in exceptional circumstances, to a discretionary relieving power',[10] maintaining that the latter is more likely to 'promote certainty, while still satisfying the sometimes inescapable need for a residue of discretion'.[11] He singles

[4] Ibid 15.
[5] Unfair Contract Terms Act 1977 (c 50).
[6] Ibid 14, Treitel (n 1).
[7] Contrast in this respect S Gardner, 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438, where he attempts to define discretion in the following terms: 'Discretion's core characteristic concerns the rule declaring the conditions in which a certain juridical event (the granting of a certain remedy, say) will occur. A discretion is present when the cast of this rule does not allow someone other than the judge to predict the outcome *authoritatively* (by showing that it is necessarily required by the terms of the rule itself) but instead makes the outcome depend at least in part on the judge's exercise of his or her own judgment' (441).
[8] Treitel (n 1) 2.
[9] Ibid 15.
[10] Ibid 19.
[11] Ibid.

out for particular criticism the exercise of discretion by a court that takes the form of 'the rejection of established rules in favour of a judge's intuitive perception of a "just solution."'[12] It is clear that his principal concern is the loss of certainty or predictability in English contract law, and it is, no doubt, for this reason that he includes within his analysis open-textured or vague rules that are unlikely to produce a high predictive yield and, therefore, can be said to make it more difficult for contracting parties to plan their relationship with confidence that the court will uphold and give effect to the deal that they have concluded.

Second, it is interesting to note the different way in which Professor Treitel approaches the existence of a discretion in the development of the common law from that which he adopts to the intervention of the legislature, particularly in the context of 'reforming statutes', which confer a significant degree of discretion upon the court. In relation to the development of the common law, Professor Treitel accepts that discretion may be 'acceptable and even desirable'[13] in modifying rules that are recognized as being defective[14] or in restricting the operation of so-called general rules that have threatened to outgrow their proper scope (a process that he describes as 'the diversification of rules').[15] The common law can also, over time, develop principles to guide the courts in the application of what were initially open-textured rules. Professor Treitel further accepts that some open-textured rules do not 'cause an unacceptable degree of uncertainty'.[16] Examples he gives in this context include rules relating to breaches that go to the root of the contract or rules that are formulated in terms of the 'intention' of the parties.[17] While these rules may be said to be open-textured, the decided cases have yielded principles that provide 'reasonably firm bases for predicting the outcome of future cases'.[18] It is also worth noting that he excludes almost entirely[19] from his consideration the equitable jurisdiction of the court where discretion traditionally plays a much greater role (for example, in relation to the decision of whether or not

[12] Ibid. The example that he gives in this context is Lord Denning's statement in *Brikom Investments Ltd v Carr* [1979] QB 467, 484, where he states 'I prefer to see that justice is done, and let the conveyancers look after themselves'.

[13] Ibid 20.

[14] One example that he gives in this context (ibid 5–6) is the extension of the kind of duress that is capable of affecting the validity of a contract at common law from duress to the person to encompass economic duress. While the extension might generate some uncertainty he observes that any such uncertainty will be reduced by the courts formulating guiding principles and that 'the price of temporary uncertainty is here worth paying for ridding the law of an indefensibly restrictive rule' (ibid 6). The second, and in his view, most important example in this category is the development of the intermediate or innominate term (see 6–8).

[15] Ibid 9.

[16] Ibid 5.

[17] Ibid 4.

[18] Ibid 5.

[19] The sole exceptions are his discussion of the development of equitable mistake (ibid 8), his brief reference to promissory estoppel (13), and his reference to the court's discretion in relation to equitable remedies such as specific performance in note 11. The failure to discuss equitable doctrines in greater detail is a curious omission.

to make a specific performance order). The role of discretion within statutes,[20] particularly 'reforming statutes', is the subject of rather more by way of criticism, but it may be that this criticism is over-stated. Statutes, when they are first introduced, inevitably create a degree of uncertainty, particularly where they contain discretionary rules, but that uncertainty can be reduced by the courts over time as they interpret the statute and provide guidelines for its interpretation. Just as the courts develop principles in the development of the common law, so can they develop principles to guide parties as to how a discretion is likely to be exercised in the context of the interpretation of a statute.

The third point relates to the advantages and disadvantages of conferring discretionary powers upon a court in a contractual context. Professor Treitel's principal concern or criticism is that discretion generates—or has the potential to generate—uncertainty, particularly at 'the planning or drafting stage' of a transaction. [21] But he is not blind to the merits of discretion in so far as it enables the common law to develop new rules, rid itself of defective rules, and refine general rules that are in danger of becoming over-broad. To this extent, the existence of discretion may be 'acceptable and even desirable'.[22] Even in the context of statutes, Professor Treitel recognizes that discretion 'may be justified by the limitations of foresight, and by the relative succinctness and rigidity of enacted (as opposed to judge-made) law'[23] and that there may be circumstances where the legislator requires 'a discretionary escape-route' to avoid the statute becoming unnecessarily rigid.[24] It is not, therefore, the case that a legal system has to choose between the elimination of all judicial discretion or the conferral of broad discretionary powers upon the court. The question is one of balance between the competing demands of discretion or flexibility, on the one hand, and doctrine and certainty, on the other. The concern expressed by Professor Treitel at the time of his lecture was that English law was in danger of striking that balance in the wrong place as a result of the drift from doctrine to discretion that he highlighted.

The fourth point is that, given that his focus was on the need to provide contracting parties with sufficient certainty, particularly at the planning stage of a transaction, he recognized that 'discretionary relief' may be 'more appropriate' in some contractual contexts than others.[25] For example, it is more important for a transaction between two commercial parties (such as a commodity sales contract) than for a contract between a commercial party and a consumer (such as the booking of a package holiday). The link that he makes

[20] The statutes that Professor Treitel had in mind were principally the Law Reform (Frustrated Contracts) Act 1943 (6 & 7 Geo 6 c 40) and the Unfair Contract Terms Act 1977 (C 50). He was also critical of Law Commission Working Papers nos 61 (Penalty Clauses and Forfeiture of Monies Paid) and 65 (Pecuniary Restitution on Breach of Contract), but, in the event, these were never implemented.

[21] Ibid 3.

[22] Ibid 20.

[23] Ibid 20.

[24] Ibid 14.

[25] Ibid 4.

between certainty and planning may also suggest that the existence of a discretion may be less helpful in some contexts than in others—that is to say, it is less likely to be helpful where it has a direct impact on the ability of contracting parties to plan their transaction when they have a legitimate interest that the court will give effect to the agreement that they have both made.

The examples given by Professor Treitel

Professor Treitel gave a number of examples of the movement that he detected from doctrine to discretion. Focusing in the first instance on developments in the common law of contract (in the sense of judge-made law), Professor Treitel drew attention to the development of the innominate or intermediate term; the extension of the doctrine of duress; the development of equitable mistake in cases such as *Solle v Butcher*;[26] the greater flexibility injected into the rule that acceptance of an offer takes place on posting of the letter of acceptance[27] and into the date on which damages for breach of contract are to be assessed;[28] the development of exceptions to the parole evidence rule; the development of the doctrine of frustration in the nineteenth century; the possible emergence (at the time) of a doctrine of inequality of bargaining power;[29] and, albeit more briefly, aspects of the law relating to the interpretation of contracts, the implication of terms into a contract, and, finally, the observation of Lord Hailsham that cases on promissory estoppel may have to be 'reviewed and reduced to a coherent body of doctrine by the courts'.[30] It is not possible within the scope of this article to examine the developments that have taken place in all of these areas, but one or two observations can be made.

