

The Commercial Bar Association

Lecture in Memory of Edmund King QC

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**“What have the French ever done for us?
Historic and Prospective French Influences on English Private Law”**

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It is my great privilege and pleasure to have been asked by COMBAR to deliver this lecture in honour of Edmund King QC, a much admired and much missed member of the Commercial bar. I have spoken elsewhere of how Edmund managed to combine his many achievements within the law with a broad hinterland outside of it. An important part of that hinterland was Edmund’s great love of France and of French language and culture, and he was astute in detecting cross-channel influences in unlikely places. A notable example, which was the subject of correspondence we exchanged in the last few months of 2020, was his theory that Ian Fleming based that most English of archetypes, James Bond, on a character created by the French writer Jean Bruce. That character was the secret agent Hubert Bonisseur de La Bath, who was also known as agent “double *one* seven”. That revelation will, I am sure, have immediately sparked in you, as it did in me, the contemplation of a succession of enticing counterfactuals – a world of *Le Docteur Non*, *Le Digit D’Or* and in which cocktails are drunk “*secoué, non agité*”.

I regret that I cannot offer you such a King’s feast of possibility this evening, with my study of trans-Manche transplants focussing on the rather more prosaic subject of the law. But I console myself with the knowledge that as well as being a brilliant conversationalist, Edmund was a serious scholar, and someone who understood only too well which topics are suitable subjects for continuing professional development, and which are not. While I fear the allusion would have been lost on Edmund, who never mastered the balls skills which a teacher at a parents’ evening once told him were essential for success in life, this lecture will be a game of three halves. First, I want to look at the historic influence of French legal writers on English private law. Next, I will look at the fate in English law of one particular French legal doctrine – the non-cumul rule which precludes the possibility of alternative contractual and non-contractual claims arising from the same facts. I will finish by looking at some of the reforms made to French contract law in 2016, and asking what lessons, if any, they may have to offer for the future development of English law.

The French Influence on the Development of English Contract Law in the Nineteenth Century

The extent of French influence on the development of English contract law was first the subject of serious study in an influential article by the late Professor Brian Simpson,

published in the Law Quarterly Review in 1975.¹ The particular focus of Professor Simpson's study was Robert Pothier. One French commentator described Pothier as "not a very original writer" whose "main strength and the primary reason for his posthumous distinction is his ability to compile and synthesise the ideas of his predecessors (both French and foreign) with remarkable clarity and concision".² If so, Pothier might be thought to personify the trait to which all puisne judges should aspire: the ability to organise without succumbing to the temptation to originate, and to do so briefly.

Professor Simpson traced the Pothier's influence³ on a number of areas of English contract law, of which I will briefly highlight four.

The first was his focus on contract as essentially a bilateral phenomenon, the product of the coincidence of offer and acceptance, in contrast to the previous unilateral enquiry favoured by English law of asking whether a promise was enforceable because consideration has been given for it. Simpson suggests that the decision in *Adams v Lindsell*,⁴ still a mainstay of the first week of most contract courses, adopted, without acknowledgement, the analysis set out in Pothier's *Treatise on the Contract of Sale*⁵ that a posted offer manifests an intention to contract which continues until the letter reaches the addressee, an analysis which was soon picked up in the second edition of Joseph Chitty's contracts treatise in 1834.⁶

The second example is a rather less happy one. It is the law of mistake which emerged as a separate doctrine in English contract law in the nineteenth century through decisions such as *Cundy v Lindsay*,⁷ and, in particular, the fraught issue of a mistake concerning the identity of the contractual counterparty.⁸ In the nineteenth century, the English courts were searching for a coherent theory with which to determine the significance of so-called identity mistakes in contract. As they had done on other occasions when in need of a conceptual corset to shape the fast-expanding body of English case law, they turned to French law, and in particular to Pothier. His influence can be found across all elements of the law relating to the effect of mistake in contracting,⁹ but his influence is particularly noticeable when it comes to identity

¹ A.W.B. Simpson, "Innovation in Nineteenth Century Contract Law" (1975) LQR 247. The article was based on a lecture Professor Simpson had given in Lincoln's Inn Old Hall.

² J-L Thireau quoted by Ciara Kennefick, "Violence in the Reformed Napoleonic Code: the Surprising Survival of Third Parties" in John Cartwright and Simon Whittaker (eds) *The Code Napoleon Rewritten; French Contract Law After the 2016 Reforms* (London, Bloomsbury, 2017) ("*The Code Napoleon Rewritten*") 109, 118.

³ In particular *Traité des Obligations* (Paris, Debure, 1761) published as *A Treaty on the Law of Obligations* in a translation by William David Evans (London, J Butterworth & Co, 1806); *Traité des Contrats de Louage Maritime* (Paris, Debure, 1775) published as *A Treatise on Maritime Contracts of Letting to Hire* in a translation by C Cushing (Boston, Cummings and Hilliard, 1821) and *Traité Du Contrat de Vente* (Paris, Debure, 1772) published as *A Treatise on the Contract of Sale* in a translation by L S Cushing (Boston, CC Little and J Brown, 1839).

⁴ (1818) 1 B & Al 681; 106 ER 250.

⁵ *Du Contrat de Vente* (1762) Pt 1, s II, art III.

⁶ Joseph Chitty and Harold Potter, *A Practical Treatise on the Law of Contracts Not Under Seal – and Upon the Usual Defences to Actions Thereon* 2nd (London, Sweet & Maxwell, 1838), 12. See also Mackenzie Chalmers' preface to the first edition of *Chalmers' Sale of Goods* (London, Butterworth & Co, 1893), which refers to Pothier's work on sale as "probably the best-reasoned treatise on the law of sale that has seen the light of day".

⁷ (1878) 3 App Cas 459.

⁸ See chapter 14 of John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* 5th (London, Sweet & Maxwell, 2019) for an in-depth study of this topic generally, and of Pothier's influence on the law relating to identity mistakes.

⁹ See C MacMillan, *Mistakes in Contract Law* (Oxford, Hart Publishing, 2010) chapter 5.

mistakes. Sir Edward Fry, in *Smith v Wheatcroft*,¹⁰ set out what appears to have been his own translation of a passage from Pothier's *Traité des Obligations* addressing identity mistakes,¹¹ albeit that translation included an ellipsis part way through.¹² The passage as quoted in Sir Edward Fry's judgment appeared to offer a very broad test as to the circumstances in which an identity mistake would preclude a contract – when the mistaken person would not have been “*equally* willing to make the contract with *any person whatever* as with him with whom [he] thought he was contracting”. Sir Edward Fry's rendition was repeatedly quoted in subsequent cases, sometimes with an attribution to Pothier and sometimes without. Critics of the doctrine of identity mistake which English law came to develop in reliance on these statements tended to blame Pothier for its parlous state.¹³ That criticism was justified in part, but Sir Edward Fry's ellipsis had made Pothier's statement support a rather broader doctrine of identity mistake than was in fact the case, by excluding a section which made it clear that the mistake had to be as to the *actual* person with whom the party intended to contract rather than some attribute of that person. The bell was finally to toll for Pothier's influence on this aspect of English law in *Shogun Finance Ltd v Hudson*.¹⁴

Pothier's influence on the nascent doctrine of frustration, as it emerged in *Taylor v Caldwell*,¹⁵ has proved rather more durable. In grappling with the consequences for the contract for the hire of the Surrey Gardens and Musical Hall of the accidental destruction of that building by fire, Sir Colin Blackburn noted that “the general subject is treated of by Pothier ... in his *Traité des Obligations*.”¹⁶ That great judge observed that:

“Although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law.”

