

Judging Reformers and Reforming Judges

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Abstract

This article examines the practice and limits of judicial law reform. In particular, I consider the question of when initiation of a reform is appropriate for the judiciary as opposed to the legislature, an issue which has been a matter of controversy amongst the Justices of the United Kingdom Supreme Court. This question is assessed in the light of the institutional and constitutional competences of the courts, particularly with respect to the structure of common law reasoning. It is also argued that it is important to have regard to perspectives of the relevant judges, in understanding the individual and collective approaches to the judicial development of the law.

Keywords: law reform, common law, judges, United Kingdom Supreme Court, legal reasoning.

A Introduction

What are the limits of judicial law reform in the common law? This article interrogates that question with specific reference to recent jurisprudence of the United Kingdom Supreme Court ('UKSC'),¹ as an exemplar of the common law tradition. The question has also been a matter of considerable controversy amongst

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1 For more detail, see A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court*, Oxford, Hart Publishing, 2013; J. Lee, 'The United Kingdom Supreme Court: A Study in Judicial Reform', in E. Guinchard & M.P. Granger (Eds.), *The New EU Judiciary: An Analysis of Current Judicial Reforms*, The Netherlands, Wolters Kluwer International, 2018a; J. Lee, 'A Common Law Perspective on the Binding Effect of Judicial Decisions: Reasoning with Precedent in the United Kingdom Supreme Court', in G. Raimondi, K. Lenaerts & P. Šámal (Eds.), *Závaznost soudních rozhodnutí – vnitrostátní a mezinárodní náhledy*, The Netherlands, Wolters Kluwer, 2018b; L. Blom-Cooper QC, B. Dickson & G. Drewry (Eds.), *The Judicial House Of Lords 1876-2009*, Oxford, Oxford University Press, 2009; J. Lee, *From House of Lords to Supreme Court: Judges Jurists and the Process of Judging*, Oxford, Hart Publishing, 2011; B. Dickson, 'The Processing of Appeals in the House of Lords', *LQR*, Vol. 123, 2007, p. 571.

the current Justices. My focus here is on the work of the Supreme Court, since it is a final court of appeal,² although we shall see that other leading UK judges have reflected upon the Court's work.³ It is a striking feature of disagreements about judicial development of the law that the Justices will disagree not just about the outcome of a given case, but about the gravity of the change being made. I argue that understanding the rhetorical framing of common law argumentation is crucial to appreciating the capacity of the courts to carry out reform. Lord Neuberger, the former President of the UKSC, has emphasized that

In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known *stare decisis*, is fundamental.⁴

Yet this fundamental role of the doctrine of precedent brings with it ancillary requirements on the higher courts to be clear about the extent of their decisions and the proper limits of their role.

In order to explore the issues, this article draws upon recent case law and extra-curial speeches. To illustrate the themes, I take two main case examples: *Ivey v. Genting Casinos*,⁵ a case that considered the meanings of cheating and dishonesty in various legal contexts; and *Newcastle upon Tyne Hospitals NHS Foundation Trust v. Haywood*,⁶ which concerned the effective giving of notice to terminate an employment contract. These cases raise important points of principle and practice for the development of the law. The cases have been chosen from the 2017-2018 year of Supreme Court decisions, for two reasons: first, to build upon, rather than re-tread ground covered in, the extensive literature on the topic (and my own previous work); and second, to reinforce my point that we must examine the perspectives of the present composition of the Court in order to appreciate the drivers of the courts as an engine for law reform.

In two recent pieces, I have considered the interplay between the UK Supreme Court and the Law Commissions (and by extension Parliament).⁷ This topic is given added currency by the presence on the Supreme Court of Lady Hale

2 The UKSC is the final court of appeal on almost all matters in the United Kingdom. The Supreme Court does not have jurisdiction appeals from Scotland on criminal law, in respect of which the High Court of Justiciary is the final court of appeal, except where an issue under devolution and human rights legislation is raised (see e.g. *Brown v. The Parole Board for Scotland, The Scottish Ministers and another (Scotland)* [2017] UKSC 69, [2018] AC 1).

3 In particular, see the caution of the Chancellor of the High Court, Sir Geoffrey Vos, in his recent Chancery Bar Association Annual Lecture, 'Preserving the Integrity of the Common Law', 16 April 2018.

4 *Willers v. Joyce (No 2)* [2016] UKSC 44, [4].

5 *Ivey v. Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67, [2017] 3 WLR 1212 (see Section C below).

6 [2018] UKSC 22 (see Section D below).

7 J. Lee, 'The Etiquette of Law Reform', in M. Dyson, J. Lee & S.W. Stark (Eds.), *Fifty Years of the Law Commissions – the Dynamics of Law Reform*, Oxford, Hart Publishing, 2016; and 'Illegality, Familiarity and the Law Commission', in S. Green & A. Bogg (Eds.), *Illegality after Patel v. Mirza*, Oxford, Hart Publishing, 2018c.

(the Court's current President) and Lord Hodge, former Commissioners at the Law Commission of England & Wales and the Scottish Law Commission, and two former Chairs of the Law Commission, Lords Carnwath and Lloyd-Jones.⁸ In this piece, I shall address the broader question of when a change is beyond the limits of the judiciary, both as a matter of institutional and constitutional competence.⁹

My aim here, therefore, is to offer a contribution to the study of what Professor Paul Mitchell has called "the patterns of legal change",¹⁰ in understanding the role of judges in the reform of the law. The common law's ability to develop incrementally is often contrasted with that of codified systems:¹¹ the former Lord Chief Justice, Lord Thomas, recently described the English common law as "one of the most dynamic systems [of law] in the world".¹² Complementing the other articles in this issue, therefore I shall illuminate the dynamics of the common law with regard to the initiation of law reform.

