The majority also observed that evidence gathered under Sch. 7 would almost certainly be excluded at any later trial under s. 78 of the Police and Criminal Evidence Act 1984 (which allows trial judges to exclude prosecution evidence that would otherwise adversely affect the fairness of proceedings). The court added its voice to calls for Sch. 7 to be amended to provide an express guarantee of such exclusion. Section 78 does not, however, provide so-called "derivative use" immunity: information extracted under Sch. 7 questioning would be excluded, but leads followed up from that information would be admissible (Lord Kerr, at [117]). Nor does s. 78 address the Articles 5 and 8 implications of the detention, questioning, searching, etc. *in and of itself*, regardless of the use to which any resulting information is put.

The case is likely to proceed to Strasbourg. In any event, that court had adjourned its decision in *Malik v UK* (Application No. 32968/11) while *Beghal* was decided. We also await the Court of Appeal's decision in *R. (on the application of Miranda) v Secretary of State for the Home Department* (on appeal from [2014] EWHC 255 (Admin); [2014] 1 W.L.R. 3140). In contrast to Beghal, Malik was held for over four hours (although the questioning lasted for around 25 minutes) and Miranda was detained and questioned for nine hours. Malik had to provide a mouth swab and fingerprints, he had copies of his credit cards and documents taken, and his mobile phone was seized. Miranda had encrypted data taken. *Beghal* hints at the likelihood of successful challenges to Sch. 7 in both cases. By taking a case-specific approach rather than reviewing the legislation on its face, the court has surely only delayed the inevitable.

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THE PENALTY CLAUSE DOCTRINE: UNLOVABLE BUT UNTOUCHABLE

BARRY Beavis fought the law of contract and the law won. To the disappointment of motorists nationwide, he failed to show that an £85 shopping centre parking fine was an unenforceable penalty at common law (or under the Unfair Terms in Consumer Contracts Regulations 1999). Ironically, he lends his name notwithstanding to a leading case which confirmed the existence of the penalty doctrine (a joined commercial challenge also failed on the facts): *ParkingEye Ltd. v Beavis; Cavendish Square Holding v El Makdessi* [2015] UKSC 67; [2015] 3 W.L.R. 1373.

It is disappointing that the Supreme Court reaffirmed this "blatant interference with freedom of contract" (*Cavendish v El Makdessi* [2013] EWCA Civ 1539, at [44], per Christopher Clarke L.J.) – a doctrine that even Lord

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Eldon, Lord Diplock, and Jessel M.R. were unable to rationalise (see [2015] UKSC 67, at [3]) and which Lords Neuberger and Sumption, in their leading joint judgment, termed "an ancient, haphazardly constructed edifice which has not weathered well" (ibid.). Timid the decision might have been; brief it was not. It required 316 paragraphs (over 100 pages of the law reports) to restate the penalty doctrine (which Lord Toulson thought "exceedingly long"). Where does this leave the law?

Deterrent clauses are now permissible. Previous orthodoxy that parties were only permitted to stipulate for *compensation* (plainly at the root of the decision below in *Cavendish* [2013] EWCA Civ 1539, at [120]–[121]) was disapproved. The fallacy is said to have developed from overly literal (mis)application of Lord Dunedin's speech in *Dunlop v New Garage* [1915] A.C. 79. There is no simple dichotomy between contracting for compensation (permissible) and for deterrence (impermissible). All sorts of contractual clauses and inducements influence party behaviour; this is not "inherently penal or contrary to the policy of the law" (Lords Neuberger and Sumption, at [31]). But limits remain. The hallmark of an unacceptable *penalty* clause is that "the means by which the contracting party's conduct is to be influenced are 'unconscionable' or … 'extravagant'" (ibid.). Lord Hodge stated the test similarly, at [255] (with the explicit commendation of Lord Toulson, at [293]): "… whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract." The crucial question becomes whether there was a legitimate interest in having the contract *performed* (as opposed to recovering compensation for its breach) and, if so, whether the detriment imposed on the contract-breaker was proportionate to that interest.

Respectful of the tradition of blatantly interfering with freedom of contract, it falls to the court to determine the legitimacy of the promisee's interest in performance, and the "proportionality" of the means agreed for enforcing it. That Lord Reid's notorious qualification to *White & Carter (Councils) Ltd. v McGregor* [1962] A.C. 413, 431, was cited (at [29]) as authority for this "legitimate interest" inquiry provides but scant comfort. Even Homer sometimes nods and J.W. Carter points out that Lord Reid's dicta were tentative and "uncharacteristically vague": (2012) 128 L.Q.R. 490, 491. We are further told (at [32]): "The innocent party can have no proper interest in simply punishing the defaulter" – i.e. the aim must be to secure performance and not in inflicting punishment per se. But, even if we grant that regulation of contractual sado-masochism is a proper goal of public policy (*sed quaere*), is it a real problem? Rather (as Tony Weir observed about the "disinterested malevolence" required in the tort of lawful means conspiracy), a contractual clause inserted purely to mete out punishment for punishment's sake must be *rara avis* indeed (cf. *Economic Torts* (Oxford 1997), 73).

