PRESENTATION

RECENT DEVELOPMENTS IN COMMERCIAL AND PUBLIC LAW

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Bar's Headquarters, Perry Gap, Roebuck Street, St. Michael

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-and-

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Richard sits as a Deputy High Court judge and as an international arbitrator. He has been the United Kingdom representative to Venice Commission (Council of Europe's advisory body on constitutional law) since 2010. Richard has undertaken work in the Caribbean (Belize, Cayman, St Vincent, Trinidad, Turks & Caicos), Canada, US, Channel Islands, Gibraltar, Hong Kong and Isle of Man. He has appeared in many Privy Council appeals including two important appeals in October 2018 and three to be heard in March 2019. Richard is also currently instructed in Trinidad to represent an advocate in contempt proceedings before the CA, on behalf of Commissioners in Trinidad to defend judicial review proceedings brought against the inquiry into Las Alturas Towers, and to act on behalf of a former Minister in allegedly unlawful cartel arrangements concerning several construction contract, and for the defence in defamation proceeding brought by the Prime Minister of Trinidad against a senator arising out of corruption allegations he made in the Trinidad Parliament.

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OUTLINE NOTES

RECENT DEVELOPMENTS IN COMMERCIAL AND PUBLIC LAW

Enforceability of contractual 'no oral variation' clauses

1. Until recently there were conflicting authorities on the legal enforceability of 'no oral variation' clauses; i.e. clauses in contracts which provide that the parties to the agreement may only vary its terms in writing, and usually also only when signed by the parties.

2. The apparent conceptual difficulty surrounding these clauses was neatly explained by Cardozo J in a decision of the New York Court of Appeals (*Beatty v Guggenheim Ex. Co.* (1919) 225 NY 380):

> *"Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other… What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window."*

3. Another perceived problem with the enforceability of these clauses, is the often-made assumption that, when the parties to a contract containing a no oral variation clause decide, later, to agree an oral variation to the contract, that later oral agreement is construed as evincing an implied intention to waive the requirements of the anti-oral variation clause.

4. There were until recently conflicting dicta on this issue in England and Wales. In *United Bank Ltd v Asif* (11 February 2000, unreported), the Court of Appeal held the following clause to prohibit any attempt by the parties to orally vary a deed: *"No variation of this Deed shall be valid or effective unless made by one or more instruments in writing signed by the parties".* In *World Online Telecom Ltd v I-Way Ltd* [2002] EWCA Civ 413, the Court of Appeal held that *"…in the absence of decisive English authority… there is room for debate and movement on the question".*

5. In *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] 2 W.L.R. 1603 the United Kingdom Supreme Court decided, at least for the purposes of English common law, that such clauses are in principle enforceable so as to prevent a later agreement to orally vary the underlying contract. Lord Sumption (with whom Lady Hale and Lords Wilson and Lloyd-Jones agreed) held, overturning the decision of the Court of Appeal, that parties can validly bind themselves as to the manner in which future changes to their legal relations are to be achieved.

6. Lord Sumption dimissed the relevance of the apparently conflicting principle of party autonomy (i.e. that parties to a contract cannot, in effect, contract away their inherent right to contract) on the basis that *"Party autonomy operates up to the point*

when the contract is made, but thereafter only to the extent that the contract allows" [11]. The *"…real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed"* (ibid). Lord Sumption also rejected the underlying assumption that, where two contacting parties agree an oral variation of a contract containing an anti-oral variation clause, they must have intended to dispense with that clause. He said *"…the most natural inference… is not that they intended to dispense with it but that they overlooked it"* [15].

7. Lord Sumption observed that the purpose of no oral variation clauses was to give legal certainty to the arrangements made between businesspeople. This was an important commodity in the law of contract. It was held, therefore, that such clauses would henceforth be enforced by the courts.

8. The judgment does cause some potential problems. Whilst one can see the merit in the argument of party autonomy, anti-oral variation clauses *are* enforceable by one party as against the other. The difficulty arises where *both* (or more) contracting parties orally agree to a variation. There is no getting away from the fact that, by refusing to enforce that oral variation, the court is failing to give effect to the joint intentions of the parties at the point they reached their later oral agreement. Or, to put the point another way, the court is preferring their initial intentions (expressed in the written terms of the contract) over their later orally expressed set of intentions. Given that their later intentions represent (presumably) their current shared thinking on the matter, this is, on one view, not a very commercial approach.

