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Lecture

"CHALLENGES FOR INDEPENDENT LAW REFORMERS: EXTERNAL PRIORITIES, SHORTER TIMESCALES AND THE RESPECTIVE ROLES OF LEGISLATIVE AND COURT-LED REFORM"

The Rt Hon Sir Jack **BEATSON** FBA*
Lord Justice of Appeal, England and Wales (2013–2018);
Rouse Ball Professor of English Law,
University of Cambridge (1994–2003);
Law Commissioner for England and Wales (1989–1994).

I. Introduction

1 I am honoured and delighted that the Singapore Academy of Law invited me to speak on this topic. It is almost 24 years since I left the Law Commission of England and Wales[1] (hereafter "the Law Commission") after five years as a law commissioner. Although some of what I will say about the challenges to systematic and relevant law reform that arise from changing external priorities and shorter timescales is based on my own experience, I do not believe that it is only of historical interest.

2 Part of what I say today is based on my chapter in *Fifty Years of the Law Commissions: The Dynamics of Law Reform*, edited by Matthew Dyson, James Lee, and Shona Wilson Stark and published by Hart in 2016.[2] But I will first say something about the respective roles of law commissions and appellate courts, in particular those at the top of the hierarchical pyramid in reforming and developing private law. When is it appropriate for courts to develop and reform an area and what areas should they leave to be reformed by statute? Has the answer to this question been affected by the challenges that have faced the reform of private law by legislation following a law commission study and report?

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* A revised version of a talk I gave on 23 July 2018 at the Supreme Court of Singapore.

1 There are three Law Commissions in the UK; the Law Commission of England and Wales, the Scottish Law Commission and the Northern Ireland Law Commission; the last of which has been non-operational since April 2015 due to budgetary pressures.

2 Sir Jack Beatson, "Challenges for Independent Law Reformers from Changing External Priorities and Shorter Timescales" in *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Matthew Dyson, James Lee & Shona Wilson Stark eds) (Hart Publishing, 2016) ch 26.

3 I will consider this by reference to two areas in which in 2016 and 2018 there has been important court-led doctrinal development by the UK Supreme Court, and a third area in which there have been ebbs and flows in the approach of courts, but no call for legislation. The two areas are the private law consequences of illegal transactions and the effect of contractual "no oral variation" clauses. The third area concerns the nature of the task of the courts in interpreting and construing contracts, taking the latter term "construction" to include to some degree and at a high level of abstraction the process of implying terms to fill gaps.

4 The important recent court-led doctrinal developments were the 2016 decision in *Patel v Mirza*[3] adopting a new "flexible structured approach" to illegality, and that in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*[4] ("*Rock*") in 2018, deciding that "no oral variation" clauses in a contract are binding in English law. On interpretation and construction, and on illegality, the approach of the UK Supreme Court and that of the Singapore Court of Appeal has differed. The difference, both as to approach and as to whether it is appropriate for courts to develop and reform an area, is now starker in the case of illegality because, in January 2018, in *Ochroid Trading Ltd v Chua Siok Lui*[5] ("*Ochroid Trading*"), the Singapore Court of Appeal chose a different path to that chosen by the majority in *Patel v Mirza*.

5 I will first say something general about the different "needs" for law reform by independent agencies for law reform such as law commissions, royal commissions, and inquiries by panels and individuals. To set the scene for a consideration of when it is appropriate for courts to develop and reform an area when reform should be left to legislation following a report by such a body, I will briefly consider two House of Lords decisions on restitution which were decided at a time the Law Commission was considering the supposed common law rule generally precluding the recovery of money paid under a mistake of law and the decisions on illegality, interpretation of contracts, and the effect of "no oral variation" clauses. I will then summarise the advantages and disadvantages of court-led reform and legislation, consider whether the fundamentals of the law commission method remain sound and the difficulties that arise from changing priorities and shorter timescales, and draw the threads together.

3 [2016] UKSC 42; [2017] AC 467.
4 [2018] UKSC 24; [2018] 2 WLR 1603.
5 [2018] 1 SLR 363.

II. Reasons for law reform

6 Notwithstanding the famous statement "Reform, reform; aren't things bad enough?",[6] it is surely not controversial to want to keep the law up to date to serve the needs of society. The issue is how to do it. There are different "needs". One, now typically undertaken in many common law countries by a law commission, is for a body which is capable of taking a long-term and informed view when reviewing law and making proposals to modernise it. Such a body should be responsive to public needs but should not be buffeted by fashion and political pressure. It should be concerned with ensuring that the law is principled and coherent, but also practical. It must be able to examine whether technical areas which may seem as dry as dust to the political and administrative classes are in fact "fit for purpose" in the modern world or whether they harbour a latent legal crisis. It should also be able to prepare recommendations for legislative steps towards codification of an area. In principle it should be capable of taking on large and ambitious projects with social implications.

7 A second "need" is for a mechanism for dealing with legal crises and defects which need to be addressed urgently. This is sometimes done by single-issue inquiries led by a judge or other public figure but can also sometimes be appropriately undertaken by a law commission. Such inquiries often involve issues of social policy as well as technical law: see the Leveson inquiry into the culture, practices and ethics of the press, and those into the Mid-Staffordshire Hospital, contaminated blood and blood products, and bailiff law.[7]

8 The third "need" is for a body which can try to make our statute law more accessible and accurate. In England and Wales, the text of important statutes is not up to date on the statute law database. For example, when I consulted it the autumn of 2014 in connection with a case before me, amendments made by the Finance Act 2005[8] to the Value Added Tax Act 1994[9] had not yet been made to the text displayed.[10] In his Scarman lecture, Sir Geoffrey Palmer stated that

6 Attributed to many people, including Lords Melbourne, Salisbury and Eldon.

7 See references to these and others in Sir Jack Beatson, "Challenges for Independent Law Reformers from Changing External Priorities and Shorter Timescales" in *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Matthew Dyson, James Lee & Shona Wilson Stark eds) (Hart Publishing, 2016) ch 26.

