"Developing the law of contract: the work of the United Kingdom Supreme Court"

Lord Hodge, Deputy President of the UK Supreme Court

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It is an honour and a pleasure to have the opportunity to address you today. I know that in the audience are students at UNISSA and students from the Laksamana College of Business. I propose to speak for about 45 minutes and then devote the rest of our time together to discussions with you, when I will attempt to the best of my ability to answer your questions.

The topic of my lecture is "Developing the Law of Contract: the work of the UK Supreme Court." Appeals relating to contract law are of course only one component of my court's varied workload. But they are important to the economic flourishing of the United Kingdom and of common law countries which draw on our jurisprudence. It is the task of an apex court to seek to clarify and maintain the coherence of contract law, and if necessary to develop the law if it can be shown that caselaw has taken a wrong turning.

Introduction

Contracts are what enable us to conduct our lives with a degree of certainty. They enable us to buy food and clothes, purchase or rent housing, travel, and enjoy leisure activities with our families. We transact with the providers of goods and services through the medium of the contract.

Contracts are also at the heart of sophisticated commercial life enabling businesses to undertake complex projects and other ventures by coordinating the participants in the venture and reducing commercial risk by setting out agreed arrangements as to what each party must do in foreseen eventualities.

A developed law of contract enforced by an independent, impartial and incorruptible judiciary is a cornerstone of a sustainable economy and a stable society.

In recent years my court has addressed legal issues of general public importance concerning the interpretation of contracts, the implication of terms, rectification, penalty clauses, the defence of illegality, the defence of economic duress, and remoteness of damage. In the time available I will explore some of the relevant caselaw to give you a flavour of our work.

The interpretation of contracts

Interpreting a contract is to ascertain the intention of the parties by reference to the words which they have used in their contract. English law, and Scots law also, take an objective approach to the interpretation of contracts. Interpretation involves a search for the meaning of the words which the parties have used rather than an attempt to ascertain their subjective intentions.

The modern approach to interpretation can be traced back to two appeals in the House of Lords, the predecessor of my court, in the 1970s. While, as I will seek to show, there has been considerable debate since then in response to a famous judgment in the House of Lords in 1997, the fundamental approach to interpretation has not changed significantly over time. Those cases, *Prenn v*

Simmonds[1] and *Reardon Smith Line Ltd*,[2] have had a great influence over the court's approach ever since.

In 1997 a famous judgment by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [3] sparked a debate as to the balance to be struck between showing a close respect for the words which the parties have chosen to use in their contract and the scope for the court to use its perception of business common sense to determine what the parties would have intended having regard to the context in which the contract was entered into.

There was perceived to be a real tension between the two approaches. On the one hand, some promoted the adoption of a "commercial interpretation" of contracts. Lord Goff of Chieveley in an extrajudicial writing in 1984 had stated that judges were there

> "to give effect to [businessmen's] transactions, not frustrate them; we are here to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil."[4]

Others may have sought to minimise transactional costs by promoting certainty and predictability through paying close attention to the words in the contract and giving less weight to perceptions of commercial common sense.

The idea that the *Investors Compensation Scheme* decision had introduced a radical new approach to the interpretation of contracts was gently but persuasively questioned by Lord Bingham of Cornhill, in a lecture in 2008. He argued that there was nothing new under the sun; the law has long brought to bear both literal and purposive elements in the composite task of interpretation.[5]

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[1] [1971] 1 WLR 1381.
[2] *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 (HL).
[3] [1998] 1 WLR 896.
[4] [1984] LMCLQ 382, 391.
[5] (2008) 12 Edin LR 374.

The Supreme Court has considered the general approach to the interpretation of contracts in three cases in recent years. In one of the early cases heard by the Supreme Court, *Rainy Sky v Kookmin Bank*,[6] Lord Clarke, giving the unanimous judgment of the court, stated:

"the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances."

This was, in my view, a clear statement of the objective approach to the interpretation of contracts which English law has repeatedly applied since the 1970s.