9. This was a point developed by Lord Briggs, who concurred in the result but not in the reasoning. In his judgment, parties are free to orally waive or remove an anti-oral variation clause, but the courts should not imply such waiver unless the anti-oral variation clause is expressly referred to by the parties when they reach their oral agreement to vary the contract, or is by *necessary implication* waived [24]. This is a more practical approach. If the parties agree to an oral variation of the contract, it will be enforced so long as they face up to what they are doing and acknowledge the existence of the clause they are overriding. This does tend to strike the balance between respect for current (orally expressed) intentions, whilst enforcing agreements properly reduced into writing.

10. The rules governing the construction and enforcement of contracts are largely a matter of common law. The common law does not develop uniformly across the common law world. As the Caribbean Court of Justice observed in Dean Boyce v AG of Belize [2017] CCJ 16 (AJ), at para 14, citing with approval the judgment of Cromwell J in the Canadian case of Bhasin v Hrynew [2014] SCC 71):

> *"…the Court has scope to develop the common law to keep in step with the dynamic and evolving fabric of our society where it can do so in incremental fashion and where the ramifications of the development are not incapable of assessment."*

The CCJ in that case noted in particular that, whilst the Canadian courts had begun to recognise a contractual duty of good faith, the courts of England and Wales had rejected this.

11. It remains to be seen whether all common law countries will consider the development in *Rock Advertising* to be a useful one, and whether the reasoning of the majority or that of Lord Briggs is preferred. Lord Briggs himself observed that the approach of the majority represented a *"…clean break with something approaching an international common law consensus"* yet this was *"…unsupported by any societal or other considerations peculiar to England and Wales"* [32].

Update on the law of unlawful means conspiracy

12. A claim for conspiracy is often an effective way to claim damages where several defendants combine to act unlawfully, especially where fraud is alleged. In a landmark decision in *JSC BTA Bank v Ablyazov (No 14)* [2018] 2 W.L.R. 1125 the United Kingdom Supreme Court has significantly expanded liability for conspiracy.

13. The Bank was granted a worldwide freezing order to recover US$6 billion of allegedly stolen money. The order was breached by the first defendant dealing with frozen assets and by fleeing the UK for France in February 2012, and by the second defendant allegedly assisting him in wrongfully dealing in the assets of Swiss, Belizean and Russian companies. The Bank sued both defendants for conspiring to injure it by unlawful means, based on their serial contempts of court. The second defendant applied to set aside the claim form, arguing that contempt of court could not constitute unlawful means for the purposes of conspiracy and that he must be sued in Switzerland, the place of his domicile, in line with the Lugano Convention on Jurisdiction. The Supreme Court dismissed both submissions.

14. Conspiracy is one of a group of torts known as "economic torts". Since the decision of the House of Lords in *Quinn v Leathem* [1901] AC 495 conspiracy takes two forms: (i) conspiracy to injure, where the overt acts done pursuant to the conspiracy may be lawful but the predominant purpose is to injure the claimant; and (ii) conspiracy to do by unlawful means an act which may be lawful in itself, albeit that injury to the claimant is not the predominant purpose.

15. The Supreme Court took the view that conspiracy may be based on a predominant intention to injure the claimant, regardless of whether the means used are lawful or unlawful. However, the Supreme Court has defined conspiracy in very broad terms. A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords that individual a just cause or excuse. But if he seeks to advance his interests by unlawful means, he has no such just cause or excuse.

16. The Supreme Court, therefore, held that the question of what constitutes an "unlawful means" does not depend on whether the acts complained of give rise to

an independent cause of action, as the second defendant argued. The correct test is whether there is a just cause or excuse for combining with one another to use unlawful means. This depends on the nature of the unlawfulness and its relationship with the resultant damage caused to the claimant. Here the defendant's conduct could not be excused on the basis that it was in furtherance of a legitimate economic interest. The object of the conspiracy and the overt acts done pursuant to it were to prevent the bank from enforcing its judgments against them- by unlawful means through those contempts of the freezing order.