8 c 5 (UK).

9 c 23 (UK).

10 Visitors to the website are, however, warned that there are outstanding changes not yet made to particular statutes, which can be found in the "Changes to Legislation" area: www.legislation.gov.uk/ukpga/2005/7/contents (accessed September 2018). For a striking example where the relevant government department, HM Customs and Revenue, relied on regulations which had been replaced, see *R v Chambers*

(*cont'd on the next page*)

"it would be appropriate to redesign and reform the way statutes are made and promulgated to the public".[11] At a time when citizens increasingly have to try to ascertain the law on a matter affecting them without professional assistance, the need for this is urgent. The process of consolidation is also likely to highlight the parts of a topic where the problem is not simply lack of clarity and confusion because the law is spread over many statutes, but a bad rule. In that way it can assist in clearing the ground for a more focused law reform exercise which can be less difficult to implement. Moreover, the process of implementing a consolidation is faster. In the UK, one long-standing candidate for consolidation is immigration law. The lack of clarity in statutes, rules and guidance and the fact that a lot of the material is either inaccessible or difficult to access means that even the lawyers acting for the Home Secretary can be misled.[12]

9 If the first two "needs" are met, what is the likely impact on the role of the court in a common law jurisdiction? In the early days of the Law Commission of England and Wales, the view of the courts tended to be that its creation meant that the systematic development of the common law was for legislation, aided by the expertise and thoroughness of a commission report and draft bill. Lord Scarman, the first chairman of the commission, was a notable proponent of this view. So, in *National Westminster Bank plc v Morgan*[13] he rejected the argument that the court should recognise that cases of duress, undue influence and unconscionable bargains are based on a general principle of inequality of bargaining power. He did so on a number of grounds, one of which was that the task of restricting freedom of contract was essentially a legislative task for Parliament and not for the courts, and one which Parliament had undertaken in contexts such as consumer sales.[14]

[2008] EWCA Crim 2467 at [64]–[68] and the comments of Lord Toulson (who had presided in that case), "Democracy, Law Reform and the Rule of Law" in *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Matthew Dyson, James Lee & Shona Wilson Stark eds) (Hart Publishing, 2016) at pp 130–131.

11 Sir Geoffrey Palmer, "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (2015) 131 LQR 402 at 421.

12 See, *eg*, *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74 at [57] *ff*, *per* Underhill LJ. In December 2017, the Law Commission of England and Wales announced a project to address the problem and, on 21 January 2019, issued its consultation paper *Simplifying the Immigration Rules* (Consultation Paper No 242).

13 [1985] AC 686.

14 *National Westminster Bank plc v Morgan* [1985] AC 686 at 708. See also *Pao On v Lau Yiu Long* [1980] AC 614 at 634. For a more modern example, see *The Great Peace* [2003] QB 679 at [161], *per* Lord Phillips MR, giving the judgment of the court: "Just as the Law Reform (Frustrated Contracts) Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope

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10 The effect of difficulties in achieving legislative implementation of law commission reports have, however, led some to regard one of the functions of such bodies as also to meet a different "need". That "need" is for a body which provides material which can influence development of the common law by the courts because it is well researched, informed by wide-ranging consultation, and empirically based. Such a body would address this need as well, proposing legislative solutions for those areas or parts of areas not susceptible to judicial reform by the incremental process of developing the common law. Some judges and former law commissioners favour the development of the common law by the courts where there has been a law commission project on the area and even see this as facilitating such development. The decisions of the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners*[15] ("*Woolwich*") and *Kleinwort Benson v Lincoln City Council*[16] ("*Kleinwort Benson*") in 1993 and 1998 and that of the Supreme Court in *Patel v Mirza* in 2016 provide notable examples.

11 The absence of a law commission study of an area has also been used to justify not developing the common law. This was the view of, for example, Lord Goff in relation to the civil consequences of illegal transactions in his dissenting speech in *Tinsley v Milligan*.[17] The common law approach was a rule (the "reliance" rule) generally precluding a claim or a defence which can only be established by relying on an illegal transaction.[18] Lord Goff recognised the problems with the common law approach[19] but stated that reform by the introduction of a

for legislation to give greater flexibility to our law of mistake than the common law allows."

15 [1993] AC 70 at 173. *Cf* his position in *Tinsley v Milligan* [1994] 1 AC 340 at 364, discussed at paras 11–12 below.

16 [1999] 2 AC 349 at 375, 398, 401 and 405–407.

17 [1994] 1 AC 340 at 363–364. T and M contributed to the purchase of a on the understanding that they were joint beneficial owners, but the house was put solely in T's name in order to assist M (with T's knowledge) in making false social security claims. When T gave M notice to quit it was held that a presumption of resulting trust applied to M's contribution, and she could demonstrate entitlement to a share in the house without relying on the illegal purpose. Had she been T's mother, a presumption of advancement would have applied to the contribution and she would not have been able to rebut it without relying on the illegal purpose.

18 See, *eg*, *Anson's Law of Contract* (Jack Beatson, Andrew Burrows & John Cartwright eds) (Oxford University Press, 30th Ed, 2016) at p 444 *ff*. There were three exceptions: where the reason the transaction is illegal is to protect a person in the position of the person bringing the claim or advancing the defence, where the *locus poenitentiae* principle applies where the illegal purpose has not been carried into effect, and where that person can establish the claim or defence without relying on the transaction, in particular by relying on a property right.

19 A property-based approach avoids addressing the underlying policy issues and can result in uncertainty and arbitrariness, and, because property can pass under an illegal transaction if the parties so intend, is open to manipulation by the parties to that transaction.

discretion (such as a "public conscience" test favoured in the Court of Appeal) should occur only after a full inquiry by the Law Commission. Such an inquiry would embrace not only the advantages and disadvantages of the present system, but also the likely advantages and disadvantages of a discretionary system.

