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ARTICLES

CONTRACT DOCTRINE, PREDICTABILITY AND THE NEBULOUS EXCEPTION

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ABSTRACT. *There is a tendency in contemporary contract law for judges to "never say never" and permit an open-ended exception from the rule. This nebulous exception is designed to cater for the rare instance where application of the rule would be undesirable in the interests of justice. However, this kind of imprecise exception is deleterious in terms of the unpredictability it generates, as well as the attendant increases in time and costs that result. The "never say never" approach is to be discouraged in contract law where commercial predictability, while certainly not inviolable, nonetheless remains a weighty goal deserving of continued deference.*

KEYWORDS: *Contract law, predictability, certainty, clarity, rule of law, imprecise exceptions, "never say never".*

I. INTRODUCTION

This article addresses a curious phenomenon in contemporary contract law—the extreme reluctance on occasions to affirm an existing categorical rule. Perhaps "curious" is too strong a word, for this reticence may be seen as another manifestation of the movement of late towards greater doctrinal flexibility and individualised justice and away from fixed, (seemingly) harsh and rigid rules in contract law.[1] And "contemporary" is contestable, for it was a generation ago that Patrick Atiyah commented: "We have a prima facie [contract] rule, and we have a loophole, a method of escape which the judge may use if he feels the prima facie rule leads to injustice. It is impossible to be certain of

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[1] See R. Bradgate, "Contract, Contract Law and Reasonable Expectations" in S. Worthington (ed.), *Commercial Law and Commercial Practice* (Oxford 2003), ch. 23 at p. 668.

the legal position in advance. And the reason is surely the result of the move away from principle toward pragmatism."[2]

Certainty and clarity in the law are important. Citizens need to know where they stand. "The basic intuition from which the doctrine of the rule of law derives", maintained Joseph Raz, is that "the law must be capable of guiding the behaviour of its subjects."[3] The principle of legal certainty is enshrined in EU law.[4] The requirement in Article 7 of the European Convention on Human Rights that no one be subjected to retroactive criminal punishment reflects this principle.

Certainty is not, of course, a virtue only in criminal law. The oft-heard plea in commercial law is for certainty or predictability. Lord Mansfield's statement in *Vallejo v Wheeler* is perhaps the most frequently cited one.[5] "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."[6] Lord Bingham noted recently that: "The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at any rate since the judgment of Lord Mansfield CJ in *Vallejo v Wheeler* (1774) … and has been strongly asserted in recent years".[7] Similarly, Lord Hoffman alluded to "a sound practical intuition that the law of contract is an institution designed to enforce promises with a high degree of predictability."[8]

When the cry for certainty is heard the desire is not certainty for certainty's sake. Certainty is not an end in itself. Rather, it is an instrumental goal. In competition law, for example, promoting effective competition is not an end in itself and it is not a matter of fostering competition for competition's sake. Promoting competition is an instrumental goal towards the attainment of growth, innovation and efficiency.[9] Fostering certainty in contract law is similar. It looks beyond itself to other goals. Jeremy Waldron points out that our objection to vague statutes is not really a concern about vagueness per se; it is a concern about the relative seriousness with which we should

[2] "From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law" (1980) 65 Iowa L. Rev 1249, 1257.
[3] "The Rule of Law and Its Virtue" in his *The Authority of the Law: Essays on Law and Morality* (Oxford 1979), 214.
[4] Article 49 of the Charter of Fundamental Rights of the European Union, 2007/C 303/01.
[5] See e.g. *Homburg Houtimport BV v Agrosin Private Ltd.* (*The Starsin*) [2003] UKHL 12 at [14] per Lord Bingham; *Jindal Iron and Steel Co. Ltd. v Islamic Solidarity Shipping Co. Jordan Inc. (The Jordan II*) [2004] UKHL 49, [2005] 1 W.L.R. 1363, 1370 per Lord Steyn.
[6] *Vallejo v Wheeler* (1774) 1 Cowp. 143, 153; 98 E.R. 1012, 1017.
[7] *Golden Strait Corporation v Nippon Yusen Kubishka Kaisha (The Golden Victory*) [2007] UKHL 12 at [23]. See also ibid., Lord Carswell at [58].
[8] *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] UKHL 38 at [37].
[9] See e.g. R. Ahdar, "An Antitrust Decalogue: The Ten Commandments of Australasian Competition Law" (2009) 37 Australian Business L.R. 324, 326–7.

take the background interest upon which the statute impinges, that is, how it restricts free speech, privacy and so on.[10] The background interests that doctrinal certainty serves (and that uncertainty undermines) in contract law are personal autonomy as well as entrepreneurship and economic efficiency.

Regarding the realisation of individual freedom, humans are "planning creatures."[11] They look to the future. Contracts provide a means whereby people can gain a measure (partial, to be sure) of direction over the future.[12] People can plan to undertake activities alone and without the cooperation of others, but so many of our aspirations are necessarily dependent upon others for their realisation—hence, the place for enforceable agreements.

As for economic efficiency, voluntary-exchange bargains (contracts) promote the collective welfare of society, a system of contract law being essential to the efficient allocation of resources in a market economy. "The whole law of contracts", observed Lon Fuller, "might be said to have the purpose of inducing men to organize their affairs through 'private enterprise.' "[13] To facilitate the process of contracting, and thereby foster economic efficiency,[14] people must be able to know with some confidence whether and when and to what extent they, and the other contracting parties, are legally bound.

"If business operations are planned in part by taking into account the existing law of contracts," asked Fuller, "is that law to be forever immune from change?"[15] The answer is a resounding "no", for then commercial law would become ossified. The larger question is how and by whom change ought to be effected. Much ought and is left to the legislature. Privity of contract is but one example.[16] The development of commercial law is also felicitously effected through the courts' recognition of commercial practice and any emergent innovations in business transacting.[17] Insofar as the common law does develop the law of contract, it ought to do so cautiously and incrementally and with a keen appreciation of the need for predictability and clarity. "On the whole, lawyers prefer their legal doctrines to be stirred but not shaken."[18] It was this sort of consideration that, for example, led Peter Gibson L.J. in *Re Selectmove* not to abolish the longstanding rule