17. But the impact of *JSC BTA Bank* goes beyond its implications for the scope and effect of freezing orders: by enabling judgment creditors to obtain compensation when a judgment debtor has moved its assets between jurisdictions to avoid enforcement, provided the judgment creditor can show a good arguable case that a third party has unlawfully agreed to assist the judgment debtor in doing so.

18. Liability for conspiracy will now focus on whether there is a just cause or excuse for the defendants combining with each other to use unlawful means- which will involve scrutinising the nature of the unlawfulness and its relationship with the resultant damage caused. In principle, conspiracy can arise from any form of unlawfulness since the unlawful means could simply amount to a breach of contract.

Enforceability of penalty clauses and update on construction of contracts

19. Although no longer, in truth, a very recent decision, the United Kingdom's judgment in *Cavendish Square v Makdessi* [2016] A.C. 1172 (running to some 124 pages) contains a root and branch evaluation and recasting of the law of penalties, with potentially very significant effects.

20. Liquidated damages clauses, stating in advance the sum payable in the event of default on the part of the other contracting party, are common place particularly in the word of construction (for example that, should the construction project overrun, the employer shall charge the contractor so many pounds or dollars per week). The most common standard form JCT and FIDIC construction contracts each contain a liquidated damages clause.

21. The test as to when such a clause becomes penal and therefore unenforceable was (however difficult to apply in practice) stated by Lord Dunedin in *Dumlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co.* [1915] A.C. 79, [86]: *"It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach"*. It was often said therefore that the starting point was whether the sum payable under the liquidated damages clause was a genuine pre-estimate of loss. However, as Lord Woolf (sitting in the Privy Council) observed in *Philips Hong Kong Ltd v Attorney General of Hong Kong* (1993) 61 BLR 41, [33]:

"…it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant… it can still be a genuine pre-estimate of the loss…"

22. The nature of the clause is a question of construction, and therefore to be determined as at the date of entry into the contract and not by reference to later events (i.e. the question is whether the sum due under the clause was within the range of genuine pre-estimates of loss as at the time of entry into the agreement). As to when and in what circumstances the sum claimed would be held to be a legitimate pre-estimate of loss (and therefore not extravagant or unconscionable), the case law was somewhat unpredictable and at times inconsistent. A number of tests had been suggested by Lord Dunedin in the Dunlop case, but these had, according to Lords Neuberger and Sumption in Makdessi wrongly *"…achieved the status of a quasi-statutory code"* [22]. The focus ought, they held, to have remained on the overarching question of whether the consequences stipulate in the clause were unconscionable.

23. Their Lordships considered that the purpose of clauses stipulating the consequences of breach was not solely *"…a question of providing a financial substitute for performance"*; it engages *"…broader social and economic considerations"* [29]. One of these was however that a person in breach of contract should not suffer an impact which *"…significantly exceeds any legitimate interest of the innocent party"* (ibid). The question of whether the clause represented a genuine pre-estimate of loss was, on this view, neither a sufficient nor necessary one to ask in the context of penalties.

24. Further, it was to be fully recognised that the law of penalties represents an interference with freedom of contract; the parties after all had agreed in terms to the clauses in question. Whilst the genesis of the principle was to prevent exploitation of desperate lenders, the law of penalties now applies across the law affecting contracts of all types [34]. There was, held Lords Neuberger and Sumption, a case for abolishing the law of penalties altogether. There are laws in place to protect consumers and other vulnerable contracting parties, such that its place in the modern commercial world was questionable. In the end, however, despite the criticisms that could validly be made of the penalty rule, it served as a useful backstop of judicial control and *"…is consistent with other well-established principles… [such as] relief from forfeiture, the equity of redemption, and refusal to grant specific performance"* [39]. The principle, however, needed clarification and restatement.

25. Lord Mance took up the mantle, explaining that key to the doctrine was understanding that there *"…may be interests beyond the compensatory which justify the imposition on a party in breach of an additional financial burden".* it followed that the real question was whether the clause served any real commercial interest. He concluded as follows [152]:

"What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second,

whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable. In judging what is extravagant, exorbitant or unconscionable, I consider (despite contrary expressions of view) that the extent to which the parties were negotiating at arm's length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."