Later his judgment, Sir Colin referred to what he described as Pothier's “celebrated *Traité du Contrat de Vente*”,¹⁷ and his own (Pothier-influenced) *On the Contract of Sale*,¹⁸ in support of the view that the principles governing the effect of the destruction of the subject of a contract of sale *de certo corpore* were merely an example of the more general rule which applied whenever contracts were entered into on the assumption that a particular thing or state of affairs would continue to exist.

The final example is the doctrine of remoteness as formulated in *Hadley v Baxendale*,¹⁹ and in particular, the distinction between the first and second rules, which reflected the twin-pronged approach adopted in Articles 1150 and 1151 of the French Civil Code. Those

¹⁰ (1878) 9 Ch D 223, 230.

¹¹ (n 3), Art. 19.

¹² JC Smith and JAC Thomas, “Pothier and the Three Dots” (1957) 20 LQR 38, 38-39.

¹³ See AL Goodhart, “Mistake as to Identity in Contract” (1941) 57 LQR 228, 244 (“it is certainly time that Pothier's statement be firmly and finally buried”); Lord Denning in *Lewis v Averay* [1972] 1 QB 198, 206 (“Pothier's statement has given rise to such refinements that it is time it was dead and buried together”); Denning LJ in *Solle v Butcher* [1950] 2 KB 671, 692 (“the doctrine of French law enunciated by Pothier is not part of English law”) and Pearce LJ in *Ingram v Little* [1961] 1 QB 31, 55.

¹⁴ [2003] UKHL 62, [2004] 1 AC 919, see eg Lord Millett, [61].

¹⁵ (1863) 3 B&S 826; 122 ER 309.

¹⁶ *Ibid*, 834-35, 313, referring to Part 3, Chapter 6, Article 3, § 668.

¹⁷ *Ibid*, 837, 314 referring to Part. 4, § 307, &c.; and Part 2, Chapter 1, Section 1, Article. 4, §1.

¹⁸ Sir Colin Blackburn, *A Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares and Merchandize* (London, W. Benning & Co, 1845), 173.

¹⁹ (1854) 9 Ex 341; 156 ER 145.

provisions did not reach English law directly from France, but travelled by a roundabout route. They were filtered through the American text *Sedgwick on the Measure of Damages*²⁰ which had in turn drawn on Pothier's *Treatise on Obligations*²¹ and his *Treatise on the Contract of Sale*.²²

Pothier's influence is seen not only in these general doctrines of English contract law, but also in the rules of commercial law applicable in more specific circumstances. For example, he had a significant influence on the law relating to bills of exchange. In 1822, Mr Justice Best in *Cox v Troy*²³ adopted Pothier's treatment of the effect of an obliterated signature on a bill of exchange, describing Pothier's opinion as an authority "as high as can be, next to a decision of a Court of Justice in this country", and observing that "we cannot have a better guide than Pothier on the subject". Pothier's influence also left its mark on the rules of English law relating to the customer's duty when drawing a cheque to take reasonable care to protect the bank against fraud;²⁴ the obligations of a bailee for reward;²⁵ and a master's obligation to take reasonable care to preserve cargo.²⁶

While Pothier was the French jurist who enjoyed the greatest influence on English law, he did not stand alone. Professor Ciara Kennefick has pointed to a number of other French treatises which were frequently cited by counsel and judges in English decisions in the nineteenth century.²⁷ In *Appleby v Myers*,²⁸ Mr Holl for the plaintiff cited from the works of Durantou, Troplong, Pothier and Domat, as well as Article 1135 of the French Civil Code and a decision of the Cour de Cassation reported in Dalloz's *Jurisprudence Générale*. Hannen for the defendant, in reply, complained that "the opinions of foreign jurists, however valuable to aid in the elucidation of a doubtful principle, cannot affect the decision here". Holl must have been disappointed to find Hannen's "Buy British" submission resonating with Sir Colin Blackburn, perhaps the most francophile of nineteenth-century judges. Rejecting the plaintiff's argument, Sir Colin stated:²⁹

"In the argument, much reference was made to the Civil law. The opinions of the great lawyers collected in the Digest afford us very great assistance in tracing out any question of doubtful principle; but they do not bind us: and we think that, on the

²⁰ Theodore Sedgwick, *A Treatise on the Measure of Damages* 2nd (New York, Baker, Voorhis & Co, 1852), 64-67.

²¹ *A Treatise on the Law of Obligations of Contracts* (London, J Butterworth & Co, 1806) Part 1, Chapter 2 Article III.

²² *A Treatise on the Contract of Sale* (Boston, CC Little and J Brown, 1839) Part II, Chapter 1, Article V.

²³ *Cox v Troy* (1822) 5 B & Ald 474, 480-81, 106 ER 1264, 1266.

²⁴ Best CJ in *Young v Grote* (1827) 4 Bing 253, 258; 130 ER 764, 766 citing Pothier's *Traité du Contrat de Change, de la Négociation Qui Se Fait par La Lettre de Change et Autres BILLETS de Commerce* (Paris, Debure, 1809), 61 discussed in *Schofield v The Earl of Londesborough* [1896] AC 514 and subsequently approved in *London Joint Stock Bank Limited v Macmillan* [1918] AC 777, 792-793.

²⁵ *Searle v Laverick* (1873-74) LR 9 QB 122, 128, Sir Colin Blackburn citing Pothier's *Du Contrat de Louage*, (Paris, Debure, 1821) Part 2, Chapter 1, §118-120, and describing him as "that very learned author".

²⁶ *Notara v Henderson* (1871-72) LR 7 QB 225, 233 citing three of Pothier's works: *Des Obligations* (n 3), Article 142; *Du Contrat du Nantissement* (Paris, Debure 1767) (Pledge) Articles 29 and following, and *Supplement Au Traité du Louage: De Louages Maritimes* (Paris, Debure, 1775), Article 31.

²⁷ Professor Ciara Kennefick, "Looking Afresh at the French Roots of Continuous Easements in English Law" in W Eves, J Hudson, I Ivarsen, & S White (Eds), *Common Law, Civil Law, and Colonial Law: Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries* (Cambridge: Cambridge University Press, 2021), 183-205. I would like to thank Professor Kennefick for her assistance in researching this section of the paper.

²⁸ (1867) LR 2 CP 651, 653-658.

²⁹ *Ibid*, 660.

principles of English law ... the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shewn that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.”