[10] "Vagueness and the Guidance of Action" in A. Marmor and S. Soames (eds.), *Philosophical Foundations of Language in the Law* (Oxford 2011), ch. 4, p. 81.
[11] C. Bridgeman, "Contract as Plans" [2009] U. Illinois L. Rev 341, 366.
[12] *Restatement (Second) of Contract*, § 72 cmt. b. (1981).
[13] *The Morality of Law*, revised ed. (New Haven 1969), p. 61.
[14] J. Smillie, "Security of Contract and the Purpose of Contract Law" (2000) 6 N.Z.Bus.L.Q. 104, 110; *Restatement (Second) of Contract*, § 72 cmt. b. (1981).
[15] *The Morality of Law*, at p. 61.
[16] Contract (Rights of Third Parties) Act 1999.
[17] See R. Cranston, "Doctrine and Practice in Commercial Law" in K. Hawkins (ed.), *The Human Face of Law* (Oxford 1997), ch. 9.
[18] H. Collins, *The Law of Contract*, 4th ed. (London 2003), p. 38.

governing part payment of debts on the basis of the newly minted principle of "practical benefit" as good consideration and to, instead, leave the matter to Parliament.[19]

In light of all this, certain recent developments in contract law are troubling. When presented with an opportunity to expound the law of contract there are occasions where the courts initially appear to firmly "close the door" and make a categorical statement on the continued validity of a well-established proposition or rule (either affirming or rejecting it). But they then accompany this with a postscript. They conclude their exposition of the law by allowing a small "crack in the door" in the form of an allusion to the exceptional meritorious situation where a departure from the rule *might* be permitted. The judicial attitude is summed up by Lord Nicholls of Birkenhead who observed "if experience in the law teaches anything, it is that sooner or later the unexpected and exceptional event is bound to occur … . 'Never say never' is a sound judicial admonition."[20]

To the contrary, it is my contention that "never say never" is a not a sound approach, at least not in contract law. To float the possible recognition of the meritorious exceptional claim in the rare occasion, discernible only by the court itself, is productive of needless uncertainty and cost. In section II I will outline the contract law doctrines and cases where the promulgation of a new imprecise exception has been advanced. I return in section III to the justifications for the view that predictability and clarity are critical in contract law. I attempt to answer the objection that this oft-heard plea is unrealistic or overstated. Section IV concludes with a restatement of my key argument.

II. The Non-Categorical Approach

The reluctance to posit a categorical rule is illustrated in three (and, possibly four) areas of contract law. In each instance, the possibility of the meritorious exceptional claim is not ruled out. (For reasons of space I shall not debate the merits of retaining the existing rule in each case, although I believe a strong case can be made for why the traditional position is sound.)

Uncertainty and unpredictability may, of course, be generated not just by the promulgation of nebulous exceptions to existing rules. The *reformulation* of existing rules into something less concrete and predictable is problematic. Furthermore, and even more fundamentally, the *original formulation* of the existing rules and doctrines may have been cloudy and uncertain to begin with. These latter two sources

[19] [1995] 1 W.L.R. 474, 479–81.

[20] This statement appears in a decision concerning exemplary damages in tort: *Bottrill v A* [2002] UKPC 44; [2003] 2 N.Z.L.R. 721 at [27].

of uncertainty and opacity are undoubtedly greater in magnitude, and thus more of a threat to the goals of contract law, than the nebulous exception problem I am addressing. They merit another article. The scope of this article is more modest and is confined to vague exceptions as a source of concern. Nonetheless, one recent example of the broader, and in my view, deleterious phenomenon might be useful.

The law on implied terms was tolerably clear and settled prior to *Attorney-General of Belize v Belize Telecom Ltd.*.[21] The "business efficacy" and "officious bystander" tests[22] were the means by which courts determined whether a term ought to be implied into a contract. Implication was not something to be undertaken lightly and thus the threshold was stringent, being grounded in the necessity of implying a term, not merely the reasonableness or fairness of doing so. Lord Hoffman in *Belize* disturbed the received understanding of implied terms when he deprecated the time-honoured twin tests and refashioned the implication of terms into an exercise in construction: "the question for the court is whether [an implied term] would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean."[23] For him, the implication of terms is not a matter of addition to the contract but merely spelling out what the instrument means.[24]

Both subsequent case law and academic criticism have failed to agree on whether, and to what extent, the former tests have survived.[25] Has the traditionally demanding "necessity" threshold now been lowered to one of reasonableness? Has the officious bystander been replaced by the venerable man on the Clapham omnibus?[26] Is implication now subsumed under interpretation? The present position is best expressed in *Stena Line* where Arden L.J. described *Belize* as a decision "which the courts are probably still absorbing and ingesting" and that its implications for the law on the implied terms were "not wholly clear."[27] Or, in the blunter language of the Singapore Court of Appeal, "the entire picture is mixed at best and ambiguous at worst".[28]

[21] [2009] UKPC 10; [2009] 1 W.L.R. 1988.
[22] From *The Moorcock* (1889) 14 PD 64, 68 and *Shirlaw v Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 277 respectively.
[23] *Belize* at [21].
[24] Ibid. at [18].
[25] On the post-*Belize* developments see Vos J. in *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch) at [38]–[96]; H. Beale (gen. ed.), *Chitty on Contracts*, vol. 1, 31st ed. (London 2012), § 13-005; Singapore Court of Appeal in *Foo Jong Peng v Phua Kiah Mai* [2012] SGCA 55 at [37]–[42].
[26] J. McCaughran, "Implied Terms: The Journey of the Man on the Clapham Omnibus" [2011] 70 C.L.J. 607.
[27] *Stena Line v P & O Ferries Ltd.* [2010] EWCA Civ 543 at [36] and [44].
[28] *Foo Jong Peng* [2012] SGCA at [43]. This led to that court rejecting *Belize* and affirming the continued validity of the *Moorcock* and *Shirlaw* tests. See also *Sembcorp Marine Ltd. v PPL Holdings Ltd.* [2013] SGCA 43 at [76]–[101].

