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# THE JUDICIAL INDIVIDUALITY OF LORD SUMPTION

JAMES LEE\*

**Brian:** Look, you've got it all wrong! You don't need to follow me; you don't need to follow *anybody*! You've got to think for yourselves! You're all individuals!

**The Crowd:** Yes! We're all individuals!

**Brian:** You're all different!

**The Crowd:** Yes! We *are* all different!

**Man in the Crowd:** I'm not.

**The Crowd:** Sssssh!

*Monty Python's Life of Brian*<sup>1</sup>

## I INTRODUCTION

This article offers a perspective from the United Kingdom ('UK') on the position of an individual judge, in order to illuminate the dynamics of judging on a final court of appeal. My aim is to examine the jurisprudence of Lord Sumption, a Justice of the United Kingdom Supreme Court ('UKSC'). We shall see that, on precedent, Lord Sumption JSC's view is essentially a conservative one, which perhaps ties into his Lordship's views on judicial self-restraint more broadly. By 'conservative' in this context, I mean cautious about change, rather than any grander political claim. Professor Alan Paterson, in his seminal book *Final Judgment*, observed that, after two years on the Court, 'Lord Sumption ... in some respects [had] begun to take on the mantle of Lord Hoffmann for his speed of thought and writing and the clarity of his vision'.<sup>2</sup> His Lordship has certainly gone on to cement his reputation as a considerable intellectual force and personality on the Court.

In order to keep within the confines of one article, I do not intend to survey every one of the UKSC decisions to which Lord Sumption has contributed as a Justice. Rather, I shall mainly focus on appeals from the most recent full year of UKSC decisions:

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<sup>1</sup> Directed by Terry Jones, HandMade Films, 1979.

<sup>2</sup> Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) 205. For studies on Lord Hoffmann's approach to judging, see Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Hart Publishing, 2015); James Lee, 'Fidelity in Interpretation: Lord Hoffmann and the Adventure of the Empty House' (2008) 28 *Legal Studies* 1.

2015–16,<sup>3</sup> which was the Court’s seventh full year. Considering decisions in which Lord Sumption has delivered the lead, concurring or dissenting judgment, I shall take two private law decisions as case studies.<sup>4</sup> This is in part because a recent collection has examined the implications of Lord Sumption’s extra-curial<sup>5</sup> views on judging from a *public law* perspective,<sup>6</sup> but also because Lord Sumption’s judicial contributions in 2015–16 mainly covered other areas.<sup>7</sup> My focus will thus be upon two areas – the law of illegality, and the tort of malicious prosecution – on which Lord Sumption has already had the opportunity to judge more than once in his relatively short judicial career. We shall see that his Lordship’s views have avowedly not changed on the relevant issues. In developing my analysis, I shall also identify some broader themes related to the business of judging in the UK’s apex court.

The aforementioned book of essays contains a response from Lord Sumption, in which his Lordship has said that ‘there is no point comparing my lectures with my judgments on these issues and finding inconsistencies between them. Of course they are inconsistent’.<sup>8</sup> That is on the basis that in his judgments he has to have regard to what he thinks the law is, whereas in a speech he can say what he really thinks.<sup>9</sup> But, with respect, I shall show that comparing Lord Sumption’s views in extra-curial speeches and judgments does help us to understand his Lordship’s judicial philosophy when it comes to precedent, not least because there are some points in which his Lordship has used the same language in both.

In an interview with Paterson shortly after Lord Sumption became a Justice, his Lordship rejected the idea that there is always a single right answer in every case, and said that he takes the view that ‘the object of this Court is to produce a result that is coherent in relation to the generality of cases in relation to other cognate areas of law’.<sup>10</sup> As we shall see below, this stance has clearly informed Lord Sumption’s approach to judging, and my main argument is that we see Lord Sumption’s judicial

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<sup>3</sup> See below Part II.

<sup>4</sup> *Patel v Mirza* [2016] 3 WLR 399 (*‘Patel’*), discussed below in Part V(C); *Willers v Joyce* [2016] 3 WLR 477 (*‘Willers (No 1)’*), discussed below in Part VI.

<sup>5</sup> Here I deliberately use the term ‘extra-curial’ to refer to speeches, since engaging with the public and the academy through such lectures is arguably still part of the judicial role.

<sup>6</sup> NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of Law* (Hart Publishing, 2016). Professor Craig’s essay in this collection, ‘Limits of Law: Reflections from Private and Public Law’, also adverts to some features of reasoning in private law cases: at 175. The collection was prompted by a lecture given by Lord Sumption in 2013: Lord Sumption, ‘The Limits of Law’ (Speech delivered at the 27<sup>th</sup> Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013) 15.

<sup>7</sup> Lord Sumption gave the brief judgment referring a question on the operation of Council Directive 79/7/EEC on the *Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security: MB v Secretary of State for Work and Pensions* [2016] UKSC 53. The case concerned whether the Directive ‘precludes the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a state retirement pension’: at [18]. Lord Sumption also gave judgment on the powers of the now-abolished Northern Ireland Commissioner for Complaints: *Re JR55* [2016] UKSC 22. See also Richard Kirkham, ‘JR55, Judicial Strategy and the Limits of Textual Reasoning’ (2017) 1 *Public Law* 46.

<sup>8</sup> Lord Sumption, ‘A Response’ in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of Law* (Hart Publishing, 2016) 213, 213.

<sup>9</sup> *Ibid.*

<sup>10</sup> Paterson, *Final Judgment*, above n 2, 272.

conservatism emerge from these cases. Responsible for giving the highest percentage of lead judgments in the UKSC in 2015–16,<sup>11</sup> Lord Sumption is a powerful voice on the Court and has developed a distinctive style of judging.

## II UK SUPREME COURT: ADJUDICATIVE STRUCTURES AND PRECEDENT

In the context of this special issue, it is worth making some brief points about the UKSC's working practices,<sup>12</sup> in order to understand the role of any individual Justice of the Court.<sup>13</sup> The Court has recently seen a period of stability in membership, with no changes between the appointment of Lord Hodge JSC in October 2013 and the retirement of Lord Toulson JSC in September 2016. Five more members of the Court will retire before the end of 2018, including Lord Sumption, who will reach his compulsory age of retirement (70)<sup>14</sup> in December of that year. It is thus an opportune time to examine the work of the Court, with a focus on one of the Justices who is nearing the end of his service.

The UKSC is meant to have the equivalent of 12 full time Justices on the Court,<sup>15</sup> but it currently has 11. It has been announced<sup>16</sup> that the six appointments will be made in two rounds of three, in order to encourage a diverse range of applicants and to balance the Court's subject needs.<sup>17</sup> Lords Neuberger PSC and Clarke JSC will retire in the summer of 2017,<sup>18</sup> and so the Court will replace three Justices for the start of the 2017–18 year. Until then, Lord Toulson, Lord Dyson (who recently retired as Master

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<sup>11</sup> See Part IV below.

<sup>12</sup> Considered more fully in James Lee, 'The United Kingdom Supreme Court: A Study in Judicial Reform' in Emmanuel Guinchard and Marie-Pierre Granger (eds), *The New EU Judiciary – An Analysis of Current Judicial Reforms* (Kluwer, forthcoming 2017). See also Paterson, *Final Judgment*, above n 2; Dickson, *Human Rights*, below n 43.

<sup>13</sup> Unlike some other apex courts, the UKSC does not have a term such as 'puisne' or 'Associate' Justice. The Court has a President and a Deputy President and then s 23(6) of the *Constitutional Reform Act 2005* (UK) c 4, provides that '[t]he judges other than the President and Deputy President are to be styled "Justices of the Supreme Court"'.

<sup>14</sup> Lord Sumption's belated judicial appointment means that he must retire at 70 because s 26 of the *Judicial Pensions and Retirement Act 1993* (UK) c 8 reduced the retirement age from 75 to 70, for judges first appointed to a relevant judicial post after 31 March 1995.

<sup>15</sup> *Constitutional Reform Act 2005* (UK) c 4 s 23(2), as amended by the *Crime and Courts Act 2013* (UK) c 22 s 20, giving effect to sch 13, Pt 2, para 2. There have so far only been a maximum of 12 Justices at any one time.

<sup>16</sup> The Supreme Court, *Statement on Supreme Court Appointments Process* (11 July 2016) <<https://www.supremecourt.uk/news/statement-on-supreme-court-appointments-process.html>>. Lord Toulson retired on 22 September 2016. The other five Justices will all retire in 2018: Lord Neuberger, Lord Clarke, Lord Mance, Lord Hughes and Lord Sumption.

<sup>17</sup> See Jenny Rowe, 'Chief Executive's Review of the Process Followed by Selection Commissions Making Recommendations for Appointment to The Supreme Court' (July 2015) <<https://www.supremecourt.uk/docs/review-of-selection-commission-process-july-2015.pdf>>; Lord Neuberger, 'The Role of the Supreme Court Seven Years On – Lessons Learnt' (Speech delivered at Bar Council Law Reform Lecture 2016, 21 November 2016) <<https://www.supremecourt.uk/docs/speech-161121.pdf>>.

<sup>18</sup> Lord Neuberger, above n 17, [52].

of the Rolls), and two retired Scottish judges, Lords Gill<sup>19</sup> and Hamilton, have served on the Supplementary Panel to bolster the Court's bench where necessary.

The UKSC has seen a marked trend towards single judgments under the Presidency of Lord Neuberger, who has 'been keen to encourage a more collegiate, even a collaborative, approach towards judgment-writing'.<sup>20</sup> Of the 75 decisions in the 2015–16 court year, 47 involved a single judgment (62.67 per cent of the total).<sup>21</sup> But it remains the case that each judge can, if they choose, issue their own opinion. Lord Sumption has himself expressed reservations about concurring and dissenting where not felt necessary: 'a judge may dissent or he may concur for different reasons. This can be personally satisfying. But it is not much of a service to the public'.<sup>22</sup> Nevertheless there are various instances of Lord Sumption issuing separate opinions, whether concurring or dissenting.<sup>23</sup> The effect of this is that we can identify themes and patterns in the jurisprudence of Lord Sumption as an individual judge on the UKSC.

Another relevant feature of the UKSC's practices is that the Court has had a practice of never sitting *en banc*. This is not least because the *Constitutional Reform Act 2005* (UK) c 4, which provided for the creation of the Court, requires it to sit with an uneven number of Justices:<sup>24</sup> in the event of the usual full complement of 12 serving Justices, therefore, it would not be possible to sit *en banc*. Instead, the vast majority of cases – just over 80 per cent – are heard with a panel of five Justices.<sup>25</sup> This approach means that the Court can hear two cases at once, in parallel panels.<sup>26</sup> In particularly important cases, or where the Court is being invited to depart from a previous decision, the Court may sit in an enlarged panel of seven or nine. There are published

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<sup>19</sup> Lord Gill reached the statutory retirement age on 25 February 2017: Judicial Committee of the Privy Council, *Lord Gill Given Supreme Court Farewell* (24 February 2017) <<https://www.supremecourt.uk/news/lord-gill-given-supreme-court-farewell.html>>.

<sup>20</sup> Lord Neuberger, above n 17, [40].

<sup>21</sup> Lee, 'The United Kingdom Supreme Court: A Study in Judicial Reform', above n 12. Paterson has shown that between 1981 and 2013, the percentage of single judgments varied from 12 per cent to 70 per cent: *Final Judgment*, above n 2, 106.

<sup>22</sup> Lord Sumption, 'A Response', above n 8, 213.

<sup>23</sup> See Lord Sumption dissenting in *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 Plc* [2016] UKSC 29, [55]: 'This case is of considerable financial importance to the parties but raises no questions of wider legal significance. There is therefore no point in dissenting at any length. But since I would have held that that these securities are not redeemable, I should, however briefly, explain why'. And in *Re B (A child)* [2016] UKSC 4, [83]: 'A dissenting judgment is not the place for a detailed examination of the ambit of the inherent jurisdiction'. A final example from 2017 is his Lordship's concurrence in *FirstGroup Plc v Paulley* [2017] UKSC 4, [92], expressing doubts about the outcome but noting that 'this is not a case in which it would be right to dissent. In a situation where there is no ideal solution, but only more or less unsatisfactory ones, I think that the approach of Lord Neuberger and Lord Toulson comes as close to giving effect to the policy of this legislation as a court legitimately can'.

<sup>24</sup> *Constitutional Reform Act 2005* (UK) c 4, s 42(1)(a).

<sup>25</sup> James Lee, 'Against All Odds: Numbers Sitting in the UK Supreme Court and Really, Really Important Cases' in Paul Daly (ed), *Apex Courts and the Common Law* (forthcoming 2017).