He went on to explain, equally uncontroversially, that where there were two possible interpretations of a provision it was generally appropriate to adopt the construction which was most consistent with business common sense.

In 2015, the court in *Arnold v Britton*[7] considered contracts which, with hindsight, should never have been entered into. A leisure park near Swansea in Wales comprised 91 chalets, each of which was let for a period of 99 years under leases granted between the early 1970s and 1991. In each lease, the tenant entered into a covenant to pay a service charge to the park for maintaining the roads and fences and other similar services which was set initially at £90 per year. The clause containing the covenant included an escalator by which the initial service charge increased every three years, or in some leases, every year by ten percent. If the words in the clauses were given their natural meaning, the

[6] [2011] UKSC 50.
[7] [2015] UKSC 36; [2015] AC 1619.

tenants on a triennial escalator would be paying £1,900 per year for their services by 2072 and those on an annual escalator would be paying £1,025,004.

The tenants unsurprisingly sought to escape from this ruinous bargain. They argued that to make commercial sense of the contract the words "up to" should be read into the clause before the words "the yearly sum of Ninety Pounds". This would have the effect of making the initial service charge, to which the escalator applied, a cap on the amount which the landlord could charge.

The majority of the court did not accept this submission. In the leading judgment the President, Lord Neuberger, focussed on the meaning of the words in the clauses of the leases in their documentary, factual and commercial context. He gave guidance of the interpretation of contracts, identifying seven factors.[8] It is sufficient to quote from the first:

> "First, the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract." [9]

In a strongly worded dissent, in which he accepted the tenants' submission, Lord Carnwath emphasised the role of interpretation in both resolving ambiguities and correcting mistakes. He identified residential long leases as "an

[8] Ibid., paras 17-23.
[9] Ibid., para 17.

exceptional species of contract" and stressed the need to interpret the service charge provisions in the light of their intended purpose to secure a fair distribution between the lessees of the reasonable cost of the shared services. He thought that, having regard to the catastrophic consequences of the annual ten per cent compound escalator, it was clear that something had gone wrong with the language that the parties had used.

The difficulty for the majority was that the tenants' interpretation radically changed what the clause said if the words were given their natural meaning. As Lord Neuberger stated, "the mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language."

Some counsel and commentators, including senior judges, saw the majority's decision in *Arnold* as a recalibration of the rules of contractual interpretation with significantly greater emphasis on literal interpretation at the expense of business common sense. They saw it as a significant move away from the judicial developments which Lord Clarke had helpfully summarised in *Rainy Sky*. Comments included that "there was a distinct chill in the air", or "a sea change in the law" or that the court had "sounded the retreat".[10]

That was not my view. Nor was it the view of the others in the majority in *Arnold*. All the judgments in *Arnold* accepted Lord Clarke's presentation of the law as accurate and authoritative. The difference between the two cases in my view was that in *Rainy Sky* the words to be construed were open to two credible constructions and the court favoured the interpretation which appeared to them to make commercial sense. By contrast in *Arnold*, the majority of the court

[10] For a discussion of the comments see Lord Hamblen's Lehane Lecture 2024, "Contractual Interpretation – An Anglo/Australian Journey", paras 20 and 21 <speech_lord_hamblen_240903_8945aba9e6.pdf> (accessed on 11 February 2025).

thought that the tenants' agreement to the clause providing for a contribution to costs of common services with a price escalator was commercially unwise, but the words were not unclear. The majority took into account: (i) that the context of the contracts had been that high rates of inflation prevailed when the leases were entered into, (ii) the utility of a fixed monetary contribution to service charges to avoid disputes among the lessees, and (iii) the lack of any credible alternative interpretation of the words which the parties had used.