A. Lawful Act Duress

In *CTN Cash and Carry Ltd. v Gallaher Ltd.*,[29] the Court of Appeal considered whether a threat to perform a lawful act in a commercial context, where the party making the threat genuinely believed that its demand was valid, could constitute economic duress. The Court dismissed the claim that the defendant, who had issued the threat, had engaged in conduct amounting to duress. On the broad issue, Steyn L.J. observed:

> We are being asked to extend the categories of duress of which the law will take cognisance. That is not necessarily objectionable, but it seems to me that an extension capable of covering the present case, involving "lawful act duress" in a commercial context in pursuit of a bona fide claim, would be a radical one with far-reaching implications. It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process.[30]

However, not content to simply reject the proposition being advanced and let matters rest there, His Lordship continued:

> Outside the field of protected relationships and in a purely commercial context, it might be a relatively rare case in which "lawful act duress" can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered his demand was valid. In this complex and changing branch of the law, I deliberately refrain from saying "never".[31]

The test for lawful act duress would be not whether the conduct is lawful (since *ex hypothesi* it must be) but "whether it is morally or socially unacceptable."[32]

Steyn L.J.'s prediction that the lawful act duress in a commercial setting would only be found in a "relatively rare case", or, as a one judge put it, "an unusual case", has proved so.[33] There have, some suggest, been cases where lawful act duress has been found, but these instances, upon closer analysis, do not appear to be unequivocal examples of this at all.[34]

[29] [1994] 4 All ER 714.
[30] Ibid. at p. 719.
[31] Ibid.
[32] Ibid. This has been rephrased as "manifestly and unconscionably disadvantageous" in *Harrison v Halliwell Landau* [2004] EWHC 1316 (QB) at [97] and involving "impropriety" in *Progress Bulk Carriers Ltd. v Tube City IMS LLC (The Cenk Kalpanoghu)* [2012] EWHC 273 (Comm); [2012] All E.R. (D.) 122 at [35].
[33] See respectively *Harrison* at [97] (the "relatively rare category") and *Progress Bulk* ("an unusual case").
[34] Lawful act duress failed in *Magsons Hardware Ltd. v Concepts 124 Ltd.* [2011] NZCA 559 at [34]–[35].

Progress Bulk Carriers Ltd. v Tube City IMS LLC (The Cenk Kalpanoghu)[35] has been cited as a case where a claim of lawful act duress was upheld.[36] But the facts indicate that unlawful conduct on the defendant's part featured prominently in the court's overall determination that economic duress was present. On 2 April 2009, the owners of the Cenk Kalpanoglu chartered it to the respondents for the carriage of shred metal to China but wrongfully delivered it to a third party soon thereafter. This amounted to a repudiatory breach. The charterers did not accept the repudiation. The owners then promised to provide an alternative vessel (the Agia) and compensate the charterers for all their losses. The Agia was secured but by then it was clear that a delay in shipment could not be avoided. The charterers sought unsuccessfully to negotiate a discount on the freight as a condition for accepting the substitute vessel and the delayed shipment. On 28 April the owners made a "take it or leave it" offer requiring the charterers to accept the Agia at $2 per metric ton discount and waive all claims connected to the owner's breach. The charterers, facing pressures from their Chinese customers, eventually agreed "under protest". Cooke J. affirmed the arbitrators' award setting aside the 28 April agreement due to economic duress. The owners somewhat audaciously contended there had been no unlawful act on their part: they were not threatening to break a contract at the time nor committing any tort in refusing to enter into a variation of the charter with the substitution of the Agia. The situation, they argued, simply reflected the operation of market forces of which the owners were entitled to take advantage.[37] Cooke J. disagreed:

> What however the Owners' submissions overlook is the fact that their repudiatory breach was the root cause of the problem and that their continuing conduct thereafter was … designed to put the Charterers in a position where they had no option but to accept the settlement agreement in order to ship the cargo to China and avoid further huge losses on the sale contract to the Chinese receivers. As the Charterers submitted, it would be very odd if pressure could be brought about by a threatened breach of contract, which did amount to an unlawful act but not by a *past breach, coupled with conduct since that breach*, which drove the victim of the breach into a position where it had no realistic alternative but to waive its rights in respect of that breach, in order to avoid further catastrophic loss.[38]

So *past* unlawful conduct by the defendants (their repudiatory breach) combined with *present* lawful conduct (taking advantage of their

[35] [2012] EWHC 273 (Comm); [2012] All E.R. (D.) 122.
[36] P.W. Lee, "Compromise and Coercion" [2012] L.M.C.L.Q. 478.
[37] *The Cenk Kalpanoghu* at [37].
[38] Ibid. at [39] (emphasis added).

ascendancy amidst the tight market pressures) to present a clear overall picture of illegitimate pressure.

Another suggested instance of lawful act duress[39] is *Borelli v Ting*.[40] Mr Ting was the chairman and CEO of Akai Holdings, a Bermudan company originally established in Hong Kong. Akai collapsed owing debts of over US$ 1 billion. The liquidators of Akai proposed a scheme to transfer shares of Akai to a third party to recoup some of this massive debt. This required the consent of the majority of shareholders including two companies controlled by Ting. He refused to give his consent and engaged in various nefarious behaviour to defeat the scheme, including forging signatures and providing false evidence. The liquidators faced a "stark choice", one that "was between two evils"[41]: either abandon the scheme and hence the last real prospect of recouping funds or make a deal with Ting to obtain the withdrawal of his companies' veto to the scheme. The unpalatable condition of this latter deal was that the liquidators would agree not to investigate Ting nor make any claims against him in relation to his misconduct at Akai. The Privy Council considered that the liquidators had no reasonable or practical alternative here but to make the deal, Ting having them "over a barrel"[42]. Economic duress was present: "the Liquidators entered into the Settlement Agreement as the result of the illegitimate means employed by James Henry Ting, namely by opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the Liquidators from investigating his conduct of the affairs of Akai Holdings Ltd. or making claims against him arising out of that conduct."[43] Here, as with *The Cenk Kalpanoghu*, the unlawful acts (forgery and false evidence) combined with the ostensibly lawful acts (the opposition to the settlement scheme, albeit due to an imporper motive) to render the entirety of Ting's conduct illegitimate.[44] But was Ting's refusal to give consent to such a settlement scheme ipso facto lawful conduct? The Board termed it "unconscionable conduct"[45] and stated that it was undertaken in bad faith.[46] Much turns on precisely what is meant by "lawful" in this context. Something can be lawful—in the sense of not being in breach of the criminal law and not constituting a tort—but still be unethical, or, more relevantly, unconscionable. It is strained to say that a threat that amounts to unconscionable conduct (as that vitiating doctrine is

[39] M. Chen-Wishart, *Contract Law*, 4th ed. (Oxford 2012) at p. 325, contends that "arguably" it is the first occasion of lawful act duress being upheld by a court.
[40] [2010] UKPC 21.
[41] Ibid. at [29]–[30].
[42] Ibid. at [31].
[43] Ibid. at [35].
[44] E. McKendrick, *Contract Law: Text, Cases and Materials*, 5th ed. (Oxford 2012), 649.
[45] [2010] UKPC 21 at [32].
[46] Ibid. at [28].

defined in contract law) can still be characterized as legitimate or lawful.[47] But if this can be so, then *Ting* is, indeed, the first case of lawful act duress.