Equitable mistake

First, one of the areas of uncertainty identified by Professor Treitel is no longer a source of difficulty. The example is the development of the equitable doctrine of mistake, which he described as an 'apparently unprincipled discretion'.[31] This distinct equitable jurisdiction to set aside a contract on the ground of common mistake was brought to an end by the Court of Appeal in *Great Peace*

[26] *Solle v Butcher* [1950] 1 KB 671.

[27] As set out in *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155, 161 where it was suggested by Lawton LJ that the postal rule ought not to apply where it 'would produce manifest inconvenience and absurdity'.

[28] As set out in *Johnson v Agnew* [1980] AC 367.

[29] As found in the judgment of Lord Denning in *Lloyds Bank v Bundy* [1975] QB 326, although Professor Treitel also noted *Pao On v Lau Yiu Long* [1980] AC 614. Lord Scarman, giving the judgment of the Privy Council, said that agreements were not voidable simply because they had been 'procured by an unfair use of a dominant bargaining position'.

[30] *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co* [1972] AC 741, 758. This review and rationalization is, however, still awaited.

[31] Treitel (n 1) 8.

Shipping Ltd v Tsavliris Salvage (International).[32] But it should be noted that the reason given by the court in *Great Peace* for taking this step was the inconsistency between the development of the equitable line of authority and the decision of the House of Lords in *Bell v Lever Brothers*.[33] It was not based on the undesirability of the injection of a degree of flexibility into the law. On the contrary, the Court of Appeal noted that the equitable jurisdiction gave 'greater flexibility' than that permitted by the common law and observed that there was 'scope for legislation to give greater flexibility to our law of mistake than the common law allows'.[34] Thus, it can be seen that the change was made not in order to remove the existence of a discretion but, rather, to remove an inconsistency in the law. To the extent that it was relevant, the removal of flexibility was seen as a disadvantage of the step taken by the court.

The date on which damages fall to be assessed

The second point relates to developments in the law relating to the assessment of damages—in particular, the date on which damages fall to be assessed. In his lecture, Professor Treitel drew attention to the decision of the House of Lords in *Johnson v Agnew*,[35] where the general rule that damages are to be assessed at the date of the breach of contract was affirmed, but Lord Wilberforce observed that 'if to follow [the rule] would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances'.[36] Professor Treitel did not believe that Lord Wilberforce's judgment amounted to a 'displacement of a settled rule by a broad discretionary power'.[37] Rather, it was an emphatic denial that 'damages must *invariably* be assessed by reference to the date of breach' so that the date for assessment is 'not governed by a single general rule, but by a group or cluster of rules each appropriate to a particular type of situation'.[38] Thus, it would appear that Professor Treitel approved of the judgment of Lord Wilberforce. But he did not approve of the way in which the law subsequently developed, which he criticized on the ground that it seemed to amount to an impairment of certainty in commercial contracts.[39] The case that drew the criticism of Professor Treitel is *Golden*

[32] *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679.

[33] *Bell v Lever Brothers Ltd* [1932] AC 161.

[34] *Great Peace* (n 32). There is a degree of irony in this statement given that it was the Court of Appeal who was responsible for eliminating the flexibility and who then suggested that the legislature might wish to restore it.

[35] *Johnson v Agnew* [1980] AC 367.

[36] Ibid 401.

[37] Treitel (n 1) 10.

[38] Ibid (emphasis in the original).

[39] GH Treitel, 'Assessment of Damages for Wrongful Repudiation' (2007) 123 LQR 9, 17 (his comments were directed at the decision of the Court of Appeal in *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2005] EWCA Civ 1190, [2006] 1 WLR 533, but they are equally

Strait Corporation v Nippon Yusen Kubishika Kaisha,[40] where the issue before the court was whether, in assessing damages, the court should take account of the fact that the defendants would, in the light of developments subsequent to the breach of contract, have terminated the contract pursuant to a war clause on the outbreak of the Second Gulf War. In holding that damages fell to be reduced on account of the early termination that would have taken place pursuant to the war clause, the majority gave greater weight to the compensation principle—namely, that damages should seek to put the injured party in the same position as if the contract had been performed rather than to the need to uphold certainty in commercial transactions. In response to the submission that damages should be assessed at the date of the breach because to do otherwise would be to undermine the principle of certainty, Lord Scott responded that:

> there is, in my opinion, no such principle. Certainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle. Otherwise incoherence of principle is the likely result. The achievement of certainty in relation to commercial contracts depends, I would suggest, on firm and settled principles of the law of contract.[41]

This approach was not shared by the minority. Thus, Lord Bingham dissented on the ground that the decision of the majority 'undermines the quality of certainty which is a traditional strength and major selling point of English commercial law'.[42] While it is the case that the House of Lords has introduced a degree of uncertainty into English contract law, it is unlikely that it has diminished the standing of English contract law in the eyes of the international legal community. As Lord Sumption subsequently observed,

> '[c]ommercial certainty is undoubtedly important, although its significance will inevitably vary from one contract to another. But it can rarely be thought to justify an award of substantial damages to someone who has not suffered any'.[43]

Innominate or intermediate terms

The third example is the development of the law relating to intermediate or innominate terms. The significance of this development is that it introduced a degree of uncertainty (or, if one prefers, flexibility) into the law relating to the termination of contracts in so far as the entitlement of the innocent party to terminate the contract on the ground of the other party's breach of contract

applicable to the decision of the House of Lords who dismissed an appeal from the decision of the Court of Appeal).

[40] *Golden Strait Corporation v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 AC 353.

[41] Ibid para 38.

[42] Ibid para 1. See, to the same effect, his acknowledgement that the 'importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law'(para 23).

[43] *Bunge SA v Nidera BV* [2015] UKSC 43, [2015] 3 All ER 1082, para 23.

depends not on the nature of the term broken (as in the case of a condition where any breach gives rise to the right to terminate) but, rather, on the consequences of the breach (namely, whether the effect of the breach was substantially to deprive the innocent party of the benefit of contractual performance). As has been noted, this development in the law received the approval of Professor Treitel in that he concluded that 'the introduction of the category of intermediate terms may be regarded as an entirely satisfactory use of an open-textured rule for the purpose of modifying a rigid distinction, some applications of which had (in the words of Lord Wilberforce) become "excessively technical"'.[44] This technicality arose from what Professor Treitel termed the 'hypothetical hardship'[45] arising from the failure of the court to consider whether the breach relied upon as the ground of termination had actually caused serious prejudice to the party seeking to terminate the contract.[46] In switching attention away from the nature of the term broken and towards the prejudice or harm caused by the breach, the development of the innominate term addressed the perceived defect in the pre-existing common law where the remedial consequences flowed inevitably from the classification of the term as either a condition (where termination was in principle always available) or a warranty (where termination was not permitted).