<sup>26</sup> This can occur whether sitting in the UKSC or as the Judicial Committee of the Privy Council ('JCPC'). Between October 2009 and August 2016, the UKSC decided 479 cases, and in the same period there were 287 JCPC decisions: see Lee, 'The United Kingdom Supreme Court: A Study in Judicial Reform', above n 12, pt 2.

criteria for when such an enlarged panel will be convened.<sup>27</sup> The court sat for the first time ever in a panel of 11 in an appeal relating to the UK's departure from the European Union: *R (Miller) v Secretary of State for Exiting the European Union*.<sup>28</sup> *Miller* saw extensive attention focused on the UKSC; when judgment was handed down, Lord Sumption joined in the judgment attributed to all eight Justices in the majority.<sup>29</sup>

The effect of these arrangements is that, unlike certain other apex courts, any individual Justice will not hear all the appeals, and indeed most Justices may not hear the majority of cases: indeed, in the 2015–16 year, only Lord Neuberger (the President), Lady Hale (the Deputy President) and Lord Toulson JSC sat in a majority of the Court's 75 decisions.<sup>30</sup> For his part, Lord Sumption sat in 44 per cent of the cases. There are no official criteria for determining the composition of panels, but Lord Neuberger has said that the Court seeks to ensure 'that a panel of five (or more) hearing a case includes any Justice with special expertise in the relevant law, and that there will also normally be Justices who can bring their more general legal knowledge and experience to bear on the case'.<sup>31</sup> We shall see that Lord Sumption's contribution spans several areas of the law, and, as demonstrated in the next Part, his Lordship has not shown himself to be reticent in bringing his experience to bear within the areas of other Justices' specialisms.

My argument as developed below is that Lord Sumption can be seen as one of the more conservative Justices in terms of precedent. But that must be understood within the context that the Supreme Court has generally been reasonably conservative as a

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<sup>27</sup> The Supreme Court, *Panel Numbers Criteria* <<https://www.supremecourt.uk/procedures/panel-numbers-criteria.html>>. I have criticised the application of these criteria: Lee, 'Against All Odds', above n 25.

<sup>28</sup> [2017] 2 WLR 583 ('*Miller*'). The Court's announcement that all 11 Justices were to sit can be found here: The Supreme Court, *Article 50 ('Brexit') Case* (8 November 2016) <<https://www.supremecourt.uk/news/permission-to-appeal-decision-08-november-2016.html>>. Lord Sumption attracted considerable media attention during the hearing in *Miller*, not only for his incisive interventions but also for his 'loud' ties: see, eg, Helena Horton, "'Brain of Britain" Judge Lord Sumption Dazzles Brexit Hearing with His Loud Ties', *The Daily Telegraph* (online), 7 December 2016 <<http://www.telegraph.co.uk/news/2016/12/07/judge-lord-sumption-dazzles-watching-brexit-hearing-loud-ties/>>; Jack Sommers, 'Judge Lord Sumption Becomes Star of Supreme Court Brexit Hearing', *The Huffington Post* (online), 6 December 2016 <[http://www.huffingtonpost.co.uk/entry/supreme-court-brexit-hearing-finds-its-star-in-lord-sumption\\_uk\\_5846a82ce4b06a503249176d](http://www.huffingtonpost.co.uk/entry/supreme-court-brexit-hearing-finds-its-star-in-lord-sumption_uk_5846a82ce4b06a503249176d)>; Patrick Kidd, 'Ties that Blind Make Lord Sumption a Brexit Hearing Star', *The Times* (online), 10 December 2016 <<http://www.thetimes.co.uk/article/ties-that-blind-make-lord-sumption-a-brexit-hearing-star-rrq7jrn9f>>; Haroon Siddique, 'Supreme Court Brexit Hearing: 10 Things We Learned' *The Guardian* (online), 9 December 2016 <<https://www.theguardian.com/politics/2016/dec/08/supreme-court-brexit-10-things-learned-royal-prerogative-henry-viii>>.

<sup>29</sup> The majority comprised Lord Neuberger PSC, Lady Hale DPSC, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge JJSC. Lord Reed, Lord Carnwath and Lord Hughes JJSC dissented, each delivering an individual opinion: see Sir Stephen Sedley, 'The Judges' Verdicts', *London Review of Books* (online), 30 January 2017 <<https://www.lrb.co.uk/2017/01/30/stephen-sedley/the-judges-verdicts>>.

<sup>30</sup> The next highest percentage was that of Lord Reed, who sat on 49.3 per cent of the appeals. This is based on the author's own empirical analysis of the 2015–16 decisions of the Supreme Court, using the same dataset as for Part IV below. Justices of the Supreme Court also have a significant workload serving in the Privy Council: see above n 26.

<sup>31</sup> Lord Neuberger, above n 17, [24].

whole.<sup>32</sup> The UKSC has maintained a practice of continuity in terms of precedent from its predecessor the House of Lords, which exercised its power to depart from its own decisions (recognised in the 1966 *Practice Statement*)<sup>33</sup> only rarely. In *Rees v Darlington Memorial Hospital NHS Trust*,<sup>34</sup> the House of Lords declined an invitation to depart from the decision in *McFarlane v Tayside Health Board*,<sup>35</sup> which had held that it was not possible to claim for the costs of raising a healthy child born after the couple had been negligently advised that a vasectomy operation had been successful. Lord Bingham stated that:

it would be wholly contrary to the practice of the House to disturb its unanimous decision in *McFarlane* given as recently as 4 years ago, even if a differently constituted committee were to conclude that a different solution should have been adopted. It would reflect no credit on the administration of the law if a line of English authority were to be disapproved in 1999 and reinstated in 2003 with no reason for the change beyond a change in the balance of judicial opinion.<sup>36</sup>

Similar dicta can be found in other House of Lords decisions,<sup>37</sup> and the Justices have confirmed that the *Practice Statement*, and the practice in respect of the *Practice Statement*, are ‘part of the established jurisprudence relating to the conduct of appeals’, and continue to apply in the UKSC.<sup>38</sup> Even on the occasions where the Court has decided to depart from a previous authority, the Court has reaffirmed its general commitment to caution: ‘This Court should be very circumspect before accepting an invitation to invoke the 1966 *Practice Statement*’.<sup>39</sup>

### III LORD SUMPTION’S HISTORY

Lord Sumption presents an interesting case study, especially since the Court’s membership has been relatively stable since 2013: ‘Inevitably, as people change the character of the institution changes too’.<sup>40</sup> He was a History Fellow at Magdalen College Oxford before going to the Bar and is the author of a multi-volume history of

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<sup>32</sup> Lee, ‘The United Kingdom Supreme Court: A Study in Judicial Reform’, above n 12, pt 2. For more detail, see James Lee, ‘Fides et Ratio: Precedent in the Early Jurisprudence of the United Kingdom Supreme Court’ (2015) 21(1) *European Journal of Current Legal Issues* <<http://webjcli.org/article/view/410/521>>; Sir Louis Blom-Cooper and Gavin Drewry, ‘Correcting Wrong Turns: The 50th Birthday of the 1966 House of Lords Practice Statement on Precedent’ (2016) 3 *Public Law* 381.

<sup>33</sup> *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (‘*Practice Statement*’).

<sup>34</sup> [2004] 1 AC 309.

<sup>35</sup> [2000] 2 AC 59.

<sup>36</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, [7].

<sup>37</sup> *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345, 1349 (Lord Wilberforce); *Horton v Sadler* [2007] 1 AC 307, 323 [29] (Lord Bingham): ‘It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors’.

<sup>38</sup> *Austin v Mayor and Burgesses of the London Borough of Southwark* [2011] 1 AC 355, 369 [24]–[25] (Lord Hope DPSC). The point is now incorporated into the Court’s Practice Directions: The Supreme Court of the United Kingdom, *Practice Direction No 4 – Notice of Appeal*, [4.2.4].

<sup>39</sup> *Knauer v Ministry of Justice* [2016] AC 908, 921 [23] (Lord Neuberger PSC and Lady Hale DPSC).

<sup>40</sup> Lord Hope, ‘Foreword’ in Paterson, *Final Judgement*, above n 2 vii.

the Hundred Years War.<sup>41</sup> Jonathan Sumption QC was sworn in as a Justice of the Supreme Court on 11 January 2012.<sup>42</sup> He was the first candidate to be appointed to the top court (whether the House of Lords or Supreme Court) directly from the Bar since Lord Radcliffe in 1949.<sup>43</sup> He did have some judicial experience,<sup>44</sup> as a Deputy High Court Judge<sup>45</sup> and Recorder in England, and as an appellate judge in Jersey and Guernsey. His first reported High Court judgment, which was an agricultural holdings case involving a man whose daffodils were ‘a spectacular sight’,<sup>46</sup> even has, dare one say it, a touch of Lord Denning in its introduction.<sup>47</sup> In fact, Lord Sumption told the Denning Society of an encounter with Lord Denning at Magdalen.<sup>48</sup> Jonathan Sumption QC’s second reported judgment begins simply: ‘this is a sad story of good intentions and subsequent recriminations’.<sup>49</sup> Similarly, the opening line of one of his first (partial) dissents in the UKSC, on remuneration of a well-paid bank employee, was ‘Mr Geys is a lucky man’.<sup>50</sup> Lord Sumption has thus taken naturally to the

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<sup>41</sup> In a profile in *The Guardian*, Marcel Berlins described Jonathan Sumption as ‘unique [because] there is no other top barrister practising today who is pre-eminent in another, unconnected field’: Marcel Berlins, ‘The Juggling Barristers’, *The Guardian* (online), 1 November 1999 <<https://www.theguardian.com/world/1999/nov/01/law.theguardian3>>. In the rest of this Part, we shall see that Lord Sumption would regard his eminence as an historian to be connected to his aptitude in law.

<sup>42</sup> The Supreme Court, *Jonathan Sumption QC to Be Sworn in as Supreme Court Justice* (10 January 2012) <<http://supremecourt.uk/news/jonathan-sumption-qc-to-be-sworn-in-as-supreme-court-justice.html>>.

<sup>43</sup> Brice Dickson, *Human Rights and the United Kingdom Supreme Court* (Oxford University Press, 2013) 385. This is not the place to dwell on the controversy which Lord Sumption’s appointment provoked over concerns about ‘queue-jumping’, or his Lordship’s prior membership of the Judicial Appointments Commission, but for a taste of the debate, see Suzi Ring, ‘Has Sumption Jumped the Queue or Is He Simply the Best Man for the Job’, *LegalWeek* (online), 11 May 2011 <<http://www.legalweek.com/legal-week/news/2070230/sumption-jumped-queue-simply-job>>; Paterson, *Final Judgment*, above n 2, 212. See also Martin Loughlin, ‘Sumption’s Assumptions’ in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of Law* (Hart Publishing, 2016) 27, 28–9, 41.

<sup>44</sup> Joshua Rozenberg highlighted that, in the circumstances of Lord Sumption’s appointment, we did not know as much about the newest Justice’s approach to judging as we otherwise might have: Joshua Rozenberg, ‘Jonathan Sumption Shows a Certain Naivety’, *The Guardian* (online), 9 November 2011 <<http://www.theguardian.com/law/2011/nov/09/sumption-shows-certain-naivety>>.

<sup>45</sup> Two examples of his early cases which have endured are *Tsikata v Newspaper Publishing Plc* [1997] 1 All ER 655 and *Marshall v NM Financial Management Ltd* [1995] 1 WLR 1461.

<sup>46</sup> *Brown v Tiernan* (1993) 65 P & CR 324, 326.

<sup>47</sup> *Ibid* 325:

Sir Douglas Howard, a retired diplomat, lived for many years at Clophill House, Clophill in Bedfordshire until he died on Boxing Day 1987. Sir Douglas’ property included in addition to the house and its garden a paddock of just under two acres, which lay beyond the garden separated from it by an iron grille and railings. Mr. Colin Brown is a local farmer. He claims that in the spring of 1973 Sir Douglas let the paddock to him from year to year for keeping livestock and that he thereby became the tenant of an agricultural holding for the purposes of the Agricultural Holdings Act 1986. The question in this action is whether he is right.

<sup>48</sup> ‘One day we had an argument about some case that he had just decided, which had hit the front pages. I told him that I planned one day to go to the bar. He said: “A big mistake. Stick to history.” I didn’t take his advice’: Lord Sumption, ‘The Disunited Kingdom: England, Ireland and Scotland’ (2014) 3(1) *Cambridge Journal of International and Comparative Law* 139, 139. That lecture is a careful study of the historical relationship between the nations within the British Isles.

<sup>49</sup> *Crowden v Aldridge* [1993] 1 WLR 433, 435.

<sup>50</sup> *Geys v Société Générale, London Branch* [2013] 1 AC 523, 563 [108].

judicial art of drawing the reader into the narrative:<sup>51</sup> ‘one should not under-estimate the importance of entertainment as a tool of advocacy or the poetic element in any well-written judgment’.<sup>52</sup> One can even find allusions to Shakespeare in Lord Sumption’s judgments: in the 2017 case of *Belhaj v Straw*,<sup>53</sup> his Lordship, referring to the work of Dr FA Mann, said ‘[t]he proposition which the High Court of Australia accepted from Dr Mann is tantamount to the abolition of the foreign act of state doctrine. This was indeed a consummation devoutly wished by that great scholar’.<sup>54</sup>

Lord Sumption has also frequently mentioned the influence of his background as an historian on his own judicial method: ‘I have no doubt that the grasp of the dynamic of human societies through their history makes a better judge. More generally, I would say that it improves the quality of almost every kind of decision-making’.<sup>55</sup>

There is a clear tension, as I have argued elsewhere,<sup>56</sup> between judicial individuality and the trend towards single (majority) judgments:<sup>57</sup> ‘the possibility of judges bringing their own perspective to bear [is] greatly reduced if a judgment [requires] the agreement of a majority of the court’.<sup>58</sup>

As a result of the context of his appointment,<sup>59</sup> Lord Sumption is in the unusual position of having appeared regularly before many of his colleagues, as counsel in two of the final decisions of the House of Lords<sup>60</sup> and in five cases decided by the UKSC between 2009 and 2011, including probably the most famous decision of the Court’s first term, *Office of Fair Trading v Abbey National plc* (‘Bank Charges

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<sup>51</sup> Simon Lee, ‘Lord Denning and Margaret Thatcher, Law and Society’ (2013) 25 *Denning Law Journal* 159, 164.