The court again addressed the general approach to contractual interpretation in *Wood v Capita Insurance Services Ltd*.[11] The case raised the question of whether an insurance company was liable in damages for past mis-selling under an imprecise indemnity clause in a share purchase agreement. The clause required the seller to indemnify the buyer against a long list of events arising out of "claims or complaints registered with the [company's regulator] … against the company." The seller argued that it did not have to indemnify the buyer because the company had reported itself to the regulator. The court accepted the seller's contention.

The panel of the court included Justices who had earlier taken part in the debate as to the approach to contractual interpretation. The panel comprised Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption and myself. I was asked to write the judgment with which the others agreed.

The court considered the indemnity in its contractual and commercial context which was that the parties were commercially sophisticated and had experience of the insurance broking industry, and the contract was a detailed and professionally drafted contract. We concluded that the principal tool in identifying the circumstances that would trigger the indemnity was a careful examination of the language which the parties had used in the disputed clause in

[11] [2017] UKSC 24.

the context of the contract as a whole. The court observed that it was not contrary to business common sense for the parties to agree wide-ranging warranties, which were subject to a time limit, and in addition to agree a further indemnity (which was the clause the court was interpreting) which was not subject to any time limit but was triggered only in limited circumstances.[12]

In its discussion of the general approach to the interpretation of contracts the court set out why it did not accept that *Arnold* had involved a recalibration of the approach taken in *Rainy Sky*. We explained that interpretation is not a literalist exercise focussed solely on parsing the words of a particular clause but that

> "the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to [its] objective meaning."

The point which the court sought to make was that there are different tools for the interpretation of contracts and there were variables which the court had to bear in mind in deciding what weight to attribute to the natural meaning of the words, the commercial context and business common sense. The court stated:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive possession of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."

[12] Ibid., para 41.

This seems to me to be no more that common sense as contracts differ in their quality and sophistication.

The are several variables. They include:

(i) Whether the agreements are complex agreements prepared with professional assistance and entered into by sophisticated parties. The court will be likely to look closely at the words which the parties have chosen to use in the context of the contract as a whole and give less weight its view of business common sense.

(ii) Sometimes in such contracts the court may detect that a clause lacks clarity or coherence. The court must be alive to the realities of a commercial negotiation and the possibility that the clause was a compromise between the conflicting aims of the parties. It is possible that the parties, aware of the lack of clarity, were willing to live with the wording as the best they could achieve in the time available for the negotiation. In such circumstances there may be more scope for the court to give weight to the factual matrix and apply its perception of commercial common sense to ascertain the parties' objective.

(iii) The court may be faced with the task of applying a contract in circumstances which, judging from the language the parties have used, they had not contemplated when they entered into it. If, from an analysis of the parties' commercial objectives disclosed by the factual matrix, it is clear what the parties would have intended, the court will give effect to that intention. An example of that approach is the court's decision in *Aberdeen City Council v Stewart Milne Group Ltd.*[13]

(iv) Where agreements are informal, or lacking in detail, or prepared without professional assistance, the court may have to place more weight on its assessment of the factual matrix, the commercial

[13] [2011] UKSC 56; 2012 SC (UKSC) 240.

> implications of the rival constructions and business common sense in determining the objective meaning of the disputed provisions of the contract.

As the court has stated in several cases, interpretation of a contract is a unitary exercise that involves an iterative process by which each suggested interpretation should be checked against the provisions of the contract and its commercial consequences.[14]

I hope that the three cases of *Rainy Sky*, *Arnold* and *Wood* have given clarity to the modern approach to contractual interpretation in English law.