12 In *Patel v Mirza* Lord Toulson stated that the decision in *Tinsley v Milligan* led to the Law Commission conducting its review of the law of illegality which, after 15 years culminated in its proposals in 2010 for addressing what it perceived to be its unsatisfactory features.[20] I shall seek to identify what can be learned about the circumstances in which judicial reform is appropriate and legitimate, and about the fundamentals of the law commission method from the histories of that area and of interpretation and the effect of "no variation" clauses. But first, to set the scene and to lay the ground for the points I wish to make, I say something about the decisions themselves.

III. Decisions

13 *Woolwich* was decided after the Law Commission's 1991 consultation paper on restitution of payments made under a mistake of law,[21] but before its final report in 1994.[22] Lord Goff rejected the argument that the reformulation of the law to establish a right, subject to defences, in restitution of money paid in response to an unlawful demand for tax should be left to legislation. He stated that the House of Lords could deal with the general principle because the Law Commission was considering the matter and could deal with any adjustments required if the principle was reformed by recommending legislation. In *Kleinwort Benson*, decided four years after the final report, the majority recognised that the problem of widespread payments made under a settled understanding of the law, to which I have referred, might require a legislative solution, but considered that that was not a reason for stating that payments made under a mistake of law are in principle recoverable. Legislation disapplying the extended limitation period for mistaken payments relating to taxation was subsequently enacted.[23]

14 *Patel v Mirza* was decided some six years after the Commission's report, four years after the Government announced it was not going to implement by enacting the legislation proposed, and not long after three

20 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [10], and see [19].
21 Law Commission, *Restitution of Payments Made under a Mistake of Law* (Consultation Paper No 120, 25 June 1991).
22 Law Commission, *Restitution: Mistakes of Law and* Ultra Vires *Public Authority Receipts and Payments* (Law Com No 227) (Cm 2731, 1994).
23 Finance Act 2004 (c 12) (UK) s 320.

Supreme Court decisions in which fundamental differences between the judges left the law on illegality in some disarray. I deal with those matters later. At this stage it suffices to summarise the facts and the outcome.

15 P agreed with M to provide M with money to bet on a share price using advance inside information M expected to obtain about an announcement which would affect the price of the shares. The transaction was a conspiracy to commit the crime of insider dealing. M was a finance professional. P, who was not, paid M £620,000 pursuant to the agreement but the inside information did not materialise. M did not place the bets but did not repay P. P claimed to recover the money and succeeded in the Court of Appeal and Supreme Court. There was unanimity as to the result in the Supreme Court but a sharp difference as to the approach.

16 The majority rejected the traditional rule-based "reliance" approach and adopted what has been described as a "flexible structured approach". They took into account "a trio of considerations" found in the case law: the underlying purpose of the prohibition which has been transgressed and whether that purpose would be enhanced by denying the claim, other relevant public policy, and whether denying the claim would be a proportionate response.[24] The minority applied the rule-based approach but gave a broad scope to the exceptions to it.[25] The majority considered that the rule-based approach was open to manipulation and led to arbitrariness, uncertainty and a potential for injustice.[26] The minority considered that the conversion of a legal principle into an exercise of discretion would lead to greater uncertainty.[27]

17 As I have stated, in January 2018, in *Ochroid Trading*, the Singapore Court of Appeal rejected the approach of the majority in *Patel v Mirza*. The reasons given were that the introduction of a discretionary policy-based test required legislation, that the approach would lead to uncertainty and to an unjustifiable distinction between the effect of statutory and common law illegality, and that it was not consistent with previous Singapore Court of Appeal authority. The court held that money advanced under loan contracts that were prohibited and unenforceable under the Singapore Moneylenders Act[28] was not

24 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [120].

25 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [101]. The phrase "trio of considerations" was used by McLachlin J in *Hall v Hebert* [1993] 2 SCR 159.

26 See *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [113], [123] and [165]. It was said that the result of *Tinsley v Milligan* [1994] 1 AC 340 was uncertainty and arbitrariness.

27 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [192], [217], [263] and [265].

28 Cap 188, 2010 Rev Ed.

recoverable by the lender because permitting restitution would make nonsense of the statutory prohibition. Commentators in Singapore have welcomed an approach that they consider reaffirms the law's tough stance against illegal transactions and more certain than that of the majority in *Patel v Mirza*.[29]

18 I turn to the two areas in which the Law Commission has not been involved, interpretation and the effect of "no oral variation" clauses.[30] In the 21 years since Lord Hoffmann's seminal judgment in 1998 in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[31] there have been differences in the approach of the UK Supreme Court and the Judicial Committee of the Privy Council as to the relative weight to be given to the text of the contract and to its context, and as to the relationship between the processes of interpretation and implication. In *Attorney General of Belize v Belize Telecom Ltd*,[32] Lord Hoffmann stated that the implication of a term in a document is an exercise in the construction of the document as a whole.[33]

19 The Singapore Court of Appeal has recognised the importance of context and the similarities at a high level of abstraction between the processes of interpretation and implication. But judgments of that court, in particular *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[34] in 2013 and *Yap Son On v Ding Pai Zhen*[35] in 2016, emphasise the importance of the wording of the contract and the difference between the processes of interpretation and that of implication.[36] The court has stated that in doing this it did not mean to signal a return to literalism.[37] It has also described the process of interpretation as ascertaining the intention of the parties to a contract by an objective process, whereas implication is a process of gap-filling.[38]

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29 See Christopher Bradley, Sophie Mathur & Kwok Hon Yee, "Illegality and Contracts: State of the Law in Singapore" *Linklaters* (22 March 2018) and Jarret Huang, "*Ochroid Trading*: Illegality and Unjust Enrichment after *Patel v Mirza*" *Singapore Law Blog* (15 June 2018).