The development of the intermediate or innominate term has continued since Professor Treitel's lecture to the extent that, in *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS*,[47] Hamblen LJ stated that 'the modern English law approach to the classification of contractual terms is that a term is innominate unless it is clear that it is intended to be a condition or a warranty'.[48] The default position, thus, would appear to be to classify a term as innominate rather than as a condition or a warranty. It cannot be denied that this development has created a degree of uncertainty in English contract law, as is evidenced by a number of recent cases in which a contracting party has been held to have wrongfully terminated a contract because the consequences of the breach of the innominate term were not sufficiently serious to entitle that party to terminate the contract.[49] Uncertainty, therefore, carries with it a price and that price can be a high one when account is taken of the financial consequences that may flow from the wrongful termination of a

[44] Treitel (n 1) 8.

[45] Ibid.

[46] One of the examples he cited was *Re Moore and Landauer* [1921] 2 KB 519 (where a buyer was held to be entitled to reject a whole consignment of tinned fruit on the ground that the tins in approximately half of the cases had been packed in cases of 24 rather than 30, as stated in the contract, and they were held to be entitled to reject notwithstanding the fact that the difference in packing had no impact on the market value of the consignment). The other example he cited was *Borrowman v Drayton* (1870) LR 5 Ex 179.

[47] *Grand China Logistics Holding (Group) Co Ltd v Spar Shipping AS* [2016] EWCA Civ 982, [2016] 2 Lloyd's Rep 447.

[48] Ibid para 92.

[49] See eg *Telford Homes (Creekside) Ltd v Ampurius Nu Homes Holdings Ltd* [2013] EWCA Civ 577, [2013] 4 All ER 377; *Urban I (Blonk Street) Ltd v Ayres* [2013] EWCA Civ 816, [2014] 1 WLR 756.

contract. This is an area where contracting parties can legitimately look to the law of contract for a substantial degree of certainty both when drafting the contract and when seeking to exercise their rights under the contract. However, it may be that, when account is taken of a number of competing considerations, English law strikes an appropriate balance between the competing claims of certainty and flexibility. First, the test applied by the English courts when deciding whether a breach of an innominate term entitles the innocent party to terminate the contract resembles that to be found in a number of international restatements of contract law.[50] In other words, this is not an area where English law stands out because of its lack of certainty. Second, as Professor Treitel has pointed out, uncertainty is reduced by the 'many decisions'[51] in which the courts have given guidance as to what constitutes a sufficiently serious breach for this purpose. Third, English law permits contracting parties to avoid uncertainty by classifying a term as a condition, any breach of which entitles the innocent party to terminate the contract. Thus, contracting parties in search of certainty can find it by appropriate drafting of their contract. It is only those who do not take this step who need fear any uncertainty created by the innominate term. In this respect, the price of a degree of uncertainty is thought to be one that is worth paying in that the development of the innominate term enables the courts to take account of a broader range of circumstances when deciding whether or not it is appropriate to permit one party to terminate a contract as a result of the other party's breach of that contract, and it does so without creating an unacceptable level of uncertainty.

The intervention of statute

The fourth example given by Professor Treitel relates to the intervention of statute. Here, he gives three examples. The first is the Law Reform (Frustrated Contracts) Act 1943[52], which deals with the remedial consequences of the frustration of a contract. Professor Treitel is critical of the lack of guidance given to the courts in terms of assessing the 'just sum' that may be recoverable by a party to a frustrated contract.[53] The Act can legitimately be criticized for its failure to deal with the remedial consequences of the frustration of a contract in a principled fashion,[54] and the failure to do so has enabled some courts to

[50] See eg Vienna Convention on Contracts for the International Sale of Goods, [1980] art 25; UNIDROIT Principles of International Commercial Contracts, [2016] art 7.3.1(2)(a) (PICC); Principles of European Contract Law, [2002] arts 8:103(b), 9:301 (PECL); Draft Common Frame of Reference Book III, [2009] art 3:502(a); and the proposed Common European Sales Law, [2011] arts 114(1), 87(2)(a). This is not to say that the tests are identical; the claim is the more modest one that they resemble the test applied in relation to innominate terms, and they are certainly closer than the condition/warranty dichotomy.

[51] Treitel (n 1) 7.

[52] Law Reform (Frustrated Contracts) Act 1943 (6 & 7 Geo 6 c 40).

[53] Ibid 15–16, Treitel (n 1).

[54] See generally E McKendrick, 'Frustration, Restitution, and Loss Apportionment' in A Burrows (ed), *Essays on the Law of Restitution* (OUP 1991) 147. The criticism of the Act is not so much

express their powers in broad discretionary terms.[55] However, it is difficult to maintain that the Act is the cause of undue uncertainty. The reason for this is that frustration operates within such narrow limits[56] that it is rarely invoked in practice, and, this being the case, the 1943 Act has an extremely limited, if not negligible, sphere of operation. The second example given by Professor Treitel is section 49(2) of the Law of Property Act 1925[57], which deals with contracts for the sale of an interest in land and provides that 'where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit'. The point that the subsection confers on the court a broad discretion is well made, but, given its limited sphere of application and the long-standing nature of the statutory provision, there is no evidence that it has created excessive uncertainty such that it can be said to be a major defect in English contract law.[58]

The most significant example of statutory intervention given by Professor Treitel is his third example—namely, the enactment of the Unfair Contract Terms Act 1977. Here, it is important to recall that Professor Treitel's lecture was given shortly after the enactment of the legislation, at a time when there had been no case law to indicate how the Act might be interpreted and how the courts might decide whether a particular exclusion or limitation clause was, or was not, reasonable. A particular criticism that Professor Treitel made of the Act can be put to one side because it has not proved to be significant in practice—namely, the lack of consistency between section 11(4) of the Act and the guidelines to be found in Schedule 2 in relation to the factors to be taken into account by the court when deciding whether or not a particular term is, or is not, unreasonable.[59] Professor Treitel's point was that it was 'not easy to make sense'[60] of the difference between the two provisions, and he was critical of the confinement of the guidelines contained in Schedule 2 'to certain

one that relates to the exercise of a discretion, but, rather, it is a failure to take sufficient account of the need to protect a particular type of expenditure—namely, wasted expenditure that does not result in an enrichment of the other party to the contract.

55 See eg the judgment of Lawton LJ in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925, 982 ('what is just is what the trial judge thinks is just') but contrast in this respect the more principled approach taken by the trial judge, Robert Goff J (*BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783.

56 These limits are much narrower than those to be found in international restatements of contract law.

57 Law of Property Act 1925 (15 & 16 Geo 5 c 20).

58 See, for example, H Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) para 26-248, where the subsection is discussed without significant criticism. Professor Treitel's criticism was particularly focused on the judgment of Buckley LJ in *Universal Corp v Five Ways Properties Ltd* [1979] 1 All ER 553, 555 (where he said that the subsection 'confers on the judge a discretion, which is unqualified by any language of the subsection, to order or refuse repayment of the deposit, a discretion which must, of course, be exercised judicially'), but it may be that the latter case can best be seen as a response to the criticism that the scope of the Act has previously been thought 'to be narrow' (Beale para 26-248).