26. Thus, it is no longer necessary to consider whether the clause provides for payment of a sum which is a genuine pre-estimate of loss, although presumably this may still be a relevant consideration when determining if there is a legitimate business interest in the clause. In practice, meeting the test of a legitimate business interest will be straightforward. An employer under a construction contract will usually have a legitimate interest in having the contractor stick to the construction timetable, as will a lender in having a loan repaid on time. as to whether, nonetheless, the sum sought is exorbitant or unconscionable, the impression one gets from the judgment is that this test will rarely be met, although it may be more readily so in cases involving a significant imbalance of bargaining power.

27. There are a couple of points worth bearing in mind.

28. First, the law of penalties only regulates the position in the event of a breach of contract; i.e. where a clause stipulates what should happen (usually the payment of a sum of money) in the event of a breach of contract. The law of penalties does not apply unless, on a proper construction of the contract, there has been a breach. This may however be a question of little more than altering the wording of the contract. Where the contract refers in terms to sums due upon breach (e.g. that a house must be constructed within 3 months, and that a charge of £10,0000 will be levied for each week that the project runs over) the law of penalties applies; but if the contract is reworded (e.g. so as to provide that whilst the house should be constructed within 3 months, if it takes longer this is not a breach but there is a further charge of £10,000 per week) the law of penalties does not apply.

29. So, the easiest way to avoid the law of penalties will often be to simply reword the contract. The same or similar remedial provisions as would be provided upon breach, can often be stipulated in the contract. In the case of a loan agreement with a potentially penal rate of interest, the agreement can simply state that the loan 'should' be repaid by X date, but that if it is not repaid there is no breach, but (a) interest will be applied to the capital sum and (b) the lender nonetheless accrues the right to enforce the security in respect of the missing the loan repayments.

30. Secondly, contract drafters will need to watch out for the usual consumer protection legislation, and other statutes dealing with unfair terms. In Barbados, these would include Part II of the Consumer Protection Act (CAP 326.D), although (in common with the position in the UK), the Act contains a limitation in that the assessment of fairness will generally not apply to the definition of the subject-matter of the contract, or the adequacy of the price paid as against the goods or services supplied (section 8(2)).

Apparent bias in the commercial context

31. The principles to be applied when considering a case of apparent bias are firmly established. The House of Lords in *Porter v Magill* [2002] 2 A.C. 357 made a "*modest adjustment*" to the "*real danger*" test in *R v Gough* [1993] A.C. 646- the court must now ask whether "*the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias*". The emphasis has moved from the court's own view of the circumstances of the case to that of an objective and informed observer, which is not of course to be confused with the opinion of the litigant, himself (*Harb v Aziz* [2016] EWCA Civ 556 at [69]). Overall, the courts will not readily make assumptions from the facts to infer bias, and emphasise that *"[t]he test is not one of 'any possibility'* but of a '*real' possibility of bias*"- each case, therefore, turns on an intense focus on the essential facts of the case (*Resolution Chemicals* [2014] 1 W.L.R. 1943 at [35]–[36].

32. A great deal of judicial attention has focused on identifying the attributes of the "*fair-minded and informed observer*". The principle, itself, is "*hypothetical*", designed to assist the court in deciding whether the proceedings in question were seen to be fair (*Virdi v Law Society* [2010] 1 W.L.R. 2840 at [37]). In *Helow v Advocate General for Scotland* [2008] 1 W.L.R. 2416 Lord Hope provided some guidance:

> *2 The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.*
>
> *3 Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.*
>
> *4 The context is crucially important in a case*

33. But there are real difficulties in basing the approach on a fictional character, attributing to him an ever-growing list of qualities- and then speculating about how such a person would answer the question of bias that the court must decide. The

notional observer is "*something of a paragon. Not only is he fair-minded and impartial, but he has diligently educated himself about the circumstances of the case*"(*Dar Al Arkan Real Estate Development Company v Majid Al-Sayed Bader Hashim Refai* [2014] EWHC 1055 (Comm) at [37]). The obvious danger is that the judge will simply project on himself onto this fictional character and just express his personal opinions (*Lanes Group Plc v Galliford Try Infrastructure Ltd* [2012] Bus. L.R. 1184 at [52]).