30 *Cf* Scottish Law Commission, *Report on Interpretation in Private Law* (SLC 160, 1997) and Scottish Law Commission, *Review of Contract Law: Discussion Paper on Interpretation of Contract* (DP 147, February 2011).

31 [1998] 1 WLR 896.

32 [2009] UKPC 10; [2009] 1 WLR 1988.

33 *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988 at [21].

34 [2013] 4 SLR 193.

35 [2017] 1 SLR 219.

36 See also *Y.E.S. F & B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd* [2015] 5 SLR 1187; *Lucky Realty Co Pte Ltd v HSBC Trustee (Singapore) Ltd* [2016] 1 SLR 1059.

37 *Yap Son On v Ding Pai Zhen* [2017] 1 SLR 219 at [37].

38 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [76]–[82], following *Foo Jong Peng v Phua Kiah Mai* [2012] 4 SLR 1267.

20 In 2015, in *Arnold v Britton*[39] and *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd*[40] ("*Marks & Spencer*"), the UK Supreme Court stepped back from Lord Hoffmann's approach and from the emphasis on context in other cases such as *Chartbrook Ltd v Persimmon Homes Ltd*.[41] Both *Arnold v Britton* and *Marks & Spencer* involved leases. In the former the change of emphasis was to give greater weight to the words used in the document. In the latter, which concerned the relationship between interpretation and implication, a majority of the court stated that, while interpreting the words which the parties have used and implying words into the contract both involve determining the scope and meaning of the contract in the broad sense, "construing the words used and implying additional words are different processes governed by different rules".[42] The differences between the UK and Singapore jurisdictions are thus now more nuanced in this area.

21 The ebbs and flows in the approach of UK judges to interpretation and implication can be criticised as producing uncertainty, something which commercial persons decry. I venture to suggest that there are likely to be further ebbs and flows.[43] Just as Lords Neuberger and Sumption led what can be described as an unpicking of Lord Hoffmann's approach once he was no longer a member of the court, so their successors may be tempted to unpick their approaches. But while there is concern about uncertainty, there have been no calls for legislation. In my view, in this area what has happened is a legitimate part of the way the common law develops in its search for principle. Lord Goff, in his magisterial Maccabean Lecture "The Search for Principle", described the process as kaleidoscopic.[44] As the kaleidoscope moves, so there are changes, mostly very gradual, occasionally more visible.

22 Finally, there is the decision in *Rock*. Lord Sumption, who gave the majority judgment in *Rock*, stated that the question "whether a contractual term prescribing that an agreement may not be amended save in writing signed on behalf of the parties … is legally effective" is a "truly fundamental issue in the law of contract".[45] He cited common law

39 [2015] UKSC 36; [2015] AC 1619.
40 [2015] UKSC 72; [2016] AC 742.
41 [2009] UKHL 38; [2009] 1 AC 1101.
42 *Marks & Spencer plc v BNP Paribas Securities Trust Co (Jersey) Ltd* [2015] UKSC 72; [2016] AC 742 at [25]–[26]. *Cf* Lords Carnwath and Clarke at [58], [62] and [76]–[77].
43 In *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396; [2017] 1 All ER (Comm) 601 at [56] I stated that the differences have primarily been ones of emphasis rather than of principle.
44 (1984) 69 Proc Brit Acad 169.
45 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [1].

contract decisions of the New York Court of Appeals, the High Court and Federal Court of Australia, and Ontario courts,[46] which decided that such clauses were ineffective. He stated that the reasons given are almost invariably that the variation of a contract is itself a contract, and absent any statutory or common law requirements of form, parties may agree informally to dispense with a clause which imposes such a requirement, and that they must be taken to have agreed to have intended to do this by the act of agreeing orally to the variation.

23 As to English law, the effectiveness of such clauses had not been the subject of decision, and Lord Sumption described the cases as "more recent, and more equivocal".[47] He noted that most statements inclined to the view that such clauses were ineffective[48] but that there was a substantial body of recent academic writing which favoured giving them effect.[49] He considered that the law "should and does give effect" to such a provision.[50] There were legitimate commercial reasons for including such clauses. They promoted certainty, prevented abusive attempts to undermine the written agreement, and "a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree to them".[51] They did not frustrate

46 *Beatty v Guggenheim Exploration Co* 225 NY 380 at 387–388 (1919), *per* Cardozo J; *Liebe v Molloy* (1906) 4 CLR 347; *Commonwealth v Crothall Hospital Services (Aust) Ltd* (1981) 54 FLR 439 at 447 *ff*; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1; *Shelanu Inc v Print Three Franchising Corp* (2003) 226 DLR (4th) 577 at [54], citing *Colautti Construction Ltd v City of Ottawa* (1984) 9 DLR (4th) 265.

47 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [9].

48 The first two cases, *United Bank Ltd v Asif* (Court of Appeal) (11 February 2000) (unreported) and *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413 at [12], appeals from decisions about summary judgment, gave different answers. The more recent cases are *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm) at [273], *per* Gloster LJ, and *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396; [2017] 1 All ER (Comm) 601 at [101]–[107], [116]–[117] and [119]–[121], *per* Beatson, Underhill and Moore-Bick LJJ.

49 He cited Jonathan Morgan, "Contracting for Self-denial: On enforcing 'No Oral Modification' Clauses" (2017) 76 Camb LJ 589; E McKendrick, "The Legal Effect of an Anti-oral Variation Clause" (2017) 32 *Journal of International Banking Law and Regulation* 439; and Janet O'Sullivan, "Unconsidered Modifications" (2017) 133 LQR 191, but none of the support for the contrary view, such as *Corbin on Contracts* (Joseph Perillo ed) (West Pub Co, 1993) at para 1295; Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 14th Ed, 2015) at para 5-036.