B Traditional and Institutional Practicalities

Before engaging with the selected and selective examples of recent cases, it is necessary to outline the framework within which the Supreme Court works with respect to its decision-making. The Supreme Court has recently reaffirmed that lower courts are bound by decisions of the higher courts in England and Wales: "Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence, clarity and predictability."¹³ In particular, it is not open to lower courts to prefer, for example, a non-binding case (for example, a decision of the Judicial Committee of the Privy Council) over a precedent which is otherwise binding on the court simply on the basis that the instant judge considers it a "foregone conclusion" that the higher court would follow the subsequent decision if it was asked.¹⁴ The Supreme Court, however, sits at the apex of the judicial hierarchy and is able to overrule lower courts and to depart from its own previous decisions, although in

8 In 'The Etiquette of Law Reform' (*supra* note 7), I demonstrated that Supreme Court Justices who have served with the Law Commissions were more likely to refer to them in their judgments than Justices who had not. Since the initial submission of this article, a third former Chair of the Law Commission, Lady Arden has been appointed to the Supreme Court.

9 See Section E below.

10 P. Mitchell, 'Patterns of Legal Change', *Current Legal Problems*, Vol. 65, 2012, p. 177.

11 Lord Reed, 'Tribunes and Steamships: Scholars, Judges and the Use of the Past', The Scrymgeour Lecture, University of Dundee, 30 October 2015, p. 7.

12 Lord Thomas LCJ, 'Keeping Commercial Law up to date', Aston University, 8 March 2017, para. 3, contrasting the position in France (as to which see S. Rowan, 'The New French Law of Contract', Vol. 66, *ICLQ*, 2017, 805).

13 *Willers v. Joyce (No 2)* [2016] UKSC 44.

14 *Willers (No 2)*, [17]–[18], disapproving the approach, though not the outcome, of the Court of Appeal in *R v. James* [2006] EWCA Crim 14, para. 43.

the latter category it is “very circumspect”¹⁵ before exercising its power in this respect and it will only do so sparingly.¹⁶

Formally, a subsequent lower court is bound only by the *ratio decidendi* of a previous case: the *ratio* is the reason for deciding the case, or the legal principle to be taken away from it. The ratio is based on the facts which were material to the decision. A court may of course make further observations beyond the ratio, which are obiter dicta and not formally binding.¹⁷ Nevertheless such comments will naturally be taken seriously by the lower courts, and have significant influence on the application of the law. In the context of this article,¹⁸ we are interested in common law argumentation as a constraint (or otherwise) on judicial law reform, as will be seen in the discussion of the case of *Ivey* in the next section.

The development of the law by the judiciary is dependent upon appropriate cases coming before the courts (at the relevant levels) and raising pertinent issues. Reform is therefore always contingent on ‘the incidents and accidents of litigation’.¹⁹ The Supreme Court generally has control over its own docket, and hears appeals on points of general public importance which the court ought to consider at the relevant time.²⁰

Even when permission has been granted, much will then turn on the way in which the case is argued, as it may turn out not to engage some of the potentially relevant issues. For example, in *Reilly v. Sandwell Metropolitan Borough Council*,²¹ an unfair dismissal case concerning employee duties of disclosure, Lord Wilson gave the leading judgment, holding that the employee had not been unfairly dismissed. Lady Hale noted that that case “might have presented an opportunity for this court to consider two points of law of general public importance which have not been raised at this level before”, but that the way the case had proceeded had meant that those points were not engaged.²² nevertheless, her Ladyship briefly

15 *Knauer v. Ministry of Justice* [2016] UKSC 9 per Lord Neuberger PSC and Lady Hale DPSC at [23].

16 Applying *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, adopted for the Supreme Court in *Austin v. Mayor & Burgesses of the London Borough of Southwark* [2010] UKSC 28, [25], and now to be found in United Kingdom Supreme Court Practice Directions 4.2.4. Lee, 2018b.

17 A.W.B. Simpson, ‘The Ratio Decidendi of a Case and the Doctrine of Binding Precedent’, in A.G. Guest (Ed.), *Oxford Essays in Jurisprudence*, Oxford, Oxford University Press, 1961.

18 For wider discussion of the precedent and common law reasoning, see N. Duxbury, *The Nature and Authority of Precedent*, Cambridge, Cambridge University Press, 2008; N. MacCormick, *Rhetoric and the Rule of Law*, Oxford, Oxford University Press, 2005; J. Bell, *Policy Arguments in Judicial Decisions*, Oxford, Oxford University Press, 1983.

19 J. Lee, ‘Precedent on High: The High Court of Australia and “Seriously Considered Dicta” on Opinions on High, 21 August 2013. Available at: <http://blogs.unimelb.edu.au/opinionsonhigh/2013/08/21/lee-precedent-on-high> (last accessed 31 October 2018).

20 That broad summary suffices for present purposes, although the precise approach varies depending upon the Court from which the matter is being appealed and the area of law, and the Court’s particular jurisdiction in respect of devolution matters: see generally, Supreme Court Practice Direction 1.

21 [2018] UKSC 16; [2018] ICR 705. See also *R (on the application of KM) v. Cambridgeshire County Council* [2012] UKSC 23, considered in J. Lee, ‘Fides et Ratio: Precedent in the Early Jurisprudence of the United Kingdom Supreme Court’, *European Journal of Current Legal Issues*, Vol. 21, No. 1, 2015.

22 [2018] UKSC 16 at [32].

noted the pros and cons of the arguments on the relevant issues.²³ Her Ladyship might be taken as inviting future parties to raise such challenges in a future case, specifically to the test in *British Homes Stores Ltd v. Burchell*.²⁴ Since the Court had not been invited to overrule previous authority, Lady Hale concluded that “It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct”, which is hardly an enthusiastic endorsement. One can find instances of the Court being reluctant to venture into territory beyond the remit of the instant case, and indeed some disagreements about the wisdom of obiter dicta. In *Reyes v. Al-Malki*,²⁵ Lord Sumption gave the leading judgment, but a majority of other Justices (Lord Wilson, Lady Hale and Lord Clarke) expressed reservations about Lord Sumption’s obiter construction of Article 31(1)(c) of the Vienna Convention on Diplomatic Relations, and instead the majority took the view that the matter would be better addressed by the International Law Commission.²⁶

What this section shows is that the scope for judicial law reform, even in a common law Supreme Court, may be limited by a number of factors, including tradition, in terms of the structure of common law reasoning; practice, in terms of the doctrine of precedent; and fortuity, in terms of the right cases coming before any court in the first place and then being appealed all the way to the apex of the court hierarchy. As we shall see, further constraints may apply on the court’s reasoning when it hears a case and the Justices are then in a position to decide whether to reform the law.

