Clayton Comments

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RECENT DEVELOPMENTS IN COMMERCIAL LAW

Introduction

1. One of the interesting and attractive features of legal practice in Trinidad is that the courts can choose to develop the common law in a way which most suits local conditions. Unlike the English Bar, the courts here will look at decisions from local Caribbean courts, Commonwealth countries and other common law jurisdictions. Trinidad courts can, therefore, follow the approach taken in the UK Supreme Court or take a different approach if that appears appropriate.

2. The recent cases I shall be discussing all have important implications for commercial practitioners. But at least two of the cases provide opportunities for the Trinidad courts to choose their own direction.

Enforceability of contractual 'no oral variation' clauses

3. 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.

4. 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."*

5. 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 to be construed as evincing an implied intention to waive the requirements of the anti- oral variation clause.

6. 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".*

7. However, 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.

8. Lord Sumption dismissed 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 contracting 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].

9. Lord Sumption at [12] pointed instead to three significant practical advantages of an enforceable no oral modification clause:

> *"The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them."*

10. No doubt these practical advantages explain why international codes recognise the validity of no oral modification clauses, as Lord Sumption pointed out, citing Article 29(2) of the Vienna Convention on Contracts for the International Sale of Goods (1980) and Article 1.2 of the UNIDROIT Principles of International Commercial Contracts, 4th edn (2016).

11. Nevertheless, the Supreme Court judgment does cause some potential problems. Whilst one can see the merit in the argument of party autonomy, anti-oral variation clauses <u>are</u> enforceable by one party as against the other. The difficulty arises where <u>both</u> (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 reach 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 not, on one perspective, a very commercial approach.

12. This was a point developed by Lord Briggs, who concurred in the result but <u>not</u> in the reasoning. In his judgment, parties are free to orally waive or remove an anti-oral variation clauses, but the courts should not imply such waiver unless the anti-oral variation clause is <u>expressly</u> referred to by the parties when they reach their oral agreement to vary the contract, or that it is clear by *necessary* implication that this was their intention [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. Lord Brigg's approach strikes the balance between respect for current (orally expressed) intentions, whilst enforcing agreements properly reduced into writing.

13. 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.

14. Lord Sumption's approach raises a number of issues of principle:
    - As Lord Sumption puts it, "*the law of contract does not normally obstruct the legitimate intentions of businessmen*", except for reasons of public policy, of which there are none in this case.
    - If parties are free to enter into contracts, without (generally) any requirements of form, why should a variation be different?
    - Lord Sumption drew an analogy with entire agreement clauses [14. Entire agreement clauses which preclude reliance upon earlier understandings or agreements between the parties, so that the latest agreement (containing the entire agreement clause) prevails. But no oral variation clauses have the opposite effect: the most recent agreement of the parties is not enforced.
    - Its effect is that increased attention will be given to doctrines such as estoppel, which provide some protection against the strict enforcement of no oral variation clauses. But Lord Sumption was keen to stress [16] that "*the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty*" derived from no oral variation clauses. Nevertheless, his approach means that many disputes will focus upon estoppel: what will need to be established for the defence of estoppel to succeed? Will an estoppel have only suspensory effect? The alleged certainty that Lord Sumption said arose from his approach may prove to be more illusionary than real.
    - His approach will also require considering whether the defence of economic duress is applicable in these circumstances. Economic duress amounts to recognising that certain threats or forms of pressure may give grounds for relief to a party who enters into a contract as a result of the threats or pressure: see the decisions of the Privy Council in *Pao On v Lau Yiu Long Pao* [1980] A.C. 614 and of the House of Lords in *Dimskal Shipping Co Ltd v I.T.W.F* [1992] 2 A.C. 152, 159, 160, 162, 165, 170.

15. On the other hand, a principle to the effect that no oral variation clauses can be defeated raises other practical problems eg establishing the proper boundaries of an agent's ostensible authority within corporate organisations will generate conflicting reasonable expectations of business parties, particularly between the corporate principal and those who deal with its agents.

16. In the Supreme Court *Rock Advertising Ltd* raised a second issue, whether an agreement whose sole effect is to vary a contract to pay money by substituting an obligation to pay less money or the same money later, is supported by consideration. However, the Supreme Court decided that the failure to comply with the formalities specified in the no oral agreement clause and holding that the oral variation was invalid, meant that the Supreme Court felt it "*unnecessary to deal with consideration*" [18].