50 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [10].

51 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [12].

or contravene any policy of the law and the reasons advanced in the case law for disregarding them "were entirely conceptual".[52]

24 Lord Sumption rejected the argument that "it is conceptually impossible for the parties to agree not to vary their contract by word of mouth because any such agreement would automatically be destroyed upon their doing". There is, he stated "no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation", and it does not follow that parties who agree to an oral variation must have intended to dispense with the clause.[53] His starting point was that this position overrode the parties' intentions because they would be unable validly to bind themselves as to the manner in which future changes in their legal relations are to be achieved, however clearly they expressed their intention to do so.[54]

25 Lord Sumption's reasons included the treatment of entire agreement clauses in English law but were primarily that there are legal systems which "impose no formal requirements for the validity of a commercial contract, and yet give effect to No Oral Modification clauses".[55] The examples Lord Sumption gave to support the latter point are the Vienna Convention on Contracts for the International Sale of Goods[56] and the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts.[57] He had previously referred to the provisions in the Uniform Commercial Code which introduced a requirement of writing for contracts of sale above a specified value and gave conditional effect to "no oral variation" clauses.[58] He considered that a person who acts on the basis of an undoubted oral agreement to vary a contract containing such a clause could be protected by the various doctrines of estoppel.

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52 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [13].

53 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [13].

54 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [11].

55 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [13].

56 United Nations Convention for Contracts for the International Sale of Goods (1489 UNTS 3) (11 April 1980; 1 January 1988).

57 4th Ed, 2016.

58 Uniform Commercial Code § 2-209(2):

> A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants a requirement on a form supplied by the merchant must be separately signed by the other party.

26 Lord Briggs agreed with the outcome but disagreed with the proposition that to refuse to recognise the effect of a "no oral variation" clause is to override the parties' intentions, so as to make it impossible for them validly to bind themselves as to the manner in which a change in their legal relations is to be achieved in the future. This was because:[59]

> … for as long as either … party to a contract containing [such] a … clause wishes [it] to remain in force, that party may so insist, and nothing less than a written variation of the substance will suffice to vary the rest of the contract.

He was not assisted by the codes relied on by Lord Sumption. If they formed part of national law, they bound the parties in the same way as legislation. If they were principles chosen by the parties to govern their relationship, they did not prevent the parties from expressly agreeing to depart from restrictions in the code, either generally or for a specific purpose, although an agreement to so depart would not lightly be inferred.[60]

27 Lord Briggs concluded that a "no oral variation" clause "continues to bind until the parties have expressly (or by strictly necessary implication) agreed to do away with it". Because necessity is a strict test, he considered that "would give the parties most of the commercial benefits of certainty and the avoidance of abusive litigation about alleged oral variation for which its proponents contend".[61] He was "comforted" by the perception that what he described as his "perhaps cautious solution" represented "an incremental development of the common law which accords more closely with the conceptual analysis adopted in most other common law jurisdictions".[62]

IV. Choice between judicial and legislative law reform

28 With that background, I turn to the choice between judicial and legislative law reform. Each method has its advantages and its disadvantages.[63] It is said that legislation may freeze the law where

59 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [31].

60 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [27].

61 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [31].

62 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [32].

63 They have been succinctly listed by Lady Hale, "Fifty Years of the Law Commissions: The Dynamics of Law Reform Now, Then and Next" in *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Matthew Dyson, James Lee & Shona Wilson Stark eds) (Hart Publishing, 2016) at pp 23–24.

common law development is more flexible, and that partial legislation may also produce difficult "boundary issues" between the common law and the statutory provisions.[64] But a number of considerations suggest that, where there is a need for wide-ranging reform particularly if it involves contestable policy choices, proposals should generally be enacted rather than just influencing development by the courts. Those considerations include practicality and the nature of the judicial function, and the skills of judges in a common law system.

29 The considerations of practicability include the fact that, even if part of the problem is susceptible to common law development, it is unlikely that it will all be and that in general the only arguments before the court will be those the parties choose to put before it. Additionally, in the case of common law rules, the declaratory theory of judicial decision-making means that the consequences of judicial changes to the law are retrospective. Legislative changes can deal with all the problems identified, and normally do so only prospectively. For example, although in *R v R*[65] the House of Lords held that, contrary to the widespread and long-standing view as to the common law, there was no rule that a husband could not be convicted of raping his wife, the decision did not and could not deal with consequential questions such as whether a wife should be compellable to give evidence for the prosecution.[66] Again, although in *Kleinwort Benson* the House of Lords held that the supposed rule barring the restitution of payments made under a mistake of law did not exist,[67] it could not deal with the particular position of over-payments of tax by large numbers of citizens in accordance with a settled understanding of the law, and the possible need, for example, for a reform of limitation periods because of the extended limitation period for mistaken payments.[68]

64 On these, see Andrew Burrows, "Post-legislative Scrutiny, Legislative Drafting and the 'Elusive Boundary'" in *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Matthew Dyson, James Lee & Shona Wilson Stark eds) (Hart Publishing, 2016) at p 193 *ff* and Andrew Burrows, "The Impact of Rule-making by Financial Services Regulators" in *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Louise Gullifer & Stefan Vogenauer eds) (Hart Publishing, 2014).

65 [1992] 1 AC 599.

66 By s 80(2) of the UK Police and Criminal Evidence Act 1984 (c 60), a defendant's spouse is only compellable to give evidence on behalf of the defendant.

67 *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349. See Law Commission, *Restitution, Mistakes of Law and* Ultra Vires *Public Authority Receipts and Payments* (Law Com No 227) (Cm 2731, 1994).

68 Limitation Act 1980 (c 58) (UK) s 32(1)(c). See now s 320 of the UK Finance Act 2004 (c 12) which provides that in proceedings brought after 8 September 2003 the extended period "does not apply in relation to a mistake of law relating to a taxation matter".