C Judicial Reform of the Test for Dishonesty: *Ivey v. Genting Casinos*

I Facts, Decision and Controversy

In *Ivey v. Genting Casinos*, the claimant, a professional gambler, sued a casino to recover his purported winnings of £7.7m in the game of Punto Banco Baccarat, a card game dependent upon achieving a particular combination of cards. Mr Ivey had used the tactic of ‘edge-sorting’, which relies on being able to observe slight differences in the backs of cards to identify them. His accomplice asked the croupier (the card-dealer) to rotate the relevant cards, on the basis of a supposed superstition, so that he could keep track of them.²⁷ This tactic gives a player an advantage in the game over the dealer and casino. The judge at first instance accepted that Mr Ivey genuinely believed that his approach was “legitimate gamesmanship” and not cheating.²⁸

23 [2018] UKSC 16 at [32]-[34].

24 *British Homes Stores Ltd v. Burchell* (Note) [1978] ICR 303.

25 [2017] UKSC 61, [2017] 3 WLR 923.

26 [2017] UKSC 61, per Lord Wilson at [68] and per Lady Hale and Lord Clarke at [68].

27 *Ivey*, [13]-[25]. A good explanation of the rules of punto banco and edge-sorting is provided by Lady Hale in ‘Dishonesty’, Bristol Alumni Association Lecture, 23 February 2018, pp. 1-3.

28 *Ivey*, [27].

It was accepted between the parties that the contract between the casino and the player contained an implied term not to cheat.²⁹ It was also accepted that the test for what amounts to “cheating” as in the eponymous offence created by s. 42 of the Gambling Act 2005,³⁰ which provides (by subsection 1, so far as relevant) that “a person commits an offence if he cheats at gambling” and (by subsection 3) that

Without prejudice to the generality of subsection (1), cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with –

- a the process by which gambling is conducted, or
- b a real or virtual game, race or other event or process to which gambling relates.

The judgment was given by Lord Hughes (with whom the other Justices agreed). It was held that cheating does not require dishonesty,³¹ and that it would be

very unwise to attempt a definition of cheating [although no] doubt its essentials normally involve a deliberate (and not an accidental) act designed to gain an advantage in the play which is objectively improper, given the nature, parameters and rules (formal or informal) of the game under examination.³²

It is quintessentially a jury question.³³ What Mr Ivey did amounted to cheating by taking steps to stack the deck (though not directly by his own hand).

It was not therefore necessary for the Court to consider what the appropriate test for dishonesty is. However, Lord Hughes did go on to examine the test, because it had been fully argued before the court and the issue was a significant one. The meaning of ‘dishonesty’ has had a long and controversial history across criminal and civil law: in particular, how to deal with the idea that, as Lord Nicholls put it, “for the most part dishonesty is to be equated with conscious impropriety”.³⁴ Broadly, it had generally been agreed that the *standard* for whether the defendant’s conduct was dishonest is objective: it is assessed by ordinary standards of honesty, and a defendant is not free to set his own standards of

29 *Ivey*, [35].

30 *Ivey*, [38].

31 *Ivey*, [45]: “Although the great majority of cheating will involve something which the ordinary person (or juror) would describe as dishonest, this is not invariably so.” Lord Hughes also notes at [46] that there are forms of deception which do not amount to ‘cheating’, such as bluffing in poker.

32 *Ivey*, [47].

33 *Ivey*, [48].

34 *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378 at 389.

honesty.³⁵ The more difficult question had been whether, once it was determined whether what the defendant did was objectively dishonest, in addition it should be asked whether the defendant realized that what he was doing would be regarded as dishonest by ordinary, honest, people. Prior to *Ivey*, it had been held that in the criminal context there should be this ‘combined test’ – the standard was objective, but there was then a subjective element with respect to the defendant’s appreciation of those objective standards. That was the test adopted for the criminal law by the Court of Appeal in *R v. Ghosh*.³⁶ It was for a time considered that the House of Lords had adopted the same test for dishonesty in a civil context, in respect of claims for dishonest assistance in a breach of trust, in the case of *Twinsectra Ltd v. Yardley*,³⁷ although subsequent decisions (somewhat creatively)³⁸ interpreted the law to be that the test was objective in private law cases.³⁹

In addressing the history of the development of tests for dishonesty in *Ivey*, Lord Hughes held that

there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose.⁴⁰

Having decided that there should be a single test, Lord Hughes went on to adopt the objective test, in a paragraph which bears quoting in full:

the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by [the private law authorities]. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowl-

35 A purely subjective test, sometimes called the ‘Robin Hood test’ – because Robin Hood took from the rich to give to the poor which was not dishonest according to his own morality – has been definitively rejected throughout the saga: see e.g. *R v. Ghosh* [1982] QB 1053 per Lord Lane LCJ at 1064; and *Twinsectra Ltd v. Yardley* [2002] UKHL 12, [2002] 2 AC 164, per Lord Hutton at [27]. See also *Walker v. Stones* [2001] QB 902, per Sir Christopher Slade at 939.

36 [1982] QB 1053.

37 [2002] UKHL 12, [2002] 2 AC 164.

38 See J. Lee, ‘Fidelity in interpretation: Lord Hoffmann and the Adventure of the Empty House’ (2008) 28 *Legal Studies* 1, pp. 6-10.

39 *Barlow Clowes v. Eurotrust Internationa* [2005] UKPC 37, [2006] 1 WLR 1476; *Abou-Rahmah v. Abacha* [2006] EWCA Civ 1492, [2007] 1 All ER (Comm) 827; and *Starglade v. Nash* [2010] EWCA Civ 1314, [2011] Lloyd’s Rep FC 102.

40 *Ivey*, [63].

edge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.⁴¹

The Supreme Court thus addresses the ‘conscious impropriety’ element of the honesty inquiry by stating that it must be assessed in the light of what the defendant knew of the facts. That is the limit of the ‘subjective element’: there is no inquiry into whether the defendant recognized that his conduct contravened ordinary standards of honesty.