The law on economic duress is in its comparative infancy.[48] Its imprecise scope, indeed its very existence, has attracted criticism.[49] Writing before *CTN Cash*, Kirby P. in *Equiticorp* considered that the entire doctrine "render[ed] the law too uncertain and in an area where certainty is highly desirable."[50] Making the test for lawful act duress dependent on social morality, as determined by the judges, hardly assuages the concerns of those already critical of the defence.

B. An Account of Profits

In *Attorney General v Blake*, Lord Nicholls stated:

> there seems to be no reason, *in principle*, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract … . When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract.[51]

The exceptional nature of this newly recognised remedy in contract law was emphasised:

> An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed.[52]

It will be recalled that the defendant, Blake, was a traitor who had betrayed secrets to the Soviet Union during his years as a member of the Security Intelligence Service. He was duly sentenced to imprisonment for his heinous disclosures. He escaped from prison in 1966, fled to Moscow and, in 1989, wrote his autobiography. By 1989 the information in the book, *No Other Choice*, was no longer confidential nor

[47] See McKendrick, *Contract Law*, p. 649. See similarly E. Peel, *Treitel, The Law of Contract*, 13th ed. (London 2011), 442 (*Borelli* cited for the view that a threat may be illegitimate because it amounts to "unconscionable conduct").
[48] R. Bigwood, *Exploitative Contracts* (Oxford 2003), p. 308.
[49] J. Morgan, *Great Debates in Contract Law* (Basingstoke 2012), 193.
[50] *Equiticorp Finance Ltd. (in Liq) v Bank of New Zealand* (1993) 32 N.S.W.L.R. 50, 107. See similarly *ANZ Banking Group v Karam* (2005) 64 N.S.W.L.R. 149 at [66].
[51] [2001] 1 A.C. 268, 284–285 (italics in original).
[52] Ibid. at 285.

was its exposure detrimental to the public interest. Blake secured a publisher (Jonathan Cape) and his memoirs were published in 1990. Some £60,000 had already been paid to Blake and this was now unrecoverable. The proceedings centred upon a sum of around £90,000 that still remained payable. Why should, as the Crown argued, Blake gain any financial fruits from his treachery? The House of Lords majority held that an account of profits was a "just response" and that the Attorney General be paid this sum representing the amount owed by the publishers to the defendant.

The circumstances in *Blake* were sufficiently exceptional to merit an account of profits. The context was the security and intelligence service.[53] Secondly, the defendant had committed deliberate and repeated breaches causing "untold and immeasurable damage to the public interest"[54]. Thirdly, Blake's obligations were "closely akin" to those owed by a fiduciary, a relationship where an account of profits is a standard remedy in the case of breach.[55]

Most claims for an account of profits have been unsuccessful.[56] There appears to have been only one case since *Blake* where an account of profits claim has succeeded, but even there it was only one of the remedies that the plaintiff could elect to pursue and, to that extent, it might be seen as a makeweight.

In *Esso Petroleum Co Ltd. v Niad Ltd*.[57] the defendant service station, Niad, breached its solus contract with the plaintiff by not adhering to a marketing scheme ("Pricewatch") that required contracted stations to charge the recommended retail fuel prices advertised nationally by Esso. Participating stations received price support from Esso to ensure they did not suffer reduced profits from having to sell at the discounted prices set by Esso. The plaintiff's desired remedies were advanced on three alternative bases. On the usual expectation basis it sought compensation for the profit it would have made on sales lost through Niad's failure to perform its obligation to implement and maintain the Pricewatch scheme. In the alternative it sought an account of the profits made by Niad arising from such failure. As a further alternative, it sought a restitutionary remedy based on the amount charged by Niad in excess of the recommended prices. As for the usual breach of contract claim, Esso would have had to have shown that it

[53] Three features that underscored the exceptional nature of *Blake* were identified by Mance L.J. in *Experience Hendrix LLC v PPX Enterprises Inc*. [2003] EWCA Civ 323 at [30].
[54] *Blake* [2001] 1 AC at p. 286 per Lord Nicholls.
[55] Ibid. at p. 287.
[56] The claim was refused in *WWF World Wide Fund for Nature v World Wrestling Federation* [2002] FSR 32*; AB Corp v CD Company* (*The Sine Nomine*) [2002] 1 Lloyd's Rep 805; *Vercoe v Rutland Fund Management Ltd*. [2010] EWHC 424 (Ch) at [345]; *Jones* v *Ricoh UK Ltd*. [2010] EWHC 1743 (Ch) at [89]; *Topline International Ltd. v Cellular Improvements Ltd*., N.Z. High Court, Auckland, C.P. 144-SW02, 17 March 2003, Venning J., at [144].
[57] [2001] EWHC 458 (Ch); [2001] 1 All E.R. (D.) 324.

has lost fuel sales by reason of the failure of Niad to charge at or below the Pricewatch recommended price, a task that "may not be easy."[58] Moreover, the amount would unlikely to be commensurate with the amount of the additional price support derived by Niad from Pricewatch which it should have passed on to its customers.[59] Given this, an account of profits was attractive. Sir Andrew Morritt VC held that

> the remedy of an account of profits should be available for breaches of contract such as these. First, damages is an inadequate remedy. It is almost impossible to attribute lost sales to a breach by one out of several hundred dealers who operated Pricewatch. Second, the obligation to implement and maintain the recommended pump prices was fundamental to Pricewatch. Failure to observe it gives the lie to the advertising campaign by which it was publicised and therefore undermines the effectiveness of Pricewatch in achieving the benefits intended for both Esso and all its dealers within Pricewatch. Third, complaint was made of Niad on four occasions. On all of them Niad appeared to comply without demur. It now appears that the breaches of its obligation were much more extensive than Esso at first thought. Fourth, Esso undoubtedly has a legitimate interest in preventing Niad from profiting from its breach of obligation.[60]

Regarding the third option, the restitutionary remedy was also available. Niad had been enriched to the extent that it charged pump prices in excess of the recommended prices, the enrichment was unjust because it was obtained in breach of contract and it was obtained at the expense of Esso because Esso was providing price support for a lower price than that charged by Niad.[61] The Vice-Chancellor added that this was "the most appropriate remedy in that it matches most closely the reality of the case, namely that Niad took an extra benefit to which it was not entitled. It is just that it should be made to restore it to its effective source."[62] The Court held that Esso was entitled damages or an account of profits or a restitutionary sum, it being incumbent upon Esso to elect which it desired.[63]

An Arbitral Tribunal has subsequently reiterated that an account of profits for breach of contract "has to be something exceptional, something out of the ordinary."[64]

[58] Ibid. at [56].
[59] Ibid.
[60] Ibid. at [63].
[61] Ibid. at [64].
[62] Ibid.
[63] Ibid. at [65].
[64] *The Sine Nomine* [2002] 1 Lloyd's Rep. 805 at p. 806.