30 The arguments favouring legislative solutions which are based on the nature of the judicial function and skills of judges include the need for the judges to be, and be seen to be, impartial and not to have an agenda of their own[69] and the fact that they are not accountable. The process is thus not seen as reflecting the democratic will. Moreover, judges are not able to consult or to conduct empirical research in order to decide which of two or more possible policy options should be chosen. They are also restricted to options which are consistent with underlying common law principles.

31 My starting point is illegality. In *Patel v Mirza* six of the nine justices departed from the classic general "reliance" rule and adopted the more flexible balancing approach I have described. The Singapore Court of Appeal stated that the UK Supreme Court had "dramatically shifted the law by replacing the traditional rule-based approach towards the doctrine of illegality with a discretionary policy-based test".[70] It considered that the balancing approach of the majority in *Patel v Mirza* is something which required legislation such as that in the New Zealand Illegal Contracts Act 1970.[71]

32 *Patel v Mirza* was decided after 15 years of involvement by the Law Commission with the effect of illegality in private law.[72] The project originated in 1995, consultation papers were published in 1999,[73] 2001[74] and 2009,[75] and there were three responsible commissioners, Professors Burrows and Beale, and David Hertzell, a commercial solicitor, before the final report in 2010.[76] Over the course of the project, the Commission's view as to the extent of any legislation needed changed. Its initial consultation paper favoured the introduction of a statutory discretion to deal with the effect of illegality on contracts and trusts. The 2001 paper proposed extending the discretion to tort. But in

69 See my Atkin Lecture: The Rt Hon Lord Justice Beatson FBA, "Judicial Independence: Internal and External Challenges and Opportunities", Atkin Lecture at the Reform Club, London (17 November 2017) at para 15 *ff* for a more general discussion of the involvement of serving judges in law reform <https://www.judiciary.uk/wp-content/uploads/2017/12/beatson-lj-atkin-lecture-20171201.pdf> (accessed September 2018).

70 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [3].

71 1970 No 129. *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [121].

72 The history is documented in detail by James Lee, "Illegality, Familiarity and the Law Commission" in *Illegality after* Patel v Mirza (Sarah Green & Alan Bogg eds) (Hart Publishing, 2018).

73 Law Commission, *Illegal Transactions: The Effect of Illegality on Contracts and Trusts – A Consultation Paper* (Consultation Paper No 154, 21 January 1999).

74 Law Commission, *The Illegality Defence in Tort: A Consultation Paper* (Consultation Paper No 160, 17 May 2001).

75 Law Commission, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, 23 January 2009).

76 Law Commission, *The Illegality Defence* (Law Com No 320) (HC 412, 2010).

its third consultation document in 2009 and its final report in 2010, the Commission concluded that legislative reform was only needed in the area of trust law. In that area the operation of presumptions of resulting trust and advancement meant that the question whether a person could make a claim without relying on illegality led to arbitrariness, uncertainty and a potential for injustice.[77]

33 After the Commission's final report, there were two developments which appear to have been important drivers for the decision of the majority in *Patel v Mirza* to depart from the reliance rule in the way that they did. The first, in 2012, was that the Government announced its decision not to implement the report.[78] It stated that it was "not satisfied that there is a sufficiently clear and pressing case for reform" and not satisfied that enacting the draft bill "would improve on the situation sufficiently to make legislation worthwhile". It also referred to the risk of unintended consequences and of a new statutory scheme introducing new uncertainties in the law. It concluded that reform of this area could not, therefore, be considered a pressing priority for the Government. In *Patel v Mirza* Lord Toulson stated that "realistically, the prospect of legislation can be ignored".[79] The second driver was the uncertainty from the inconsistent approaches to illegality taken in three other Supreme Court decisions decided in 2014 and 2015.[80] The first decision favoured a flexible policy-based approach. The second disapproved of such an approach and of the Law Commission's recommendations. The third laid bare "the irreconcilable differences on the topic among the judges".[81]

34 Against a background in which the Commission provides good value in that it is cheap compared with the majority of other inquiries and compared with the cost of bad law,[82] this history raises two questions. The first is whether the fundamentals of the Law Commission's method of operating are still sound. The second is what the impact is of a law commission report on the legitimacy of court-led

77 This was said to be the effect of *Tinsley v Milligan* [1994] 1 AC 340, discussed at paras 11–12 above.

78 See United Kingdom, Ministry of Justice, *Report on the Implementation of Law Commission Proposals* (HC 1900, March 2012).

79 *Patel v Mirza* [2016] UKSC 42; [2017] AC 467 at [114].

80 *Hounga v Allen* [2014] UKSC 47; [2014] 1 WLR 2889; *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430; *Bilta (UK) Ltd v Nazir (No 2)* [2015] UKSC 23; [2016] AC 1.

81 James Lee, "Illegality, Familiarity and the Law Commission" in *Illegality after* Patel v Mirza (Sarah Green & Alan Bogg eds) (Hart Publishing, 2018) at p 140.

82 See the examples in Sir Jack Beatson, , "Challenges for Independent Law Reformers from Changing External Priorities and Shorter Timescales" in *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Matthew Dyson, James Lee & Shona Wilson Stark eds) (Hart Publishing, 2016) at pp 254–255.

judicial law reform. Does the existence of such a report mean that the courts have greater flexibility in that it is legitimate for them to proceed to develop the common law in a way that would not be absent such a report? The width of the consultation and the Law Commission's more holistic approach than is general in the determination of a particular dispute are factors that can be deployed in support of this. Alternatively, does the existence of such a report reduce the courts' flexibility, in the sense that where, for example, the Government decides not to proceed by legislation, the courts should not?