II Reaction to the Development

For present purposes, the decision in *Ivey* is significant for two reasons: first, it settles what had been a controversy over the test for dishonesty in private law, by confirming the *Barlow Clowes* objective approach. Second, the Supreme Court offers strong disapproval of the *Ghosh* combined test for criminal cases, and instead restates the law as involving a single test: the defendant’s conduct is assessed by objective standards of honesty, in the light of what they knew or genuinely believed as to the relevant facts which made the conduct dishonest. This change is clearly an attempted reform of at least the criminal law position. But, as we have noted, the observations on the *Ghosh* test were strictly obiter: the issue for the Court was whether ‘cheating’ required proof of dishonesty; only if it did would the court have had to consider what that appropriate test was. The Court held that dishonesty was not required to ‘cheat’, but nevertheless went on to (purport to) restate the test for dishonesty. Does *Ivey* then settle the position for the criminal law?

The initial response to *Ivey* has been somewhat mixed. Judicially, it has been described as having “clarified” the test,⁴² or alternatively as having moved “the tectonic plates of the legal firmament”,⁴³ and has been considered in cases engaging a wide variety of legal areas, from tax evasion⁴⁴ to professional misconduct.⁴⁵ As to the merits of the approach to dishonesty, numerous leading criminal law academics have engaged with the case,⁴⁶ and it is not my purpose to engage with what the test should be here: the Supreme Court has chosen the objective test. Rather, I am interested in what the case tells us about the limitations of judicial

41 *Ivey*, [74].

42 *Ahmed v. Revenue & Customs* [2017] UKFTT 866 (TC).

43 *Wingate v. Solicitors Regulation Authority; Solicitors Regulation Authority v. Malins* [2018] EWCA Civ 366 per Jackson LJ at [90].

44 *Ahmed v. Revenue & Customs*, 2017.

45 *General Medical Council v. Krishnan* [2017] EWHC 2892 (Admin); *General Medical Council v. Raychaudhuri* [2017] EWHC 3216 (Admin); *Ramasamy v. Solicitors Regulation Authority* [2018] EWHC 117 (Admin).

46 M. Dyson & P. Jarvis, ‘Poison *Ivey* or Herbal Tea Leaf?’, *LQR*, Vol. 134, 2018, p. 198; G. Virgo, ‘Cheating and Dishonesty’, *CLJ*, Vol. 77, 2018, p. 18 and K. Laird [2018] *Crim LR*, p. 395. Virgo (at p. 21) describes *Ivey* as involving “an unacceptable expansion of the criminal jurisdiction”, while Laird says that the judgment will “reverberate throughout the criminal law”.

law reform: *Ivey* has been described by Laird as “distort[ing] principles that are fundamental to the common law”.⁴⁷

Some points could certainly be made in defence of the breadth of the approach in *Ivey*. One reason for caution with respect to obiter dicta is that, if a point is not necessary to the court’s decision, it may either not have been fully argued or not fully considered by the court: neither point applied in *Ivey*. Further, adopting a test which is stricter towards defendants does not raise the prospect of successful appeals against conviction, so it is not likely to be productive of uncertainty in that respect.⁴⁸ The question of dishonesty had been one of intense controversy in both criminal and civil contexts, and *Ivey* was unusual in engaging both a criminal and private law (since it was conceded that the meaning of ‘cheating’ should be the same for both). However, the Court did not expressly recognize the extent of the controversy in the private law context,⁴⁹ as a matter of both principle and precedent.⁵⁰ there is therefore a certain irony in the Supreme Court’s attempted resolution of the issue itself raising problems of precedent.

In *Director of Public Prosecutions v. Patterson*,⁵¹ the Administrative Court of the Queen’s Bench Decision had to consider whether magistrates had been correct to dismiss two charges of theft on the basis that there was no case to answer. The Court held that the magistrates had been wrong to dismiss the charges. The case afforded the opportunity for Sir Brian Leveson, the President of the Queen’s Bench Division, to consider the implications of *Ivey* for the crime of theft. Speaking of *Ivey*, Sir Brian noted

These observations were clearly obiter, and as a matter of strict precedent the court is bound by *Ghosh*, although the Court of Appeal could depart from that decision without the matter returning to the Supreme Court... Given the terms of the unanimous observations of the Supreme Court expressed by Lord Hughes, who does not shy from asserting that *Ghosh* does not correctly represent the law, it is difficult to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future.⁵²

As Sir Brian Leveson says, no doubt it would be a bold Crown Court judge, or Lord or Lady Justice of Appeal, who declined to follow *Ivey* on the basis of the strict doctrine of precedent. And yet, there is a clear tension when compared the Supreme Court’s broader pronouncements on the strictness of precedent, as seen in Section B above. Conceptually, it is difficult for the Supreme Court to be able to declare that its obiter dicta are to be followed as though binding, for that is to cloak them with authority which properly belongs to the *ratio*. The observations of the Supreme Court are entitled to respect, but not everything in its judgment is

47 Laird, 2018, p. 399.

48 *Ibid.*, p. 397.

49 Virgo, 2018, p. 18, at 20.

50 Lee, 2008.

51 [2017] EWHC 2820 (Admin).

52 *Patterson* [2017] EWHC 2820 (Admin) at [16].

formally binding.⁵³ There is also the concern that Parliament had legislated in the general area – the Fraud Act 2006, which, although not expressly engaged by the wording of the statute, was introduced on the basis that the common law, *Ghosh* test applied.⁵⁴

Overall, what *Ivey* reveals is that for the Supreme Court, the opportunity to make a desirable (or desired) change in the law may prove difficult to resist, even if the point does not arise precisely within the confines of the relevant case. If the Justices believe in their responsibility for developing the law, then they will be reluctant to leave the law to stagnate while waiting for a putatively perfect set of facts to engage the issue.⁵⁵ This wider point is considered in Section E below. Before leaving *Ivey*, it is noteworthy that in *Ivey* the court was led in taking the bold step by Lord Hughes: although his Lordship has been willing to develop the criminal law,⁵⁶ he has otherwise shown more caution in respect of judicial reform than his fellow Justices in recent cases in other areas of the law.⁵⁷

D Noticing Controversy: *Newcastle upon Tyne Hospitals NHS Foundation Trust v. Haywood*

In *Ivey*, it was accepted that the *Ghosh* combined test had been the test for dishonesty: the controversial question was then whether it *should be* the test. The next case serves to demonstrate how the law is developed where what the law is, as well as what it should be, is contested. I take *Newcastle upon Tyne Hospitals NHS Foundation Trust v. Haywood*⁵⁸ as an illustrative example, without suggesting that it is a particularly unusual case: rather, it is typical of disagreements over common law adjudication.