C. Exemplary Damages

Traditionally, damages are awarded for a breach of contract to compensate parties for their loss not to punish them.[65]

The New Zealand Court of Appeal in *Paper Reclaim Ltd. v Aotearoa International Ltd.* appeared to make a categorical statement that exemplary damages would not be available for breach of contract.

> It is easy for a Court to hedge and say that exemplary damages should not be possible save "in very rare cases" or "in exceptional circumstances" But the downside of "leaving an out" is that any plaintiff can blithely plead a claim for exemplary damages, asserting that his or her case is in the "exceptional" category. It is quite wrong to give plaintiffs a powerful weapon with which they can harass defendants …[66]

However, and despite noting the distinct costs of leaving room for a meritorious exception, the court added: "We leave open the possibility that exemplary damages may be available in circumstances where the breach of contract also constitutes a tort for which exemplary damages are recoverable."[67] Given the stringent test imposed by the New Zealand Supreme Court for exemplary damages in negligence (conscious wrongdoing where a defendant "deliberately and outrageously r[uns] a consciously appreciated risk of causing personal injury to the plaintiff"[68]), successful claims for exemplary damages for breaches of contract are likely to be rare. Nonetheless, the opportunity still exists.

In Canada, the Supreme Court has allowed claims for exemplary damages, albeit only in the "exceptional" case and only where the defendant's conduct itself gives rise to an independent "actionable wrong".[69] The expression actionable wrong is wider than tort and may embrace a breach of the duty of good faith. Thus, punitive damages can be awarded in the absence of an accompanying tort.[70] In *Whiten v Pilot Insurance Co*, the Court stated:

> Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto* … The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour.[71]

[65] See *Addis v Gramophone Co. Ltd.* [1909] A.C. 488, 494; *Ruxley Electronics and Construction Ltd. v Forsyth* [1995] UKHL 8; [1996] A.C. 344, 353 per Lord Bridge of Harwich.
[66] [2006] 3 N.Z.L.R. 188 at [181].
[67] Ibid. at [183].
[68] *Couch* v *Attorney General* [2010] NZSC 27 at [179]. *Couch* overturned *Bottrill* on this point.
[69] *Whiten* v *Pilot Insurance Co*., 2002 SCC 18, [2002] 1 S.C.R. 595 at [78]–[79].
[70] *Whiten* at [81].
[71] Ibid. at [36]. See similarly *Fidler v Sun Life Assurance Co. of Canada* [2006] SCC 30 at [62].

The plaintiffs in *Whiten* were awarded $1m in punitive damages. The insurance company had in bad faith denied the Whitens' claim following the destruction of their home from fire, the company having relied upon a wholly contrived and unsustainable allegation of arson by the insureds.

In *Honda Canada Inc. v Keays* the Supreme Court noted that punitive damages "should 'receive the most careful consideration and the discretion to award them should be most cautiously exercised' … Courts should only resort to punitive damages in exceptional cases."[72] Honda's conduct in wrongfully dismissing Keays was not sufficiently egregious or outrageous to justify the award of punitive damages and the award was set aside. In addition, the claim failed because the employer's discriminatory conduct in breach of the human rights legislation did not constitute an independent actionable wrong.[73] In *Fidler v Sun Life Assurance Co. of Canada* the denial of disability benefits to the insured was not in bad faith but based upon a real, albeit incorrect, doubt as to the suitability of Fidler to perform any work in terms of the policy.[74] The Supreme Court thus set aside the lower courts' award of punitive damages.

D. Previous Negotiations in Interpretation Disputes

Traditionally, evidence of previous negotiations has not been admissible as evidence assisting in the interpretation of a contract.[75] The policy reasons behind this stance include the desire to avert unpredictability and increased time and costs.[76] However, in *Chartbrook Ltd. v Persimmon Homes Ltd*., Lord Hoffman commented that:

> In exceptional cases … a rule that prior negotiations are always inadmissible will prevent the court from giving effect to what a reasonable man in the position of the parties would have taken them to have meant. Of course judges may disagree over whether in a particular case such evidence is helpful or not … . In principle, however, I would accept that previous negotiations may be relevant.[77]

His Lordship nonetheless declined to overturn the exclusionary rule and thus allow resort to prior negoations in all instances. This last example then is not really on a par with the instances above. The House

[72] [2008] SCC 39 at [68] (citing *Vorvis v Insurance Corp. of British Columbia* [1989] 1 S.C.R. 1085, 1104–5).
[73] Ibid. at [64], [67].
[74] [2006] SCC 30 at [74].
[75] *Prenn v Simmonds* [1971] 1 W.L.R. 1381, 1384.
[76] See Lord Hoffman and Lord Rodger of Earlsferry in *Chartbrook* [2009] UKHL 38 at [35]–[38] and [69]–[70] respectively; McGrath J. in *Vector Gas Ltd. v Bay of Plenty Energy Ltd*. [2010] 2 N.Z.L.R. 444 at [71] (Sup. Ct).
[77] [2009] UKHL 38 at [33].

of Lords *did* affirm the rule excluding resort to previous negotations to ascertain the meaning of a contract.[78] But I include it here for there is a strong hint that the exceptional meritorious case may justify departure from the rule in future cases.