The implication of terms

The traditional approach of English law to the implication of terms is a restrictive one. The court implies a term into a contract only where it is necessary to give the contract business efficacy.[15] An alternative formulation is that if the parties were asked by an officious bystander what would happen in a certain event, they would both reply, "of course, so and so will happen."[16]

This approach appeared to be called into question by a judgment of the Judicial Committee of the Privy Council in 2009 in which Lord Hoffmann delivered the Board's advice.[17] Lord Hoffmann described the implication of a term as "an exercise in the construction of a contract".[18] He said that the court should ask whether the term to be implied "would spell out in express words what the instrument read against the relevant background, would reasonably be

[14] See *In re Sigma Finance Corpn* [2009] UKSC 2; [2010] 1 All ER 571, para 12 per Lord Mance; *Arnold* (above) para 77 and *Wood* para 12.
[15] *The Moorcock* (1889) 14 PD 64.
[16] *Reigate v Union Manufacturing Co Ramsbottom)* [1918] 1 KB 592 (CA) 605.
[17] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988.
[18] Ibid, paras 19 and 21.

understood to mean." The traditional business efficacy or officious bystander tests were not different or additional tests.

The judgment gave rise to a flurry of academic writing and the Court of Appeal of Singapore declined to follow its reasoning in so far as it suggested that the traditional business efficacy and officious bystander tests were not central to the implication of terms.

The question of whether the test for the implication of terms in English law should be liberalised was addressed by the Supreme Court in *Marks and Spencer plc v BNP Paribas*[19] in 2015. I do not need to recite its facts but refer to it for the guidance which is of general interest. The leading judgment was by Lord Neuberger, with whom Lord Sumption and I agreed. Lord Carnwath and Lord Clarke gave separate concurring judgments.

Lord Neuberger reasserted the business efficacy test:

> "[A] term can only be implied if, without the term, the contract would lack commercial or practical coherence."

He emphasised the warning, which Lord Bingham had given, of the danger of the use of hindsight.[20] The question of the implication of a term almost invariably arises after a crisis has been reached in the performance of a contract. The court may be tempted to fashion a term which reflects what it sees as the merits of the situation, but it is wrong to do so.

Lord Neuberger warned that Lord Hoffmann's judgment should not be read as suggesting that reasonableness was a sufficient ground for implying a term. He explained that there had to be a two-stage process; the first, interpretation, involved construing the words which the parties had used in their contract. Only once the court had done so, ascertaining the meaning of the express words of

[19] [2015] UKSC 62; [2016] AC 742.
[20] *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 482.

the contract, did it move to consider whether a term should be implied, applying the traditional tests.[21]

In conclusion, in English law, implication is not merely an aspect of the construction of a contract but is available only if the contract would otherwise lack practical or commercial efficacy.

Rectification

In English law, rectification is an equitable remedy which is available in certain circumstances where a document, such as a contract, does not accurately express the intention or agreement of the parties.

In 2014, the Supreme Court considered the boundaries of rectification in a case, *Marley v Rawlings*,[22] which is interesting on its facts. A man and his wife, Mr and Mrs Rawlngs, instructed the preparation of short Wills which mirrored each other: each left his or her entire estate to the other, but, if the other had already died, the estate would go to a young friend, Mr Marley, whom they had treated as their son. Unfortunately, the solicitor who visited the couple, gave each spouse the other's draft will to sign. As a result, Mr Rawlings signed his wife's Will and she signed the Will meant for him.

When Mrs Rawlings died in 2003, nobody noticed the error in her Will and her estate was transferred to her husband. When Mr Rawlings died in 2006 the error was discovered when the couple's two sons challenged the validity of their father's Will and thus Mr Marley's right to succeed to the estate.

Lord Neuberger gave the leading judgment in which he assimilated the interpretation of contracts and the interpretation of Wills and, because Mr

[21] *Marks and Spencer* para 31.
[22] [2014] UKSC 2; [2015] AC 129.

Marley argued that he should succeed as a matter of interpretation, by correcting an obvious mistake, or alternatively through rectification, discussed the boundary between the interpretation of a document and its rectification. In the end, Mr Marley won as the court accepted his argument on rectification and did not decide whether the mistake could be corrected by interpretation.

Time does not permit me to discuss the boundary between interpretation and rectification, but it is important to bear in mind the difference between the two processes. As Lord Neuberger explained,

(i) If the court interprets a document, then the document has always had the meaning and effect as determined by the court; but

(ii) By contrast if the court rectifies a document the document as rectified has a different meaning from that which appears to have on its face, and the court has jurisdiction to refuse rectification or to grant it on terms where there has been delay, change in position or third-party reliance.