59 Treitel (n 1) 17–18. He describes this as the 'worst' example of inconsistency (17).

60 Ibid 18.

exemption clauses in certain contracts' when they might be suitable for more general application.[61] Although the guidelines contained in Schedule 2 are only expressly applicable to contracts that fall within sections 6 and 7 of the Act, 'they are frequently regarded as being of general application' and so the criticism, while correct in theory, has not created a difficulty in practice.[62]

On the face of it, the 1977 Act confers a substantial degree of discretion upon a court when deciding whether a particular exclusion or limitation clause is, or is not, unreasonable. However, in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*,[63] Lord Bridge of Harwich stated that it would not be appropriate to describe a decision as to the reasonableness of a clause as 'an exercise of discretion', although he conceded that it did have in common with the exercise of discretion that 'the court must entertain a whole range of considerations, put them in the scales on one side or the other, and decide at the end of the day on which side the balance comes down'.[64] While, as a matter of authority, the decision of the court may not be technically classified as the exercise of a discretion, it clearly has strong parallels with the exercise of a discretion. This can be seen most obviously in the approach taken by appellate courts to the review of decisions made by first instance judges as to the reasonableness of a particular clause, where they have been slow to interfere in this balancing exercise, only interfering where the lower court 'proceeded upon some erroneous principle or was plainly and obviously wrong'.[65] This rather *laissez-faire* approach of the appellate courts has created a degree of uncertainty in the law, but, otherwise, the case law suggests that Professor Treitel's fear that the Act would generate too much uncertainty has not been fulfilled. The courts have recognized, at least in commercial transactions between parties of roughly equal bargaining power, that the parties:

> should be taken to be the best judge on the question whether the terms of the agreement are reasonable. The court should not assume that either is likely to commit his company to an agreement which he thinks is unfair, or which he thinks includes unreasonable terms. Unless satisfied that one party has, in effect, taken unfair advantage of the other—or that a term is so unreasonable that it cannot properly have been understood or considered—the court should not interfere.[66]

This is not to deny that the Act has generated a degree of uncertainty. But, at the same time, the case law has provided to commercial parties a considerable

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61 Ibid 17.

62 Beale (n 58) para 15-097.

63 *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803.

64 Ibid 815.

65 Ibid 816.

66 *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] EWCA Civ 317, [2001] 1 All ER (Comm) 696, para 55. Further examples of a judicial reluctance to strike down a term that has been freely agreed between large commercial parties who are regarded as the best judges of their own interests include *Granville Oil & Chemicals v Davis Turner* [2003] EWCA Civ 570, [2003] 2 Lloyd's Rep 356, para 31; *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, para 321; *Air Transworld Ltd v Bombardier Inc* [2012] EWHC 243 (Comm), [2012] 1 Lloyd's Rep 349, para 133; cf *Britvic Soft Drinks Ltd v Messer UK Ltd* [2002] 1 Lloyd's Rep 20, 57–8.

degree of assurance about the range of factors that the courts will take into account when deciding whether or not an exclusion or limitation clause is unreasonable.

Professor Treitel contrasted the 1977 Act in unfavourable terms with the Railway and Canal Traffic Act 1854.[67] The 1854 Act was enacted to protect the public from being unjustly dealt with by railway companies who, at that time, exercised a monopoly power. Section 7 of the Act imposed liability on railway companies for neglect or default in the carriage of goods 'notwithstanding any notice, condition or declaration made and given by such company thereto' unless the court held the condition to be 'just and reasonable'. In applying the latter test, the courts developed the 'fair alternative' doctrine, according to which the requirement of reasonableness was satisfied if the carrier gave the consignor of the goods the option of sending the goods either at the carrier's or at the consignor's risk at differential rates.[68] Although Professor Treitel cast the 1854 Act in a favourable light, it is important not to forget that the courts in the 19th century did express their discomfort about the powers conferred on them under the Act. The most famous example is perhaps the statement of Lord Bramwell in *Manchester Sheffield and Lincolnshire Railway Co v Brown*,[69] where he stated:

> '[H]ere is a contract made by a fishmonger and a carrier of fish who know their business, and whether it is just and reasonable is to be settled by me who am neither fishmonger nor carrier, nor with any knowledge of their business.'[70]

The 1854 Act is, in some respects, a helpful precedent when considering the claim that the 1977 Act may generate excessive uncertainty. First, it demonstrates the unease felt by some judges as to the task they are required to undertake and the degree of uncertainty that is, at least initially, created by legislation of this type. But, second, it illustrates how, over time, the legislation can settle down as the courts develop principles to aid them in their decision-making in such a way as to give guidance to contracting parties when they are drafting their contracts or contemplating litigation. In relation to the Unfair Contract Terms Act 1977, the balancing exercise can be a difficult one and, while one can occasionally find cases where the balance appears to have been struck by different courts in different places, overall the Act can be said

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67 Railway and Canal Traffic Act 1854 (17 & 18 Vict c 31), see Treitel (n 1) 15.

68 See eg *Peek v North Staffordshire Railway Company* (1863) 10 HLC 473, 511–12. It has been argued, however, that the 'fair' or 'reasonable' alternative doctrine was adopted by the courts in an attempt to diminish the difficulties encountered by the courts in assessing the reasonableness of a notice. PS Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1979) 559. By insisting on alternatives being offered, the court would only interfere if the rate with carriers' liability was exorbitant. In this way, a substantive rule, that a clause be reasonable, gave way to a procedural rule that the terms must be offered in a reasonable way.

69 Lord Bramwell was a man committed to the ideas of laissez-faire and freedom of contract. See more generally Atiyah (n 68) 374–80. It is perhaps no surprise that he carried these views into his interpretation of the 1854 Act.

70 *Manchester Sheffield and Lincolnshire Railway Co v Brown* (1883) 8 App Cas 703, 716.

to have achieved its task of regulating the use (and abuse) of exclusion and limitation clauses without impairing unduly the ability of contracting parties of roughly equal bargaining power to allocate the risk of loss flowing from a breach of contract.

Subsequent developments

It would be possible to examine developments in a number of areas of contract law that post-date Professor Treitel's lecture for the purpose of assessing his claim that there can be seen in the law of contract a movement from doctrine to discretion. Here, attention will be confined to four of these developments: namely, the possible role of good faith in contract law; the principles applied by the courts to the interpretation of contracts; developments in relation to the assessment of damages for breach of contract; and, finally, the law relating to illegality as it applies to contracts. We shall consider each in turn.

The role of good faith

The possible role of good faith in English contract law did not even merit a mention by Professor Treitel in his lecture. It is well known that modern[71] English contract law has set its face against the recognition of a general doctrine of good faith in contract law,[72] and, in this respect, English law is out of step with many legal systems in the world where such a general principle is a fundamental part of contract law. However, English law now appears to be in a state of flux largely as a result of the judgment of Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd*,[73] where he concluded that 'the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced'.[74] Of particular interest in this context is his handling of the objection that the recognition of such a duty would generate too much uncertainty on the basis that 'the content of the obligation would be vague and subjective and that its adoption would undermine the goal of contractual certainty to which English law has always attached great weight'.[75] He concluded that the fear of excessive uncertainty was 'unjustified' and that there was 'nothing unduly vague or

[71] It was perhaps rather different in the 18th century where good faith might have played a greater role had it been able to flourish under the guiding hand of Lord Mansfield. See eg *Carter v Boehm* (1766) 3 Burr 1905.