> *The issue is a difficult one. The only consideration which MWB can be said to have been given for accepting a less advantageous schedule of payments was (i) the prospect that the payments were more likely to be made if they were loaded onto the back end of the contract term, and (ii) the fact that MWB would be less likely to have the premises left vacant on its hands while it sought a new licensee. These were both expectations of practical value, but neither was a contractual entitlement. In Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1 the Court of Appeal held that an expectation of commercial advantage was good consideration. The problem about this was that practical expectation of benefit was the very thing which the House of Lords held not to be adequate consideration in Foakes v Beer (1884) 9 App Cas 605 : see, in particular, p 622, per Lord Blackburn. There are arguable points of distinction, although the arguments are somewhat forced.a bit differently constituted Court of Appeal made these points in In re Selectmove Ltd [1995] 1 WLR 474, and declined to follow Williams v Roffey. The reality is that any decision on this point is likely to involve a re-examination of the decision in Foakes v Beer. It is probably ripe for re-examination. But if it is to be overruled or its effect substantially modified, it should be before an enlarged panel of the court and in a case where the decision would be more than obiter dictum.*

17. 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].

A new approach to the law of unlawful means conspiracy

18. A claim for conspiracy is often an effective way to claim damages where several defendants combine with the intention or the result of harming economic interests, but where it may not be possible to allege fraud / deceit. 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. Judgment was given by Lord Sumption and Lord Lloyd-Jones with whom Lords Mance, Hodge and Briggs agreed.

19. 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.

20. 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 maybe 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.

21. 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. Individuals have the right to advance their own interests by lawful means- even if the foreseeable consequence is to damage the interests of others. Nevertheless, the existence of that right affords the individual a just cause or excuse. But if they seeks to advance their interests by unlawful means, they have no such just cause or excuse.

22. 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.

23. 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.

24. 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.

25. As a result, unlawful means could simply amount to a breach of contract. This is consistent with the House of Lords decision in *Rookes v Barnard* [1964] AC 1129 at 1209 where he stated, *"I find therefore nothing to differentiate a threat of a breach of contract … the nature of the threat is immaterial…All that matters to the plaintiff is that, metaphorically speaking, a club has been used. It does not matter to the plaintiff what the club is made of - whether it is a physical club or an economic club, a tortuous (sic) club or an otherwise illegal club*.

26. There is of course no good reason why the ambit of "unlawful means" in this form of conspiracy should not be the same as its scope in the other economic torts. It has been held that whenever an act is itself tortious, a combination to do that act is a tortious conspiracy. Thus a combination which does damage to the claimant by means of intimidatory threats to break contracts or by way of procurement of breaches of contracts ((*Stratford & Son Ltd v Lindley* [1965] A.C. 269) or by violence or fraud is actionable. While not all equitable wrongs appear to be unlawful means, where a serious contravention occurs it is still open to the court to regard such wrongs as unlawful means for the purposes of conspiracy, especially where directors are in breach of their fiduciary duties or in breach of statutory prohibitions: see *Belmont Finance Corp v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393. If, on the other hand, the overt acts alleged are not actionable in a civil claim, the claimant will fail to establish a cause of action for conspiracy, eg as where it was claimed that two policemen had conspired to make false statements about him to the Director of Public Prosecutions and to give false evidence both in court and before the masters of his Inn of Court, such proceedings being

privileged and allowing for no civil action (*Marrinan v Vibart* [1963] 1 Q.B. 234). In *Revenue & Customs Commissioners v Total Network* [2008] 1 A.C. 1174,the House of Lords endorsed this view- in deciding that unlawful means for the unlawful means form of the tort of conspiracy could include crimes whether or not the defendants' criminal acts were otherwise actionable by the claimant.

27. Nevertheless, *JSC BTA Bank* will have a significant impact on the way conspiracy claims are now to be analysed.

Enforceability of penalty clauses and update on construction of contracts

28. The United Kingdom Supreme Court's judgment in *Cavendish Square v Makdessi* [2016] A.C. 1172 (running to some 124 pages) is not so recent. However, the judgments of a panel of 7 judges contains a root and branch evaluation and recasting of the law of penalties, with potentially very significant effects if adopted in the rest of the common law world.
29. The Supreme Court considered two appeals. *Cavendish's* appeal concerned clauses in a share sale agreement which restricted competition by the seller of the shares and stipulated a reduced price in the event he defaulted. *Beavis's* appeal concerned a parking charge of £85 imposed for overstaying the 2 hour period of free parking.

30. Liquidated damages clauses, which state in advance the sum payable in the event of default on the part of the other contracting party, are of course 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 liquidated damages clauses.

