TRYING COMMERCIAL LAW CASES

LECTURE: FOR THE SUPREME COURT OF BRUNEI DARUSSALAM

6 June 2024

INTRODUCTION: LINKS BETWEEN BRUNEI DARUSSALAM AND THE UNITED KINGDOM

1. It is an honour to serve as a Judge of the Supreme Court of Brunei Darussalam and I am enormously grateful for the warmth of my welcome here. Likewise, I am honoured to be asked to give this lecture on "*Trying Commercial Law Cases*" a topic which, in England[1], furnishes a prime example of common law development of the law – and it is the common law tradition and family which epitomises the historical - and continuing - connections between Brunei and the United Kingdom. Indeed, the field of justice is one of the strongest of the ties linking our two countries.
2. Today, 6 June, is also a most auspicious anniversary. It is 80 years from D-Day, the Anglo-American led invasion intended to rid Europe of the evils of Nazi Germany domination. Though the choice of date for today's lecture is wholly coincidental, it is worth a poignant pause to reflect on the importance of that successful and massive endeavour, of which we have all enjoyed the benefits in our lifetimes.
3. In outline, in addressing today's topic, I propose to begin by looking at the lessons to be learnt from the beginnings of the Commercial Court in London; then to look at three cornerstones of English law in the context of international trade and the common law method in developing the law. Thereafter, I would like to illustrate these more general concepts with two

[1] For shorthand and convenience, I refer to "England" and "English law" rather than "England and Wales" and "English and Welsh law".

practical examples: first, the doctrine of case management; secondly, a study of the law in action – namely, the interpretation of contracts. Finally, I will return to some early, very early, reflections on sitting as a Judge in Brunei.

4. May I make two things clear at the outset. First, the views I express are my own. They are not in any way intended to reflect the collegiate views of the Supreme Court of Brunei Darussalam or the Judiciary of England and Wales (from which I retired some 4 ½ years ago). Secondly, my professional experience was grounded in England, practicing English law as a barrister doing commercial and some Admiralty law (it now seems a long time ago!). It is never my view that simply because something has been done in English law, it should be followed elsewhere; Brunei law will set its own course and direction. But I do want to share my views and experience of English law in the hope that they will be of interest and use here.

LESSONS LEARNT FROM THE BEGINNINGS OF THE COMMERCIAL COURT IN LONDON

5. The Commercial Court with which I am most familiar is the English Commercial Court, which can properly be regarded as a world leader in this area. All great institutions must, however, start somewhere. The start of the Commercial Court in London is a story worth telling[2].
6. A General Average case called *Rose v Bank of Australasia* was tried in the Queen's Bench Division over 22 days in May 1891. The Judge was Lawrance J, described as a very popular Judge, who had practiced in a

[2] The account which follows is taken from V.V. Veeder, *Mr Justice Lawrance: the "true begetter" of the English Commercial Court* (1994) 110 LQR 292; and Sir David Foxton (as he now is), *The Life of Thomas E. Scrutton* (Cambridge University Press 2013), at pp. 100 – 102.

purely agricultural county, and whose elevation to the Bench owed more to politics than legal merit. A reserved judgment (if judgment it was) appeared some 6-9 months later. It was embarrassing. Whatever his other merits, Lawrance J was wholly out of his depth in dealing with General Average. Counsel, however, including amongst others the future Scrutton LJ, constituted a stellar selection of legal talent. In fairness, though reversed in the Court of Appeal, Lawrance J's judgment (perhaps by chance) was restored in the House of Lords – but for other reasons.

7. The fiasco of this Trial brought to a head the dissatisfaction of the London business community with the handling of civil trials. Their cases, they said, were not brought as a means of educating people who had never before heard of the matters involved. The upshot was the establishment of the Commercial Court, the start date now generally taken as 1 March 1895 - a Court devoted purely to commercial cases, with specially appointed Judges.

8. The establishment of the English Commercial Court gives rise to a number of interesting pointers, of the first importance for trying commercial cases:

   (1) First, the need for a specialist court with specialist Judges. That feature continues to this day; no one sits in the Commercial Court unless specifically designated, ordinarily on the basis of expertise in dealing with commercial cases. The Judges can then – and do – shape the practice, culture and ethos of the Court. Thus, the Court has well in mind that commercial law is intended to facilitate commerce. So too, case management (to which I return later) has been a feature of the Court's practice long before it became more widely fashionable.