[72] See eg *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433, 439; *Walford v Miles* [1992] 2 AC 128, 138.

[73] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321.

[74] Ibid para 153.

[75] Ibid para 124.

unworkable about the concept' of an implied duty of good faith in the performance of a contract, given that its application involved 'no more uncertainty than is inherent in the process of contractual interpretation'.[76] In his judgment, the content of the duty was objective, not subjective,[77] and, given that its aim is to give effect to the intention of the parties, its recognition would not amount to an 'illegitimate restriction on the freedom of the parties to pursue their own interests'.[78] Judges in subsequent cases have been more hesitant about the recognition of such an implied duty,[79] and, although there is increasing authority to support the enforceability of an express term that requires the parties to act in good faith in the performance of the contract,[80] the courts remain reluctant to imply a good faith duty into a commercial contract, principally on the ground that the proposed term does not fit with the arm's-length nature of the relationship between the parties[81] or on the ground that its existence cannot be reconciled with the express terms of the contract between the parties.[82] Given this reluctance, it is in the context of long-term or relational contracts that good faith is likely to play its most important role.[83]

The way in which Leggatt J chose to cast the duty of good faith in *Yam Seng* and its restriction (at least for the present) to the performance and not the negotiation of a contract, is unlikely to generate significant uncertainty provided that the focus of the courts remains on the aim of giving effect to the presumed intention of the parties and the desire of the parties to 'bind themselves in order to co-operate to their mutual benefit'.[84] In this way, the development has the potential to promote and protect the expectation of honesty in commercial transactions by encouraging adherence to the standards of commercial dealing that are generally accepted in the marketplace. It is also important to note that Leggatt J believed that 'there is no need for common lawyers to abandon their characteristic methods and adopt those of civil law systems in order to accommodate the principle'.[85] The fate of *Yam Seng* remains, finally, to be determined, but in many ways it provides a fascinating example of the incremental development of the law of contract as a judge in a particular case seeks to draw together a number of different threads running through the

[76] Ibid para 152.
[77] Ibid para 145.
[78] Ibid para 148.
[79] See eg *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] BLR 265, paras 105, 150–4.
[80] See eg *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200, [2013] BLR 265; *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), [2014] 2 Lloyd's Rep 457; *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 (QB).
[81] See eg *Myers v Kestrel Acquisitions Ltd* [2015] EWHC 916 (Ch), [2016] 1 BCLC 719.
[82] See eg *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch), [2014] 2 Lloyd's Rep 169; *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC), [2015] BLR 675.
[83] *Al Nehayan v Kent* [2018] EWHC 333 (Comm) paras 167–76.
[84] *Yam Seng* (n 73) para 149.
[85] Ibid para 147.

case law and derive from that case law a principle, cautiously expressed, but capable in time, of developing into a principle of broader application.

The interpretation of contracts

The second development relates to the principles by which contracts are interpreted—a topic that was lightly touched upon by Professor Treitel in his lecture. At the time, Professor Treitel's principal concern was with the way in which the *contra proferentem* rule was applied to the interpretation of exclusion clauses and, in particular, to attempts to exclude liability for fundamental breach.[86] In this respect, the law has moved on since Professor Treitel's lecture. The doctrine of fundamental breach has been largely confined to the dustbin of history, and the *contra proferentem* rule is rarely invoked by modern courts, particularly in the context of commercial contracts between parties of roughly equal bargaining power.[87] Exclusion and limitation clauses are now more likely to be interpreted in the same way as any other term of a commercial contract, and, in adopting this more natural approach, the courts have recognized the role that such clauses play in the 'allocation of benefit, risk and responsibility' between the contracting parties.[88] At the same time, the courts have continued to insist that exclusion and limitation clauses be drafted in 'clear and unambiguous' terms.[89] Although the particular issues raised by Professor Treitel are no longer a particular source of difficulty, it does not follow that the principles applicable to the interpretation of commercial contracts are uncontroversial. On the contrary, they have occupied the attention of the House of Lords and the Supreme Court on a number of occasions in recent years.[90]

It cannot be said that the interpretation of a contract is a matter of discretion for the court, but it would be true to say that this is an area of law that is governed by general principles that have been stated by the courts at a high level and that can come into conflict. In the view of some, the law has developed in a direction that is undesirable because too much uncertainty has been created. Examples of such uncertainty are said to include the range of materials on which a court can draw when seeking to interpret a contract (the so-called

[86] Treitel (n 1) 12.

[87] *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, [2012] Ch 497; *Transocean Drilling UK Ltd v Providence Resources Plc* [2016] EWCA Civ 372, [2016] 2 Lloyd's Rep 51, para 20; *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2016] UKSC 57, [2017] AC 73, para 6; *Persimmon Homes Ltd v Ove Arup & Partners Ltd* [2017] EWCA Civ 373, [2017] PNLR 29, paras 52–3; *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd* [2018] EWHC 558 (TCC), [2018] BLR 511, para 85.

[88] *McGee Group Ltd v Galliford Try Building Ltd* [2017] EWHC 87 (TCC), 170 Con LR 203, para 25.

[89] Ibid.

[90] See eg *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101; *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

'matrix of fact'),[91] the adoption of a 'contextual' approach to the meaning of words and phrases in a contract,[92] and the importance attached by some courts to considerations of 'commercial common sense' as a guide to interpretation.[93]

The claim that English law has lurched in the direction of uncertainty, however, is difficult to defend. In comparison with many legal systems in the world, English law continues to restrict the range of materials on which the courts can draw when seeking to interpret a contract so that, for example, pre-contractual negotiations[94] and evidence of conduct subsequent to the making of the contract[95] remain generally inadmissible in evidence. While it is true that the words in a contract are no longer, if they ever were, inevitably interpreted in a literal fashion, it does not follow from this that the words used by the parties do not matter. On the contrary, they do matter, and they matter a lot. As Lord Neuberger recently observed, reliance upon considerations of commercial common sense and the surrounding circumstances 'should not be invoked to undervalue the importance of the language of the provision which is to be construed'.[96] Thus, contracts between commercial parties drawn up with the benefit of legal advice are likely to be interpreted 'principally by textual analysis'[97] on the basis that they have been drawn up by professionals who know how to use the English language properly, so that to give the words their ordinary and natural meaning is most likely to give effect to the objective intention of the parties. But this proposition may not hold true for all contracts. So, for example, in the case of a transaction that is characterized by a high degree of informality, the courts may place 'greater emphasis on the factual matrix',[98] on the basis that the parties to such a transaction may have placed greater reliance on the informal understandings that underpin their relationship than on the careful drafting of the express terms of their contract. Even in the case of contracts drawn up with the benefit of professional advice, the courts do not inevitably assume that the parties

[91] See eg C Staughton, 'How Do the Courts Interpret Commercial Contracts?' [1999] CLJ 303, 306–8.

[92] See eg Yihan Goh, 'From Context to Text in Contractual Interpretation: Is There Really a Problem with the Plain Meaning Rule?' (2016) 45 Common L World Rev 298; see also PS Davies, 'Construing Commercial Contracts: No Need for Violence' in M Freeman and F Smith (eds), *Law and Language* (OUP 2013) 434.