34. Allegations of bias may need to be viewed slightly differently when applying the principles to the Caribbean context. As the Board pointed out in *Re Chief Justice of Gibraltar* [2009] UKPC 43 "*… in this small jurisdiction, the Chief Justice needed to exercise particular sensitivity and discretion in his dealings with Government*". Connections between people, industries, politics and judges are likely to be more common and more widely known and it can be argued that these issues affects the standard of independence that should be taken into account? See *Belize Bank Ltd v Attorney General of Belize* [2011] UKPC 36, and, in particular, the dissenting opinion of Lord Brown [111ff]. And see e.g. *Panday v Virgil* [2007] TTCA 7 (4 April 2007) where the former Prime Minister challenged his conviction before the Chief Magistrate which involved a sequence of events of which Archie JA said '"*the word extraordinary' can hardly do justice*". The Chief Magistrate, was party to a land transaction with a well-known company and received a cheque for $400,000 drawn in his favour by another company, with connections to that first company on the final day of the trial. The Chief Magistrate was concerned about the timing and delivery of that cheque and reported it to the Attorney-General and Chief Justice, but not to the defendant, Mr Panday or to his lawyers.

35. In *Almazeedi v Penner* [2018] UKPC 3 the Privy Council recently considered a bias challenge to the independence of a retired English High Court judge, sitting in the Financial Services Division of the Grand Court of the Cayman Islands. The Board allowed the appeal, holding that it been inappropriate for a judge to sit in the Grand Court of the Cayman Islands, in proceedings relating to the winding-up of a company whose economic interests were mainly held by persons connected with Qatar, without disclosure of his position as a supplementary judge of the Qatar Civil and Commercial Court.

36. The Board took the view that a fair-minded and informed observer was someone involved in the Cayman Islands legal environment who would see the whole position in "*its overall social, political and geographical context*". They were, therefore, taken to be aware of the Qatari background and the personalities involved, as well as the opaque way in which judges of the Civil and Commercial Court were appointed and renewed. The disputes in which the appellant was engaged prior to the winding-up order included personal threats, one of which associated his resistance to the order with a challenge to the state of Qatar itself. The persons representing the Qatari interests were also closely concerned in some aspects of the arrangements by which the judge became a part-time judge of the Qatar court.

37. The Board, therefore, decided that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar for the

period after 26 June 2013, and that this represented a flaw in his apparent independence. But the Court of Appeal was wrong to treat the earlier period differently. The judge should have disclosed his Qatar involvement before determining the winding-up petition. In the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least January 2012, when he became aware of aspects of the disputes between the parties. Disclosure could have dispelled concern, and might have meant that no objection was raised. The Board decided to set aside the proceedings before the judge.

38. But the outcome of bias applications are difficult to predict, as demonstrated by Lord Sumption's dissenting opinion in *Almazeedi* [36] when he said that "*applications based on apparent bias are open to abuse, and the particular problem which arises in this case is not uncommon. Retired judges from Commonwealth jurisdictions commonly sit on an occasional basis in other Commonwealth jurisdictions and in tribunals of international civil jurisdiction. The law is exacting in this area, but it is also realistic*".

39. The principles for bias in arbitral proceedings were recently considered by the English Court of Appeal in *Halliburton Co v Chubb Bermuda Insurance* [2018] 1 W.L.R. 3361, which specifically discussed the obligation in *Almazeedi* to disclose potential conflicts which might give rise to application to recuse on grounds of apparent bias [65-66]. The Court of Appeal pointed out that many arbitral rules impose a stricter test of disclosure e.g. the IBA Guidelines, require disclosure of facts or circumstances "*that may, **in the eyes of the parties**, give rise to doubts as to the arbitrator's impartiality or independence*" [67]. The Court of Appeal took the view that best practice in international commercial arbitration would have required disclosure of the arbiter's other appointments.

40. However, the consequences of non-disclosure require careful analysis. Although the fact of non-disclosure "*must inevitably colour the thinking of the observer*" as Lord Bingham observed in *Davidson v Scottish Ministers (No 2)* [2005] 1 S.C. (H.L.) 7 [19], non-disclosure does not, in and of itself, justify an inference of apparent bias. Something more is required—as Lord Mance pointed out in *Helow* [58] "*to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing*".

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