In *Haywood*, the Supreme Court divided 3:2 over what the common law regards as the effective date of the written notice of termination when delivered by post.⁵⁹ It was common ground that the law implies a term with respect to the giving of notice, but it was disputed as to what the content of that term was. Mrs Haywood worked in the NHS for many years, latterly with the Newcastle upon Tyne NHS Foundation Trust. In 2011, having identified her post as redundant,

53 Compare the position in Australia with respect to ‘seriously considered dicta’ beyond the strict ratio: M. Harding & I. Malkin, ‘The High Court of Australia’s Obiter Dicta and Decision-Making in the Lower Courts’, *Sydney Law Review*, Vol. 34, 2012, p. 239 and Lee, 2013; *Benson v. Rational Entertainment Enterprises Ltd* [2018] NSWCA 111 at [109]-[124].

54 See Dyson & Jarvis, 2018, p. 201; Laird, 2018, p. 399; and D. Ormerod, ‘The Fraud Act 2006 – Criminalising Lying?’, *Crim LR*, 2007, p. 193, at 200-201.

55 See Laird, 2018, p. 399.

56 In addition to *Ivey*, Lord Hughes gave (with Lord Toulson) the judgment for the court in *R v. Jogee* [2016] 2 WLR 681, a case which changed the approach to criminal liability with respect to joint enterprise.

57 See, e.g. his Lordship’s reservations as to the expansiveness of the reasoning of other Justices in *Commissioner of Police of the Metropolis v. DSD* [2018] UKSC 11; and *Robinson v. Chief Constable of West Yorkshire Police* [2018] UKSC 4.

58 [2018] UKSC 22.

59 This was not necessarily the same as the ‘effective date of termination’ in the context of employment rights legislation: *Gisda Cyf v. Barratt* [2010] UKSC 41; [2010] ICR 1475.

the Trust sought to terminate Mrs Haywood's employment. The minimum notice period under the contract was 12 weeks: it would have been possible for the parties to make express provision relating to the giving of notice and its effect, but that had not occurred here. The Trust sent the notice of termination on 21 April. However, as the Trust knew, Mrs Haywood was on holiday in Egypt on annual leave from 19 to 27 April. The key question was whether the notice had taken effect before 27 April, as then the twelve weeks would expire on or after 20 July 2011: that was Mrs Haywood's 50th birthday and she would be entitled to an early retirement pension if made redundant from that date onwards. Mrs Haywood's father-in-law had collected the letter from the postal sorting office and left it at their house on 26 April. Mrs Haywood read the letter after her return from holiday on 27 April. The Trust argued that the notice was effective from the date of delivery to the recipient's home address, relying on cases dating back to the 1700s; Mrs Haywood argued that it was only effective from the date when she actually read the letter or she had the reasonable opportunity of reading it.⁶⁰

The majority held that the notice was only effective from the date that Mrs Haywood actually received the letter. Lady Hale gave the leading judgment, rejecting the Trust's argument that there was a long line of authority which supported their argument: such statements as the Trust could find were "scarcely... a ringing endorsement"⁶¹ or "as consistent with Mrs Haywood's case as they are with the Trust's".⁶² Instead, her Ladyship took the view that the cases on which the Trust relied were generally landlord and tenant cases, outwith the employment context (and in some cases in the context of specific statutes which were not applicable to the instant case); whereas Mrs Haywood was able to rely on a more recent line of employment cases.⁶³ Lady Black agreed with Lady Hale that the relevant authorities did not establish the proposition of the Trust (or the minority):

I do not think that it has been shown that there is a clear and long-standing common law rule that service of what Lord Briggs [(who dissented)] describes as an 'ordinary civil notice' occurs when the notice is delivered to the recipient's address.⁶⁴

It was also relevant that Parliamentary intervention in the field of employment rights had not expressly spoken to the position: the common law rule as identified by the majority had "survived" and could not be taken to have "caused significant difficulty".⁶⁵

In addition to their conclusion that there was no existing common law rule to the effect of the Trust's argument, the majority also thought that their approach produced a better rule in terms of policy. Lady Hale endorsed the view that the

60 The 'reasonable opportunity' point is to address the obvious problem of an employee who refuses to open a letter.

61 *Haywood*, [20].

62 *Haywood*, [15].

63 Starting with *Brown v. Southall & Knight* [1980] ICR 617.

64 *Haywood*, [73].

65 *Haywood*, [38]. See also [39](4).

implication of the relevant term raised questions of “reasonableness, fairness and the balancing of competing policy considerations”.⁶⁶ Lady Black saw ‘no reason’ to imply the Trust’s term into an employment contract, expressly on the basis that there was no common law rule to the contrary. Significant in Lady Hale’s reasoning was that it was possible for employers to make alternative arrangements, whether by express provision in the contract, or by giving notice in person (and simultaneously handing over a letter).⁶⁷

Lord Briggs and Lord Lloyd-Jones dissented, with the former giving the reasoned judgment. For Lord Briggs, both policy and precedent pointed in favour of the Trust’s rule. First, in terms of authority,

there has been for over two centuries a term generally implied by law into relationship contracts terminable on notice, namely that written notice of termination is given when the document containing it is duly delivered, by hand or by post, to the home (or, if appropriate, business) address of the intended recipient, rather than, if later, when it actually comes to the recipient’s attention, or when the recipient, absent at the time of delivery, has returned home and has had a reasonable opportunity to read it. That term is clearly identified by the common law authorities as the correct one.⁶⁸