[93] For a careful assessment of the role that considerations of commercial common sense play in English law, see N Andrews, 'Interpretation of Contracts and "Commercial Common Sense": Do Not Overplay This Useful Criterion' [2017] CLJ 36.

[94] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101. Exceptionally, such evidence is admissible in cases of rectification, estoppel and to prove that a matter of fact that may be relevant as background was known to the parties. Contrast PICC (n 50) art 4.3(a); PECL (n 50) art 5:102(a).

[95] *Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. Contrast PICC (n 50) art 4.3(c); PECL (n 50) art 5:102(b).

[96] *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, para 17.

[97] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, para 13.

[98] Ibid.

have used the English language correctly. Thus, the courts have acknowledged that 'negotiators of complex formal contracts may often not achieve a logical and coherent text',[99] and, in such a case, the court is not compelled to interpret the contract as if it were entirely logical and coherent. In other words, allowances can be made. But they will be made within narrow limits because it 'requires a strong case to persuade the court that something must have gone wrong with the language' of the contract.[100] Such cases, however, are exceptional and will be made out only where it is clear that something has gone wrong with the language and that it is 'clear what a reasonable person would have understood the parties to have meant'.[101] On this basis, both the problem and the solution must be clear before the courts will engage in 'verbal rearrangement or correction' of the terms of the contract.[102]

Viewed in this perspective, it cannot be said that the principles applied by the English courts to the interpretation of contracts are characterized principally by their discretionary nature. Contracting parties who use clear and unambiguous language have little to fear from the English courts. The courts can be relied upon to give effect to their intention as expressed in the terms of their contract. More difficult are cases in which the contract has been poorly drafted, is ambiguous, or fails to deal fully with the issue that has arisen on the facts of the case. It is, however, important to note that the responsibility for the latter difficulties lies principally with the contracting parties themselves and not with the courts. It is not surprising that the courts experience difficulty in giving a clear meaning to an obscure text, but these struggles should not be used as evidence of a drift from doctrine to discretion. As Lord Hodge recently observed, the 'recent history of the common law of contractual interpretation is one of continuity rather than change' and 'one of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation'.[103]

Damages

The third development relates to the law of damages for breach of contract. As we have noted, Professor Treitel examined the law relating to the date on which damages fall to be assessed, but here we shall focus on three issues that were not examined by Professor Treitel—namely, the availability of punitive damages in a breach of contract claim; the entitlement of a contracting party to recover 'negotiating damages' or damages assessed by reference to the gain made by the breaching party; and the penalty clause rule. The focus in relation to the first of these issues is on a recent decision of the Singapore Court of Appeal, whereas the focus for the others are decisions of the UK

[99] Ibid.
[100] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 15.
[101] Ibid para 25.
[102] Ibid.
[103] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, para 15.

Supreme Court. The particular issue for examination is the extent to which the courts enjoy flexibility or discretion in relation to the assessment of damages.

The first context for consideration of this issue is the extent to which it is possible to recover punitive damages in a breach of contract claim. This was one of the issues before the Singapore Court of Appeal in *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd*.[104] After an extensive consideration of the doctrinal and policy arguments for and against the availability of punitive damages in a purely contractual context, including a comparative analysis,[105] the Court of Appeal concluded that 'there ought to be a general rule that punitive damages cannot be awarded for breach of contract'.[106] Factors that were taken into account in deciding not to make punitive damages available included the absence of criteria to govern the availability of such damages and the uncertainty that would be generated by making them available.[107] Having thus identified the general rule that punitive damages should not be recoverable, the court turned to consider whether there ought to be a residual discretion to award punitive damages in a purely contractual context and concluded that it 'would not rule out entirely the possibility that a case may one day come before this court, which necessitates a departure from the general rule'.[108] But it would have to be 'a truly exceptional case'[109] to persuade the court to award punitive damages. To the extent that the court enjoys a discretion, it is to be exercised within very narrow limits on the basis that '"never say never" is a sound judicial admonition'.[110] This is not a case of discretion supplanting doctrine but of discretion playing a limited role to supplement a decision based squarely on doctrinal and policy considerations.

Our second case is the decision of the UK Supreme Court in *Morris-Garner v One Step (Support) Ltd*,[111] where the issue before the court was the availability of 'negotiating damages'—that is to say, damages awarded to represent the monetary amount that might reasonably have been demanded by the claimant from the defendant as a *quid pro quo* for permitting the defendant to breach its

[104] *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26, [2017] 2 SLR 129.

[105] The jurisdictions examined included England and Wales, Australia, New Zealand, and Canada. The most influential judgment in favour of making punitive damages available is the decision of the Supreme Court of Canada in *Whiten v Pilot Insurance Company* (2002) 209 DLR (4th) 257. Extensive consideration was given by the Court of Appeal to the decision in *Whiten* but the reasoning was found to be 'unpersuasive' (see paras 114–29).

[106] Ibid para 135.

[107] Ibid paras 86–90.

[108] Ibid para 136.

[109] Ibid.

[110] *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449, para 27. For criticism of this 'never-say-never' approach, see R Adhar, 'Contract Doctrine, Predictability and the Nebulous Exception' [2014] CLJ 39, 42 who argues that the flotation of 'the possible recognition of the meritorious exceptional claim in the rare occasion, discernible only by the court itself, is productive of needless uncertainty and cost'. The concern that he identifies is not so much the existence of an exception but the nature of the exception, namely its breadth and indeterminacy (56).

[111] *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2018] 2 WLR 1353.

contract with, or other obligation owed to, the claimant. The Court of Appeal had held that the claimant had an election between suing to recover compensatory damages in respect of the losses suffered as a result of the breach and negotiating damages.[112] The jurisdiction to award negotiating damages was said to be a broad one based on whether or not an award of damages assessed on this basis would be a 'just response' to the breach.[113] The Supreme Court rejected this approach and affirmed that 'common law damages for breach of contract are not a matter of discretion' but, rather, are 'claimed as of right, and they are awarded or refused on the basis of legal principle'.[114] The principle on which damages are awarded is that they are 'intended to compensate the claimant for loss or damage'[115] resulting from the breach, so that, in the case where the claimant's interest in the performance of the contract is purely economic and it cannot establish that it has suffered any loss, then in such a situation it 'cannot be awarded more than nominal damages'.[116] In the case where the claimant's loss is 'incapable of precise measurement', a court should be 'tolerant of imprecision'[117] and seek to measure or estimate the loss 'as accurately and reliably as the nature of the case permits'.[118] But the difficulty of measuring the loss does not, of itself, justify the court in seeking to award damages on a different basis—namely, by reference to the gain made by the defendant or the price that the claimant might have charged for permitting the defendant to breach the terms of its contract.

However, it does not follow that damages can never be assessed by reference to the gain made by the breaching party. There are two principal situations in which damages can be assessed on the latter basis. First, in *Attorney General v Blake* the Attorney-General was held to be entitled to recover the entirety of the profits made by the spy, George Blake, from his breach of contract in writing an autobiography and including within it information that he had given an undertaking to the Crown that he would not divulge. But it is now clear from *Morris-Garner* that *Blake*[119] is very much an exceptional case[120] and, in all likelihood, is unlikely to be followed. The jurisdiction to award an account of profits in respect of a breach of contract may be a discretionary jurisdiction, but, once again, it is a discretion to be exercised within very narrow limits.