35 As to the first question, in my view the fundamentals of the Commission's methods remain sound. They are to identify needs by extensive discussion with officials in government departments, industry and stakeholder groups, and once a project has been authorised to continue such contact through an extensive consultation process before formulating proposals and publishing them with a draft bill. The difficulties with implementation may suggest that greater care is needed in choosing projects but, in my contribution to *Fifty Years of the Law Commissions*, I suggested that the real problem lay elsewhere;[83] in particular, during the life of a project, for a number of reasons priorities may have changed.

36 One reason is that during the life of a project changes in the background or in perceptions about what the rule is, for example, as a result of developments in the case law, may affect the case for legislation or show there is either no need for it or only a limited need. This happened in the case of the Law Commission's projects on the so-called parol evidence rule,[84] mistake of law and *ultra vires* receipts,[85] fiduciary

83 I was sceptical that the 2010 Protocol (Law Commission and Ministry of Justice, *Protocol between the Lord Chancellor (on Behalf of the Government) and the Law Commission* (Law Com No 321) (HC 499, 2010))would make a real difference to implementation rates because in relation to the initial choice and authorisation of a project in substance it only introduced greater formality to practices which had existed in a more informal way. Formally pinning a government department down to accept a need for reform at the outset of the process may reduce the risk of it later saying there is no need but does not eliminate it: see Sir Jack Beatson, "Challenges for Independent Law Reformers from Changing External Priorities and Shorter Timescales" in *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Matthew Dyson, James Lee & Shona Wilson Stark eds) (Hart Publishing, 2016) at pp 256–257.

84 Law Commission, *Law of Contract: The Parol Evidence Rule* (Law Com No 154) (Cmnd 9700, 1986) at paras 2.7 and 2.17.

85 Law Commission, *Restitution: Mistakes of Law and* Ultra Vires *Public Authority Receipts and Payments* (Law Com No 227) (Cm 2731, 1994) at paras 1.9–1.10 as a result of the decision in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 discussed above.

duties and regulatory rules,[86] and the illegality defence. In only the first of these cases did the changes lead the Commission to conclude that no legislation at all was needed. In the case of illegality, the differing views of members of the Supreme Court in the three cases[87] decided before *Patel v Mirza*, two of which were decided within three months of each other, may indicate that the Commission may have been too quick to conclude that only very limited legislation was needed.

37 A second reason is that wider policy rather than purely technical legal factors may have changed either as the result of changes within government and Parliament or of pressure by the public or by interest groups. In the case of the Law Commission's 1990 proposals on divorce,[88] the re-assessment of policy came after enactment of the Family Law Act 1995, which was never brought into force, but it could have happened before the Commission reported. Policy may also change because former pressure for change and for legislation has dissipated by the time the Commission reports.[89]

38 The other reasons are pressure on the Government's legislative programme, unwillingness by those responsible for deciding whether to bring forward legislative proposals to take responsibility for change in a particularly sensitive area, for example, one involving difficult moral and ethical questions, and the financial climate. The Lord Chancellor's annual reports on implementation since 2011 state that financial stringency is a major factor in not implementing law reform proposals.[90]

39 I have suggested that one way to seek to anticipate and address the first two of these reasons is for the commission, before taking on a project, to try to assess whether the case for reform is based on durable or transitory factors. The position of those pressing for reform in a particular area may be thought to prove to be transitory because, for example, it is based on fear of legal uncertainty as a result of other changes or tied to the position of a particular political party or interest group. Such an assessment will often not be straightforward. Sometimes it is. For example, in the light of the position taken by a number of bodies, in particular the Organisation for Economic Co-operation and

86 Law Commission, *Fiduciary Duties and Regulatory Rules* (Law Com No 236) (Cm 3049, 1995) at para 1.12. The decisions of the courts, especially *Kelly v Cooper* [1993] AC 205, are discussed at paras 3.1–3.41.

87 See n 80 above.

88 Law Commission, *Family Law: The Ground for Divorce* (Law Com No 192) (Cm 636, 1990).

89 This happened in the case of the fiduciary duties report: see n 86 above

90 United Kingdom, Ministry of Justice, *Report on the Implementation of Law Commission Proposals* (HC 719, 2011); (HC 1900, 2012); (HC 908, 2013); (HC 1237, 2014); (HC 1062, 2015).

Development, there was general recognition by the Government that the UK's bribery laws were inadequate. The Law Commission's first recommendations on the topic[91] were criticised by industrialists and politicians. The durability of the problem was, however, shown by a second reference in 2007, and the Commission's 2008 report[92] was (not without further difficulty) implemented by the Bribery Act 2010.[93]

40 It is also the case that the longer a project, the greater the risks. Apart from the risk that priorities will have changed by the time the Commission reports for one of the reasons I have given, there may be changes of personnel, in particular commissioners, relevant civil servants and members of the Government. Moreover, producing recommendations quickly is not a guarantee of speedy implementation, even where the Government is fully in favour of them. That was the case in my one-man report on bailiff law which, as required, was produced within 12 months of the Lord Chancellor asking me to undertake it, and the legislation was enacted seven years after my report.[94]

41 The risks of longer projects should not, however, be taken as a reason for a general move to short timescales for projects. Short timetables will be suitable for pressing legal problems which are self-contained and narrow. They are desirable where there is a window of opportunity for legislation on a particular and defined issue which needs quick action.[95] But timetables which are too short may, particularly in relation to problems which are not clearly self-contained and narrow, lead to a short view taken in order to deal with an urgent problem which is part of a larger topic only to find that they have to revisit the matter or address another part of the topic soon afterwards. Short timetables may also lead to pressure to undertake smaller-scale projects and not to address the entirety of an area.

91 Law Commission, *Legislating the Criminal Code: Corruption* (Law Com No 248) (HC 524, 1998).

92 Law Commission, *Reforming Bribery: A Consultation Paper* (Consultation Paper No 313, 2008).

93 c 23 (UK).