<sup>52</sup> Lord Sumption, ‘The Historian as Judge’ (Speech delivered at training session for upper tribunal judges, The Rolls Building, 6 October 2016) 5 <<https://www.supremecourt.uk/docs/speech-161006.pdf>>.

<sup>53</sup> [2017] UKSC 3.

<sup>54</sup> *Ibid* [247]. ‘Tis a consummation devoutly to be wished’ is a line from Hamlet’s ‘To be or not to be’ soliloquy: William Shakespeare, *Hamlet*, Act III, Scene I.

<sup>55</sup> Lord Sumption, ‘The Historian as Judge’, above n 52, 9.

<sup>56</sup> James Lee, ‘A Defence of Concurring Speeches’ [2009] *Public Law* 305.

<sup>57</sup> See also Lady Hale, ‘Judgment Writing in the Supreme Court’ (Speech delivered at The Supreme Court First Anniversary Seminar, 30 September 2010) <[https://www.supremecourt.uk/docs/speech\\_100930.pdf](https://www.supremecourt.uk/docs/speech_100930.pdf)>.

<sup>58</sup> Lee, ‘A Defence of Concurring Speeches’, above n 56, 331.

<sup>59</sup> Lord Wilberforce was the last Law Lord to be appointed direct from the High Court.

<sup>60</sup> *Lexington Insurance Co v AGF Insurance Ltd* [2010] 1 AC 180; *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] 1 AC 1391.

Case’).<sup>61</sup> Not only that, Lord Sumption was also widely regarded as amongst the outstanding counsel of the day,<sup>62</sup> and is currently the seventh most senior Justice.<sup>63</sup>

At the time of writing, there are 12 speeches by Lord Sumption published on the UKSC website;<sup>64</sup> we may also add his FA Mann Lecture,<sup>65</sup> delivered shortly before his appointment to the Court. Reference is made to those speeches at appropriate points below, but they cover a range of topics, from specific areas of public or private law. Lord Sumption has particularly deprecated the idea of specialisation, amongst both students and practising lawyers.<sup>66</sup> In a recent speech entitled ‘Family Law at a Distance’, Lord Sumption confessed that he had ‘always taken the view that legal specialisations are essentially bogus. At the bar, I liked to trespass on other people’s cabbage patches. As a judge I do it most of the time’.<sup>67</sup> His Lordship added that he does ‘not regard law as comprising distinct bundles of rules, one for each area of human affairs. This is partly because no area of law is completely self-contained’.<sup>68</sup>

An example of Lord Sumption’s disinclination to defer to certain specialisms is shown by his dissent in *Re B (A child)*,<sup>69</sup> in which his Lordship declined to defer to the view of Lord Wilson, one of the Court’s family law experts, and dissented along with Lord Clarke. Lord Wilson’s lead judgment suggested that Lord Sumption ‘misunderstands my judgment’<sup>70</sup> and had ‘inadvertently ... been too selective’.<sup>71</sup> Lord Sumption has also elsewhere noted his work as counsel in two cases on illegality

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<sup>61</sup> [2010] 1 AC 696 (albeit that the argument in the case took place in the House of Lords). The other four cases were: *Norris v Government of the United States of America [No 2]* [2010] 2 AC 487; *NML Capital Ltd v Argentina* [2011] 2 AC 495; *Risk Management Partners Ltd v Brent London Borough Council* [2011] 2 AC 34; *Lucasfilm Ltd v Ainsworth* [2012] 1 AC 208. In that final case, which concerned Star Wars stormtrooper helmets, one finds a taste of the nature of Sumptionian advocacy in the judgment of Lords Walker and Collins: at 226:

In this Court the claimants have challenged the reasoning of the judge and the Court of Appeal. Mr Sumption QC said that it was eccentric of the judge to describe the helmet’s purpose as utilitarian, and that the Court of Appeal could find it to have a functional purpose only by treating it as having the same functional purpose as a real helmet ‘within the confines of a film’. This is quite a puzzling point.

<sup>62</sup> ‘David Pannick QC and Jonathan Sumption QC were repeatedly identified by the Law Lords I interviewed as at the top of the profession, but their styles are quite different’: Alan Paterson, ‘Does Advocacy Matter in the Lords?’ in James Lee (ed), *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Hart Publishing, 2011) 255, 264.

<sup>63</sup> Lord Sumption’s appointment was announced on the same day as that of Lord Wilson, but Lord Sumption’s swearing in was delayed.

<sup>64</sup> The Supreme Court, *Speeches* (2017) <<https://www.supremecourt.uk/news/speeches.html>>.

<sup>65</sup> Jonathan Sumption, ‘Judicial and Political Decision-Making: The Uncertain Boundary’ (2011) 16 *Judicial Review* 301. Joshua Rozenberg described the lecture as showing ‘a certain naivety’: above n 44. See also Sir Stephen Sedley, ‘Judicial Politics’ (2012) 34(4) *London Review of Books* 15, 15–16.

<sup>66</sup> Lord Sumption, ‘The Historian as Judge’, above n 52, 9–10.

<sup>67</sup> Lord Sumption, ‘Family Law at a Distance’ (Speech delivered at the At a Glance Conference, Royal College of Surgeons, 8 June 2016) 1; cf Paterson, *Final Judgment*, above n 2, 90.

<sup>68</sup> Lord Sumption, ‘Family Law at a Distance’, above n 67, 2. Lord Sumption is not alone in recognising the values of generalist expertise: see Chief Justice Robert French, ‘“In Praise of Breadth” – A Reflection on the Virtues of Generalist Lawyering’ (Paper presented at Law Summer School, University of Western Australia, 20 February 2009) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20feb09.pdf>>.

<sup>69</sup> [2016] UKSC 4.

<sup>70</sup> *Ibid* 20 [54].

<sup>71</sup> *Ibid* 20 [55].

included ‘a victory which earned me the undying resentment of company lawyers, and ... another case in which the defence was upheld to the horror of all sound competition lawyers’.<sup>72</sup> Nor is his Lordship alone in recognising the value of generalist expertise: the recently retired Chief Justice of Australia, Robert French, has argued that ‘it is necessary ... to make sure that neither the profession nor the courts evolve into a kind of archipelago of islands of expertise separated by a sea of unknowing’.<sup>73</sup>

#### IV STATISTICS

One might think that Lord Sumption has especial cause to reflect on the nature of judging in the Court, having acted on both sides of the bench much more recently than his colleagues.<sup>74</sup> Lord Sumption has certainly made a considerable impact during his short tenure: Paterson recorded that Lord Sumption had delivered the third highest percentage of lead and single judgments as a percentage of total cases during the first four years of the Court, and his position was the same if dissents were included, at just under 30 per cent.<sup>75</sup> The only judges at that point to have delivered a higher percentage of judgments were Lords Phillips and Hope, who were respectively President and Deputy President for most of the period and therefore assumed a higher burden of judgment-writing duties (a trend continued by Lord Neuberger and Lady Hale, as detailed below).<sup>76</sup>

The graphs below are based on an analysis of the UKSC decisions in the 2015–16 year.<sup>77</sup> The UKSC sits in legal years generally commencing in October and ending in late July (the Court’s medium neutral citations follow the calendar year). The Court has very rarely delivered judgments in August<sup>78</sup> and September.<sup>79</sup> The Court was inaugurated on 1 October 2009 and is currently in its eighth year of decisions. The significance of the legal year for the Court is illustrated by the appointment of Presidents to sit from the start of a given year (Lord Neuberger succeeded Lord Phillips in October 2012, and Lord Neuberger will himself retire in the summer of 2017).

In 2015–16, we see that Lord Sumption’s early contributions, as identified by Paterson,<sup>80</sup> are consistent with his subsequent performance,<sup>81</sup> with him ranking

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<sup>72</sup> Lord Sumption, ‘Reflections on the Law of Illegality’ (2012) 20 *Restitution Law Review* 1, 1. The two cases were respectively *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)* [2009] 1 AC 1391 and *Safeway Stores Ltd v Twigger* [2011] 2 All ER 841.

<sup>73</sup> Chief Justice French, above n 68, 18.

<sup>74</sup> Indeed, Lord Sumption was the only person interviewed by Professor Paterson as both counsel and a Justice: Paterson, *Final Judgment*, above n 2, 5 n 22.

<sup>75</sup> Paterson, *Final Judgment*, above n 2, 161.

<sup>76</sup> For further information on the burdens of the two senior Justices, see *ibid* 71, 86–97.

<sup>77</sup> Lords Thomas LCJ, Lord Dyson MR and Lord Gill (a former Lord President from Scotland) are not permanent members of the UKSC but serve as ad hoc judges: see text accompanying above n 20.

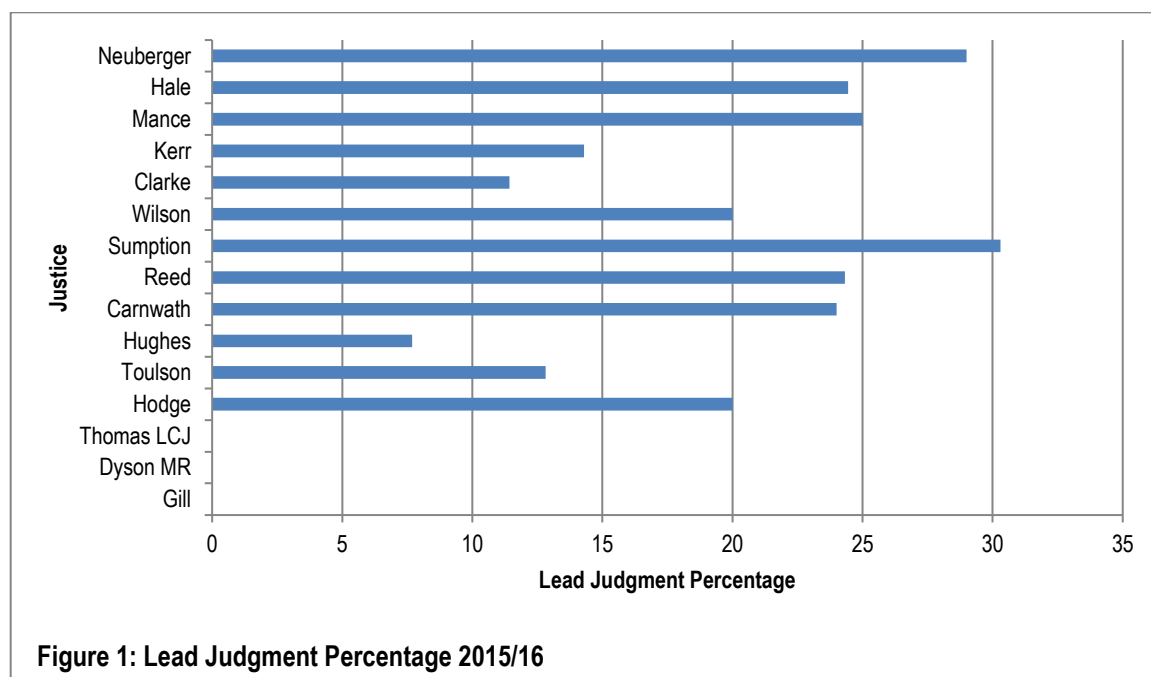
<sup>78</sup> The only occasions on which the Court has done so are *SerVaas Incorporated v Rafidian Bank* [2013] 1 AC 595; *Moreno v The Motor Insurers’ Bureau* [2016] 1 WLR 3194.

<sup>79</sup> The only occasions on which it has done so are *A v A (Children: Habitual Residence)* [2014] AC 1; *Robertson v Swift* [2014] 1 WLR 3438; *Marley v Rawlings* [2015] AC 157.

<sup>80</sup> Paterson, *Final Judgment*, above n 2, 205 (as quoted in the accompanying text to above n 2).