[112] [2016] EWCA Civ 180, [2017] QB 1.
[113] Ibid paras 119–21.
[114] *Morris-Garner* (n 111) para 95(12).
[115] Ibid para 95(6).
[116] Ibid para 95(9).
[117] Ibid para 95(8).
[118] Ibid.
[119] *Attorney General v Blake* [2001] 1 AC 268.
[120] *Morris-Garner* (n 111) para 95(11). See to similar effect the decision of the Singapore Court of Appeal in *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, [2018] SLR 655, where *Blake* was described as 'truly exceptional' (para 251), and the court tentatively suggested (para 254) that the case could be seen as one in which the law had a legitimate basis for punishing the defendant and deterring breach because the contract involved a public interest—namely, national security—that went beyond the private interests of the parties themselves.

Second, negotiating damages may be awarded by a court, but the jurisdiction to award damages on this basis has been severely curtailed by the Supreme Court and is confined principally to cases where the defendant has infringed a proprietary right of the claimant or to cases where the court is exercising its jurisdiction to award damages in lieu of specific performance or an injunction. The rationale for the award of negotiating damages can be seen by reference to the case in which the defendant wrongfully makes use of property belonging to the claimant. In such a case the effect of awarding negotiating damages is to prevent the defendant from taking 'something for nothing, for which the owner was entitled to require payment'.[121] A contractual right is not generally to be treated as an asset or a species of property for this purpose. But the Supreme Court recognized that a contractual right might be 'of such a kind that its breach can result in an identifiable loss equivalent to the economic value of the right, considered as an asset, even in the absence of any pecuniary losses which are measurable in the ordinary way'.[122] Examples of such contractual rights include a right to control the use of land, intellectual property, or confidential information. But it is unlikely that there will be cases beyond these categories where negotiating damages may be available, although the Supreme Court did not entirely rule out this possibility.[123] Once again, we appear to be in the realms of discretion, but it is a discretion within narrow limits. The principal message that emerges from the case is that 'common law damages for breach of contract are not a matter of discretion'[124] and that the principle on which damages are awarded is that they aim to compensate the claimant for the loss that it has suffered as a result of the breach.

The third case is the decision of the UK Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis*,[125] which reformulated the penalty clause rule as it operates in English law and held that the correct test for the identification of a penalty clause is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's legitimate interest in the performance of the contract. While the court recognized that the penalty clause rule is an interference with freedom of contract that 'undermines the certainty which parties are entitled to expect of the law', it nevertheless

[121] *Morris-Garner* (n 111) para 30.

[122] Ibid para 93.

[123] Ibid para 94. Although it is not entirely easy to ascertain the limits of this exception. See *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] SGCA 44, [2018] 2 SLR 655, paras 277–88. It has been observed that the decision of the Singapore Court of Appeal in the latter case 'coheres with an emerging trend in Singapore law to depart from English developments which introduce uncertainty'. See Man Yip and Alvin W-L See, 'One Step away from *Morris-Garner: Wrotham Park* Damages in Singapore' (2019) 135 LQR 36, 39.

[124] *Morris-Garner* (n 111) para 95(12).

[125] *Cavendish Square Holding BV v Talal El Makdessi and ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172.

declined the invitation to abolish the rule.[126] To this extent, it has not advanced the cause of certainty.[127] But, on the other hand, it has not taken English law in the direction of recognizing a broad discretionary power to review agreed damages clause. As Lords Neuberger and Sumption observed, 'in a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach'.[128] If, however, the parties overstep that mark by stipulating for an extravagant sum in comparison with the claimant's legitimate interests under the contract, the courts retain a residual jurisdiction to decline to give effect to the clause and relegate the claimant to its action for damages at common law. To this extent, the penalty clause rule continues to create a degree of uncertainty, but it is now an uncertainty within much narrower limits.

Illegality

The final example concerns the law relating to illegality, a topic not covered by Professor Treitel in his lecture. Here we have a pair of contrasting decisions. The first is the decision of the UK Supreme Court in *Patel v Mirza*,[129] and the second is the decision of the Singapore Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Import & Export)*.[130] The facts of *Patel* are straightforward. The claimant paid to the defendant £620,000 in connection with an illegal agreement to trade in shares in the Royal Bank of Scotland. The agreement was not implemented because the expected information did not materialize. The Supreme Court held, unanimously, that the claimant was entitled to recover his payment. Although the court was unanimous in terms of outcome, it diverged sharply in its reasoning, in particular, as to whether the remedial consequences of entry into an illegal contract should be decided by the court in the exercise of a discretion or whether this is an area that should be characterized by clear rules of law. The majority adopted a discretionary approach or an approach based on the balancing of a range of factors, concluding that a court considering the application of the defence of illegality should have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the

[126] Ibid para 33.

[127] It declined the invitation for a number of reasons: (i) the rule is well established; (ii) similar rules are to be found in most other jurisdictions in the world; (iii) the rule is needed given the imbalance in negotiating power between contracting parties; (iv) although statute has intervened to regulate such clauses in some circumstances the regulation does not cover the whole field; and (v) the existing rule does not give rise to difficulty in practice for commercial parties.

[128] *Cavendish* (n 125) para 35.

[129] *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

[130] *Ochroid Trading Ltd v Chua Siok Lui (trading as VIE Import & Export)* [2018] SGCA 5.

relief claimed. When deciding whether it is contrary to the public interest to enforce a claim on the ground that to do so would be harmful to the integrity of the legal system, the court should consider: (i) the underlying purpose of the prohibition that has been transgressed and whether that purpose will be enhanced by denial of the claim; (ii) any other relevant public policy on which the denial of the claim would have an impact; and (iii) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.[131] In conducting this balancing approach, much will depend on the decision of the first instance judge and the appellate courts will only interfere with that decision if the judge has 'proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant, or failed to take into account matters that were legally relevant'.[132] Much will, therefore, depend on the evaluation conducted by the trial judge, and the input of appellate courts will be strictly limited. Support for a similar discretionary or balancing approach can also be derived from both the Unidroit Principles of International Commercial Contracts[133] and the Principles of European Contract Law.[134]

Lord Sumption, in the minority in *Patel*, declined to adopt this approach on the ground that its effect was to convert 'a legal principle into an exercise of judicial discretion',[135] which had the effect of leaving 'the problem to case by case evaluation by the lower courts by reference to a potentially unlimited range of factors'.[136] Accepting the important role that the value of certainty plays in the law of contract, he questioned the appropriateness of making 'a legal right, and particularly a contractual right, dependent on a judge's view about whether in all the circumstances it ought to be enforced'.[137] His preference was to supply 'a framework of principle which accommodates legitimate concerns about the present law'.[138] The Singapore Court of Appeal, in *Ochroid Trading*, also declined to follow the approach of the majority in *Patel* on the

[131] *Patel* (n 129) para 120.