94 Jack Beatson, *Report of the Independent Review of Bailiff Law* (2000), substantially implemented in Pt III of the UK Tribunals, Courts and Enforcement Act 2007 (c 15).

95 A recent example was that the "scandalising the court" aspect of a project on contempt was accelerated: see Law Commission, *Contempt of Court: Scandalising the Court* (Law Com No 335) (HC 839, 2012), implemented by the Crime and Courts Act 2013 (c 22). The remainder of the contempt project was completed in 2013 and 2014: Law Commission, *Juror Misconduct and Internet Publications* (Law Com No 340) (HC 860, 2013) and, Law Commission, *Contempt of Court (2): Court Reporting* (Law Com No 344) (HC 1162, 2014).

42 With that I turn to the second question, the impact of a law commission report on the legitimacy of court-led judicial law reform. In the *Woolwich* case Lord Goff stated that, although he was "well aware of the existence of the boundary separating the legitimate development of the law by judges from legislation", he was never quite sure where to find it and that "its position seems to vary from case to case".[96] In the case of illegality, the Government's decision not to implement the report is seen by some as meaning that development of the law by the introduction of a discretionary approach along the lines recommended by the Commission was not legitimate. But, as James Lee has stated, the Government's announcement was "neither an outright rejection of the courts developing the law" nor of it "expressly vacating the field to leave the courts to develop the law instead".[97] Moreover, in its final report the Commission stated that "it is open to the courts to make the law more transparent and less apparently arbitrary by doing more to articulate the policy rationales that underlie their decisions".[98]

43 The issue is not straightforward, but the fact that the Government has decided not to implement a commission report should not necessarily preclude court-led development of doctrine if that can be justified by traditional common law methods. Could the approach of the majority in *Patel v Mirza* be so justified? I believe that it can. The trio of necessary considerations identified by Lord Toulson as ones to be taken into account are derived from previous cases, and the approach had been the product of extensive consideration by scholars and the Law Commission.[99] The approach is similar to that taken in 1995 by the High Court of Australia in *Nelson v Nelson*[100] ("*Nelson*") and had previously been taken by the Supreme Court of Canada in *Hall v Hebert*[101] in relation to the effect of illegality on a tort claim. In December 2017, in *Horsfall v Potter*,[102] the New Zealand Supreme Court referred to *Nelson* and *Patel v Mirza* without criticism. Although a majority of the court decided that case by applying the New Zealand Illegal Contracts Act, Elias CJ, dissenting, decided the case on common law, and preferred *Nelson* and *Patel v Mirza* to the earlier New Zealand authority.

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96 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 at 173.

97 James Lee, "Illegality, Familiarity and the Law Commission" in *Illegality after* Patel v Mirza (Sarah Green & Alan Bogg eds) (Hart Publishing, 2018) at p 155.

98 Law Commission, *The Illegality Defence* (Law Com No 320) (HC 412, 2010) at para 1.6.

99 See Andrew Burrows, "A New Dawn for the Law of Illegality" in *Illegality after* Patel v Mirza (Sarah Green & Alan Bogg eds) (Hart Publishing, 2018) at pp 37–38, a more recent version of his "Illegality after *Patel v Mirza*" (2017) 70 CLP 55.

100 (1995) 184 CLR 538 at 613, *per* McHugh J.

101 [1993] 2 SCR 159, *per* McLachlin J.

102 [2017] NZSC 196.

44 The Singapore Court of Appeal in *Ochroid Trading* reached a different conclusion. While very alive to the difficulties of determining the effects of illegality in private law, and stating that any attempt to settle this particular area of the law is always going to be an uphill task due to its nature, "which is at once harsh in is consequences yet fluid and elusive in its doctrinal form",[103] it considered that what it described as a broad balancing approach to all categories of illegality is something which required legislation such as that in New Zealand.[104] The mere fact that the approach involves a structured discretion does not mean that it is not a suitable one for the common law and for a court to develop. Structured discretions involving policy factors are to be found in a number of areas of common law and equitable doctrine, including the standard of care in negligence, justification for what would otherwise be an economic tort, and the public interest defence to breach of confidence.[105] The divided views in *Patel v Mirza* and in the commentary on it, and decisions such as that in *Ochroid Trading* show that there can be more than one respectable view of the way to deal with illegality and more than one model which is principled and possible in a purely doctrinal and technical sense.[106]

45 Finally, I return to *Rock* and "no oral variation" clauses. The majority judgment given by Lord Sumption gave general recognition to the efficacy of such clauses despite the general rule allowing contracts to be made orally. Lord Briggs disagreed with Lord Sumption's conceptual solution for the reasons I gave earlier. He described Lord Sumption's solution as "radical" and a "clean break with something approaching an international common law consensus, unsupported by any societal considerations peculiar to England and Wales".[107] Since court-led development of the law should be restricted to options which are consistent with underlying common law principles, the merits of Lord Sumption's solution are fundamental to the correctness of the decision. In the light of my involvement in the issue in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*,[108] I do not comment on the merits of his and Lord Briggs's conceptual arguments. But the fact that the majority approach was a clean break with an international common law consensus and depended on analogising from quasi-legislative codes

103 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [67].
104 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [121].
105 Andrew Burrows, "A New Dawn for the Law of Illegality" in *Illegality after* Patel v Mirza (Sarah Green & Alan Bogg eds) (Hart Publishing, 2018) at pp 35–37.
106 See the articles listed by the court in *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [108] and the contributions to *Illegality after* Patel v Mirza (Sarah Green & Alan Bogg eds) (Hart Publishing, 2018).
107 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24; [2018] 2 WLR 1603 at [32].
108 [2016] EWCA Civ 396; [2017] 1 All ER (Comm) 601 at [101]–[107].

may suggest that such a break should have been made only after a full inquiry and wide consultation by the Law Commission, and thus with fuller information from a variety of stakeholders as to the implications.

46 Thank you.