III. Predictability and Clarity Revisited

A. The Importance of Predictability

The business world seeks certainty, or as Sir Roy Goode prefers to term it, "predictability"[79]. The reason is not mysterious: commerce needs clear, settled rules.[80] Lord Mansfield's statement in *Vallejo*, quoted in the Introduction, suggested that, for business operators, the actual content of the rules is not so critical as the fact that the rules are fixed and certain. As Neil MacCormick puts it: "Even if the law impinges in an unwelcome way, at least [business people] know where they stand. Not knowing is extremely uncomfortable."[81] John Gava explains

> Market players are not interested in the particular formulation of the rules *as long as these rules are predictable and have some connection to transacting*. Market players will use law for their own purposes and can easily contract around inconvenient or unwanted rules … . Business people may prefer formalist adjudication but this is not based on a principled preference for the doctrinal structure of classical contract rules. Rather, their preference for formalist law based on clear rules and applied in a formalist manner is based on a belief that such a regime is more likely than a non-formalist regime to be predictable and useful as a bargaining and planning tool.[82]

The irony then is that well-intentioned efforts by courts to refashion the rules to make them conform to judicial perceptions of contemporary business needs may be counterproductive.[83]

Strictly speaking, predictability of the legal regime is valued more by lawyers, who advise clients, rather than the contracting parties themselves.[84] For the latter, the formal written contract (and its detailed rights, duties and remedies) and the intricacies of the law of contract

[78] Ibid. at [2], [41], [69].
[79] "The Codification of Commercial Law" (1988) 14 Monash U. L. R. 135, 150; *Commercial Law in the Next Millennium* (London 1998), 23.
[80] Goode, "Codification", at p. 150.
[81] *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford 2005), 238.
[82] "Can Contract Law be Justified on Economic Grounds?" (2006) 25 University of Queensland L.J. 253, 261 (italics in original).
[83] Gava, ibid., at p. 268.
[84] See O. Raban, "The Fallacy of Legal Certainty: Why Vague Legal Standards may be better for Capitalism and Liberalism" (2010) 19 Public Interest L.J. 175, 183; E. Posner, "Standards, Rules, and Social Norms" (1997–1998) 21 Harvard J. Law and Pub. Policy 101, 113.

itself are likely to be of little interest.[85] The individual entrepreneur or business is concerned with the successful performance of the deal, the other party doing its bit, its own potential liability if things go awry, and so on. "To the extent that certainty is needed for planning, what is needed is not certainty of rule, but confidence in result."[86] Businesses want to know where they stand. But that said, to meet this objective, the commercial lawyer, who advises his or her client, is assisted by certain and clear rules.[87] The comprehensibility and predictability of the law is thus ultimately important to business.[88]

Predictability is definitely *a* goal, but not the only one, nor "the be-all and end-all of contract law."[89] It should yield to the dictates of fairness and justice when the occasion demands this. It is, indeed, trite to reiterate that fairness and justice must be balanced against the need for certainty, with the relative weight given each dependent upon the precise legal, social and economic context, one's philosophical outlook and so on.[90] (The balance between predictability and flexibility in commercial law has been achieved most efficiently and effectively through the courts' recognition of trade custom and business usage.[91]) It is the law's concern with individualised justice that explains the resort to the "never say never" dictum. As Lord Nicholls explained, in regard to the availability of exemplary damages in tort:

> However, if experience in the law teaches anything, it is that sooner or later the unexpected and exceptional event is bound to occur. It would be imprudent to assume that, in the absence of intentional wrongdoing or conscious recklessness, a defendant's negligent conduct will *never* give rise to a justifiable feeling of outrage calling for an award of exemplary damages. "Never say never" is a sound judicial admonition. There may be the rare case where the defendant departed so far and so flagrantly from the dictates of ordinary or professional precepts of prudence, or standards of care, that his conduct satisfied this test even though he was not consciously reckless.[92]

Yet there are undoubted costs of a "never say never" approach. Litigation may be rendered more complex, costly and protracted.[93] There is the incentive to pursue a claim in the hope that the instant suit

[85] See e.g. S. Macaulay, "The Real and Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules" in D. Campbell, H. Collins and J. Wightman (eds), *Implicit Dimensions of Contract* (Oxford 2003), ch. 3.
[86] M. Eisenberg, *The Nature of the Common Law* (Cambridge, Mass 1988), 158.
[87] R. Calnan, "Construction of Commercial Contracts: A Practitioner's Perspective" in A. Burrows and E. Peel (eds), *Contract Terms* (Oxford 2007) ch. 2, p. 19.
[88] Bradgate, "Contracts", at p. 689.
[89] Lady Justice Arden, "Coming to Terms with Good Faith" (2013) 30 J. C. L. 199, 211.
[90] See e.g. E. McKendrick, *Goode on Commercial Law*, 4th ed. (London 2009), 1348–9.
[91] See Cranston, "Doctrine and Practice in Commercial Law".
[92] *Bottrill v A* [2002] UKPC 44 at [27] (emphasis in original).
[93] See Smillie, "Certainty", at p. 635.

is just one of the rare exceptions deserving of recognition. Conversely, there is incentive to settle a claim lest this be one of the few that does fall within the exceptional category. The New Zealand Court of Appeal in *Paper Reclaim* cogently described these costs:

> But the downside of "leaving an out" is that any plaintiff can blithely plead a claim for exemplary damages, asserting that his or her case is in the "exceptional" category. The defendant will never be successful in having the claim struck out, as the court will not be able to assess at a strike-out stage whether the case factually comes within the exceptional category where exemplary damages might lie. A claim may go to trial unnecessarily, the plaintiff hoping that he or she may win the $1 million jackpot Mrs Whiten won … . The fact that the odds may be slim may not deter a plaintiff with stars in his eyes. Alternatively, defendants may feel compelled to offer something in order to get rid of the possibility that this case is found to be within the exceptional category … . It is quite wrong to give plaintiffs a powerful weapon with which they can harass defendants and, perhaps, extract large settlements because the costs of defending even an unmeritorious claim may be huge … [94]

The irony is, as I noted earlier,[95] that in the next breath the Court posited an exception for the contractual breach qualifying for an award of exemplary damages.

The potentially deleterious consequences of the meritorious exception approach for commercial law were confronted directly by Lord Nicholls in *Blake*. In his view, the unsettling effect of recognising a new contract remedy (account of profits) would be minimal:

> The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, *in practice*, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances.[96]

By contrast, Lord Hobhouse, dissenting in *Blake*, warned that "if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far reaching and disruptive."[97]

Earlier I referred to the background interest that lies behind commercial law's desire for certainty. The insistence upon clarity and

[94] [2006] 3 N.Z.L.R. at [181].
[95] Note 67 above.
[96] [2001] 1 A.C. at p. 285 (italics in original).
[97] Ibid. at p. 299.

predictability is because such virtues enable contract law to achieve its broader goals of fostering economic efficiency and personal autonomy. The effects of insufficient guidance (in terms of greater costs and so on) have just been noted. Waldron points out another less obvious adverse effect:

> An alternative objection is that such imprecise standards provide altogether too much in the way of action-guidance, because they chill and deter not only the behavior to which they are eventually applied, but also a lot of behavior in the vicinity as people strive to avoid the risk of being caught out by these indeterminate provisions.[98]

The "behavior in the vicinity" here is nothing less than commercial contracting generally. This what is being "chilled". Civil rights guarantees, such as freedom of expression, may be thought to "need breathing space to survive, [hence] government may regulate in the area only with narrow specificity."[99] But is contractual freedom and our interest in individual autonomy and economic efficiency any less deserving than our societal concern for freedom of association or freedom from arbitrary arrest and detention? It might be said that when it comes to harmful conduct, such as dangerous driving, the chilling effect consequent upon an imprecise rule is less objectionable: there is no background interest in freedom to drive quickly that requires an unchilled breathing space.[100] But contracting and the making of demands in commercial life do not seem like driving quickly—an activity that by its nature is suspect—but more like freedom of speech.