[132] *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84; [2018] 1 WLR 2777, para 65. In this respect the approach of the courts resembles that taken in the context of an appeal against the finding of a first instance judge in relation to the reasonableness or unreasonableness of an exclusion or limitation clause under the Unfair Contract Terms Act 1977 (n 65). For criticism of the decision in *Singularis* on the ground that an 'issue as to whether a claim should be barred for illegality seems too important to be left to a potentially arbitrary and unpredictable discretion of the first instance judge which may not be open to reconsideration on appeal', see N Strauss QC, 'Illegality Decisions after *Patel v Mirza*' (2018) 134 LQR 538, 541–2.

[133] PICC (n 50) arts 3.3.1, 3.3.2.

[134] PECL (n 50) art 15:102.

[135] Patel (n 129) para 265.

[136] Ibid.

[137] Ibid para 263.

[138] Ibid.

ground that it was 'unnecessary to achieve remedial justice'[139] and that it involved 'an unnecessarily broad balancing process'.[140]

The approach of the majority in *Patel* has been the subject of considerable academic commentary[141] and, indeed, it has received support from commentators who are otherwise strong believers in the importance of legal rules. Thus, Professor Burrows, after observing that he had not come lightly to the 'counter-intuitive view' that 'the way forward is to confer a judicial discretion and to abandon the existing legal rules',[142] described the decision of the majority as a 'triumph.'[143] Why did the Supreme Court adopt this discretionary approach in the context of illegality? Three reasons can be suggested. First, the existing law was believed to be unsatisfactory and lacking in certainty so that this is not a case where the courts have created uncertainty where none previously existed. Second, the range of factors to which a court can legitimately have regard when considering its response to the impact of illegality on the obligations of the parties to the contract is so broad that these factors cannot meaningfully be subsumed within a single clearly defined legal rule (or even a set of such rules). Third, the claim of the parties that they are entitled to the protection of a set of clearly defined legal rules is not strong given that, as Lord Kerr acknowledged, certainty or predictability of outcome 'is not a premium to which those engaged in disreputable conduct can claim automatic entitlement'.[144] The latter point has not been universally accepted,[145] but it is suggested that it has some force in the sense that the interest in certainty of those planning an illegal transaction is clearly not as strong as those who are planning entry into a commercial transaction that is not tainted in any respect by illegality.

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[139] *Ochroid Trading* (n 130) para 119.

[140] Ibid para 120.

[141] See eg A Burrows, 'Illegality after *Patel v Mirza*' [2017] Current Legal Problems 55; J Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 LQR 4; E Lim, '*Ex Turpi Causa*: Reformation Not Revolution' (2017) 80 MLR 927.

[142] Burrows (n 141) 55.

[143] Ibid 56.

[144] *Patel* (n 129) para 137; see, to similar effect, Lord Toulson (para 113).

[145] Thus, Lord Neuberger observed that 'criminals are entitled to certainty in the law just as much as anyone else. In any event, third parties are often affected by the enforceability of rights acquired or lost under contracts, and innocent third parties, it could be said with force, are in a particularly strong position to expect certainty and clarity from the law. Quite apart from this, there is a general public interest in certainty and clarity in all areas of law, not merely because it is a fundamental aspect of the rule of law, but also because the less clear and certain the law on any particular topic, the more demands there are on the services of the courts' (para 158). Lord Sumption did not express concern on behalf of those involved in the criminal enterprise but observed that those who advise parties to such transactions do have a legitimate interest in certainty and that uncertainty is likely to generate a great deal of wasteful and unnecessary litigation (para 263); see also Burrows (n 141) 61.

Conclusion

The issues raised by Professor Treitel in his lecture in 1980 continue to be live issues in English law today, albeit his fear that English contract law is moving from doctrine to discretion has been largely unrealized. English contract law continues to place a strong emphasis on the importance of certainty in contract law, particularly commercial contract law,[146] but, at the same time, the courts recognize that the law has to contain an element of flexibility if it is to adapt to the changing needs of society and of contracting parties. The discretion or flexibility thus given to the courts is, however, exercised within carefully defined limits and in the main is exercised cautiously by the judiciary as they develop the law in an incremental fashion. This being the case, it is unlikely that English contract law will ever develop in the direction of conferring upon the courts a broad discretionary power to modify or to adjust the rights and duties of the parties to a contract when the contract has unexpectedly become more difficult or more onerous to perform.[147] That is not the English way. But it does not follow from this that English law is incapable of developing new doctrines that, in the early stages of their life, may contain a significant degree of discretion or uncertainty. Two examples that feature in this article are the current developments in relation to the implied duty of good faith in the performance of a contract and the remedial consequences that flow from entry by the parties into an illegal contract. Both developments are controversial. The duty of good faith is the least secure, given that it has not been given serious consideration by the appellate courts and it has potentially wide-ranging implications. But the introduction of the implied term requiring the parties to act in good faith in the performance of a contract, such as it is, has been done cautiously and in the spirit of the careful, incremental development of the common law. The level of uncertainty created by the decision of the Supreme Court in *Patel v Mirza* is much greater, but here it can be said that the contracting parties do not have as legitimate a claim as other contracting parties to know the ground on which they stand. Entry into an illegal contract carries with it a price.

But, even in the case of illegality, sight should not be lost of the role that the courts can and do play in the development of areas of the law of contract that are characterized by a degree of uncertainty. Thus, Professor Burrows, commenting on the decision of the Supreme Court in *Patel v Mirza*, has observed that the decision of the Supreme Court should not be regarded as the end of the story:

> Rather, it should be viewed as allowing the courts the flexibility to reach satisfactory results in an open and transparent way and thereby leading, over time, to the informed

[146] Consumer contract law has developed in a rather different direction, as evidenced by the enactment of the Consumer Rights Act 2015 (c 15). These developments are beyond the scope of this article.

[147] Thus, English law is unlikely to develop a hardship doctrine of the type to be found in PICC (n 50) art 6.2 or PECL (n 50) art 6:111.

> formulation of at least some rules capturing the decisions of the courts. In other words, the flexible balancing approach should in time allow the formulation of a certain number of rules that, always against a flexible background, reflect the complex variables involved.[148]

The words 'over time' are important here, and their importance can be seen more clearly if we look back at Professor Treitel's fear that the enactment of the Unfair Contract Terms Act 1977 would introduce an unacceptable degree of uncertainty into English contract law. At the time of his lecture, and in the absence of case law, Professor Treitel's fear was entirely understandable. However, the subsequent development of the case law has provided contracting parties with guidance that substantially, but not entirely, reduces the uncertainty created by the reasonableness test under the Act. The same may well happen in the case of illegality, although here the flow of cases is likely to be slower, and the opportunity for the courts to provide guidance in relation to the exercise of discretion correspondingly reduced. This conclusion evidences the vital role played by the judiciary in the development of the English law of contract. They can fill out the open-textured terms of legislation and develop principles to guide the courts in emerging or developing areas of the common law (as was the case in relation to intermediate or innominate terms, and may yet be the case in relation to good faith and illegality). In this way, the law of contract can develop and adapt to meet the legitimate needs of present and future generations of contracting parties without sacrificing the certainty and predictability that has been such a valuable feature of English contract law.

[148] Burrows (n 141) 57.