<sup>81</sup> For further details of the Supreme Court’s statistics in the period since Paterson’s study, see the annual reviews (by calendar year) by Professor Brice Dickson in *The New Law Journal*: Brice

amongst the ‘most prolific’ judgment writers on the court.<sup>82</sup> Indeed, his Lordship delivered the highest percentage of lead (or joint lead) judgments in those cases in which he sat (30.3 per cent, ahead of Lord Neuberger on 29 per cent):



Lord Sumption is also in the top three Justices in terms of dissent percentage in that same most recent full court year. It should be noted that there is an asterisk next to the names of Lords Mance, Clarke and Sumption, because of the decision in *Patel*:<sup>83</sup> that case saw the Justices unanimous as to the outcome, but vehemently disagreed as to the applicable principles. I am therefore not counting the judgments in that case as dissents. It is fully considered below.<sup>84</sup>

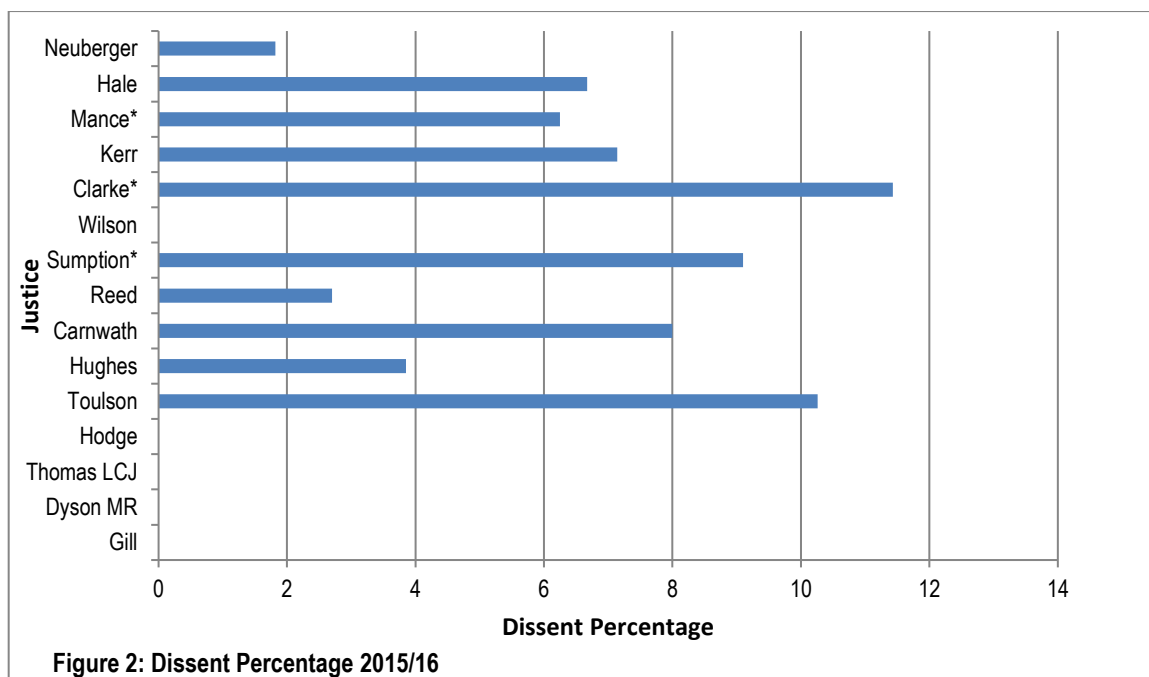
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Dickson, ‘A Supreme Education’ (2014) 164 *New Law Journal* 17; Brice Dickson, ‘A Steady Ship’ (2015) 165 *New Law Journal* 26; Brice Dickson, ‘Reigning Supreme’ 166 *New Law Journal* 19; Brice Dickson, ‘Supreme Justice’ (2017) 167 *New Law Journal* 20.

<sup>82</sup> Dickson, ‘Supreme Justice’, above n 81, 20.

<sup>83</sup> [2016] 3 WLR 399.

<sup>84</sup> See Part V below.



These statistics certainly point to a significant work ethic, but also intellectual influence in engaging with colleagues. As an example of dialogues amongst the Justices, Paterson recounts that in the case of *Oracle*,<sup>85</sup> Lord Sumption’s draft dissent eventually, after circulation and revision, became the single judgment for the Court.<sup>86</sup>

Where Lord Sumption has dissented, he has done so with gusto, often delving into the historical background to legal principles,<sup>87</sup> which is fitting for an accomplished historian. His judgment style involves short, punchy sentences and a strident tone. His partial dissent in *R (Nicklinson) v Ministry of Justice*<sup>88</sup> begins in striking fashion:

English judges tend to avoid addressing the moral foundations of law. It is not their function to lay down principles of morality, and the attempt leads to large generalisations which are commonly thought to be unhelpful. In some cases, however, it is unavoidable. This is one of them.<sup>89</sup>

Elsewhere, I have described his judgment in *Williams v Central Bank of Nigeria*<sup>90</sup> as ‘characteristically trenchant’,<sup>91</sup> and one can observe patterns of the majorities and minorities amongst the Justices, as we shall see in the case studies which follow. It is worth noting, in respect of individual judging, that, on the three occasions on which Lord Sumption dissented in 2015–16, his Lordship was not the sole dissenter.<sup>92</sup> This

<sup>85</sup> *Oracle America Inc (Formerly Sun Microsystems Inc) v M-Tech Data Ltd* [2012] 1 WLR 2012 (‘*Oracle*’).

<sup>86</sup> Paterson, *Final Judgment*, above n 2, 205.

<sup>87</sup> See, eg, *Geys v Société Générale, London Branch* [2013] 1 AC 523.

<sup>88</sup> [2015] AC 657 (‘*Nicklinson*’).

<sup>89</sup> *Ibid* 824 [207].

<sup>90</sup> [2014] AC 1189.

<sup>91</sup> James Lee, ‘Constructing and Limiting Liability in Equity’ (2015) 131 *Law Quarterly Review* 39, 40.

<sup>92</sup> *Re B (A child)* [2016] UKSC 4 (Lord Clarke also dissenting); *Willers v Joyce [No 1]* [2016] 3 WLR 477 (Lords Neuberger, Mance and Reed also dissenting); *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2016] 1 All ER 497 (Lord Clarke also dissenting).

demonstrates an ability to bring colleagues with him, and to persuade them as to the merits of an alternative argument. Indeed, 2015–16 may mark the peak of his Lordship’s ascendancy in terms of contribution to the Court:<sup>93</sup> as we shall see in the next section, that court year culminated in two key cases which reveal insights into his Lordship’s jurisprudence.

## V ILLEGALITY

### A The Defence

The defence of illegality has recently been the subject of extensive disagreement in the UKSC:<sup>94</sup> beyond Lord Mansfield’s dictum ‘no court will lend its aid to a man who founds his cause of action on an immoral or an illegal act’,<sup>95</sup> it has not been clear how the defence is to operate. Over a series of four cases in the space of just two years, the Court has seen what Lord Sumption has labelled a ‘judicial schism’.<sup>96</sup> Lord Sumption has played a significant role in three of the four cases, and indeed the law on illegality was the subject of his Lordship’s first extra-curial speech after his appointment to the Court.<sup>97</sup> His Lordship has characterised the schism as being between ‘those judges and writers who regard the law of illegality as calling for the application of clear rules, and those who would wish to address the equities of each case as it arises’.<sup>98</sup> From the framing of that issue, one would not be surprised to learn that Lord Sumption is in the former camp, let alone that it confirms his Lordship’s preference for clarity and certainty in adjudication.

In his Chancery Bar Association (‘CBA’) lecture on illegality, Lord Sumption argued that

the law of illegality is an area in which there are few propositions, however contradictory or counter-intuitive, that cannot be supported by respectable authorities at the highest levels. For as long as I can remember, the English courts have been endeavouring to rationalise it.<sup>99</sup>

The lecture displays dissatisfaction with the arbitrary technicality of the law, as typified by the approach of the House of Lords in *Tinsley v Milligan*,<sup>100</sup> which held that the test in cases of illegality was whether the claimant ‘was required by the nature of his or her case to rely on his illegal acts’.<sup>101</sup> His Lordship viewed cases like *Tinsley* as resorting to devices to avoid the seemingly harsh application of the principles in the

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<sup>93</sup> At the time of submission of this article in March 2017, Lord Sumption has issued lead judgments in 2 out of 11 cases on which he has sat in the 2016–17 court year, has separately concurred in a further 4 cases, and has yet to dissent. The caveat is that these figures are interim and incomplete, and also distorted by the short notice interruption of the Court’s docket by the hearing of the seminal case of *Miller* [2017] 2 WLR 583.

<sup>94</sup> For background, see James Lee, ‘The Etiquette of Law Reform’ in Matthew Dyson, James Lee and Shona Wilson Stark (eds) in *Fifty Years of the Law Commissions – The Dynamics of Law Reform* (Hart Publishing, 2016) 274, 286–92; R A Buckley, ‘Illegality in the Supreme Court’ (2015) 131 *Law Quarterly Review* 341.

<sup>95</sup> *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121 (Lord Mansfield).

<sup>96</sup> *Patel* [2016] 3 WLR 399, 471 [256].

<sup>97</sup> Lord Sumption, ‘Reflections on the Law of Illegality’, above n 72.

<sup>98</sup> *Patel* [2016] 3 WLR 399, 459 [226].

<sup>99</sup> Lord Sumption, ‘Reflections on the Law of Illegality’, above n 72, 1.

<sup>100</sup> [1994] 1 AC 340 (‘*Tinsley*’).

<sup>101</sup> Lord Sumption, ‘Reflections on the Law of Illegality’, above n 72, 4.

cases,<sup>102</sup> while also noting his involvement as counsel in two key appellate cases on the defence.<sup>103</sup> Finally, his Lordship welcomed the Law Commission's recommendations on the topic,<sup>104</sup> although he lamented that the Commission had pulled back from proposing wider scale reform: 'like the Grand Old Duke of York, [the Commission project across four papers] marched its men to the top of the hill and then marched them down again'.<sup>105</sup> Instead:

[The] only way in which the complexity, capriciousness and injustice of the current English law can be addressed is by making the consequences of a finding that a claim is founded on the Claimant's illegal act subject to a large element of judicial discretion. That is why I regret the decision of the Law Commission to abandon its original proposal to confer such a discretion on the court by statute.<sup>106</sup>

The counter-argument that the courts were more open about the application of the relevant principles was 'all very well ... but, if the principle is an unattractive one, its lucid demonstration is a mixed blessing at best'.<sup>107</sup> We shall see that Lord Sumption's development of the law of illegality on the bench contrasts somewhat with his initial vision. Before turning to the key decision in *Patel*,<sup>108</sup> a brief sketch of three previous UKSC cases is necessary.

## **B The Previous Trilogy**

The first case on illegality to reach the UKSC after Lord Sumption's appointment<sup>109</sup> was *Hounga v Allen*,<sup>110</sup> a case in which his Lordship did not sit on the panel. The claimant had been dismissed from her employment as an au pair and sought to bring a claim in respect of unlawful discrimination. With her knowing participation, she had been trafficked to the UK from Nigeria by the defendant's family. It was therefore necessary to decide whether the claimant could bring her discrimination claim even though she had been involved in the illegal contract at the start of the story. The Court held that the claim should succeed. Lord Wilson gave the leading speech and noted that there is a 'subjectivity inherent in the requisite value judgement'.<sup>111</sup> Lord Hughes' concurring speech suggested that the focus should be 'on the position of the claimant vis-à-vis the court from which she seeks relief',<sup>112</sup> and that the claim should fail if there is a close connection between the illegality and the civil claim.<sup>113</sup>

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<sup>102</sup> Ibid 2.

<sup>103</sup> Ibid 1.

<sup>104</sup> The Law Commission (UK), *The Illegality Defence*, Report No 320 (2010).

<sup>105</sup> Lord Sumption, 'Reflections on the Law of Illegality', above n 72, 8–9.

<sup>106</sup> Ibid 12.

<sup>107</sup> Ibid.

<sup>108</sup> [2016] 3 WLR 399 .

<sup>109</sup> Lord Sumption acted as counsel in *Safeway Stores v Twigger* [2011] 2 All ER 841, a case for which permission to appeal to the UKSC was refused in April 2011: Supreme Court, *Applications for Permission to Appeal – Results April 2011* (April 2011) <[https://www.supremecourt.uk/docs/PTA-1104\\_v2.pdf](https://www.supremecourt.uk/docs/PTA-1104_v2.pdf)>.

<sup>110</sup> [2014] 1 WLR 2889 ('*Hounga*').

<sup>111</sup> Ibid 2902 [38].

<sup>112</sup> Ibid 2907 [56].

<sup>113</sup> Ibid 2908 [57]

Lord Sumption gave the lead judgment in *Les Laboratoires Servier v Apotex Inc*,<sup>114</sup> which concerned the applicability of the *ex turpi causa* defence where the illegality was the infringement of a foreign patent. As noted, the Law Commission had rowed back from proposing the introduction of a statutory discretion in favour of the flexible development of the law by the courts, which had been endorsed by the Court of Appeal in the instant case.<sup>115</sup> Lord Sumption disavowed such an approach: ‘It makes the law uncertain, by inviting the courts to depart from existing rules of law in circumstances where it is difficult for them to acknowledge openly what they are doing or to substitute a coherent alternative structure’.<sup>116</sup> Lord Sumption did not refer to his published CBA lecture in his judgment (although he relies on some of the relevant same authorities and makes similar points in both), nor did his Lordship mention the decision in *Hounga* at all. Lord Mance joined in this disapproval of the more flexible approach. Lord Toulson issued a separate concurrence, noting that the appellants were attempting ‘to extend the doctrine of illegality beyond any previously reported decision in circumstances where I see no good public policy reason to do so’.<sup>117</sup> Lord Toulson did engage with *Hounga*, and regarded the Court of Appeal’s approach as consistent with *Hounga*.

The difficulty is that the approaches of the leading judgments in each case are incompatible: *Hounga* favours flexibility, while *Apotex* favours clear rules. In 2015, a seven Justice panel of the UKSC was convened to hear *Bilta (UK) (in liq) v Nazir [No 2]*:<sup>118</sup> the case invited the court to consider the illegality defence and also when the conduct of fraudulent company directors can be attributed to the company itself. The Justices were unanimous that the illegality defence did not apply on the facts, but their reasoning diverged: on attribution, the court also confined the scope of the House of Lords decision in *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)*.<sup>119</sup> Lord Mance noted that Lord Sumption’s views on the operation of the illegality defence in cases of attribution ‘lies in a concession by counsel (Mr Jonathan Sumption QC), no doubt tactically well-judged, in *Stone & Rolls*’.<sup>120</sup> A majority of the Justices decided that the full breadth of the illegality defence, and resolving the tension between *Hounga* and *Apotex*, would have to await ‘another day’,<sup>121</sup> and another case, preferably ‘as soon as appropriately possible’.<sup>122</sup> As Lord Neuberger would later recognise in *Patel*, the diversity of approach in the recent UKSC decisions had ‘left the law on the topic in some disarray’.<sup>123</sup>

## C *Patel v Mirza*

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<sup>114</sup> [2015] AC 430 (*Apotex*).