I personally would attach considerable weight to the importance of third-party reliance and be reluctant to see the courts using interpretation as a means of rectifying mistakes where third parties have relied on the terms of a contract or other document.

There are important questions still to be resolved in relation to rectification, but those are a matter for a separate lecture on another occasion.[23]

I will now turn briefly to discuss:

<u>The regulation of contracts by the common law</u>

[23] Lord Hoffmann's obiter dicta on the objective approach to assessment of the common intention of the parties in *Chartbrook v Persimmon* Homes *Ltd* [2009] AC 1101 was recently rejected by the UK Supreme Court in *NURMTW v Tyne and Wear Passenger Transport Executive (t/a Nexus)* [2024] UKSC 37; [2024] 3 WLR 909, para 31, confirming the judgment of the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, pare 176.

1) Penalty clauses

Many contracts include a provision for liquidated damages if a party breaches the contract. The doctrine by which the court refuses to enforce a penalty clause is sometimes, but by no means always, concerned with such clauses. Over 100 years ago the House of Lords in *Dunlop Pneumatic Tyre Co*[24] set out helpful guidance which distinguished between a genuine pre-estimate of loss on the one hand and a penalty to deter the offending party on the other. Over time, the courts have come to read the neat propositions of Lord Dunedin in that case, which were intended to be guidance, as if they were a statutory code. They have sought to escape the apparent straitjacket of a dichotomy between a genuine pre-estimate of loss and a penalty, which is useful when considering liquidated damages clauses, but unsuited to clauses which are not concerned with liquidated damages.

In *Cavendish Square Holding BV v El Makdessi*,[25] the court addressed covenants in a share purchase agreement for the acquisition of the largest advertising and marketing communications group in the Middle East. Much of the value of the company lay in the personal connections of the vendor, Mr El Makdessi. The sale contract contained restrictive covenants by the sellers not to compete with the group in order to protect their goodwill. Breach of the covenants had two serious consequences. First, it stopped the payment of outstanding instalments of the purchase price. Secondly, it gave the purchasers a call option, requiring the seller in breach to transfer any remaining shares in the group at a set price which did not allow for goodwill. In breach of the covenant,

[24] [1915] AC 79
[25] [2015] UKSC 67.

Mr El Makdessi involved himself in the business of a competitor and Cavendish exercised their rights under the clause.

After Mr El Makdessi won in the courts below, Cavendish appealed to the Supreme Court.

The appellants, Cavendish, argued as their primary submission that the court should abolish the rule that the courts do not enforce penalty clauses. In the alternative, they argued that the rule should be altered so that it did not apply in commercial transactions in which the contracting parties are of equal bargaining power and each acted on skilled legal advice. The court rejected both submissions as it did the submission on behalf of the respondent, Mr El Makdessi, that the rule against penalties should be extended to circumstances which did not involve a breach of contract.

The court restated the law on penalties in a way which covers a much wider range of clauses than clauses for liquidated damages. Now the approach is that a court applying the rule asks whether the contractually stipulated remedy for a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract.

In *Cavendish* and an appeal which we heard at the same time, which concerned a parking charge in a supermarket car park (a case which was at the other end of the financial spectrum from the *Cavendish* case),[26] the Court applied that test and held that the contractual terms did not offend the rule against penalties.

2) <u>The defence of illegality</u>

The correct approach to the law on illegality of contract – ex turpi causa non oritur actio - has caused the court greater difficulty and it took several tries to

[26] *ParkingEye v Beavis* [2015] UKSC 15.

obtain an authoritative ruling on the question. In those cases, some of the Justices advocated a clearcut rule which renders a contract unenforceable at the instance of the party who founds on the illegal or immoral act in its claim, while others favoured a multi-factorial approach, which has regard to various considerations of public policy, and gives the court greater scope to achieve a just result.