In *The Teutonia*,³⁰ debating the effect of the outbreak of war on a charterparty, Sir Robert Phillimore cited Article XV of the French *Ordonnance de la Marine* and textbooks written by René-Josué Valin,³¹ Balthazard-Marie Emérigon³² and Pierre-Sébastien Boulay-Paty.³³

Before concluding this part of the lecture, I want to look rather more closely at two other French treatise writers who were particularly influential in the development of English commercial law, but who have rather languished in Pothier's shadow. The first, Balthazard-Marie Emérigon,³⁴ was the author of *Traité des Assurance et des Contrats à la Grosse*,³⁵ a seminal treatise on insurance law published in 1783, the year before Emérigon's death. In that brief intervening period, an article in the *Journal de Provence* later recalled, Emérigon would respond to any letters written to him raising questions about insurance law by simply referring his correspondent to the relevant passage in his book. Among many notable observations in his work is one contrasting the insurer's pleasure in receiving premium with his pain experienced in paying claims, which Emérigon likened to the contrast between the pleasure of conception and the pain of childbirth. Emérigon's book, which in modern parlance was a practitioner text, was first translated into English in London in 1850,³⁶ but it had become hugely influential long before that. It is possible to find some 120 references to Emérigon's *Traité* in English or Privy Council decisions, the greater part in the period after Meredith's English translation became available, but over 40 at a time when the text was only available in French. They include such significant cases of English insurance law as *Trinder Anderson & Co v Thames and Mersey Marine Insurance*³⁷ and *Spence v Union Marine Insurance Co Ltd*.³⁸ Sir Colin Blackburn was among those to praise “Emérigon's high character for learning and research.”³⁹

The other French jurist who enjoyed frequent citation in English commercial cases was Jean-Marie Pardessus. His father had been a pupil of Pothier's, and Pardessus was appointed to the chair in commercial law at the University of Paris on its formation in 1810, later losing it as

³⁰ (1869) LR 3 A & E 394.

³¹ R. J Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine du Mois d'Aout 1681* 2 v. (La Rochelle, J Legier, 1760).

³² *Traité des Assurances et des Contrats à la Grosse d'Emérigon* (Paris, Henri Bossange, 1827) edited by P S Boulay-Paty, v. i. cap. xii., sec. xxxi.

³³ *Cours de droit Commercial Maritime* (Paris, Videcoq, 1834) tit viii; s 10, v 2, 424.

³⁴ See Alfred Jauffret, “Un Comparatiste Au XVIIe Siècle: Balthazard-Marie Emérigon”, *Revue Internationale de droit comparé*, Vol 24(2) (1972) 265-277 for more information about Emérigon, one of 13 children. All six of his sons became lawyers who enjoyed distinguished careers, and the potential of his daughters, had they been born in more auspicious times, can only be wondered at. See also Charles E Shields III, “Chancellor Kent's Abridgment of Emérigon's Maritime Insurance” (2004) 108 *Dick L Rev* 1123.

³⁵ 2 vs, published by Jean Mossy in Marseilles in 1783.

³⁶ Samuel Meredith, *A Treatise on Insurances by Balthazard Marie Emérigon translated from the French* (London, Butterworths, 1850). A translation by John E Hall of that part of Emérigon's work concerning respondentia and bottomry as *An Essay on Maritime Loans* was published by Farrand and Nicholas in Philadelphia in 1811. Hall had apparently produced a translation of the full *Treatise* which never made it to publication: see Shields, (n 34), 1138.

³⁷ [1898] 2 QB 114.

³⁸ (1867-68) LR 3 CP 427

³⁹ *Potter v Rankin* (1873) LR 6 HL 83, 125.

the political wind changed with the fall of Louis XVIII. His lectures were published in four volumes under the title *Cours de Droit Commercial*⁴⁰ and were described by one English reviewer as “the most complete course of commercial law that has ever been published”.⁴¹ He also published four volumes of collections of maritime laws,⁴² and two on the laws of the sea.⁴³ Although those works were never translated into English, they were nonetheless cited on a regular basis in English authorities. Excluding appeals from civilian jurisdictions, between 1782 and 1896 references to Pardessus’ work can be found in 30 cases, including such decisions such as *Castrique v Imrie*,⁴⁴ *Overend Gurney Co ex parte Swan*⁴⁵ and *Dakin v Oxley*.⁴⁶

Various explanations have been offered for the popularity which French legal treatises enjoyed in English courts in the nineteenth century. Professor Simpson attributes it to the fact that English treatises had traditionally taken the form of annotated digests or abridgements of cases, rather than a systematic statement and exploration of principle. As he explained, in England:

“There existed no literary tradition of expounding the law of contract in a form which invites the reader to proceed to the solution of problems by applying general principles of substantive law”.⁴⁷

The French texts, and the Roman works on which they had themselves drawn, provided inspiration for a new generation of English textbook writers, and also for the lawyers and judges who consumed their product. Professor Geoffrey Samuel⁴⁸ identifies further causes of the interest in French *doctrine*. First the procedural reforms undertaken in the English legal system from the middle of the century – the abolition of the forms of action in 1852 and the gradual disappearance of the civil jury – which moved English law away from a procedure-based focus on claims to one based on legal principles. Second, the legal establishment’s reaction to the Report of the House of Commons Select Committee on Legal Education depicting the parlous state of legal education in Britain and Ireland.⁴⁹ By the end of the nineteenth century, reference to French jurists and legal sources had become much less common, their influence on English texts now lost to time, and the substantial body of English case law providing a more than sufficient stock of source material for advocates and judges to draw on. But that influence remains embedded in the DNA of English private law, and, like an atavistic gene, it has enjoyed the occasional re-appearance.

The doctrine of non-cumul

⁴⁰ Paris, Garnery, 1813-1817.

⁴¹ (1832) *Law Magazine or Quarterly Review of Jurisprudence* 438.

⁴² *Collection de Lois Maritimes* 4 vs (Paris, L’Imprimerie Royale, 1828-1848).

⁴³ *Us et Coutumes de la Mer* 2vs (Paris, L’Imprimerie Royale, 1847).

⁴⁴ (1869-70) LR 4 HL 414.

⁴⁵ (1868) LR 6 Eq 344.

⁴⁶ (1864) 15 CBNS 646, 143 ER 938.

⁴⁷ (n 1), 251-52.

⁴⁸ Professor Geoffrey Samuel, “Civil Codes and the Restructuring of the Common Law”, chapter 9 of Duncan Fairgrieve (ed), *The Influence of the French Civil Code on the Common Law and Beyond* (London, British Institute of International and Comparative Law, 2007), 96.

⁴⁹ *Report from the Select Committee on Legal Education* (1846) House of Commons Reports and Papers Vol 686

In the second part of this lecture, I want to look at the fate of one particular doctrine of French private law in English cases: the doctrine of non-cumul. The issue which the doctrine seeks to address, and the competing solutions to it, were elegantly outlined by Lord Goff in *Henderson v Merrett Syndicates Ltd*⁵⁰ when he observed:

“All systems of law which recognise a law of contract and a law of tort (or delict) have to solve the problem of the possibility of concurrent claims arising from breach of duty under the two rubrics of the law. Although there are variants, broadly speaking two possible solutions present themselves: either to insist that the claimant should pursue his remedy in contract alone, or to allow him to choose which remedy he prefers ... France has adopted the former solution in its doctrine of non cumul, under which the concurrence of claims in contract and tort is outlawed ...”.