Lord Briggs here accepted the argument of the Trust, and holds that the relevant cases involve “relationship contracts terminable on notice”.⁶⁹ including tenancies, licences, partnerships and various business contracts. Contrary to the majority’s view, the common law rule was generally applicable: even though the rule had been developed in landlord-tenant cases, “the reasoning is not specific to that relationship”.⁷⁰

Importantly, his Lordship made clear that he believed that that line of authorities was sufficient on its own, but in his view policy also supported his approach:

I would add that there are in my view sound reasons of policy why the implied term should be as I have described, to some of which I will refer in due course. But these do not amount even collectively to a ground for my conclusion, save in the negative sense that the existing law is not so defective in policy terms that it needs now to be changed. Rather, my conclusion is based simply upon an analysis of what the reported cases show that the law already is on this question.⁷¹

66 *Haywood*, [32], quoting Dyson LJ in *Crossley v. Faithful & Gould Holdings Ltd* [2004] ICR 1615 (as endorsed in *Geys v. Société Générale, London Branch* [2012] UKSC 63).

67 *Haywood*, [37].

68 *Haywood*, [81].

69 *Haywood*, [79].

70 *Haywood*, [81].

71 *Haywood*, [82]; Lord Briggs offers discusses policy further at [118]-[121].

Lord Briggs seemed to suggest that the gravity of the potential consequences for Mrs Haywood was a factor in the majority's reasoning,⁷² but his Lordship did not believe that the facts called "for an anxious re-examination or development of the previous law".⁷³

Haywood is a valuable case because it illustrates the potential for disagreement on both what the law is and what it should be. The majority and minority take diametrically opposed approaches to the question, seeking to frame the matter as the law being on their side from the outset. This approach involves denying that the law is being reformed except by the other side: it is in theory more difficult to argue for a change to the law. The majority rationalize the authorities by considering the employment cases which are supportive of their approach to be directly relevant, with other cases being either distinguishable as being in a different context or equivocal on the point. For the minority, there is a general common law rule which applies across the board, except insofar as certain employment cases have been influenced by a different statutory context.

Both sides thus claim that policy and precedent are aligned in their favour which is of course, no coincidence: there is a reflective relationship in their respective understandings of the law. As Mitchell has it, in cases such as *Haywood*,

judicial accounts of legal history... are made to legitimize subsequent statements about what the law is, by making the past consistent with, and indeed, appear to lead inevitably to, an assertion about the present;⁷⁴

and, one might add, the *future*. So understood, the framing of the debate in *Haywood* shows how controversial judicial development of the law can be presented as consistent with the courts' general conservatism with respect to precedent (as set out in Section B above).

E. Conceptions of Competence

Drawing together the themes from the above discussion, the limits of judicial law reform, and the presentation of a judge's reasoning, may be understood in terms of their conceptions of two forms of competence: institutional and constitutional. These are related but distinct: for example, it may be argued that judges should be wary of entering the field of social policy or areas of political controversy on the basis of the institutional reasons that they are ill-equipped to make decisions given their expertise and the nature of adversarial litigation, and cannot under-

⁷² *Haywood*, [80].

⁷³ *Ibid.*

⁷⁴ Mitchell, 2012, 179. See further at 182: "Once it is appreciated that judges have choices about where history starts, and about what kind of historical narrative they wish to construct from the historical cross-section that they have chosen, it becomes easier to understand how common law can be both apparently determined by history and capable of constant change." See also Lord Reed, 2015, p. 3.

take empirical research to support a change in the law.⁷⁵ The alternative is an argument on constitutional reasons concerning the proper allocation of responsibility between the branches of government. It is also clear that different judges do and will have different views on where the boundary is to be drawn in particular cases.⁷⁶ As Lord Lloyd-Jones, a Justice of the Supreme Court and former Chairman of the Law Commission, has recognized,

It is accepted that judges have the power to make new law... [and t]here are, no doubt, limits to the judicial function in this regard, although they are difficult to formulate with any precision.⁷⁷

One example of the difficulties is the defence of illegality in private law.⁷⁸ The Supreme Court heard four cases between 2014 and 2016, displaying serial disagreement over the relevant tests to be applied.⁷⁹ Broadly, the debate was between those who favoured a strict and clear application of rules and those who favoured a more nuanced, flexible approach, capable of taking into account the circumstances of the instant case. The latter view prevailed when the saga culminated in *Patel v. Mirza*.⁸⁰ In *Patel*, a majority of nine Justices adopted a test that considers the underlying purpose of the relevant law that has been contravened, any pertinent public policy engaged by the case and lastly the proportionality of denying the claim given the illegality in question.⁸¹ This approach was influenced by the work of the English Law Commission, which had favoured a structured discretion and reform by judicial development of the law.⁸² Lady Hale has since reflected on the recent history of illegality as

clearly an area of judge-made law where the judges had got us into a mess and Parliament was most unlikely to get us out of it. A thorough investigation by the Law Commission was a great help to us in trying to do so.⁸³

75 Although rare instances of reference to empirical research can be found: see *Hurnam v. The Attorney General and others (Mauritius)* [2017] UKPC 33 per Lord Wilson at [31].

76 See further, Lee, 2018c, pp. 157-161.

77 Lord Lloyd-Jones, 'General Principles of Law in International Law and Common Law', Conseil d'Etat, Paris, 16 February 2018, p. 7.

78 See especially the respective chapters by A. Bogg & S. Green, A. Burrows, J. Goudkamp, N. McBride, F. Wilmot-Smith & J. Lee in Green & Bogg, 2018; Lord Neuberger, 'Implications of Tort Law decisions', Address to Northern Ireland Personal Injury Bar's Inaugural Conference, County Down, 13 May 2017, para. 5.

79 *Hounga v. Allen* [2014] 1 WLR 2889; *Les Laboratoires Servier v. Apotex Inc* [2015] AC 430; *Jetivia SA v. Bilta (UK) Limited (in liquidation)* [2015] UKSC 23; and *Patel v. Mirza* [2016] UKSC 4. See Vos, 2018, paras. 17-23.

80 [2016] UKSC 42.

81 *Patel*, per Lord Toulson JSC at [120].