In *Blake* their Lordships disagreed over the probable practical impact of the new exception. Empirical evidence would clearly be valuable but studies that investigate whether novel and ill-defined rules (or exceptions to rules) will result in increased costs for clients and more litigation are rare. One recent study suggests that the practical arguments against abandoning the prior contractual negotiations exclusionary rule "lack weight"[101]. The costs to clients receiving legal advice on contract interpretation matters would be marginally increased, as would be the costs of litigation.[102] But this is just one

[98] "Vagueness", at p. 75.

[99] *National Association for Advancement of Colored People v Button*, 371 U.S. 415, 433 (1963) (Sup. Ct.).

[100] Waldron, "Vagueness", at p. 77.

[101] J.E. Bayley, "Prior Negotiations and Subsequent Conduct in Contract Interpretation: Principles and Practical Concerns" (2012) 28 J.C.L. 179, 201, 209. The survey had 63 responses from the 248 lawyers in the UK and New Zealand it was sent to.

[102] Ibid. at p. 184 and p. 186. Some 67 percent of the respondents thought that removal of the prior negotiations exclusionary rule would, at worst, marginally increase the costs to clients for advice on contract construction issues; 57 percent of litigators thought that the rule's removal would, at worst, marginally increase the costs of litigation.

study and its author acknowledges that it does not possess scientific rigour.[103]

If we accept that an important goal of contract law is to provide guidance to the commercial community, then unclear rules dependent upon case-by-case resolution detract from that. Appellate courts should be enhancing not undermining legal predictability. They should be endeavouring to counter not exacerbate the "entropic" tendency for legal certainty to decrease over time as rules unravel and become more unpredictable in content and in application.[104] They should be issuing rulings "that improve the clarity and consistency of the law they are administering. That need not involve going out of their way to find excuses to formulate new doctrine. But when the chance is there to put an issue to rest, they should do so."[105]

B. The Importance of Clarity

Clarity is another objective of commercial law. "The desideratum of clarity", explained Fuller, "represents one of the most essential ingredients of legality."[106] The problem is not that a rule may be subject to an exception. This is commonplace. It is not so much the existence but rather the *nature* of any exception. A clearly articulated and identifiable exception is not a cause for concern. For example, the exceptions to the rule against granting mental distress damages where (a) the distress is directly due to physical inconvenience caused by the breach of contract[107] or (b) where an important object of the contract is to provide enjoyment, comfort or prevent distress,[108] are not unduly troublesome. By contrast, an imprecise, open-ended exception is a breeding ground for uncertainty. So, to condition the award of distress damages where, hypothetically, the upset caused by the breach was "especially great" or "highly foreseeable" would be undesirable.

The problem, as illustrated in Part II, is where the exceptions are of the broad, case-by-case kind. To alleviate the breadth and indeterminancy of the exception, courts may resort to a "thick term of evaluation"[109]. The use of these to guide or channel the exercise of practical deliberation by a decision-maker tasked with applying a standard is familiar.[110] It is a matter of "cruel" punishment, "degrading" treatment, and so on. We see this occurring here too. Thus we have the "outrageousness" threshold for an award of exemplary damages. But such

[103] Ibid. at p. 181.
[104] A. D'Amato, "Legal Uncertainty" (1983) 71 Calif. L. Rev 1.
[105] A. Stewart, "What's Wrong with the Australian Law of Contract?" (2012) 29 J.C.L. 74, 80.
[106] *The Morality of Law*, at p. 63.
[107] *Perry v Sidney Phillips & Sons* [1982] 1 W.L.R. 1297.
[108] *Farley v Skinner* [2001] UKHL 49; [2002] 2 A.C. 732 at [24].
[109] Waldron, "Vagueness", at 80; R. Dworkin, *Justice for Hedgehogs* (Cambridge, Mass 2011), 181.
[110] Waldron, loc.cit.

a cipher is weak. It channels the exercise of deliberative judgment by a modest degree at best. McGrath J. pointed out that

> The problem with a stand-alone outrageousness test is that it requires the court to make an assessment without reference to precise criteria. Judges must apply the remedy if, as a matter of impression, they consider it appropriate in the case … . If this test is retained, there will be considerable uncertainty within the legal system as to when such damages are available. Like cases will not be decided alike. This … will lead to many claims and multiple appeals against decisions where the minds of judges will reasonably differ.[111]

With lawful act duress, the test is the equally, if not more, nebulous one of "moral or social unacceptability".

For the remedy of an account of profits, Lord Nicholls expressly stated that "no fixed rules can be prescribed" and that "it would be difficult, and unwise, to attempt to be more specific" than offer a general guide or two.[112] He implied that an account of profits might only be awarded where the usual contract remedies (compensatory damages, specific performance, injunctions) were inadequate. In addition to the usual garden-variety factors,[113] he did proffer one factor in favour of an award, viz, whether the plaintiff "had a legitimate interest in preventing the defendant's profit-making activity"[114]. Lord Steyn added two others, namely, whether the defendant was in a position closely analogous to that a fiduciary and, less helpfully, whether the needs of "practical justice" dictate it.[115] Lord Nicholls explained that the following considerations would *not* be sufficient to merit an award: "skimped" performance, where the defendant failed to provide the full extent of services he contracted to provide and situations where the defendant obtained his profit by doing the very thing he contracted not to do.[116] This non-exhaustive list of criteria is helpful but it still leaves a large degree of discretion to the court.