31. The test as to when such a clause becomes penal and, therefore, unenforceable was (however difficult to apply in practice) clearly stated by Lord Dunedin in *Dunlop 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 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…"*

32. The nature of the clause is a question of construction, and therefore has to be determined at the time the contract was made 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 losses as at the date 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, their Lordships held, remained the overarching question of whether the consequences stipulated in the clause were unconscionable.

33. 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, not a sufficient or determinative one.

34. Furthermore, they pointed out that the law of penalties represents an interference with freedom of contract; after all, the parties have expressly agreed the clauses in question. Whilst the genesis of the penalty rule was prevention of exploitation of desperate borrowers during a period when lending was scarce, the law of penalties now applies right across the law and affects contracts of all types [34]. There was, held their Lordships, a case for abolishing the law of penalties altogether.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.

35. 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 legitimate 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 lengthon the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."*

36. The Supreme Court decided that hat the common law rule that a term in a contract which constituted a penalty was unenforceable should not be abolished or restricted: it was a long- standing principle of English law, common to almost all major systems of law, and had a useful role to play in protecting people against some categories of oppressive bargain which were not subject to statutory regulation. However, the law of penalties should not be extended to cover clauses which imposed onerous obligations on a party on certain contingencies which did not involve a breach of contract. This conclusion was based on the principle that the courts had no power at common law to regulate the parties' primary obligations under a contract. That rule applied not only to provisions requiring the payment of money on breach of contract but also to clauses providing for the withholding of payments or the transfer of property.

37. The Supreme Court held that a provision was penal if it was a secondary obligation which imposed a

detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.

38. Consequently, the fact that the contractual provision did not provide for a pre-estimate of loss, or that it was deterrent, did not necessarily mean that it was penal- the legitimate interest of the innocent party might extend well beyond the recovery of compensation for his loss. The Supreme Court took the view that in a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption had to be that the parties themselves were the best judges of what was legitimate in a provision dealing with the consequences of breach.

39. 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. Overall, therefore, the judgment can be taken as increasing the threshold to be met when seeking to impugn a contractual clause as penal.

40. The Supreme Court dismissed *Cavendish's* appeal, itself. The first clause preventing competition was, in reality, a price adjustment clause, and was a primary obligation, not a secondary provision.
Although the clause had no relationship with the measure of loss attributable to the breach, Cavendish had a legitimate interest in the observance of the restrictive covenants which extended beyond the recovery of that loss. Viewed in the context of a carefully negotiated agreement between informed and legally advised parties at arm's length, the clause could not be regarded as extravagant, exorbitant or unconscionable. It was not a penalty. The second clause, which contained a price formula for the sale of retained shares, was justified by the same legitimate interest, and was, again, not a penalty.

41. In *Beavis's* appeal the parking charge had two main objectives: to manage the efficient use of parking space in the interests of the nearby retail outlets and of their customers, and to provide an income stream to enable ParkingEye to meet the costs of operating the scheme and make a profit. Those objectives were perfectly reasonable. The charge was not a penalty: ParkingEye had a legitimate interest in charging overstaying motorists which extended beyond the recovery of any loss. There was no reason to suppose that £85 was out of all proportion to ParkingEye's interests. Motorists regularly used the car park knowing of the charge, which was some evidence of its reasonableness. They clearly regarded the risk of having to pay £85 for overstaying as an acceptable price to pay for the convenience of parking there. The fact that some customers underestimated or overlooked the time required or taken for shopping, or whatever else they were doing, did not make the scheme excessive or unconscionable. The parking charge did not infringe the Unfair Terms in Consumer Contracts Regulations 1999.

42. One important criticisms of the penalty clause doctrine is that it is triggered only by a breach of contract, allowing parties to draft around this with relative ease. For instance, as Moore-Bick LJ suggested in the Court of Appeal in *ParkingEye Ltd v Beavis* [2015] EWCA Civ 402 at [23], there might be two ways of looking at the contract to which motorists agree when entering the car park in question:

Example 1:

"A parks his car in B's car park for free and agrees to leave in two hours. If A fails to leave in two hours, in breach of contract, A will pay B £85."

Example 2:
"A parks his car in B's car park and agrees either to leave in two hours and pay B nothing or remain in the car park for longer and pay B £85."

43. Despite being the same as a matter of commercial common sense, the requirement for a breach of contract means that the doctrine against penalty clause can only apply to ***Example 1***. Thus form defeats substance. As Lord Denning put it in Bridge v Campbell Discount Co Ltd [1962] A.C. 600 HL at 629:

> "*Let no one mistake the injustice of this. It means that equity commits itself to this absurd paradox: it will grant relief to a man who breaks his contract but will penalise the man who keeps it. If this be the state of equity today, then it is in sore need of an overhaul so as to restore its first principle*s."