82 The final report was *The Illegality Defence* (Law Com 320, 2010). The Law Commission did recommend legislation in one respect, but the Supreme Court changed the law itself.

83 Lady Hale DPSC, 'Legislation or Judicial Law Reform: Where Should Judges Fear to Tread?', Society of Legal Scholars Annual Conference, Oxford, September 2016, p. 8. Available at: <https://www.supremecourt.uk/docs/speech-160907.pdf> (accessed 31 October 2018).

This observation highlights several considerations of relevance here: is the area one of judge-made law (and which has been complicated by the judiciary)? Is there the prospect of legislative intervention? Are there relevant reform proposals (in this case by the Law Commission) which can inform a court's decision? There has subsequently been some debate over the extent to which *Patel* applies across private law,⁸⁴ although it seems clear that the majority's intention was "to give general guidance on the topic".⁸⁵ The Supreme Court's approach was informed by the work of the Law Commission, but judicial reform leaves different uncertainties as to scope when compared to legislative reform. The common law usually proceeds incrementally, rather than implementing wider systemic reforms.

Patel is one of several instances signs of the Justices of the Supreme Court being willing to develop the law, especially where there has been Parliamentary "failure to take up judicial invitations, indeed judicial pleas"⁸⁶ to enact legislation: the rights of unmarried cohabiting couples is another.⁸⁷ Lord Neuberger has said that, although "it is important for a judge to know when to stand back and leave policy-based developments in the law to the legislature",⁸⁸ there is a safeguard in the possibility of legislative intervention. For,

if a judge makes a policy-based decision with which the legislature is not happy, the remedy in a system with parliamentary supremacy, such as we enjoy in the UK, lies with Parliament. Any decision made by a court can always be reversed by the legislature.⁸⁹

For this reason, Professor Burrows has argued that the judiciary should be willing to develop the law when the opportunity arises, as Parliament can always inter-

84 Compare *Henderson v. Dorset Healthcare University NHS Foundation Trust* [2016] EWHC 3275 (QB) per Jay J at [25] with *Gujra v. Roath* [2018] EWHC 854 (QB) per Martin Spencer J at [25].

85 Lord Neuberger, 2017, para. 5.

86 *Ibid.*, para. 26. See also Lord Toulson in *Patel*, *supra* note 81, at [114]: [114]: "Realistically, the prospect of legislation can be ignored. The government declined to take forward the [Law Commission's] bill on trusts because it was not seen to be 'a pressing priority for government' (a phrase familiar to the Commission), and there is no reason for optimism that it would take a different view if presented with a wider bill."

87 I considered both these areas of the law in 'The Etiquette of Law Reform' (*supra* note 7). In the absence of legislation, Lord Neuberger, described the judiciary as having "moved the law on... to treating [the property of unmarried cohabitants] in a way which may be as close to the treatment of property in a matrimonial context as it is possible for judge-made law properly to go": 'The Plight of the Unmarried' (speech delivered 21 June 2017), para. 16. See further Lord Neuberger's earlier 'The conspirators, the tax man, the Bill of Rights and a bit about the lovers', 2008 Chancery Bar Association Annual Lecture, Lady Hale's recent Keynote Speech, Resolution's 30th National Conference, Bristol, 20 April 2018, pp. 9-11 and her judgment in *Gow v. Grant (Scotland)* [2012] UKSC 29 at [44]-[56].

88 Lord Neuberger, 2017, para. 24.

89 *Ibid.*, para. 25. See also Lord Neuberger, President of the Supreme Court, 'Twenty Years a Judge: Reflections and Refractions', Neill Lecture 2017, Oxford Law Faculty, 10 February 2017, para. 51.

vene to correct them.⁹⁰ Lord Neuberger noted in the context of cohabitation “the absence of such legislation leaves the judiciary freer to do what seems right to them, albeit very much within limits”.⁹¹ Similarly, Lord Reed has said that “Where modernising legislation is absent, the development of the law becomes an important responsibility of the courts, within the limits of their constitutional and institutional competence”.⁹²

This formulation casts a duty on the courts: what Lord Toulson called “the responsibility of the courts for dealing with defects in the common law”,⁹³ although recognizing that departing from previous decisions “is never a step taken lightly”.⁹⁴ And judges’ understanding of the responsibility of the courts may evolve as Lord Thomas, the former Lord Chief Justice has recognized, “Parliament will be engaged for some years in Brexit and related issues”.⁹⁵ On this view, the courts should be more willing to play an active role in developing the law in other areas. Even if, ideally, a change should be made by the legislature, Parliamentary inertia invites the judiciary to take on the task of reform.

However, in some cases, the Justices recognize that some changes to the law may be more appropriately effected by Parliament, ideally after consideration by the Law Commission:⁹⁶ what is not clear is when such a change counts as more appropriate for Parliament rather than by the courts.⁹⁷ One relevant factor seems to be where there are *current* proposals for law reform, that may be a reason for the courts to exercise self-restraint in developing the law. An example of this approach is the Scots appeal of *Gordon v. Campbell Riddell Breeze Paterson*,⁹⁸ which concerned when the clock started on a prescription period in a breach of contract claim. The trustees alleged that their solicitors had breached their contractual duties to exercise skill and care in respect of dealings with the abortive termination of leases on land owned by the trust. It was held that the limitation period started when the trustees suffered loss – in incurring legal fees in respect of an application to the Scottish Land Court – and not when the trustees realized that they had a claim after their application to the Land Court failed. The prescription clock had therefore started more than 5 years before the claim was brought and

90 A. Burrows, ‘Post-Legislative Scrutiny, Legislative Drafting and the “Elusive Boundary”’, in M. Dyson, J. Lee & S.W. Stark (Eds.), *Fifty Years of the Law Commissions – the Dynamics of Law Reform*, Oxford, Hart Publishing, 2016, p. 196; see also A. Burrows, ‘A New Dawn for the Law of Illegality’, in S. Green & A. Bogg (Eds.), *Illegality after Patel v. Mirza*, Oxford, Hart Publishing, 2018, ch. 2.