Lord Goff noted that English law, because of its historical procedural framework, had not segregated claims into separate contract and tort categories before the abolition of the forms of action by the Common Law Procedure Act 1852. While there had been English decisions which veered towards the French solution,⁵¹ Lord Goff rejected it, advising us all to beware “the temptation of elegance”.⁵² As is well known, he concluded:⁵³

“there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded.”

So much for the principle of non-cumul, one might think. And yet the considerations which under-pin the doctrine – the primacy of contract, and the uncertainties which follow from giving the claimant an unfettered choice of causes of action depending on which best serves their purpose – have retained their allure.

In *Henderson v Merrett*, the ability to sue a contracting party in tort mattered for limitation reasons, not simply because of the different points-in-time at which the causes of action accrue, but because the statutory extension of the limitation period under the Latent Damage Act 1986 applies only to claims in tort. But in the substantive, rather than the procedural, context, English courts have proved more susceptible to the argument that a party with claims in both contract and tort should not be better off by pursuing one claim rather than the other. Thus the courts have interpreted the Law Reform (Contributory Negligence) Act 1945 so as to achieve a form of reverse non-cumul, with the defence being available to claims brought solely in contract in respect of a duty of care owed concurrently in tort.⁵⁴ As Professor Paul

⁵⁰ [1995] 2 AC 145, 184,

⁵¹ Eg *Groom v Crocker* [1939] 1 KB 194 and *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, 107.

⁵² (n 50), 197.

⁵³ (n 50), 193-194.

⁵⁴ *Forsikringsaktieselskapet Vesta v Butcher* [1988] 3 WLR 565. On this topic see T Foxtan, “Share and Share Alike: Contributory Negligence in Contractual Claims” (2017) Oxford University Undergraduate Law Journal 21.

Davies has explained, the rationale for this outcome is that “the defendant should not be deprived of the defence of contributory negligence simply because the claimant chooses to frame his claim in contract rather than tort”.⁵⁵

The courts have also been reluctant to allow a party to a contractual relationship to gain the benefit of a more favourable test of remoteness by suing in tort. The first attempt to achieve this goal – brave in conception but challenging in execution – was to suggest that the remoteness test should depend on the *type* of harm suffered, rather than the cause of action, with the tighter contractual test applying to economic loss, and the broader tort test to physical damage and bodily injury.⁵⁶ Lord Goff observed in *Henderson v Merrett* that an attempt to draw a distinction of that kind was “perhaps crying for the moon”.⁵⁷ However, part of that lunar landscape was subsequently captured by Court of Appeal decision in *Wellesely Partners Ltd v Withers LLP*,⁵⁸ Floyd LJ being persuaded that:

“where, as in the present case, contractual and tortious duties to take care in carrying out instructions exist side by side, the test for recoverability of damage for economic loss should be the same, and should be the contractual one.”

Floyd LJ said that the remoteness test in contract reflected the fact “that the parties have the opportunity to draw special circumstances to each other's attention at the time of formation of the contract” and thereby reach a consensus as to the kinds and duration of loss for which they would be liable in the event of breach. In his view:

“It makes no sense at all for the existence of the concurrent duty in tort to upset this consensus, particularly given that the tortious duty arises out of the same assumption of responsibility as exists under the contract.”

The final area in which a principle of non-cumul of contract and tort claims has received some support arises in a context in which I must tread with care, having unsuccessfully argued one of the cases which sought to grapple with the issue. So far as questions of applicable law and general jurisdiction are concerned, there is no doubt that a claimant with concurrent contract and tort claims can choose the cause of action which best serves their purpose.⁵⁹ But what of the protective jurisdictional regime for employment claims provided for by the Brussels I Regulation and the various associated regimes for “matters relating to individual contracts of employment”?⁶⁰ In particular can an employer, by suing their employee in tort in respect of matters for which the employer also has a claim under the contract of employment, remove the claim from the special jurisdictional regime? Initially, there was some support for the view that the employer's choice between concurrent and tortious and contractual claims could not affect the application of that jurisdictional regime:

⁵⁵ Paul S Davies, “Concurrent Liability: A Spluttering Revolution”, *Revolution and Evolution in Private Law* ed. Sarah Worthington, Andrew Robertson and Graham Virgo (Oxford, Hart Publishing, 2018), 273, 286.

⁵⁶ *Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791.

⁵⁷ (n 50), 186.

⁵⁸ [2016] Ch 529, [80].

⁵⁹ For service out see *The ERAS Eil Actions* [1992] 1 Lloyd's Rep 570. For applicable law, see *Base Metal Trading Ltd v Shamurin* [2004] EWCA 1316, [2005] 1 WLR 1157, [35] (and for an argument in favour of “applicable law non-cumul” see Professor Adrian Briggs, “Choice of choice of law” [2003] LMCLQ 12).

⁶⁰ Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2007] OJ L339/1, Section 5.

from Silber J in *CEF Holdings v. Munday*⁶¹ and from Longmore LJ (in particular) in *Alfa Laval Tumba v Separator Spares International*.⁶²

However that decision was distinguished, and a pure principle of non-cumul rejected, by the Court of Appeal in *Arcadia Petroleum Limited v Bosworth*,⁶³ the Court holding it was not enough that the matters complained of *could* have been asserted as a breach of the employment contract, but rather that it was necessary to ask if the claim could “reasonably be regarded” as one for breach of contract, for which purpose it was necessary to focus on the substance of the matter and to ask whether it was “indispensable” to consider the contract in order to resolve the matter in dispute. The Advocate General, on the reference to the Court of Justice of the European Union, delivered an opinion which would have allowed a claimant with concurrent claims in contract and tort a choice of jurisdictions under Articles 5(1) and (3) of the Lugano Convention,⁶⁴ but he adopted a rather stricter position for the special jurisdictional provisions relating to employment, contending that the mere fact that a claim was brought in tort did not place it outside the special jurisdictional regime, provided that there was a material link between the claim and the contract of employment.⁶⁵ For its part, the Court of Justice did not address the issue at all, holding that the special jurisdictional rules for claims relating to contracts of employment were not engaged in the case.⁶⁶

So where does that leave us? There have been two first instance decisions which have grappled with the resultant state of the law: *Semtech Corp and others v Lacunaspace Limited and others*⁶⁷ and *Chep Equipment Pooling BV v ITS Limited*.⁶⁸ Both followed the decision of the Court of Appeal, but concluded that the claims brought in tort in those cases *did* fall within the special jurisdictional regime for “matters relating to individual contracts of employment”. The result is that we appear to have a form of jurisdictional non-cumul in this very specific context, albeit one to be applied by reference to the substance rather than form of the claim. For those hoping that this issue is now a matter of historical interest only, it may be relevant to note that the special jurisdiction regime for employment claims remains part of the English jurisdictional scene by virtue of what is now s15C⁶⁹ of the Civil Jurisdiction and Judgments Act 1982.