(2) Secondly, the importance of the Court commanding the confidence of the business community, a matter linked to the respect in which the Judges are held.

(3) Thirdly, in London, the Court is assisted by specialist legal practitioners, solicitors and barristers. This is not a venture which the Judiciary alone can sustain.

(4) Fourthly, to attract and maintain international business, integrity, impartiality and expertise are all essential. London is a world class venue for commercial dispute resolution because these features are present. Litigants from all 4 corners of the globe are welcome; the same rules apply to all; there is no home ground advantage.[3]

9. Though still, in my view, the leading Commercial Court internationally, the Commercial Court in London is of course no longer alone. As you know[4], in recent decades newer courts have been created specifically to adjudicate on and attract international commercial cases.[5] Later, I shall return to this topic with some thoughts concerning Brunei.

THREE CORNERSTONES OF ENGLISH LAW IN THE INTERNATIONAL TRADE CONTEXT

10. I turn next to 3 cornerstones of English law in the international trade context, resulting in the combination of freedom of contract, certainty and flexibility, that is its hallmark.

11. In his remarkable work, *Making Commercial Law Through Practice 1830-1970 (2021),* Sir Ross Cranston[6], sets the scene as follows:[7]

[3] As I said in *Bank Mellat v HM Treasury* [2019] EWCA Civ 449

[4] Consider by way of examples, the experience of Singapore, Dubai and Qatar.

[5] See, Xandra Kramer & John Sorabji (Eds), *International Business Courts: A European and Global Perspective*, ch. 1, *Introduction – The International Business of Courts*, at p.2.

[6] Who has unusually varied experience as an academic, barrister, politician and Judge.

[7] At p.xvii of the Preface

"…the hand of state law was largely benign in the field of commercial transactions, absent fraud and egregious market abuse. Regulation was virtually non-existent, and the common law was predominantly facilitative, containing default rules which commercial parties could largely vary at will. State law offered a capacious and flexible framework within which commercial practices could operate and evolve… A familiar pattern when matters occasionally reached court was of the common law incorporating a commercial practice as a rule, reshaping existing rules in its shadow, or at the very least conferring its blessing on how things were being done."

12. Within this benign, flexible, framework three principles "*animated*" English commercial law during the period covered by Sir Ross Cranston. As he described them[8], the basic principle was *freedom of contract.* This entailed, first, that commercial parties should be held to their bargains; just because a bargain turned out badly for a party, did not entitle the court to intervene. Party autonomy was another dimension of freedom of contract; commercial parties could design for themselves, in a largely unfettered manner, the arrangements they desired for their transactions.
13. The second principle was *certainty*. Commercial law should comprise bright-line rules which commercial parties could readily understand and apply in commercial practice – knowing where they stood and planning for the future. The importance of certainty dated back to Lord Mansfield (the great 18th century Lord Chief Justice).[9]
14. The third principle was that "*…the law should be flexible enough to accommodate commercial expectations, needs and developments…*".

[8] At pp. 30-31
[9] *Lord Mansfield: Justice in the Age of Reason*, Poser (2013), at p.229.

Traditionally too, the expectations or needs of commerce guided or justified the decisions in commercial cases.[10] As I have already indicated it is this combination of *certainty* and *flexibility*, which has contributed immeasurably to the success of the common law, domestically and internationally.[11]

15. Even first principles can atrophy. How then did the law develop and do so in an acceptable, incremental manner? It did so in accordance with the "*common law method*", as explained by Sir John Laws in *"The Common Law Constitution*" (2014)[12]. Thus:[13]

"*…the method of the common law is fourfold: evolution, experiment, history and distillation…Evolution – rules of law honed through the doctrine of precedent; experiment – working hypotheses discarded if they are not robust; history – the power of continuity; distillation – the modification and adjustment of the law to meet new conditions…*"