<sup>115</sup> Etherton LJ (as he then was, a former Chairman of the Law Commission during its project on illegality) had said that the defence required ‘an intense analysis of the particular facts and of the proper application of the various policy considerations underlying the illegality principle so as to produce a just and proportionate response to the illegality’: *Les Laboratoires Servier v Apotex Inc* [2013] Bus LR 80, 100 [75].

<sup>116</sup> *Apotex* [2015] AC 430, 444 [20].

<sup>117</sup> *Ibid* 451 [46].

<sup>118</sup> [2016] AC 1 (*Bilta*).

<sup>119</sup> [2009] 1 AC 1391.

<sup>120</sup> *Bilta* [2016] AC 1, 21 [48].

<sup>121</sup> *Ibid* 22 [52] (Lord Mance JSC).

<sup>122</sup> *Ibid* 12 [15] (Lord Neuberger PSC).

<sup>123</sup> *Patel* [2016] 3 WLR 399, 444 [164].

Matters thus culminated in *Patel*.<sup>124</sup> The claimant Mr Patel paid Mr Mirza £620 000 pursuant to a contract under which Mr Mirza was to trade in shares in the Royal Bank of Scotland. The intention was to rely on insider information which Mr Mirza expected to obtain from contacts at the Bank relating to a government announcement that would have an effect on the price of shares. This purported contract between Mr Patel and Mr Mirza was a conspiracy to commit an offence of insider dealing.<sup>125</sup> No government announcement was forthcoming, and so no bets on the share price were placed. Mr Patel sought the return of the money under the law of unjust enrichment. The nine Justices were unanimous that he was able to recover the money, albeit that the Court was far from univocal.

## 1 *Majority Judgments*

Lord Toulson gave the lead judgment for the majority,<sup>126</sup> holding that the ‘essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system’.<sup>127</sup> Lord Toulson determined that the correct approach to the defence is that judges should take into account the underlying purpose of the relevant law which has been broken, public policy as engaged by the case and finally the proportionality of denying the claim given the illegality in question.<sup>128</sup> This is a conscious and confident adoption of the approach which Lord Sumption would characterise as addressing the equities of the particular case. The Court departed from the House of Lords decision in *Tinsley*. Departing from a previous decision, said Lord Toulson,

is never a step taken lightly. In departing from [*Tinsley*] it is material that it has been widely criticised; that people cannot be said to have entered into lawful transactions in reliance on the law as then stated; and, most fundamentally, that the criticisms are well founded.<sup>129</sup>

In response to criticism (not least from Lord Sumption), that this approach would leave the law uncertain, Lord Toulson pointed out that the current law was ‘doctrinally ... riven with uncertainties’,<sup>130</sup> that the similarly flexible approach in other jurisdictions had not engendered serious problems,<sup>131</sup> and that people contemplating unlawful activities are not entitled to the same protection of certainty as to the consequences of their behaviour.<sup>132</sup> It was also relevant for Lord Toulson, a former Chairman of the Law Commission, that ‘[r]ealistically the prospect of legislation can be ignored’,<sup>133</sup> as the government had said that the limited reform

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<sup>124</sup> Ibid. For critical commentary, see James Goudkamp, ‘The End of an Era? Illegality in Private Law in the Supreme Court’ (2017) 133 *Law Quarterly Review* 14. See also *Chitty on Contracts: 1st Supplement to 32nd ed* (Sweet & Maxwell, 2016) [16-014A]–[16-014L].

<sup>125</sup> Under *Criminal Justice Act 1993* (UK) c 36, s 52.

<sup>126</sup> Lady Hale DPSC, Lord Wilson and Lord Hodge agreed with Lord Toulson’s judgment, as did Lord Kerr, who also concurred separately (see below n 137 and accompanying text).

<sup>127</sup> *Patel* [2016] 3 WLR 399, 433 [120].

<sup>128</sup> Ibid. See also Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) 221–30.

<sup>129</sup> *Patel* [2016] 3 WLR 399, 432 [114].

<sup>130</sup> Ibid 431 [113].

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid 431 [114].

proposed by the commission ‘was not seen to be “a pressing priority for government” (a phrase familiar to the Commission)’.<sup>134</sup>

Lord Kerr issued a separate concurrence, particularly seeking to defend Lord Toulson’s approach from the criticisms of the minority: ‘Lord Toulson JSC’s judgment outlines a structured approach to a hitherto intractable problem. It is an approach, moreover, which, if properly applied, will promote, rather than detract from, consistency in the law’.<sup>135</sup> Although the Justices all agreed as to the outcome of the appeal, Lord Kerr preferred Lord Toulson’s approach as Lord Sumption’s approach was ‘a much more adventitious and less satisfactory route to the proper disposal of the case’<sup>136</sup> than the assessment of factors approach. Finally, Lord Kerr particularly scrutinised Lord Sumption’s tracing of the recent history of the defence and argued that *Apotex* did not fully represent the law, and that *Hounga* was not reconcilable with it.<sup>137</sup>

The final Justice to concur with Lord Toulson was Lord Neuberger PSC. His Lordship considered carefully the development of the law and on the facts held that the principle of restitution should apply where there was no valid contract pursuant to which a payment was made. On the broader question of the proper test in cases of illegality, Lord Neuberger, despite confessing some doubts,<sup>138</sup> concluded that the structured approach ‘provides as reliable and helpful guidance as it is possible to give in this difficult field’.<sup>139</sup>

## 2 *The Judgments of Lords Mance and Clarke*

Three Justices concurred in the outcome but for very different reasons from the majority, and in terms which are tantamount to dissents: Lords Mance, Clarke and Sumption. Lord Mance accepted that the law of illegality and *Tinsley* required review,<sup>140</sup> but favoured an approach that simply put the parties back in the position that they would have been in if there had been no illegal contract.<sup>141</sup> In particular, Lord Mance viewed it as both unnecessary for the appeal, and undesirable that ‘the law of illegality should be generally rewritten’.<sup>142</sup> Lord Clarke agreed with both Lords Mance and Sumption: he recognised that ‘common law principles develop from time to time’,<sup>143</sup> but viewed the majority approach as inappropriate given the agreement as to the resolution of the appeal.<sup>144</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid 434 [123].

<sup>136</sup> Ibid 435 [128].

<sup>137</sup> Ibid 435–38 [130]–[140].

<sup>138</sup> Ibid 446 [175].

<sup>139</sup> Ibid 446 [174]. Lord Neuberger concluded by observing at 448 [186]:

Finally, I should say that, although my analysis may be slightly different from that of Lord Toulson JSC, I do not think that there is any significant difference between us in practice. I agree with his framework for arriving at an outcome, but I also consider that there is a prima facie outcome, namely restitution in integrum.

<sup>140</sup> Ibid 448 [187].

<sup>141</sup> Ibid 452 [198].

<sup>142</sup> Ibid 454 [204]. His Lordship also refers to the majority ‘tearing up the existing law and starting again’: at 455 [208].

<sup>143</sup> Ibid 458 [220].

<sup>144</sup> Ibid 459 [222]–[223].

### 3 *Lord Sumption's Judgment*

Lord Sumption's judgment, as noted, frames the debate as between those who favour the application of clear rules and those who favour more flexibility. His Lordship's concern is that, while the flexibility of the common law provides advantages over codified systems,

there is a price to be paid for this advantage in terms of certainty and accessibility to those who are not professional lawyers. The equities of a particular case are important. But there are pragmatic limits to what law can achieve without becoming arbitrary, incoherent and unpredictable even to the best advised citizen, and without inviting unforeseen and undesirable collateral consequences.<sup>145</sup>

His Lordship would have refined the operation of *Tinsley*, but still held that 'the reliance test accords with principle',<sup>146</sup> because it prevents the derivation of legal rights from illegal acts, ensures a relevant causal link, and prevents the scope of the illegality defence being unduly broad.<sup>147</sup> By contrast, '[e]very alternative test which has been proposed would widen the application of the defence as well as render its application more uncertain'.<sup>148</sup> Allowing Mr Patel's claim here, for Lord Sumption, did not offend against the law on illegality: rather, it 'merely recognises the ineffectiveness of the transaction and gives effect to the ordinary legal consequences of that state of affairs'.<sup>149</sup> Lord Sumption viewed the majority's approach as changing the law on terms and in circumstances which did not justify such a development:

We are entitled to change the law, but if we do that we should do it openly, acknowledging what we are doing and assessing the consequences, including the indirect consequences, so far as we can foresee them. In my opinion, it would be wrong to transform the policy factors which have gone into the development of the current rules, into factors influencing an essentially discretionary decision about whether those rules should be applied.<sup>150</sup>

Instead, the majority was introducing 'revolutionary change in hitherto accepted legal principle'.<sup>151</sup>

In his 'Reflections on the Law of Illegality' article, Lord Sumption suspected 'that the main reason why English law has got itself into this mess has been a distaste for the consequences of applying its own rules'.<sup>152</sup> He recognised that again in *Patel*, but concluded that 'would be doing no service to the coherent development of the law if we simply substituted a new mess for the old one'.<sup>153</sup>

It is not of course inconsistent for Lord Sumption to now prefer what he thinks of as a rule-based approach, for at least two reasons. First, as we have seen, his Lordship has

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<sup>145</sup> Ibid 460 [226].

<sup>146</sup> Ibid 465 [239].

<sup>147</sup> Ibid.

<sup>148</sup> Ibid.

<sup>149</sup> Ibid 469 [250].

<sup>150</sup> Ibid 473 [261] (sic).

<sup>151</sup> Ibid 474 [264].

<sup>152</sup> Lord Sumption, 'Reflections on the Law of Illegality', above n 72, 2.

<sup>153</sup> *Patel* [2016] 3 WLR 399, 475 [265].

said that there is a difference between speaking in and out of court. Second, Lord Sumption's principal concern is about whether it is appropriate for the judiciary to develop the law in this way. In his Lordship's view, it is one thing for Parliament (as advised by the Law Commission) to confer a discretion on the courts, it is quite another for the courts to arrogate it to themselves. The recent illegality cases thus serve as a valuable example of Lord Sumption's strong views on particular topics and his broader vision of the limits of the judicial role.

## VI THE TORT OF MALICIOUS PROSECUTION

Lord Sumption's dissenting judgment in *Willers(No 1)* is instructive because his Lordship took the opportunity to reaffirm his approach to precedent as well as again reaffirming his own approach in a previous judgment. In this, the 'most closely contested case' of 2016,<sup>154</sup> a majority of the Justices held that the tort of malicious prosecution of civil proceedings existed. A panel of nine Justices was convened in order to resolve a tension between a decision of the House of Lords in *Gregory v Portsmouth City Council* ('Gregory')<sup>155</sup> and that of the Privy Council in *Crawford Adjusters v Sagicor General Insurance (Cayman) Ltd* ('Crawford').<sup>156</sup>

Privy Council decisions do not generally have binding authority on the courts in England and Wales. Thus, Lord Sumption's persistence on the limits of the tort should be understood in the context that *Crawford* should not be taken to have settled the English law. A final preliminary point is that the Supreme Court answered a wider question about the status of Privy Council decisions in English law in the unanimous decision in *Willers v Joyce (No 2)*.<sup>157</sup> The Court held that the

[Privy Council], which normally consists of the same judges as the Supreme Court, should, when applying English law, be capable of departing from an earlier decision of the Supreme Court or House of Lords to the same extent and with the same effect as the Supreme Court.<sup>158</sup>

The short judgment for the Court in *Willers (No 2)* was delivered by Lord Neuberger, with the agreement of all of the Justices (including Lord Sumption, who also expressly agreed with it in *Willers (No 1)*).<sup>159</sup>

### A Background

The tort of malicious prosecution is available to a claimant who suffers damage as the result of the institution of proceedings against her, where those proceedings are determined in her favour and were brought without reasonable and probable cause and where the defendant was motivated by malice.<sup>160</sup> In *Gregory*, the House of Lords held

<sup>154</sup> Dickson, 'Supreme Justice', above n 81, 21.

<sup>155</sup> [2000] 1 AC 419.

<sup>156</sup> [2014] AC 366.

<sup>157</sup> [2016] 3 WLR 534; See Peter Mirfield, 'A Novel Theory of Privy Council Precedent' (2017) 133 *Law Quarterly Review* 1.

<sup>158</sup> *Willers v Joyce [No 2]* [2016] 3 WLR, 542 [21].

<sup>159</sup> *Willers (No 1)* [2016] 3 WLR 477, 532 [180].