The doctrine of non-cumul, and the primacy it accords to the parties’ contractual rights, is generally invoked when there are concurrent claims in contract and tort. However, similar issues have arisen when considering whether there is room for claims in unjust enrichment between contracting parties, and the interrelationship of contract and equity.

Taking unjust enrichment first, it is possible to find statements of the law with a distinct non-cumul flavour, such as that by Sir Jeremy Cooke that the subsistence of a contract between the parties leaves “no room for restitution at all ... There is no room for a remedy outside the terms of the contract where what is done amounts to a breach of it, where ordinary contractual remedies can apply and payment of damages is the secondary liability for which

⁶¹ [2012] EWHC 1524, [160]-[167].

⁶² [2012] EWCA Civ 1569, [2013] 1 WLR 1110, [22], [24], [28] (Longmore LJ).

⁶³ [2016] EWCA Civ 818; [2016] 2 CLC 387, [66].

⁶⁴ *Arcadia Petroleum Ltd v Bosworth* Case 603/17 [2020] ICR 349, [AG83]-[AG84].

⁶⁵ *Ibid*, [AG93]-[AG94].

⁶⁶ *Ibid*, [36].

⁶⁷ [2021] EWHC 1143 (Pat), [67].

⁶⁸ [2021] EWHC 2485 (Comm), [88]-[89], [108].

⁶⁹ Added by Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479 Pt 2 reg 26 (December 31, 2020).

the contract provides.”⁷⁰ That statement was too wide, but in the vast majority of cases, the continued subsistence of a contract presents an obstacle to an unjust enrichment claim between the contracting parties in relation to a benefit transferred under the contract, a principle no longer rationalised (as it once was) on the basis of the doctrinal supremacy of contract law, but because permitting a claim in unjust enrichment will generally cut across the allocation of risk or agreement as to value inherent in the contract.⁷¹

Given this substantive justification, the effect of a subsisting contract on unjust enrichment claims has a rather different justification to the taxonomy-driven non-cumul rule in French law. As has been noted, the effect of the subsisting contract is, in most cases, to negate the unjust factor, the failure of condition or basis, on which an unjust enrichment claim depends.⁷² But the primacy accorded to the terms of the contract, in determining what the basis of the transfer was, or what conditions were attached to it,⁷³ is redolent of the pre-eminence accorded to contract law by the doctrine of non-cumul. And where the contract itself provides, expressly or by implication, for a right to recover a payment or benefit in certain circumstances, there is support for a pure principle of non-cumul, and that the contractual right precludes a concurrent claim for recovery in unjust enrichment. Lord Goff, in *The Trident Beauty*,⁷⁴ explained the rationale for this principle in terms which are immediately familiar to proponents of a non-cumul approach:

“[T]he law of restitution has no part to play in the matter; the existence of the agreed regime renders the imposition by the law of a remedy in restitution both unnecessary and inappropriate.”

The courts in Australia may have gone a stage further towards a non-cumul principle when contract and unjust enrichment claims are available between the contracting parties. By a majority of 4:3, the High Court in *Mann v Paterson Constructions Pty Limited*⁷⁵ has stepped back from an earlier decision⁷⁶ that when work was done or services provided under a contract, but no right to payment accrues because of the other party’s breach, the claimant was confined to a claim in damages and could not claim in unjust enrichment. However, the majority held that the contractual remuneration fixed the upper limit of any restitutionary recovery – in short, the claimant could not be better off suing in unjust enrichment than in contract.

The operation of the doctrines and remedies of equity in “the contractual space” is another complex topic. Here too it is possible to detect the occasional manifestation of the view that the rights and remedies of the parties’ contract are paramount, and the scope for the concurrent operation of doctrines of equity to achieve an outcome which differs in some meaningful respect from that which would follow in contract, correspondingly limited. One interesting example, given the limitation imperative which made the issue of concurrent claims so important in *Henderson v Merrett*, is where one party to a fiduciary contractual relationship seeks to avoid the effect of the contractual limitation period by claiming equitable compensation for conduct which involved a breach of a fiduciary as well as contractual duty.

⁷⁰ *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm), [23].

⁷¹ Goff & Jones, *The Law of Unjust Enrichment*, 9th (London, Sweet & Maxwell, 2016) [3-12] to [3-13], [3-16].

⁷² A point well-made by Carr LJ in *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149, [67], [70].

⁷³ *Ibid*, [116]-[117], [133] (Carr LJ); [141] (Sir Timothy Lloyd). [142] (Asplin LJ).

⁷⁴ *Pan Ocean Shipping Co Ltd v Creditcrop Ltd (The Trident Beauty)* [1994] 1 WLR 161, 164.

⁷⁵ [2019] HCA 32.

⁷⁶ *Baltic Shipping Company v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344.

In *Cia de Seguros Imperio v Heath (RBX) Ltd*,⁷⁷ the Court of Appeal rejected such an attempt, Waller LJ observing that:

“In my view the authorities ... support the submission that equity would have taken the view that it should apply the statute by analogy to a claim for damages or compensation for a dishonest breach of fiduciary duty. I say that because what is alleged against Heaths as giving rise to the dishonest breach of fiduciary duty are precisely those facts which are also relied on for alleging breach of contract or breach of duty in tort.”

Another celebrated example is the treatment of breach of a “commercial trust”, arising in the context of a contractual relationship between trustee and beneficiary, as considered in *AIB Group (UK) plc v Mark Redler*⁷⁸ and before that in *Target Holdings Ltd v Redferns*.⁷⁹ In simplified terms, in those cases the issue was whether a claim for relief in equity for breach of such a trust could deliver an outcome which was substantially different from that available at common law for breach of the concurrent contractual promise, by seeking relief pursuant to the court’s power to order an account and then surcharge and falsify, rather than compensation assessed on an essentially “but for” basis. The answer, in both cases, was that it could not.⁸⁰ In *AIB*, Lord Toulson emphasised the importance of the contractual context, stating:⁸¹

“it is a fact that a commercial trust differs from a typical traditional trust in that it arises out of a contract rather than the transfer of property by way of gift. The contract defines the parameters of the trust”;

and he observed that “in circumstances such as those in *Target Holdings* the extent of equitable compensation should be the same as if damages for breach of contract were sought at common law.” In so doing, he cited with apparent approval a statement by Professor Hayton that “where a bare trust is mere incidental machinery in the furtherance of a contractual agreement, ... there are sufficient policy reasons to oust traditional trust law principles as to consequential losses”.⁸² That view has also attracted the approval of the Hong Kong Final Court of Appeal.⁸³

So in terms of substance at least, elements of a doctrine of non-cumul are now found in English private law, and Professor Davies is surely right to contend that “the general trend of the law is to move away from allowing the claimant freely to choose how to label his or her claim in order to obtain all the advantages that flow from that characterisation”.⁸⁴ What about style? In *Henderson*, in rejecting the recognition of a rule of non-cumul in English private law, Lord Goff contrasted the seductive elegance of the French system of categorisation, with the “untidy” position under English law. However, English jurists have become increasingly enamoured by the idea of clean and conceptually distinct lines in the taxonomy of private

⁷⁷ [2001] 1 WLR 112, 121.