16. As can at once be seen, the development of the English law of contract was largely down to Judge-made law – not statute. The Judicial art lay in knowing when to develop the law but not to do so in a manner which moved from permissible (and essential) judicial development to impermissible Judicial legislation, i.e., straying into areas best left to the Legislature. The dividing line is inevitably easier to state than to apply. But – at least in my view – it is best approached by a combination of judicial restraint and the application of the common law method. Having regard to social cohesion and consensus, together with relative institutional

[10] *The Life of Thomas E. Scrutton*, *supra,* at pp. 268-269
[11] See, generally, *A good forum to shop in London and English law post-Brexit,* Sir Peter Gross [2018] 1 LMCLQ 222.
[12] The 2013 Hamlyn Lectures.
[13] *Ibid*, at pp. 6-7

competence[14], the late Lord Bingham put it in terms of traffic lights – so, where amber was flashing the Courts should think long and hard before intervening.

17. Standing back, we can discern in outline where these principles or cornerstones leave us:

    (1) Commercial law should facilitate commerce.

    (2) Freedom of contract and party autonomy mean that the bargain made is the parties' bargain – it is not for the court to impose the bargain it thinks should have been made. More of this presently.

    (3) The right balance needs to be struck between certainty and predictability (on the one hand) and flexibility on the other, so adjusting to changed times and circumstances and doing practical justice[15].

    (4) As we shall see in a moment, delay is (save exceptionally) the enemy of justice. The Court's task is to keep the show on the road.

CASE MANAGEMENT

18. I come next to Case Management and would like to focus on a paper which I had the privilege to co-author together with a senior Australian Judge: *SIFoCC: International Best Practice in Case Management.* The paper was produced for SIFoCC (*The Standing International Forum of Commercial Courts*). My intention is to give you the flavour of international best practice.

19. Though my background and that of my co-author lies in the common law, the paper was intended to apply to civil law systems as well – and was

[14] In some areas, the Judiciary have advantages over the Legislature and Executive; in others, not so and the converse may prevail.

[15] See, by way of example the debate as to whether a contractual term is a "condition" strictly so-called or an intermediate term: *Spar Shipping v Grand China Logistics* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep 447.

adopted and published by SIFoCC on that basis. The paper recognised that the application of Case Management would vary in different national jurisdictions, but the fundamentals would be the same.

20. SIFoCC objectives include sharing best practices in commercial dispute resolution and promoting the Rule of Law. As the paper observed, "*The stability, fairness and equality before the law that comes with the Rule of Law protect and encourage investment.*" Commercial law exists to facilitate commerce, hence the importance of the Rule of Law to commercial law (even looked at in isolation). Case Management, largely judicially developed, exists in this context to assist in the resolution of commercial disputes. As we underlined, "*It is not process for its own sake. The mindset, culture or ethos is central. It should be seen as a means to an end to resolve disputes…*".

21. What then is Case Management? Put simply it "*entails a judicial 'grip' on the proceedings at all stages: pre-trial, trial, appellate and enforcement*". It means getting on with it, identifying and focusing on the real issues in dispute and not being sidetracked. In a nutshell: getting a judicial grip on the case; identifying the real issues as early as possible; keeping the show on the road.

22. Fundamental to Case Management is "*the early identification of what is common ground and what are the real issues*". It is as simple as that – but of profound importance. It streamlines the proceedings and facilitates the effective, efficient and expeditious resolution of disputes. Once the issues have been identified, you can concentrate on what matters, take a view on what evidence is needed and work out a sensible timetable for the case. As already flagged, such Case Management has been a feature of

London Commercial Court practice long before Case Management became more fashionable generally.

23. As a Judge (and Arbitrator) I have always said that I am "*allergic to adjournments*" – and that approach is very much part of the Case Management philosophy: "*Save exceptionally, delay is the enemy of justice and Case Management requires that applications for adjournments should be subjected to rigorous scrutiny.*" Exceptionally, however, Case Management accommodates relaxation of court-imposed timetables where appropriate in the interests of justice. In short, adjournments are so often the path of least resistance and best avoided; but there will be times (e.g., genuine ill-health) where an adjournment is unavoidable to do justice.