Some of the Supreme Court's clarification seems rather unclear. "Unconscionability" is at the heart of the new approach (replacing the fixation with compensation, or "genuine pre-estimate of loss"). But unconscionability does not bear its usual meaning (i.e. some species of procedural misconduct). Lord Mance (at [168]) rejected a submission to that effect because it would "appear effectively to deprive the [penalty] doctrine of any role at all" (an unacceptable fate!). Also, the doctrine's limitation to clauses operating on breach of contract was reaffirmed (with the peculiar Australian decision in *Andrews v Australia and New Zealand Banking Group* (2012) 247 C.L.R. 205 rightly, and magisterially, dismissed at [42]). But the difference in opinion between Lord Hodge and the majority over whether one of the relevant clauses in the *Cavendish* appeal created a primary obligation (thus outside the penalty jurisdiction), or one governing the consequences of breach (i.e. a secondary obligation), indicates that the boundaries of the doctrine will remain difficult to draw. Indeed, all of the judges accepted that it can be "circumvented by careful drafting" (at [257]).

Throughout the judgments runs a concern that the doctrine not be lightly invoked – especially not to benefit professionally advised parties well able to protect their own interests (i.e. in commercial cases). This approves the trend of conferring "a strong initial presumption" of enforceability (at [35]) upon (allegedly penal) clauses in such contracts, prominent since *Philips Hong Kong Ltd. v A.-G. of Hong Kong* (1993) 61 B.L.R. 41. Although welcome, such caution does not satisfactorily solve the problem of uncertainty acknowledged, at [33] and [259]. Even a rarely invoked derogation from straightforward enforcement brings disproportionate doubt and delay – for it can be pleaded much more frequently than it is successfully applied. Lord Hoffmann recognised this (in a slightly different context) in *Union Eagle v Golden Achievement* [1997] A.C. 514, 519. Hence the need for clear, crisp rules of commercial law.

Instead of counselling restraint, why then did the Supreme Court not go further and accept counsel's invitation to abolish the penalty doctrine as being "antiquated, anomalous and unnecessary, especially in the light of the growing importance of statutory regulation" (as paraphrased at [36])? Or at least abolish it in *commercial* cases (counsel's second submission)? Their Lordships advanced some arguments for the penalty doctrine's continued utility – but none sufficiently justifies retaining this anomalous regulation of freely agreed contracts. The main reason for rejecting counsel's argument was the doctrine's being too well established – in English law, the Commonwealth, and in European legal systems (including Euro soft law) – for mere judges to sign its death warrant.

What are the doctrine's supposed benefits? To many, it might seem obvious that unconscionability, extravagance, and exorbitance are not to be countenanced by the law of contract. Perhaps not. But there are other doctrines designed to deal with procedural misconduct (i.e. cases where

apparent contracts were not freely agreed). Once free agreement is shown, the common law does not intervene to regulate the *substance* of agreements, outside the narrow compass of the illegality defence (*ex turpi causa non oritur actio*). Why regulate "penalties" only? The need to protect consumers through the penalty doctrine seems very considerably attenuated given the general regulation of unfair terms in the Consumer Rights Act 2015. (It is true that, in *ParkingEye*, the 1999 Regulations challenge – under the forerunner of the 2015 Act – also failed in the majority's opinion, but it cannot credibly be suggested that the penalty jurisdiction confers *wider* protection. On the contrary, while Lord Toulson would have allowed Mr. Beavis's appeal under the consumer legislation, His Lordship agreed that the parking charge was not a penalty clause.)

The Supreme Court stressed that commercial parties (notably small businesses) do not enjoy the same statutory protection. But that omission is hardly a legislative accident or oversight. In 2002, the Law Commission proposed that businesses (or just small businesses) should enjoy the same protection as consumers (Consultation Paper No. 166), but this suggestion was withdrawn by the Commission, with Toulson J. as its chairman, after critical reaction (Report No. 292 (2005)). The extension to commercial contracts was (unsurprisingly) not taken up by Parliament in 2015. With respect, it seems wildly unlikely that the penalty doctrine would have received legislative reinstatement to protect (small) businesses had *ParkingEye* abolished it, given Parliament's manifest attitude to regulation of "unfair" commercial contracts in the same year of grace.

Given the penalty doctrine's long history and the continuation of cognate doctrines such as relief from forfeiture, the Supreme Court thought it would exceed the judicial function to abolish it: "… this is not the way in which English law develops" (Lords Neuberger and Sumption, at [36].) Clear support, then, for David Ibbetson's observation that judge-made law can never bring itself to abolish whole doctrines of its own creation (*A Historical Introduction to the Law of Obligations* (Oxford 1999), 301). Instead, the law becomes ever more complex as troublesome rules are narrowed and refined, but never finally removed. The reliance on Law Commission research deepens further the judicial caution (see Lord Mance, at [163]). If nothing else, the observation (ibid.) that the "consequences and merits" of abolition had been insufficiently researched should spur scholars to be unsparing in criticism of the penalty doctrine (and other misconceived common law rules), in the hope that the Supreme Court might boldly embark upon radical reform in suitable future cases.

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