⁷⁸ [2014] UKSC 58; [2015] AC 1503.

⁷⁹ [1996] AC 421.

⁸⁰ (n 78), [70]-[71] (Lord Toulson); [138]-[139] (Lord Reed).

⁸¹ *Ibid.*

⁸² D Hayton, “Unique Rules for the Unique Institution, the Trust” in S Degeling and J Edelman (es), *Equity in Commercial Law* ((Sydney, Lawbook Co, 2005), 305.

⁸³ *Thanakharn Kasikhorn Thai Chamkat (Mahachon) v Akai Holdings Ltd* [2010] HKCFA 64, [155].

⁸⁴ Paul S Davies, (n 55#), 274. See also Sir Rupert Jackson, “Concurrent Liability: Where Have Things Gone Wrong?” [2015] 23 Tort [Law Review 3, 3, arguing that the law took a “wrong turning” on the issue of concurrent liability in *Henderson v Merrett*.

law, a tendency which owes much to the influence of the late Professor Birks. He argued persuasively and repeatedly for a taxonomy of English private law, encouraging private law scholars to be inspired by their nineteenth-century predecessors who sought to map the structure of English private law on coherent lines, and to follow their example by looking to civil law for a model in doing so.⁸⁵ Many of those Birks acolytes have been rapidly ascending the academic and judicial hierarchies in this jurisdiction and elsewhere.⁸⁶ So we may be fast reaching the point when we can safely succumb to the temptation of elegance after all.

The 2016 reforms of French contract law: what, if anything, do they have to tell us?

The final part of this lecture concerns the very significant reform and restatement of French contract law effected by Ordonnance No 2016-31.⁸⁷ The benefits which that reform was intended to bring to French contract law, which may not all be mutually compatible, were summarised in a report to the President of the Republic as follows: “to modernise it, to facilitate its accessibility and readability, while still preserving the spirit of the Code civil, at the same time favourable to a consensualism which encourages economic exchange and which is protective of the weakest”.⁸⁸ So no pressure there.

It may be a source of some satisfaction to those here that one of the principal reasons for the extensive reform programme was a perception that French contract law was less attractive than the common law to those conducting international business transactions. Madame Taubira, the Minister of Justice at the time of the reforms, justified them with the following rallying cry:

“There is a battle for influence in Europe between our continental law ... and the common law ... This battle is ... permanent. Our law does not inspire anyone in the world”.⁸⁹

However, I hope we can rapidly replace any fleeting feeling of satisfaction with one of curiosity as to what changes have been made and what we might learn from them. While some may feel that we are at the start of an era in which the Supreme Court will be critically re-evaluating many features of English private law, the process will reach us over time in the manner of a serialised novel rather than as a completed work in the manner of the French reforms of 2016. I am going to look at a selection of those reforms, focussing on those which might be thought to have particular resonance to current trends or tensions in English contract law.

Pre-contract disclosure

⁸⁵ See e.g. "Unjust Enrichment—A Reply to Mr Hedley" (1985) 5 LS 67, 70; "Rights, Wrongs and Remedies" OJLS 2000, 20(1), 1; "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UWAL Rev 1, 4-5; "Definition and Division: A Meditation on Institutes 3.13" in P Birks (ed), *The Classification of Obligations* (Oxford, Oxford University Press, 1997), 3-4, 34-35; *English Private Law* (Oxford, Oxford University Press, 2000), xxix. See also D Sheehan and TT Arvind, "Private Law Theory and Taxonomy: Reframing the Debate" [2015] Legal Studies 480.

⁸⁶ For Professor Birks' influence in Singapore see Rachel Leow and Timothy Liao, "Birksian Themes and their Impact in England and Singapore: Three Points of Difference" [2021] LMCLQ 350.

⁸⁷ *Ordonnance No 2016-31 due 10 Février 2016 Portant Réforme du Droit des Contrats, du Régime General et de la Preuve des Obligations*.

⁸⁸ *Report to the President of the République*, 2.

⁸⁹ JO S (CR) 24 January 2014, 632.

The first, and perhaps the most obvious, point of comparison between French and English contract law is the centrality which the concept of good faith is given in the French restatement. Article 1104 provides that;

“Contracts must be negotiated, formed and performed in good faith”.

I am not going to explore the well-trodden ground of the desirability of the parties to some, or all, contracts owing a mutual duty of good faith in the performance of a contract. That is neither a new principle of French law, nor a fresh controversy for English lawyers.⁹⁰ However, what *is* new about Article 1104 is its reference to good faith in the negotiation of contracts, an obligation which, whilst appearing in a codification of the law of contract, cannot itself be contractual in origin. This French innovation has been criticised on the basis that it “runs the risk of courts seeing it as an invitation to produce new rules beyond those already set out for negotiation, obligations of information or fraud”.⁹¹ The generalised statement in Article 1104 is given effect in other provisions in the Ordonnance. The most important, Article 1121-1, creates an “information duty”, providing:⁹²

“The party who knows information which is of decisive information for the consent of the other must inform him of it where, legitimately, the latter does not know the information or relies on the contracting party. However the duty to inform does not apply to an assessment of the value of the act of performance. Information is of decisive importance if it has a direct and necessary relationship with the content of the contract or the status of the contract ... The parties may neither limit nor exclude this duty”.

Even in the absence of such a duty,⁹³ Article 1139 provides for the consequences of fraudulent concealment, providing that “a mistake induced by fraud is always excusable” and “is a ground of nullity even if it bears on the value of the act of performance or on a party’s mere motive”.

Does a similar concern at informational asymmetry at the point of contracting arise under English law, and, if so, what if anything might be done about it? The categories of contract *uberrimae fidei* have remained resolutely closed, the duty in relation to insurance contracts largely constrained (at least in relation to its consequences) by the Insurance Contracts Act 2015, and that relating to contracts of surety largely contracted around. None of that suggests that there is likely to be any enlargement of the categories of pre-contractual duty of disclosure any time soon in this jurisdiction. However, developments in the law relating to implied representations in English law might be seen as a response to concerns about information asymmetry. When the issue of what implied representations were made by a bank offering a product on LIBOR terms first arose, Flaux J in *Graiseley Properties Ltd v Barclays Bank Plc*⁹⁴ held that the implied representations pleaded were arguable, laying

⁹⁰ For a summary of the current output of the “Yam Seng” industry see *Chitty on Contracts* 34th edition (London, Sweet & Maxwell, 2021), Chapter 2, Section 4.

⁹¹ See Simon Whittaker, “Contracts, Contract Law and Contractual Principle” in *The Code Napoleon Rewritten*, 30, 45.

⁹² French jurisprudence had not previously recognised a general duty of information, such a duty being recognised on a case-by-case: see Carole Aubert de Vincelles, “Validity of Contract: Dol, Erreur and Obligation d’Information”, *The Code Napoleon Rewritten*, 78, 82.