24. Who is responsible for Case Management. We suggested that Judicial leadership was *necessary* but, by itself not *sufficient*. The cooperation of the legal profession was fundamental and was to be viewed as professional best practice. The form this takes will vary in individual jurisdictions but in our view the principle was clear.

25. So far as the Judiciary is concerned:

"*Case Management must be seen as an integral part of the judicial role in commercial disputes. It forms a part of the judicial leadership mission. Sufficient time must be allowed… for the proper performance of this role.*"

That time is important as box ticking is not wanted.

26. Inevitably – the paper was written during Covid – we commented on the impact and harnessing of technology to improve Case Management. Internationally, Zoom came to the rescue of commercial law and commercial cases during Covid. For the future, that experience will undoubtedly eliminate much unnecessary travel but in-person hearings

(in my view) remain much to be preferred for trials and substantive appeals.

27. The SIFoCC paper is there for you to consider – it gives you a clear indication of international norms and will, I hope, prove useful for you.

THE INTERPRETATION OF CONTRACTS

28. How does English law approach the interpretation of contracts? An authoritative and concise statement is to be found in *A Restatement of the English Law of Contract*, by Lord Burrows JSC (as he now is)[16], at s.14:

"*(1) The correct approach to interpreting a term of a contract is to ask what the term, viewed in the light of the whole contract, would mean to a reasonable person, having all the relevant background knowledge reasonably available to the parties at the time the contract was made.*

(2) In applying subsection (1), one must consider –

(a) the natural and ordinary meaning of the words and syntax used;

(b) the overall purpose of the term and the contract;

(c) the facts and circumstances known or assumed by the parties at the time the contract was made;

(d) commercial common sense as at the time the contract was made, if that can be ascertained; but one must be careful to avoid placing too much emphasis on paragraph (b), (c), or (d) at the expense of paragraph (a).

[In short, purpose, surrounding circumstances and commercial common sense should not be over-emphasised at the expense of the language the parties have chosen to use.]

(3) In interpreting a term of a contract the words or syntax must not be amended in order to protect one of the parties from having entered into a

[16] 2nd ed. (2020), Assisted by an Advisory Group of Academics Judges and Practitioners, of which I was one.

bad bargain; but exceptionally it may be decided that the parties must have used the wrong words or syntax.

(4) In interpreting a term of a contract the pre-contractual negotiations of the parties must not be taken into account except where one party seeks to establish that a fact relevant to the background was known to the parties….

(5) In interpreting a term of a contract, the subsequent conduct of the parties must not be taken into account.

….”

29. That is a lot to absorb. Let me break it down.

(1) An objective exercise: The exercise is designed to establish the *objective* meaning of the language in which the parties have chosen to express their agreement. Please note the reference by Lord Burrows to a *reasonable person* – a pointer to the objective nature of the exercise. The *subjective* intention of the parties is irrelevant to the correct interpretation of a contract.[17]

[So, black means black – even if, subjectively, a party meant to say white.]

(2) The natural meaning of the language used: The parties have control over the language they used in the contract[18]. The natural meaning of that language - used by the parties in *their* contract - is of great importance, as Lord Burrows’ outline makes clear. But interpretation is not only a question of the literal meaning of the language used divorced from context.

[17] Though it may/will be relevant to other matters, e.g., rectification.

[18] *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, at [17]

(3) *The clause as a whole:* Clearly, the wording must be considered in the context of the clause as a whole; one cannot focus on a few words, regardless of the clause under consideration, read as a whole.

(4) *The contract as a whole:* Equally, the interpretation of an individual clause must be considered in the light of the contract as a whole. It must make sense in that context.

(5) *The factual background or matrix:* This factor enables regard to be had to the context in which the whole agreement is to be found – what a reasonable person, having all the relevant background knowledge reasonably available to the parties at the time the contract was made would understand it to mean. Although it may sometimes appear that there is a tension between language and context, both need to be considered as part of the "*unitary*" exercise of construction[19].

(6) *Commercial common sense:* When considering rival constructions of an agreement, weight can be given to the construction which makes better commercial sense. But caution is needed before such considerations displace the natural meaning of the words used. In particular, commercial common sense is not to be invoked retrospectively, with the wisdom of hindsight.[20]

(7) *The bargain is the parties' bargain:* It is necessary to keep in mind throughout that the bargain is the parties' bargain – not the bargain that the court thinks the parties should have made.