91 Lord Neuberger, 2017 (*supra* note 87), para. 27.

92 Lord Reed, 2015, p. 12.

93 *Patel* (*supra* note 80) [114]. Relying on *R v. Jogee* [2016] 2 WLR 681, [85], and *Knauer v. Ministry of Justice* [2016] 2 WLR 672, [26]. See also *Clayton v. The Queen* (2006) 231 ALR 500, per Kirby J at [119].

94 *Patel* (*supra* note 80) [114].

95 Lord Thomas LCJ, ‘Law Reform Now in 21st Century Britain: Brexit and Beyond’, Scarman Lecture, 26 June 2017, para. 37.

96 See, e.g. *R (on the application of Black) v. Secretary of State for Justice* [2017] UKSC 81 per Lady Hale at [35].

97 Lee, *supra* note 7.

98 *Gordon & Ors (Trustees of the Inter Vivos Trust) v. Campbell Riddell Breeze Paterson LLP (Scotland)* [2017] UKSC 75.

so the action was prescribed. Lord Hodge recognized that this result indicated that there is a distinction between financial loss and “observable damage to... physical property”⁹⁹ and that “hard cases may be more common than it was previously thought”.¹⁰⁰ But his Lordship went on to note that there were “live proposals for law reform”,¹⁰¹ as the Scottish Law Commission has published its Report on *Prescription*.¹⁰² the reform would change the law so as to provide that the clock would only begin to run when the pursuer becomes aware of “the factual cause of loss by an act or omission”.¹⁰³ Lord Hodge recognized that the Scottish Government had announced its intention to bring forward legislative proposals based on the Commission’s recommendations. Thus,

It will be the task of the Members of the Scottish Parliament to decide whether they agree with the Scottish Law Commission’s recommendation for the reform of the discoverability test achieves a fair balance between the interests of the creditor and the debtor in the obligation to make reparation.¹⁰⁴

The primary focus for Lord Hodge was the proper construction of the statute. However, implicit in the quoted paragraph is the consideration that, even if the preferred interpretation gives rise to awkward or harsh applications, it is not for the courts to preempt live proposals for law reform (and indeed, the court may be reassured that a position regarded as unsatisfactory may soon be corrected). The judgment of the correct balance of fairness between debtor and creditor is properly one for the legislature.

The Chancellor of the High Court, Sir Geoffrey Vos, has recently expressed concerns about the willingness of UKSC Justices to develop the law judicially:

I think the integrity of the common law would be better preserved and enhanced if all our courts were to allow it to develop in the ways that it always has. I am not counselling some form of extreme judicial conservatism – far from it. But nonetheless, a measure of judicial restraint remains, I think, desirable.¹⁰⁵

The Chancellor “detected a greater willingness amongst modern judges to throw away the rule book”.¹⁰⁶ These points are framed in strong terms, and indicate another significant aspect to the judicial development of the law: if the Supreme

99 *Gordon*, [23].

100 *Gordon*, [25]; see also Lord Malcolm in the court below, *Gordon & Ors v. Campbell Riddell Breeze Paterson LLP* [2016] CSIH 16, [24].

101 *Gordon*, [25].

102 Scot Law Com No 247 (2017).

103 Report on Prescription, para. 3.20.

104 *Gordon*, [25]. At the time of writing, the Scottish Government had introduced the Prescription (Scotland) Bill, and the Scottish Parliament’s Delegated Powers and Law Reform Committee was considering responses to its call for evidence on the Bill.

105 Vos, 2018, para. 60.

106 *Ibid.*, para. 4.

Court is to insist upon strict adherence to precedent, is it beholden on the Justices to retain their traditional circumspection¹⁰⁷ with respect to the development of the law? Although, as we have seen, it is possible to identify what the Court sees as relevant considerations when determining whether it is appropriate to develop the law at all, and if so, in a particular direction, it is more difficult to predict the weight that will be given to those considerations in any given case.¹⁰⁸ The risk then is that the values of “coherence, clarity and predictability” as extolled by Lord Neuberger,¹⁰⁹ are undermined.

F Conclusions

The analysis in this article has demonstrated that the Justices of the Supreme Court share a commitment to observing the boundaries of proper judicial development of the law, as manifested in the language of their judgments. Lord Mance, the Deputy President of the Supreme Court has spoken of the “discipline” of judging:¹¹⁰

The attitudes and values with which judges approach their work is... central to the judicial role. I have already mentioned some [disciplinary] controls on judicial excess or exuberance: loyalty, precedent and methodology.¹¹¹

It is clear that the Justices’ shared commitment to this discipline of judging is intellectual rather than being merely rhetorical. The doctrine of precedent both facilitates and constrains judicial law reform: *Ivey* demonstrated that judicial enthusiasm to seize an opportunity to reform the law can sometimes burst free of such restrictions. Although there is a consensus that there is a boundary of appropriate judicial development, there does not seem to be a consensus as to where it should be drawn. As *Haywood* showed, the drawing of that boundary by individual judges is closely linked to their views of the substantive outcome of the relevant case, which is perhaps to be expected in a superior appellate court where cases are necessarily controversial.¹¹² I have argued that the debate over law reform in, and by, the Supreme Court is not just about the merits of particular cases, but also a product of different conceptions of the judicial role, both individual and collective.

107 *Knauer* (*supra* note 15).

108 Lee, 2016, pp. 285-286 and 296.

109 *Willers (No 2)* (*supra* note 4).

110 See also, A.W.B. Simpson, *Leading Cases in the Common Law*, Oxford, Oxford University Press, 1996: “The belief in legal science, in the deep principles of the common law, which underlies the conception of the leading case, remains, very influential today.”

111 Lord Mance, ‘The Role of Judges in a Representative Democracy’, Lecture given during the Judicial Committee of the Privy Council’s Fourth Sitting in The Bahamas, 24 February 2017. See also Lord Lloyd-Jones, 2018.

112 See, e.g. Lady Hale, ‘Judges, Power and Accountability Constitutional Implications of Judicial Selection’, Constitutional Law Summer School, Belfast 11 August 2017 and P. Daly (Ed.), *Apex Courts and the Common Law*, Toronto, University of Toronto Press, forthcoming, 2019.