⁹³ In contrast to the previous position under French case law in which there could be no fraudulent concealment in the absence of a duty to speak: the *Arrêt Baldus* decision, Cass civ (1) 30 May 2000, no 98-11381.

⁹⁴ [2012] EWHC 3093 (Comm), [16]-[17] and [21].

emphasis on evidence suggestive of knowledge within the bank of issues with the manner in which the LIBOR rate was fixed. His focus on the knowledge of one of the negotiating parties might be thought to have the flavour of a non-disclosure complaint. By contrast Cooke J rejected similar implied representations in *Deutsche Bank AG v Unitech Global Ltd*⁹⁵, in part because they “would effectively impose ... a positive duty to disclose to the counterparty any information which it had which might undermine the integrity of LIBOR”. The Court of Appeal held that the representations were arguable, but while accepting that doing nothing could not amount to an implied representation, it appeared to accept it might take little by way of positive action before a representation could be implied.⁹⁶ When the issue returned to the Court of Appeal in *Property Alliance Group Ltd v Royal Bank of Scotland*,⁹⁷ the Court approved an earlier formulation by Colman J that “a helpful test is whether, having regard to the beneficiary's conduct in such circumstances, a reasonable potential surety would naturally assume that the true state of facts did not exist *and that, had it existed, he would in all the circumstances necessarily have been informed of it.*” That has a flavour, at least, of an obligation to speak arising from a position of superior knowledge. While statistics can be misleading, and those derived from Westlaw searches even more so, a search for the term “implied representation” in contract and commercial cases returns some 286 responses. 229 of them were decided in and after 2000, 167 since 2010 and 98 since 2015. While not a pre-contract informational duty as such, the contrast with French law on this issue may be less stark than at first appears.

Standard form contracts and exemption clauses

Another striking feature of the 2016 reforms is the creation of different regimes for standard form contracts (*contrats d'adhésion*) and bespoke contracts (*contrats de gré à gré*). Article 1110 of the Code defines a bespoke contract as one “whose stipulations are freely negotiated by the parties” and a standard form contract “as one that contains a set of non-negotiable clauses determined in advanced by one of the parties”.⁹⁸ In what might be thought a rather elegant provision, Article 1190 provides that “in case of ambiguity a bespoke contract is interpreted against the creditor and in favour of the debtor and a standard form contract is interpreted against the person who put it forward”. The difference in treatment does not end in two different formulations of the *contra proferentem* principle. As originally formulated, Article 1171 provided that:

“A term of a standard form contract which creates a significant imbalance in the rights and obligations of the parties to the contract is deemed not written. The assessment of significant imbalance must not concern either the main subject-matter of the contract nor the adequacy of the price in relation to the act of performance”.

This was later amended to refer to “any non-negotiable term, determined in advance by one of the parties, which creates a significant imbalance in the rights and obligations of the parties”.⁹⁹

⁹⁵ [2013] EWHC 471 (Comm), [27].

⁹⁶ [2013] EWCA Civ 1732, 28.

⁹⁷ [2018] EWCA Civ 355, [128], [132]

⁹⁸ As amended by the Ratification Law No 2018-287 of 20 April 2018. I am grateful to Professor Geneviève Helleringer for drawing my attention to the 2018 amendments.

⁹⁹ Law No 2018-287 of 20 April 2018, Article 7.

Professor Stoffel-Monck has suggested that “this article constitutes a major innovation at a practical level because the power given to the courts is inversely proportionate to the predictability of the criterion which guides it.”¹⁰⁰ He also suggests that “the new tasks of the judge call for skills that are not learned from undertaking law degrees: they require an experience of life, especially of business life”.¹⁰¹ For benefit of some of the audience, I suspect Professor Stoffel-Monck believes that those tasks call for skills not learned in the course of history degrees, or joint honours in French and Philosophy, either. Those comments are likely to put any English lawyer off the French approach, and serve as a reminder that a French setting is of itself no guarantee of quality. This provision is, perhaps rather more *Emily in Paris* than *Call my Agent*.

However the challenges posed by standard form contracts for the conventional consensual contractual model, and the crisis of “normative legitimacy” to which this has given rise, have increasingly troubled contract scholars working in the common law tradition.¹⁰² Of more interest, for present purposes, is the question whether the common law can accommodate, *sub rosa*, different rules for the interpretation and application of boilerplate and bespoke agreements. I have argued elsewhere that it already does, and could do so to a greater extent.¹⁰³ Professor Louise Gullifer has also outlined a basis for applying a special set of rules to the interpretation of *market* standard forms.¹⁰⁴ Although not quite the different species of animal they are under French law, bespoke and boilerplate contracts are certainly different breeds.

For my final topic, I want to look at a recent development under English law, in what we may prove to be the first chapter of that serial novel of English private law reform: the law of lawful act duress. In *Times Travel (UK) Ltd v Pakistan Airlines Corp*,¹⁰⁵ the Supreme Court unanimously rejected what would have been a clear, but rather harsh, bright line test: that threatening a lawful act could never constitute duress. So where is the line to be drawn? For the majority, the equitable concept of unconscionability is the touchstone: was the behaviour of the party who obtained the relevant benefit by exploiting the position of vulnerability of its counterparty morally reprehensible?¹⁰⁶ For Lord Burrows, who dissented, the demand had to be made in bad faith, that is to say without an honest belief in the entitlement asserted.¹⁰⁷ In addition to this disagreement as to the required characterisation of the acts of the benefiting party, *Times Travel* also reveals differing views as to whether that person must have caused or contributed to the other party’s vulnerable status. In one of the two strands of authority drawn on by the majority – exploitation of knowledge of criminal activity – there is clearly no such requirement.¹⁰⁸ However, it is an element of the second strand – the majority referred to “using illegitimate means to manoeuvre the claimant *into* a position of weakness to force him to waive his claim”.¹⁰⁹ The answer would appear to be that this causal element may help

¹⁰⁰ Philippe Stoffel-Munck, “The Revolution in Unfair Terms” in *The Code Napoleon Rewritten*, 145, 150.

¹⁰¹ *Ibid.*, 160.

¹⁰² See in particular Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press), 2013.

¹⁰³ David Foxtan, “The Boilerplate and the Bespoke: Should Differences in the Quality of Consent Influence the Construction and Application of Commercial Contracts” in Charles Mitchell and Stephen Watterson (eds), *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* (Hart Publishing, 2020), 259-278.

¹⁰⁴ Louise Gullifer, “Interpretation of Market Standard Form Contracts” (2021) 3 *Journal of Business Law* 227.

¹⁰⁵ [2021] UKSC 40.

¹⁰⁶ *Ibid.*, [2] (Lord Hodge).

¹⁰⁷ *Ibid.*, [136(iv)].

¹⁰⁸ See e.g. *Williams v Bayley* (1866) LR 1 HL 200 and *Kaufman v Gerson* [1904] 1 KB 591.