(8) *That the bargain has turned out badly is neither here nor there:* Sometimes, parties make very imprudent bargains. On other occasions, bargains turn out badly for one of the parties. It is no part

[19] As discussed further, below.

[20] *Arnold v Britton (supra)*, at [19] – [20].

of the court's function to relieve parties of the consequences of imprudence or bad advice.

(9) *A unitary and iterative exercise:* Construction is a single (unitary) exercise and each suggested interpretation should be checked against the provisions of the contract and a consideration of the commercial consequences.

(10) *Pre-contractual negotiations and post-contractual conduct:* In English law, pre-contractual negotiations and post-contractual conduct are not to be taken into account when construing a contract. Though my personal view is that there is much to be said for the approach taken by English law, it is by no means a universal approach. For example, it may be noted that the *DIFC Contract Law*[21] permits regard to be had to both these matters: see Art. 51, (a) and (c).

30. It is a feature of English law over the past few decades that the House of Lords and subsequently the Supreme Court, have repeatedly grappled with the question of contractual interpretation. An excellent synthesis[22] is provided by Lord Hodge JSC in *Wood v Capita* [2017] UKSC 24; [2017] AC 1173, at [10] – [15]:

"10. *The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the 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 that objective meaning.*

[21] DIFC Law No. 6 of 2004

[22] Which complements the *(Burrows) Restatement.*

11. … Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense…

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated…

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation 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. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be

particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type…

…

15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation."

The interpretation of contracts provides an excellent example of Judge-made common law at work.

INTERIM BRUNEIAN REFLECTIONS

31. I preface these few observations with humility and caution, conscious as I am both of the privilege of serving as a Judge of the Supreme Court here and being a very new member of the Court.

32. Brunei has, if I may say so, a strong common law tradition, with a demonstrably independent Judiciary under the leadership of the Chief Justice, who commands respect in the Region and beyond.[23] Brunei is situated in a Region which is itself exciting and dynamic, offering many opportunities for commercial and associated legal and judicial development. In setting the direction of the Court, a matter for Brunei, what might be the aims in the sphere of Commercial law? Commercial cases do appear in our list but there is no instant, overnight, recipe for conjuring up a dedicated Commercial Court commanding international support. Instead, building on what there is, with a relentless emphasis on

[23] The supportive coverage of Court proceedings in the *Borneo Bulletin* is noteworthy, highlighting their importance in society. Today (6 June 2024), the article entitled *Legal Eagles*, covered the current Court of Appeal session, and concluded with the observation that "*…the Court of Appeal plays a vital role in upholding the rule of law and safeguarding the rights of individuals within the legal system.*"

quality, must be the way ahead. As the reputation of the Court grows, so commercial work will be attracted over time.

33. This is, however, not a task the Judiciary can accomplish on its own; in particular, it requires the support of the profession allied to Judicial leadership. What can the profession do? Quality is the watchword. By way of examples, it is of great comfort to the Judiciary (in a common law system) when it can be reassured that those appearing in Court have taken care in the preparation of their bundles and the papers lodged with the Registry; know the case and their papers backwards (with all the references at hand); when bad points have been jettisoned and only good points are pursued; and when the authorities have been checked so that the Court has an up-to-date picture. These are challenges for the legal profession generally in common law jurisdictions (not just Brunei) – hence the focus on international best practice - but they are of great importance to the Judiciary and (which is in the profession's own interests) to driving up standards and boosting the standing of the Court.

34. Two final thoughts. First, Courts and arbitration are mutually supportive – they are not in competition. I was delighted to read[24] and would welcome learning more about the *Brunei Darussalam Arbitration Centre (BDAC)*; cooperation between the Court and arbitration can generally be said to boost the attractiveness of a Jurisdiction. Secondly, in time, Brunei may well consider exploring the possibility of forging links with SIFoCC and benefiting from the dissemination of best practice internationally which is part of SIFoCC's role.

35. Thank you.

[24] In the *Borneo Bulletin*.

The Rt Hon Sir Peter Gross