The other familiar pathway to reduce uncertainty is to wait for an array of decisions by an authoritative court.[117] Over time, and as the case law accumulates, a pattern may slowly emerge, the penumbra of uncertainty[118] hopefully shrinks. However, is it really true that the scope of exceptions is, as Lord Steyn observed, "best hammered out on the

[111] *Couch v Attorney-General* at [243].
[112] *Blake* [2001] 1 A.C. at p. 285.
[113] See ibid.
[114] Ibid.
[115] Ibid. at p. 292.
[116] Ibid. at p. 286.
[117] Waldron, "Vagueness", at p. 75.
[118] H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harvard L. Rev 593, 607.

anvil of concrete cases"?[119] In *The Sine Nomine*, the Arbitration Tribunal, after quoting this sentence by Lord Steyn, added: "We are tempted to answer, as one well-known Judge used to say in days gone by 'not in the Reading County Court' ".[120] The years it may take for substantive guidance to emerge comes at a high price: the costs incurred meanwhile in providing advice and adjudicating disputes.[121]

C. Is the Desire for Certainty Illusory, Problematic and Over-Rated?

The plea for certainty is, some contend, vain, for the law is inherently uncertain.[122] It is, as Critical Legal Studies theorists contend, incorrigibly indeterminate[123] and contract law is no exception.[124] But no one seriously insists upon perfect legal certainty.[125] Absolute predictability is not what is advocated by the traditionalists (for want of a better description), but, rather, a high degree of predictability—or, to put it another way, the avoidance of unnecessary or avoidable uncertainty. No sensible jurist would deny that there is always going to be a certain degree of fuzziness—"an element of forensic uncertainty in borderline cases"[126]—surrounding rules. The modest but valuable aim is surely to keep the penumbra of uncertainty to a minimum. As MacCormick commented:

> I always had a certain inclination to remind colleagues that certainty is unattainable, and that the most one can do is aim to diminish uncertainty to an acceptable degree. What degree is acceptable depends on the fact that other values, including justice in light of developing but currently unforeseen situations, are at stake. Even this modest role of avoiding needless uncertainty would, however, be viewed most suspiciously by many legal thinkers of the present epoch …[127]

A stronger charge is that the quest for certainty in commercial and contract law has actually been productive of a misalignment between commercial law and commercial practice.[128] The "zeal" and "excessive concern"[129] for doctrinal certainty has led to a static, ossified law that is unresponsive to the practical, dynamic needs and reasonable expectations of the commercial community. Doctrinal certainty is, it is said,

[119] *Blake* [2001] 1 AC at p. 291.
[120] [2002] 1 Lloyd's Rep. 805, 806.
[121] L. Kaplow, "Rules versus Standards: An Economic Analysis" [1992] Duke L.J. 557, 622.
[122] See e.g. E.W. Thomas, *The Judicial Process* (Cambridge 2005), at pp. 16, 115.
[123] E.g. R. Unger, "The Critical Studies Movement" (1983) 96 Harvard L. Rev 561.
[124] See R. Hillman, *The Richness of Contract Law* (Dordrecht 1997), pp. 190–6.
[125] I. MacNeil, "Uncertainty in Commercial Law" (2009) 13 Edin. L.R. 68, 78.
[126] Lord Nicholls in *Bottrill* at [35]. This observation concerns standards, but the same can be said of rules.
[127] *Rhetoric and the Rule of Law*, at p. 11.
[128] G. Puig, "The Misalignment of Commercial Law and Commercial Practice" [2012] L.M.C.L.Q. 317.
[129] Ibid. at pp. 324, 327.

a "problem"[130] the solution to which lies in a greater weight being given to flexibility. This is more of an assertion than an argument and there is a distinct dearth of empirical evidence to support the contention that the emphasis upon certainty has stymied business activity.

In an attempt to downplay the significance of certainty in contract law some, such as Lord Scott, contend that it is best characterised as a mere "consideration" or "desideratum", and not a principle or a goal.[131] If legal certainty were cut down to size, so to speak, and treated "as a valid consideration, but a consideration only"[132], so much the better. But as it stands, the critics continue, too many pursue certainty as a paramount goal.[133] The contention that certainty is too frequently treated in absolutist terms, becoming an "idol",[134] is rather overstating the case. Perfect certainty is a straw man. One may re-characterise predictability as a consideration if one wants. But whether dubbed a goal or a consideration—a distinction that is difficult to sustain[135]—the numerous judicial pronouncements over a sustained period that predictability *is* an important matter in commercial and contract law indicates its ongoing importance.[136]

IV. Conclusion

At the risk of being characterised as a "dinosaur"[137] or a recalcitrant "new formalist"[138], the importance of predictability as a goal, and hence clear, settled rules, in contract law, is something that is worth restating and defending. The hortatory function[139] of the courts—its signaling or channeling role, achieved by way of legal and judicial "incentives and disincentives … . to encourage behavior of a positive or affirmative character"—in contract law ought not to be neglected.

There has been enough uncertainty introduced into contract law—whether it be the birth of new doctrines of uncertain scope, such as economic duress, or the attempts to reformulate longstanding rules, such as remoteness, with novel and vague tests.[140]

The promulgation of open-ended imprecise exceptions is but another manifestation of the gravitational pull of modern contract law

[130] Ibid. at p. 328.
[131] *The Golden Victory*, at [38].
[132] Thomas, *Judicial Process*, at p. 135.
[133] Ibid. at p. 137.
[134] Ibid. at ch. 5.
[135] S. Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge 2011), pp. 188, 229.
[136] See the judicial statements above fns 5–8.
[137] An appellation borne unashamedly by Lord Bingham of Cornhill, "A New Thing Under the Sun? The Interpretation of Contract and the *ICS* Decision" (2008) 12 Edin. L.R. 374, 389.
[138] Gava, "Can Contract Law", at p. 259.
[139] Atiyah, "Principles to Pragmatism", at p. 1249.
[140] *The Achilleas* [2008] UKHL 48; [2009] 1 A.C. 61.

away from particularised, hard-and-fast rules to general principles and standards calling for individualised, context-specific decisions. The creation of nebulous exceptions exemplifies this *Zeitgeist*. Rigid, iron-cast rules may, the argument goes, work injustice and thus the exceptional situation ought never to be foreclosed, for to do so would be to make achieving justice a hostage to certainty. Yet despite the appeal this stance has to certain segments of the judiciary, it is distinctly unattractive to businesses and their advisers. Commercial actors prefer clear predictable rules. An ostensibly unjust rule can be worked around. What cannot be so readily accommodated is the introduction of an unpredictable legal outcome, one determined afresh on a case-by-case basis by non-commercial actors (courts) applying nebulous standards. The fact that the successful invocation of the exception is as rare, if not as elusive, as sightings of the Tasmanian Tiger, leads one to further question the point of the exercise. The "never say never" mindset is a pernicious one in commercial and contract law. The dictum, and (more importantly) the philosophy it represents, should be jettisoned, as should its doctrinal offspring, the imprecise exception.