<sup>160</sup> See generally Michael A Jones et al (eds), *Clerk & Lindsell on Torts*, (Sweet & Maxwell, 21<sup>st</sup> ed, 2014) 1182–3; Michael A Jones et al (eds), *Clerk & Lindsell on Torts: Second Supplement to the Twenty-First Edition*, (Sweet & Maxwell, 2016) 146. See also *Savile v Roberts* (1698) 1 Ld

that the availability of the tort was generally limited to the prosecution of *criminal* proceedings, subject to some exceptions, such as the malicious bringing of ex parte proceedings and of a winding-up petition.<sup>161</sup> The Law Lords in particular rejected the argument that disciplinary proceedings should be within the scope of the tort of malicious prosecution. In reaching that view, Lord Steyn had noted that there was a ‘stronger case’ for extending the tort to civil proceedings than for disciplinary ones but concluded, in obiter, that ‘for essentially practical reasons [he was] not persuaded that the general extension of the tort to civil proceedings has been shown to be necessary if one takes into account the protection afforded by other related torts’.<sup>162</sup>

In 2013, however, the Privy Council revisited the question in *Crawford*. The case concerned a claim by a Mr Paterson, a loss adjuster who had been the victim of a campaign by an employee of the defendant insurers to ‘destroy him professionally’.<sup>163</sup> Prompted by their employee, the insurers had issued proceedings in fraud and conspiracy against Paterson and the builders, which it later discontinued.

The Board, by a majority, held that the tort could, and should, extend to civil proceedings. Each of the five Justices gave a judgment.<sup>164</sup> The leading judgment was given by Lord Wilson, who held that since ‘a distinctive feature of the tort is that the defendant has abused the coercive powers of the state, it applies as much to civil as to criminal proceedings’.<sup>165</sup> Lord Wilson held that, even after *Gregory*, it was still open to the Privy Council to recognise that malicious prosecution could apply to civil proceedings. He did so on the basis that ‘no other tort is capable of extension so as to address the injustice of the present case’,<sup>166</sup> whereas Lord Steyn’s reservation had been predicated on the basis that ‘other related torts’ could afford protection.<sup>167</sup> Mr Paterson’s case, in Lord Wilson’s view, was a ‘monument’ for the damage that can be wrought by malicious instigation of civil proceedings.<sup>168</sup> The target of the tort was an ‘action ... taken for reasons disassociated with the professed purpose of the proceedings’.<sup>169</sup> Lady Hale and Lord Kerr concurred with Lord Wilson.

For Lords Sumption and Neuberger, on the other hand, it was impermissible to regard *Gregory* as leaving open the possible extension of the malicious prosecution tort. This is partly attributable to a difference of opinion over the status of Lord Steyn’s comments. Lord Sumption accepted that they were strictly ‘obiter’, but asserted that

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Raym 374; 91 ER 1147. As Lord Mance points out in *Willers v Joyce* [2016] 3 WLR 477, 508 [98], there are inconsistencies between the different reports of the case. See also Lord Reed: at 532 [183].

<sup>161</sup> *Gregory* [2000] 1 AC 419. See also *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674.

<sup>162</sup> *Gregory* [2000] 1 AC 419, 432.

<sup>163</sup> *Crawford* [2014] AC 366, 380 [14] (Lord Wilson). The affair is succinctly summarised by Lord Kerr JSC at 404 [91].

<sup>164</sup> Lord Mance noted in *Willers (No 1)* [2016] 3 WLR 477 that the ‘question received intense and helpful consideration in no less than five judgments given by the five members of the court’: at 506 [92].

<sup>165</sup> *Crawford* [2014] AC 366, 400 [78]. Baroness Hale spoke of ‘intentionally abusing the legal system ... bringing claims which you know to be bad’: at 404 [89].

<sup>166</sup> *Ibid* 386 [39].

<sup>167</sup> *Gregory* [2000] 1 AC 419, 432. Lord Kerr placed weight on this point: *Crawford* [2014] AC 366, 410 [117]–[118].

<sup>168</sup> *Crawford* [2014] AC 366, 392 [61].

<sup>169</sup> *Ibid* 411 [119] (Lord Kerr JSC).

‘there are dicta and dicta. The application of the tort to the abuse of civil proceedings was decided in *Gregory* because it was important to settle it’.<sup>170</sup> Their Lordships also disagreed over the history of the tort and as to whether the case law had formally recognised a distinction between civil and criminal proceedings. In *Crawford*, Lord Sumption viewed control mechanisms in the tort as crucial, but as largely questions of policy: ‘Defining the legal elements of a tort and the legal limitations on its ambit will commonly involve a large element of policy which may conflict with the simple principle that for every injustice there should be remedy at law’.<sup>171</sup>

## **B The Facts in *Willers (No 1)***

*Willers (No 1)* was an expedited appeal from the High Court,<sup>172</sup> because of the direct conflict between the House of Lords in *Gregory* and that of the Privy Council in *Crawford*. The claimant Mr Willers was the ‘right hand man’<sup>173</sup> to a Mr Gubay, a successful businessman (Mr Gubay died while the case was being appealed to the UKSC and so his executors, including Mr Joyce, continued to defend the claim on behalf of his estate). Mr Gubay dismissed Mr Willers after over 20 years of service. One of Mr Gubay’s companies was Langstone Leisure, and Mr Willers was a director of it. Langstone had initiated but then abandoned (on Mr Gubay’s instructions) a claim for wrongful trading against another company, Aqua Design and Play, in 2009. A year after his dismissal, Langstone sued Mr Willers for various alleged breaches in respect of the abandoned litigation. Mr Willers defended the claim on the basis that Mr Gubay had directed him in the pursuit of the claim against Aqua. Two weeks before trial of the claim against Mr Willers and Langstone discontinued their action, and were ordered to pay Mr Willers’ costs. Mr Willers then sought to sue in malicious prosecution, claiming damage to his reputation, loss of earnings and various other costs: it was accepted that, if the tort did extend to the prosecution of civil proceedings, then the other ingredients of the claim were made out. However, Mr Gubay’s executors argued that, on the authority of *Gregory*, there was no cause of action on English law.

The nine Justice panel in *Willers (No 1)* included all five members of the Board from *Crawford*, who each maintained their previous positions on the scope of the tort. They were joined by four further Justices, who divided evenly on the appeal, with the result that there was a 5:4 split in favour of the tort extending to the prosecution of civil proceedings.

## **C Lord Toulson’s Leading Judgment and the Majority**

The majority comprised Lady Hale, Lords Kerr, Clarke, Wilson and Toulson. As he had in *Patel*, Lord Toulson gave the leading judgment, while Lord Clarke concurred separately. (It is of note that none of the three Justices who had been in the majority in *Crawford* repeated themselves). For the majority, it was significant that Lord Steyn’s doubts in *Gregory* as to whether the tort should extend to the prosecution of civil proceedings were obiter and briefly stated.<sup>174</sup> Lord Toulson viewed the legal history

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<sup>170</sup> Ibid 421 [146].

<sup>171</sup> Ibid 412 [123].

<sup>172</sup> *Willers v Gubay* [2015] EWHC 1315 (Ch) (15 May 2015).

<sup>173</sup> *Willers (No1)* [2016] 3 WLR 477, 482 [3] (Lord Toulson JSC).

<sup>174</sup> Ibid 483 [8] (Lord Toulson JSC), 506 [88]–[90] (Lord Clarke JSC).

as being ‘capable of more than one respectable interpretation’,<sup>175</sup> and in any case the Court’s decision ‘should not depend on which side has the better argument on a controversial question about the scope of the law some centuries ago’.<sup>176</sup>

Lord Toulson said that the ‘common law is prized for its combination of principle and pragmatism’:<sup>177</sup>

The case law on the tort of malicious prosecution is in point. It shows how the courts have fashioned the tort to do justice in various situations in which a person has suffered injury in consequence of the malicious use of legal process without any reasonable basis.<sup>178</sup>

His Lordship proceeded to analyse the question in terms of both policy and principle: the starting point was that the intuitive appeal to justice of the claimant’s case was ‘both obvious and compelling’.<sup>179</sup> It therefore fell to be determined whether there were countervailing considerations that should limit the scope of the tort to existing authority. In his judgment, Lord Toulson patiently and meticulously addressed the range of policy factors<sup>180</sup> identified by the minority and held that none is of sufficient weight to deny the availability of the tort. Lord Clarke supported Lord Toulson’s historical analysis: as a former commercial lawyer, Lord Clarke also particularly focused on the relevance of the jurisprudence on arrest of ships,<sup>181</sup> as a parallel example of a tort involving the subversion of legal processes to the detriment of the instant claimant.

## D The Dissentients

Lords Neuberger, Mance, Sumption and Reed dissented. The judgments are marked by their strong wording, and by a conviction that the recognition of the tort of malicious prosecution of civil proceedings would be a bold departure from the ‘heavily circumscribed’<sup>182</sup> instances of exceptional liability previously established.

In his dissent, Lord Mance subjected the case to detailed historical analysis,<sup>183</sup> but also associated himself with the dissent of Lord Sumption in *Crawford*.<sup>184</sup> His Lordship conceded that, ‘[v]iewed in isolation, the assumed facts of this case make it attractive

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<sup>175</sup> Ibid 485 [16]. See also Lord Neuberger at 526 [150], although his Lordship was persuaded by Lord Mance’s analysis.

<sup>176</sup> Ibid 485 [16].

<sup>177</sup> Ibid 493 [42].

<sup>178</sup> Ibid 494 [42].

<sup>179</sup> Ibid 494 [43].

<sup>180</sup> Lord Toulson identifies ‘floodgates’ concerns, deterrence, the interests in finality of litigation, duplication of remedies, inconsistencies with witness immunity and the law of negligence, the limits of the tort, the absence of a tort of ‘malicious defence’, the uncertainty as to malice, and the awarding of excess costs: Ibid 494–8 [44]–[58].

<sup>181</sup> Ibid 500–3 [67]–[79], 503–4 [82]–[85]. Lord Mance in dissent strongly disagreed with Lord Clarke’s reliance on this line of cases as support for a generalised tort, on the basis that Lord Mance believed that ‘a remedy [had] been recognised in respect of procedural measures taken against the person or property’: at 519 [126].

<sup>182</sup> Ibid 517 [154] (Lord Neuberger).

<sup>183</sup> See Lord Mance’s discussion of the legal history: Ibid 507–15 [95]–[114].

<sup>184</sup> Ibid 522 [136]. On Lord Sumption’s dissent in the previous case, see especially *Crawford* [2014] AC 366, 420–2 [145]–[148].

to think that the appellant should have a legal remedy',<sup>185</sup> but thought there were valid reasons why he should not. In addition to arguments such as the uncertainty as to the nature of the heads of damage available,<sup>186</sup> Lord Mance argued that there were further reasons of principle and policy for the 'apparent dearth of authority' to support the existence of a generalised tort prior to *Crawford*.<sup>187</sup> His reasoning was based on both history and the present, with a notable turn of phrase:

Not only does [the majority approach] ignore the teaching of history, showing courts studiously avoiding any such parallel. It also ignores the fact that, in an era when private prosecutions have largely disappeared, the tort of malicious prosecution of criminal proceedings is virtually extinct. To create a tort of malicious prosecution of civil proceedings might in these circumstances be thought to come close to necromancy.<sup>188</sup>

Lord Neuberger also dissented, noting that the Justices had 'been given a fuller analysis of the history and implications of this tort than we had in the Judicial Committee'.<sup>189</sup> Lord Reed agreed with Lords Mance and Neuberger.

Lord Sumption's dissent again displays his caution and scepticism when it comes to judicial innovation. It is a brief judgment of eight paragraphs: his Lordship limited himself since he had 'expressed my reasons at length in [*Crawford*], and I entirely agree with the judgments of Lord Neuberger and Lord Mance in this one'.<sup>190</sup> Even with its brevity, however, the judgment is marked by the force of its historical conviction and its concern for the limits of (and on) judicial decision-making in a private law context. It is Lord Sumption's view that the history of the principle is clear. The 'tort of general application ... has never once been successfully invoked in the period of some five centuries during which the question has arisen'.<sup>191</sup> That being the case, the tort was 'novel':

Novelty as such is of course no bar to the recognition of a rule of law. But in a system of judge-made customary law, judges have always accepted limitations on their ability to recognise new bases of non-consensual liability.<sup>192</sup>

Lord Sumption noted two particular limitations, which he has identified - along with, so his Lordship says judges, generally - as criteria applicable to this (and any) proposed development of the law. The first is a requirement of coherence, that 'the development must be consistent with other, cognate principles of law, whether statutory or judge-made'.<sup>193</sup> Lord Sumption did not regard the generalised tort as coherent because it would cut across other areas of liability and immunities. The second is that any 'proposed development of the law should be warranted by current values and current

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<sup>185</sup> *Willers (No 1)* [2016] 3 WLR 477, 506 [93].

<sup>186</sup> *Ibid* 521 [130].

<sup>187</sup> *Ibid* 506 [93].

<sup>188</sup> *Ibid* 521 [131]. See also, Lord Mance at 518 [123]: 'A judge of today would also be as sensible as a judge of Bowen LJ's time to heed the fact that the wisdom of the past presents no decisive authority for the broad contrary proposition which counsel for Mr Willers puts forward'.

<sup>189</sup> *Ibid* 525 [148]. The President listed 15 reasons why the tort should not be recognised: at 527–30. These reasons largely mirror Lord Toulson's factors mentioned at above n 181.

<sup>190</sup> *Willers (No 1)* [2016] 3 WLR 477, 531 [175].

<sup>191</sup> *Ibid* 531 [176].

<sup>192</sup> *Ibid*.