In *Hounga v Allen*,[27] a panel of five Justices addressed a claim for the statutory tort of unlawful discrimination by a young illegal immigrant whom Mrs Allen employed unpaid to look after her children, physically abused and then dismissed and evicted forcibly from her home. Her claim failed before the Court of Appeal because Miss Hounga's immigration offences were inextricably linked to her contract of employment which was illegal. Lord Wilson, giving the lead judgment, rejected this approach, holding that the defence of illegality rested on the foundation of public policy and it was therefore necessary to ask, first, what aspect of public policy founds the defence and, secondly, whether there is another aspect of public policy to which the defence would run counter. The concern to uphold the integrity of the legal system by not enforcing an illegal contract was wholly outweighed by the fact that Miss Hounga was the victim of trafficking at the hands of the Allen family.

Shortly afterwards, in *Les Laboratoires Servier v Apotex Inc*,[28] a different panel of five Justices addressed the question of what amounted to turpitude which could support the defence of illegality in the context of a patent dispute. The panel unanimously held that the infringement of foreign patent rights did not constitute a relevant turpitude for the purpose of the defence. Lord Sumption in the lead judgment rejected any reliance on questions of public conscience or a balancing of various considerations when deciding whether the defence was

[27] [2014] UKSC 47.
[28] [2014] UKSC 55.

available. He argued that the decision of the House of Lords in *Tinsley v Milligan*[29] was a binding statement of an established legal rule notwithstanding that it could have draconian consequences. Lord Toulson concurred in the result but indicated a sympathy for the approach taken in *Hounga* and suggested that it might be necessary to reassess *Tinsley v Milligan* in the light of the criticisms of that decision by, among others, the Law Commission.

The question arose again in a seven-Justice appeal in *Jetivia SA v Bilta (UK) Ltd*,[30] which concerned a VAT carousel fraud, in which the panel was divided as to the correct approach. Lord Sumption adhered to the view that the defence of illegality was a rule of law and rejected the wider approach to public policy which Lord Toulson advocated and I supported. The other Justices reasoned that the case was not appropriate for deciding on a general basis the proper approach to the defence of illegality and suggested that the law on illegality be reviewed by the court in another case.

Lord Neuberger thereafter convened a nine-Justice panel in *Patel v Mirza*,[31] to resolve the issue authoritatively. Lord Toulson's approach prevailed by a majority of 5:3, with the President, Lord Neuberger, also supporting Lord Toulson's approach as reliable guidance. Lord Toulson explained:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality …)."

He said that the assessment of the public interest involved three considerations:

(i) the underlying purpose of the prohibition and whether that purpose will be enhanced by denial of the claim,

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[29] [1994] 1 AC 240.
[30] [2015] UKSC 23.
[31] [2016] UKSC 42.

(ii) any other relevant public policy on which the denial of the claim may have an impact and

(iii) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.[32]

Economic Duress and remoteness of damage

Time does not permit me to address cases on lawful economic duress and remoteness of damage, but I will include them in an end note on the written text of this lecture.[i]

Conclusion

I hope that this quick overview of our work in the field of contract has been of interest to you. I am happy now to hear your views and to answer your questions.

[i] The defence of lawful economic duress in the law of contract: *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40; [2023] AC 101 and *Law Debenture Trust Corporation plc v Ukraine* [2023] UKSC 11; [2024] AC 411, which was a dispute over the enforceability of a loan by Russia to Ukraine. Remoteness of damage: *Attorney General of the Virgin Island v Global Water Associates* [2020] UKPC 40; [2021] AC 23. In this case the Judicial Committee of the Privy Council discussed and reformulated the tests set out in the famous cases of *Hadley v Baxendale* (1854) 9 Exch 341, *Victoria Laundry* [1949] 2 KB 528, and *The Heron II* [1969] 1 AC 350.

[32] Ibid., para 120.