44. Importantly, however, the High Court of Australia took a very different approach in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 290 A.L.R. 595 [10] where it significantly expanded the scope of the doctrine. The High Court of Australia carefully reconsidered and restated the penalties doctrine without confining the principle to a breach of contract:

> "[A] *stipulation prima facie imposes a penalty on a party ('the first party') if, as a matter of substance, it is collateral (or accessory) to a primary stipulation in favour of a second party and this collateral stipulation, upon the failure of the primary stipulation, imposes upon the first party an additional detriment, the penalty, to the benefit of the second party.*"

45. In *Cavendish Properties*, however, the UK Supreme Court declined to follow the High Court of Australia in expanding the scope of the doctrine, although its approach is seriously contested.
    - It disagreed [42] with the High Court of Australia's historical analysis of the equitable origins of the penalty doctrine.
    - It questioned [42] whether the High Court's redefinition of the doctrine in fact allowed it to escape the requirement of a breach of contract. The primary stipulation "*is some kind of promise, in which case its failure is necessarily a breach of that promise*". However, *Andrews* held [34] that the performance of the primary stipulation discharges the obligation.
    - It refused to follow on the ground [42] that the equitable jurisdiction had left "*no trace*" in any authorities following the fusion of common law and equity in 1873, deciding that three cases were wrongly decided
    - Its most fundamental objections [42] was that removing the requirement of breach would

> "*represent the expansion of the courts' supervisory jurisdiction into a new territory of uncertain boundaries, with has hitherto been treated as wholly governed by mutual agreement*".

In other words, the decision in *Andrews* means that the courts would be able to review all primary contingent obligations in contracts for penalties, rather than just the remedial obligations triggered on breach, which would detract from the Supreme Court's emphasis on party autonomy and

freedom of contract at common law would be substituted for a much more welfare-orientated approach.

46. The High Court of Australia had the opportunity to respond to the Supreme Court's criticisms of *Andrews* in the appeal in *Paciocco v Australian and New Zealand Banking Group Ltd* [2016] HCA 28. However, the correctness of *Cavendish Properties* this issue was not raised on appeal and the High Court restated the correctness of its approach in *Andrews*. The High Court appeared untroubled by the UK Supreme Court's comments [41] that the finding that the penalty doctrine survived in equity was a *'radical departure from the previous understanding of the law*'. As French CJ put it [9], *'the common law in Australia is the common law of Australia*'.

47. So there remains a fundamental difference of principle between the UK and Australian case law and it is open to the Trinidad courts to decide which approach to take.

48. Assuming that the UK analysis prevails, there are still a couple of points worth bearing in mind.

49. 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.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.

Apparent bias in the commercial context

50. 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].

51. 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*

52. 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. Notonly 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]).

53. 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.

54. 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.

55. 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.

56. 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.

57. 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*".

58. 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.

59. 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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Richard is a commercial litigator / arbitrator and undertakes a wide range of advisory and litigation work covering commercial work, data protection/Freedom of Information, discrimination, environmental, human rights, local government, public procurement, Privy Council/international work and regulatory/disciplinary work. He has extensive experience in conducting Supreme Court and Privy Council appeals and Lord Wilson in Mohammed v Public Service Commission of Trinidad [2017] UKPC 31 said "Mr Clayton QC with the charm and skill which is characteristic of him." Chambers Directory 2019 describes him as "one of the finest minds at the Bar – an intellectual giant who is an asset to the Bar." "Very, very clever."

Richard sits as a Deputy High Court judge and has been the United Kingdom representative to Venice Commission (Council of Europe's advisory body on constitutional law) since 2010. He regularly undertakes work in the Caribbean (Anguilla, Barbados, 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 Surrat v A-G of Trinidad in 2008, two important appeals in October 2018 (including the Judicial and Legal Services Commission appeal concerning High Court appointments following the resignation of Marcia Caesar-Ayers) and two further appeals in March 2019.

In Trinidad Richard's work includes:

- In 2008 he led the successful apparent bias appeal to the Court of Appeal by Basdeo Panday, the Leader of the Opposition, against his convictions under the Integrity in Public Life Act 1987;
- In December 2018 he represented Wayne Sturge before the CA in his contempt proceedings;
- In February 2019 he represented the Commissioners defending judicial review proceedings brought in relation to the inquiry into Las Alturas Towers; and he is currently instructed on behalf of a former Minister in allegedly unlawful cartel arrangements concerning several construction contracts