<sup>193</sup> *Ibid* 531 [178].

social conditions’, for ‘[u]nless the law is to be reinvented on a case by case basis, something must generally have changed to make appropriate that which was previously rejected’.<sup>194</sup> Lord Sumption viewed the modern powers of the courts to deal with abuse of procedures through case management powers as reinforcing, rather than undermining, the policy reasons against the generalised tort. Again then, in this brief judgment, we find various features of Lord Sumption’s judicial style and philosophy: an insistence on historical accuracy, a reaffirmation of previous views, and concern over the appropriateness of judicial innovation. The parallel with *Patel* is also clear: each time, the argument is then presented in a manner which frames the debate as being between a responsible, self-conscious respect for the existing law on Lord Sumption’s side, and a more creative, ‘case by case’ approach on the other.

## VII WIDER THEMES

The two case studies considered so far have shown that Lord Sumption is conscious of what he sees as the appropriate limits of the judicial role. In both *Patel* and *Willers (No 1)*, Lord Sumption is cautious with respect to the judicial evolution of the law, and differs from some of his colleagues as to when a change can be regarded as incremental. In this Part, I identify wider themes in Lord Sumption’s judicial catalogue, beginning with two rhetorical features of Lord Sumption’s approach to recent authority.

### A Considering Recent Precedent

#### 1 *Never or Ever?*

I have argued above that Lord Sumption’s reasoning in both *Patel* and *Willers (No 1)* frames the argument as having precedent on his side, and exhibits caution in the development of the law. Yet in *R v Taylor* (*‘Taylor’*),<sup>195</sup> Lord Sumption was less precise in his phrasing. The appellant was charged with aggravated vehicle taking in breach of section 12A of the *Theft Act 1968* (UK) c 60.<sup>196</sup> He had taken a truck and been involved in an accident in which a scooter driver was killed. There was no evidence to show that he was at fault in the manner of his driving. The argument in *Taylor* was over the nature of the requisite element of fault: whether fault in respect of the driving of the vehicle had to be shown, or if the fault in the unauthorised taking of the vehicle sufficed.

In the 2013 case of *R v Hughes* (*‘Hughes’*),<sup>197</sup> the UKSC held that causative fault in the defendant’s control of the vehicle was necessary as part of the offence causing death of another while driving uninsured, contrary to section 3ZB of the *Road Traffic Act 1988* (UK) c 52. The question in *Taylor* was whether *Hughes* also applied to a charge under section 12A of the *Theft Act 1968* (UK) c 60. There was a Court of Appeal authority that no fault element was required under section 12A,<sup>198</sup> the correctness of which was left open by the Justices in *Hughes*.<sup>199</sup>

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<sup>194</sup> Ibid 531 [179]. See also Part VII(A) below.

<sup>195</sup> [2016] 1 WLR 500.

<sup>196</sup> As inserted by the *Aggravated Vehicle Taking Act 1992* (UK) c 11.

<sup>197</sup> [2013] 1 WLR 2461.

<sup>198</sup> *R v Marsh* [1997] 1 Cr App R 67.

<sup>199</sup> [2013] 1 WLR 2461, 2475 [34] (Lord Hughes and Lord Toulson JJSC).

In *Taylor*, the Crown’s ‘primary case’<sup>200</sup> was that *Hughes* should be departed from under the *Practice Statement* on the basis that the Crown had in that case conceded that the fault (or absence) could in some circumstances be relevant. Lord Sumption rejected the contention that this affected the result: it was ‘clear ... that the concession did not displace the need for argument or analysis. It simply exposed the weakness of the Crown’s case’.<sup>201</sup> His Lordship continued:

In those circumstances, the only basis on which it could be right to depart from the decision now is that the court as presently constituted takes a different view. A mere difference of opinion can rarely justify departing from an earlier decision of this court. I can see nothing in the present case which could justify our taking such a course, and I would decline to do so.<sup>202</sup>

His Lordship then held that the reasoning in *Hughes* could not be distinguished,<sup>203</sup> but that even if it could, the ‘relevant fault is the fault in the driving which is necessary to establish the causal connection between the driving and the accident’.<sup>204</sup> The defendant’s appeal was therefore allowed.

What is key to note for present purposes, however, is Lord Sumption’s phrasing of this ‘mere difference of opinion’ constraint on a subsequent court: ‘A mere difference of opinion can *rarely* justify departing from an earlier decision of this court’.<sup>205</sup> That use of ‘rarely’ may be significant, because it could indicate a change from the established practice that a mere difference of opinion can *never* justify a departure from precedent to that it can rarely do so. I do not wish to overplay this point – in *Taylor* itself the Court reaffirmed the existing precedent, and it is possible that one may focus unduly on a Justice’s choice of adverb. The other six Justices<sup>206</sup> in *Taylor* all agreed with Lord Sumption’s judgment. Given that we have seen Lord Sumption is committed to constraints of reasoning with precedent, it is surprising that his Lordship should express himself without his typical precision.

## 2 *The Individual and the Court*

Lord Sumption’s judicial reticence can also be seen in *Société Coopérative de Production Seafrance SA v Competition and Markets Authority*,<sup>207</sup> where his Lordship reaffirmed that ‘caution ... is required before an appellate court can be justified in overturning the economic judgments of an expert tribunal’.<sup>208</sup> Furthermore, his Lordship prefaced that dictum with the formulaic phrase ‘this court has recently emphasised the caution...’, referring to a case in which Lord Sumption had himself given the judgment.<sup>209</sup> His Lordship did a similar thing in the

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<sup>200</sup> *Taylor* [2016] 1 WLR 500, 506 [18] (Lord Sumption).

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid* 507 [19].

<sup>203</sup> *Ibid* 508 [22].

<sup>204</sup> *Ibid* 511 [31].

<sup>205</sup> *Ibid* 507 [19] (emphasis added).

<sup>206</sup> Lord Neuberger, Lady Hale, Lord Mance, Lord Carnwath, Lord Hughes and Lord Toulson.

<sup>207</sup> [2016] 2 All ER 631.

<sup>208</sup> *Ibid* 651 [44], referring to *British Telecommunications plc v Telefónica O2 UK Ltd* [2014] 4 All ER 907, 925–6 [46], 927 [51].

<sup>209</sup> *British Telecommunications plc v Telefónica O2 UK Ltd* [2014] Bus LR 765, [46], [51].

illegality case of *Bilta*, when discussing *Apotex*.<sup>210</sup> It is indeed true that a dictum from a member of a unanimous court has the authority of the court, but this noticeable technique of referring to ‘this Court’ having held or emphasised something when referring to one of his Lordship’s own judgments is a conscious stylistic choice to lend force to the point which Lord Sumption supports. This trait is also a function of the trend towards single judgments,<sup>211</sup> and the teamwork involved in discussion, circulation and revision of judgments.<sup>212</sup>

## B Affirmation of Doctrine

Several of the other recent decisions in which Lord Sumption took the lead have involved the confirmation of general principles, when the UKSC has nonetheless been willing to entertain a challenge to existing authority by hearing the relevant appeal. As is Lord Sumption’s wont, these judgments demonstrate a rigorous and historically detailed approach born of considerable learning.<sup>213</sup>

*Cavendish Square Holding BV v Makdessi* (‘*Cavendish*’)<sup>214</sup> saw, on two appeals, the UKSC consider the common law rule that contractual penalty clauses are not enforceable. Seven Justices sat on the appeal, since the Court was invited to re-examine a long-established rule of the law of contract. One of the appeals concerned a commercial arrangement to see a controlling stake in an advertising company that the defendant had founded. The defendant agreed to a non-compete clause, with provision for financial consequences and the loss of rights to further payment in the event of a breach of the clause. The other appeal concerned an attempt by the claimant to enforce a fine of £85 after the defendant exceeded the permitted two hours stay in a privately owned car park. Lords Neuberger and Sumption issued the joint lead judgment, reaffirming the existence and operation of the penalty rule.<sup>215</sup> The Supreme Court criticised the reasoning of the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd*,<sup>216</sup> as representing ‘a radical departure from the previous understanding of the law’,<sup>217</sup> going so far as to say that ‘although the reasoning in the *Andrews* case was entirely historical, it is not in fact consistent with

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<sup>210</sup> ‘This was the essential problem about the reasoning of the Court of Appeal in [*Apotex*], which explains why this court felt unable to adopt that reasoning while arriving at the same result’: *Bilta* [2016] AC 1, 42 [99]. See also Lee, ‘The Etiquette of Law Reform’, above n 94, 290.

<sup>211</sup> See above n 22 and accompanying text.

<sup>212</sup> I am grateful to one of the anonymous reviewers for this clarification. See Paterson, *Final Judgment*, above n 2, 97 ff.

<sup>213</sup> Lord Sumption’s fondness for great historical detail can also be seen in two 2017 decisions of the UKSC on the act of state doctrine: *Mohammed v Ministry of Defence* [2017] 2 WLR 287, 319–21 [82]–[87]; *Belhaj v Straw* [2017] 2 WLR 456, 542–8 [198]–[208]. [2016] AC 1172.

<sup>215</sup> The Supreme Court heard two appeals on this issue – the other was *ParkingEye Ltd v Beavis* [2016] AC 1172. The *ParkingEye* appeal also raised a separate issue under the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) SI 1999/2083, which is not material for present purposes.

<sup>216</sup> (2012) 247 CLR 205. The High Court has since returned to the broad issues in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 333 ALR 569, in which French CJ reaffirmed the distinctiveness of Australian law (at [6]–[10]), in light of *Cavendish*, albeit that the resolution of the case leaves the law somewhat similar, at least in the context of contractual breach: see Katy Barnett, ‘Coralling the Penalties Horse: *Paciocco v Australia and New Zealand Banking Group Ltd*’ on *Opinions on High* (8 August 2016)

<<https://blogs.unimelb.edu.au/opinionsonhigh/2016/08/08/barnett-paciocco/>>. *Cavendish* [2016] AC 1172, 1207 [41].

the equitable rule as it developed historically'.<sup>218</sup> Lords Neuberger and Sumption said further interference with freedom of contract ought not to be extended 'at least by judicial, as opposed to legislative, decision-making'.<sup>219</sup> Here we again see the views of Lord Sumption as to the proper limits of judicial development of the law.<sup>220</sup>

A relatively rare example of all five UKSC Justices delivering separate judgements<sup>221</sup> is *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* ('*Versloot*').<sup>222</sup> The Justices considered what constitutes a fraudulent claim in the context of insurance contracts. A majority of the Court, led by Lord Sumption, held that where a collateral lie was irrelevant to the recoverability of the claim, it did not bar recovery. Lord Sumption argued for caution, on the basis that the court could not

assess empirically the wider behavioural consequences of legal rules. The formation of legal policy in this as in other areas depends mainly on the vindication of collective moral values and on judicial instincts about the motivation of rational beings, not on the scientific anthropology of fraud or underwriting. As applied to dishonestly exaggerated claims, the fraudulent claims rule is well established ...<sup>223</sup>

Lord Mance dissented, partly in defence of one of his own decisions from when he was in the Court of Appeal.<sup>224</sup> Further, though, Lord Mance insisted that in the UKSC 'we are of course free to reconsider prior authority at a lower level, although we should no doubt be reluctant to upset the instincts of previous courts addressing an issue over the past century'.<sup>225</sup> In Lord Mance's view, then, *Versloot* stands as an example of where Lord Sumption was willing to overrule a precedent (albeit of a lower court) and go against the history of the matter in developing the law.

### C Raising New Arguments

As counsel, Lord Sumption admitted that, when appearing before the Lords or Supreme Court, he had 'found myself quite often reformulating the way that the issue is argued, not fundamentally, it's not jettisoning the grounds below, but trying to suggest a completely different approach to the problem'.<sup>226</sup> Now as a Justice of the Supreme Court, there are examples of that advocate's tendency in Lord Sumption's judging. However, this willingness to reframe arguments is arguably at odds with the pattern of judicious and judicial caution that we have so far seen. It is certainly a manifestation of Lord Sumption's judicial individuality.

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<sup>218</sup> Ibid 1208 [42].

<sup>219</sup> Ibid 1209–10 [43].

<sup>220</sup> Cf Lady Hale, 'Fifty Years of the Law Commissions: The Dynamics of Law Reform Now, Then and Next' in Matthew Dyson, James Lee and Shona Wilson Stark (eds), *Fifty Years of the Law Commissions – The Dynamics of Law Reform* (Hart Publishing, 2016) 17; Lady Hale, 'Legislation or Judicial Law Reform: Where Should Judges Fear to Tread?' (Speech delivered at the Society of Legal Scholars Conference 2016, 7 September 2016) <<https://www.supremecourt.uk/docs/speech-160907.pdf>>. See also Lord Sumption's concurrence in *FirstGroup Plc v Paulley* [2017] 1 WLR 423, 447–8 [91]–[92].

<sup>221</sup> Lee, 'The United Kingdom Supreme Court: A Study in Judicial Reform', above n 12.

<sup>222</sup> [2017] AC 1.

<sup>223</sup> Ibid 11 [10].

<sup>224</sup> *Agapitos v Agnew* [2003] QB 556.

<sup>225</sup> *Versloot* [2017] AC 1, 47 [122].

<sup>226</sup> Paterson, 'Does Advocacy Matter in the Lords?', above n 62, 272.