¹⁰⁹ *Borrelli v Ting* [2010] Bus LR 1718 and *The Cena K* [2012] 2 All ER (Comm) 855.

establish unconscionability, but it is not a *sine qua non* of lawful act duress. Lord Burrows' alternative formulation expressly incorporates this causal requirement,¹¹⁰ but other passages in his judgment suggest that lawful act duress can be established even in its absence.¹¹¹

What of the position under the Civil Code following the French reforms of 2016? Duress – *la violence* – is dealt with in that part of the Code Civil addressing defects in consent, together with mistake and fraud.¹¹² To a common lawyer's eyes, there are a number of striking features of the treatment adopted, of which I will briefly consider three.

First, the separation in English law between constraints on consent arising in the course of protected relationships (addressed by the law of undue influence), and those arising outside of such relationships, is absent. The 2016 reforms abolished a particular category of duress previously recognised in French law, *crainte révérencielle*. This form of duress applied when a young person entered into a contract for “fear of displeasing the senior members of [their] family”.¹¹³ Its abolition does not surprise me. It has been my personal experience that, far from being an inhibition on freedom of action on the part of the young, the prospect of displeasing senior members of their family is often a great attraction of a possible course of conduct. Relational dependency is now addressed in a provision dealing with states of dependence more generally, in provisions which impose no requirement that the advantaged party should have caused or exacerbated that vulnerable state.¹¹⁴

Second, there is no separate treatment of lawful and unlawful act duress, and indeed the focus of French law is not on the nature of the demand, as it is under English law, but on the position of the party who claims to have contracted to their detriment.¹¹⁵ The only provision directly addressing lawful act duress is Article 1141, which deals with the strangely specific topic of threats of legal proceedings. These do not constitute duress unless “the legal process is deflected from its proper purpose” or “invoked or exercised in order to obtain a manifestly excessive advantage”. That appears to combine the improper purpose requirement of the English torts of malicious prosecution and abuse of civil process,¹¹⁶ with a requirement that the content of the resulting contract be manifestly unbalanced. It is perhaps unsurprising that a system of law which recognises a general tort of abuse of legal right should be less troubled than English lawyers have been by the idea that the threat of a lawful act can amount to duress.

However, that additional requirement of manifest disadvantage brings me to the third distinct feature of the French law of duress in contract. That appears not only in Article 1141, but also in Article 1143 dealing with the exploitation of states of dependency. However, it is not a requirement of Article 1140 which addresses those who contract in fear of one of the specified forms of “considerable harm”. The idea that the degree of benefit extracted by the exploitation of a position of vulnerability should be relevant to the issue of whether the contract can stand is an interesting one, suggesting it is possible for one contracting party to

¹¹⁰ (n 105), [136(v)].

¹¹¹ *Ibid*, [122].

¹¹² Articles 1129-1144.

¹¹³ Previously Article 1114 of the Code Civil. See Professor Ciara Kennefick “Violence in the Reformed Napoleonic Code: the Surprising Survival of Third Parties”, *The Code Napoleon Rewritten*, 109, 110.

¹¹⁴ Article 1143: “There is also duress where one contracting party exploits the other’s state of dependency”.

¹¹⁵ In addition to Article 1143, Article 1141 provides there is duress “where one party acts under the influence of a constraint which makes him fear that his person or wealth, or those of his near relatives, might be exposed to considerable harm”.

¹¹⁶ *Clerk & Lindsell on Torts* 23rd (Sweet & Maxwell, 2020) [15-57] and [15-69].

exploit the other's position of vulnerability provided it is not too greedy in the process. The fact that a transaction is manifestly disadvantageous has an evidential role in the English law of undue influence,¹¹⁷ and a substantive role in those cases where equity grants relief against unconscionable bargains.¹¹⁸ Lord Hodge referred to these equitable doctrines in *Times Travel* when adopting the test of unconscionability as the touchstone of lawful act duress at common law,¹¹⁹ raising the prospect that, in this context at least, English law may follow French law in treating the manifest unfairness of the bargain as relevant when determining whether a contract should fail by reason of economic duress.

Conclusion

The French comparativist René David identified three benefits of comparative law analysis: its use in historical or philosophical legal research; that it enables us better to understand and improve our own national law, and that it promotes understanding between different peoples, and thereby creates a context favourable to the development of international relations.¹²⁰ Some fifty years on, the last of those three sounds somewhat Panglossian, strangely redolent of the winner's speech in a beauty pageant. However, the first and second remain a more than sufficient justification for the discipline of comparative law. In legal terms, the French have contributed much to English private law, not simply through those doctrines we have imported wholesale or with local modifications, but in the conceptual architecture its treatise-writers provided, and in the local treatises they inspired and informed. That latter enterprise proved so successful that it is now rare indeed for a French text to be cited to an English court in the context of a domestic, rather than trans-national, legal argument. Further, whereas Victorian lawyers benefited from translations of most of the leading French texts, the works of the modern giants of French private law – the likes of Jacques Ghestin¹²¹ and Geneviève Viney¹²² – have, for many, been lost in non-translation.

However, a vast amount of high-quality comparative law research is published in English, and the French codes themselves appear in workable translations on the internet. The French Code Civil remains a dynamic private law legal system, which continues to challenge and re-invent itself. The changes to the nature of our legal relationship with the member states of the European Union notwithstanding, there remains a free market in ideas and tariff-free cultural exchange. Edmund would have remained a very active participant in that market, both as prolific buyer and trusted seller. In this, as in so much else, we should try and follow his example.

¹¹⁷ Where the transaction “requires explanation”: *Chitty on Contracts* (34th) (London, Sweet & Maxwell, 2020) [10-080], [10-084], [10-087], [10-117], [10-120] to [10-123].

¹¹⁸ *Ibid*, [10-161], [10-164] to [10-165].

¹¹⁹ (n 106), [19], [23] and [24].

¹²⁰ René David and John E C Brierley, *Major Legal Systems in the World Today: An Introduction into the Comparative Study of Law* 3rd (Stevens & Sons, London, 1985), 4.

¹²¹ *Traité de droit civil: le contrat*, (LGDJ, Paris, 1992); *Droit civil, 5.1 : introduction a la responsabilité*, Jacques Ghestin, Geneviève Viney, (LGDJ, Paris, 1997); *Droit civil Les obligations, la responsabilité, 2 : les conditions*, Jacques Ghestin, Geneviève Viney P. Jourdain (LGDJ, Paris, 1998).

¹²² *Droit civil, 5.1 : introduction a la responsabilité*, Jacques Ghestin, Geneviève Viney, (Paris, LGDJ, 1997); *Droit civil Les obligations, la responsabilité, 2 : les conditions*, Jacques Ghestin, Geneviève Viney, P. Jourdain (Paris, LGDJ, 1998); *Traité de droit civil, - 3 les effets de la responsabilité, exécution et réparation en nature, dommages et intérêts, aménagement légaux et conventionnels de la responsabilité*, Geneviève Viney and Patrice Jourdain (Paris, LGDJ, 2001).
Geneviève Viney, P. Jourdain (Paris, LGDJ, 2001).