In *Angove's Pty Ltd v Bailey* ('Bailey'),<sup>227</sup> Lord Sumption considered when, if ever, an agent's authority was irrevocable. Having concluded that the principal had terminated the agent's authority in the relevant case, it was 'strictly speaking unnecessary'<sup>228</sup> to answer a second question relating to the scope of constructive trusts. However, Lord Sumption considered it in obiter dicta, because 'the point is of some general importance and has been fully argued before us'.<sup>229</sup> In his obiter analysis, Lord Sumption disapproved of *Neste Oy v Lloyd's Bank Plc* ('Neste Oy'),<sup>230</sup> a long-standing decision of Bingham J, for being insufficiently precise or certain.<sup>231</sup> His Lordship noted that an alternative justification for Bingham J's decision rested on mistake.<sup>232</sup> But his Lordship declined to address that point because it did not arise on the appeal.<sup>233</sup> And yet, having decided to consider the status of *Neste Oy* when it was not necessary to do so, it would have been desirable to address the case in the round, rather than leaving its status in doubt.

Lord Sumption has come in for some criticism on occasion for his approach to argument. *Eclairs Group Ltd v JKN Oil & Gas plc* ('Eclairs'),<sup>234</sup> saw Lord Sumption consider the proper purposes rule in respect of the exercise of fiduciary powers by company directors. The case involved an 'alleged "corporate raid"', and an attempt by the target company's directors to restrict the voting rights of the raiders at the annual general meeting.<sup>235</sup> Lord Sumption traces the history of the rule.<sup>236</sup> His Lordship decided that the approach to causation should be that if the power would not have been exercised but for the presence of the improper purpose, it should be exercised. Such a view would be 'consistent with the rationale of the proper purpose rule ... [and] corresponds to the view which courts of equity have always taken about the exercise of powers of appointment by trustees'.<sup>237</sup> Lord Mance expressed reservations with respect to Lord Sumption's approach, noting that the argument was not 'advanced by any party during the oral hearing before the Supreme Court'.<sup>238</sup>

although I have sympathy with Lord Sumption's view that 'but for' causation offers a single, simple test, which it might be possible or even preferable to substitute for references to the principal or primary purpose, I am not persuaded that we can or

<sup>227</sup> [2016] 1 WLR 3179.

<sup>228</sup> Ibid 3187 [18].

<sup>229</sup> Ibid.

<sup>230</sup> [1983] 2 Lloyd's Rep 658. His Lordship also disapproved of *In re Japan Leasing* [1999] BPIR 911.

<sup>231</sup> *Bailey* [2016] 1 WLR 3179, 3192 [28]: 'Property rights are fixed and ascertainable rights. Whether they exist in a given case depends on settled principles, even in equity'.

<sup>232</sup> *In re Farepak Food and Gifts Ltd* [2006] All ER (D) 265 (Dec), [39]–[40] (Mann J).

<sup>233</sup> *Bailey* [2016] 1 WLR 3179, 3139 [32].

<sup>234</sup> [2016] 3 All ER 641.

<sup>235</sup> Ibid 644 [1] (Lord Sumption).

<sup>236</sup> Ibid 648 [15]:

So far as the reported cases show the doctrine dates back to *Lane v Page* (1754) Amb 233 and *Aleyn v Belchier* (1758) 1 Eden 132 at 138, but it was clearly already familiar to equity lawyers by the time that those cases were decided. In *Aleyn's* case, Lord Northington could say in the emphatic way of 18<sup>th</sup> century judges that 'no point was better established'.

<sup>237</sup> Ibid 652 [22], citing as support *Birley v Birley* (1858) 25 Beav 299, 307 (Romilly MR); *Pryor v Pryor* (1864) 2 De G J & S 205, 210 (Knight Bruce LJ); *In re Turner's Settled Estates* (1884) 28 Ch D 205, 217, 219; *Roadchef (Employee Benefits Trustees) Ltd v Hill* [2014] EWHC 109 (Ch), [130]. See generally Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2<sup>nd</sup> ed, 2012) [9.85]–[9.89].

<sup>238</sup> *Eclairs* [2016] 3 All ER 641, 662 [48].

should safely undertake what all parties consider would be ‘a new development’ of company law, without having heard argument.<sup>239</sup>

Lord Clarke agreed that ‘not all the points were the subject of full argument and consideration below’.<sup>240</sup>

The UKSC considered the response of insurance policies to exceptional causation tests in *International Energy Group (Ltd) v Zurich Insurance plc UK Branch*.<sup>241</sup> The hearing began with five Justices, but was re-argued before a panel of seven in light of points made in argument. When judgments were delivered, there was a 4:3 split between the Justices, with Lord Mance, for the majority, viewing Lord Sumption’s dissent<sup>242</sup> as challenging a repeated concession by all of the parties as to the extent of an insurer’s liability.<sup>243</sup>

In the Privy Council, Lord Sumption has held that points should be determined more narrowly,<sup>244</sup> or at least differently, from either his judicial colleagues or counsel before him. In *Arorangi Timberland Limited v Minister of the Cook Islands National Superannuation Fund*,<sup>245</sup> the Privy Council concluded that section 53 of the *Cook Islands National Superannuation Act 2000* (Cook Islands) as enacted, was discriminatory against migrant workers. Lord Sumption partially dissented on this point, noting that the ‘claimants object[ed to the scheme] on two grounds which, although elided in argument and in the majority’s analysis, are actually distinct’.<sup>246</sup> His Lordship’s partial dissent seems to view the majority’s view as resting on a disagreement with the policy over loss of rights under the pension scheme, but ‘the way in which different societies resolve such dilemmas involves legitimate policy choices’.<sup>247</sup>

In the 2017 UKSC decision of *Akers v Samba Financial Group*,<sup>248</sup> a case concerning purported trusts, private international law and the *Insolvency Act 1986* (UK) c 45, Lord Sumption concurred, but took issue with how counsel on both sides had sought to frame the case:

The real issues raised by this argument have been obscured by the narrow basis on which it was presented in the courts below ... This was unfortunate, for it meant that the oral argument proceeded on an artificial basis ... The omission was ultimately made good after the conclusion of argument by the service of written submissions at the request of the court. This means that it is possible for us to address the issue on a rather

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<sup>239</sup> Ibid 664 [53].

<sup>240</sup> Ibid 662 [46].

<sup>241</sup> [2016] AC 509.

<sup>242</sup> Lords Neuberger and Reed agreed with Lord Sumption.

<sup>243</sup> [2016] AC 509, 529 [9]: ‘Before the Supreme Court, the parties and interveners accepted that such an insurer must, at least in the first instance, answer for the whole expense or liability, but Lord Sumption’s judgment on this appeal raises for consideration whether they were correct to do so’.

<sup>244</sup> See, eg, *Advantage General Insurance Company Limited v The Commissioner of Taxpayer Appeals (Jamaica)* [2016] UKPC 8 [55]–[61].

<sup>245</sup> [2017] 1 WLR 99.

<sup>246</sup> Ibid 127 [96]: ‘The first is that it is discriminatory, and the second that it is confiscatory’.

<sup>247</sup> Ibid 126 [95].

<sup>248</sup> [2017] 2 WLR 713.

broader basis of principle than the courts below. It also means that a number of the issues which featured in argument below can be seen not to arise.<sup>249</sup>

Taken together, these instances of Lord Sumption's willingness to adopt either much narrower or much wider analyses of cases before the Court than his colleagues (or counsel) indicate two points. Lord Sumption feels the strong temptation to issue his own reasons, which he has deprecated elsewhere,<sup>250</sup> and there is also some tension in respect of his Lordship's general support for a restrained approach to judging.

## VIII RHETORIC IN AND OUT OF COURT

I noted above Lord Sumption's warning about reading everything he says in and out of the court and reading anything into it. The full quote is as follows:

there is no point in comparing my lectures with my judgments on these issues and finding inconsistencies between them. Of course they are inconsistent. As a judge, I am not there to expound my own opinion. My job is to say what I think the law is. By comparison, in a public lecture, I am my own master. I can allow myself the luxury of expressing approval or dismay about the current state of the law. You might wonder whether, in the highest court of the land, which is bound by no precedent even of its own, there is any difference between my own opinion and my exposition of the law. I have to tell you that there is and that it matters. The personal opinions of the judges in the Supreme Court are only one element in the complex process of decision-making, and not necessarily the most important one.<sup>251</sup>

I am not arguing here that Lord Sumption's speeches, writings and judgments are inconsistent; rather that in some respects they are strikingly consistent, to the point of using the same language. We saw in Part V the significance of his Lordship's 'Reflections' lecture in his thinking on the law of illegality.<sup>252</sup> Further examples show that there is more to be learned from Lord Sumption's observations.

An example from public law is *Nicklinson*,<sup>253</sup> which concerned prosecutorial discretion in relation to assisted suicide. The Supreme Court declined to make a declaration of incompatibility as to the consistency of the current law of England and Wales with the *European Convention on Human Rights*.<sup>254</sup> Lord Sumption dissented as to whether the Supreme Court should have competence to make a declaration of compatibility at all, considering that it went to the 'proper constitutional function of the courts as opposed to Parliament'.<sup>255</sup> In his Lordship's assessment, the applicable jurisprudence of the European Court of Human Rights made clear that it was within the State's margin of appreciation: 'the issue is an inherently legislative issue for Parliament, as the representative body in our constitution, to decide'.<sup>256</sup> But what is particularly of note is that Lord Sumption's opinion in *Nicklinson* draws on his views in his speeches. He goes as far as using the same examples. Thus, Lord Sumption

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<sup>249</sup> Ibid 739 [81].

<sup>250</sup> Lord Sumption, 'A Response', above n 8.

<sup>251</sup> Ibid 213.

<sup>252</sup> Lord Sumption, 'Reflections on the Law on the Law of Illegality', above n 72.

<sup>253</sup> [2015] AC 657.

<sup>254</sup> Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

<sup>255</sup> Ibid 830 [223].

<sup>256</sup> Ibid 835 [234].

made the point that the courts should not allow parties to win battles on moral and political judgements which they have lost in Parliament,<sup>257</sup> referring to observations by Lord Bingham in *R (Countrywide Alliance) v A-G*<sup>258</sup> and Lord Hope in *AXA General Insurance Ltd v HM Advocate*.<sup>259</sup> The same point, and quotes, are made in a paragraph of his FA Mann Lecture.<sup>260</sup> In *Nicklinson*, his Lordship referred to the difficulty of courts engaging with ‘polycentric problems’<sup>261</sup> which may involve more interested parties than those before the court, as he did in his ‘Limits of Law’ lecture.<sup>262</sup>

Lord Sumption has also used the same vivid metaphors in his extra-curial speeches. In his lecture ‘The Historian as Judge’, he pointed to his concerns in respect of the majority’s approach in *Willers (No 1)*: ‘Even the Supreme Court cannot approach the law of tort as if Britain were an uninhabited island awaiting its lawgiver, instead of a complex society shaped by a long past’.<sup>263</sup>

His Lordship had, in *Patel*, made exactly the same analogy in the context of the defence of illegality:

The common law is not an uninhabited island on which judges are at liberty to plant whatever suits their personal tastes. It is a body of instincts and principles which, barring some radical change in the values of our society, is developed organically, building on what was there before.<sup>264</sup>

This island metaphor is not quite the same as criticisms of discretion more broadly in terms of ‘palm tree justice’, for example, as Dillon LJ once observed: ‘the court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair’.<sup>265</sup> There the island is clearly already inhabited by the judges and subjects, but the judges do not regard themselves as bound by principle. On Lord Sumption’s imagined island, the concern is instead a judge showing insufficient regard for history, doctrine and precedent, which, as we have seen, are part of the fabric of Lord Sumption’s jurisprudence.

To be clear, my point here is not that judges should not give extra judicial speeches, and I am mindful of recent controversies. At the time of the initial submission of this article, there was extensive media attention focused on the Justices of the UKSC and their judgments in and out of the Court, in advance of the hearing in the *Miller* appeal concerning the process for the UK leaving the European Union.<sup>266</sup> The coverage included criticism of a constitutional law lecture by Lady Hale in Malaysia<sup>267</sup> the

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<sup>257</sup> Ibid 834–5 [231].

<sup>258</sup> [2008] AC 719, 755–6 [45].

<sup>259</sup> [2012] 1 AC 868, 912–13 [49].

<sup>260</sup> Sumption, ‘Judicial and Political Decision-Making: The Uncertain Boundary’, above n 65, [20].

<sup>261</sup> *Nicklinson* [2015] AC 657, 835 [232].

<sup>262</sup> Lord Sumption, ‘Limits of Law’, above n 6, 26.

<sup>263</sup> Lord Sumption, ‘The Historian as Judge’, above n 52, 6.

<sup>264</sup> *Patel* [2016] 3 WLR 399, 459–60 [226].

<sup>265</sup> *Springette v Defoe* [1992] 2 FLR 388, 393.

<sup>266</sup> *Miller* [2017] 2 WLR 583.

<sup>267</sup> Lady Hale, ‘The Supreme Court: Guardian of the Constitution?’ (Speech delivered at the Sultan Azlan Shah Lecture, Kuala Lumpur, 9 November 2016)

month before the hearing in *Miller*, which some perceived to be speculating about the forthcoming arguments. The Court published a response stating that ‘it is entirely proper for serving judges to set out the arguments in high profile cases to help public understanding of the legal issues, as long as it is done in an even-handed way’.<sup>268</sup> Lord Mance withdrew from delivering the Thomas More Lecture (which is always on a European topic) at Lincoln’s Inn the week before the hearing.<sup>269</sup> Lord Neuberger PSC, on the first morning of the hearing in *Miller*, recorded that all parties had been asked whether they wished to ask for any Justice to recuse themselves: all parties stated that they had no objection to any of the 11 Justices sitting on the appeal.<sup>270</sup>

It is a valuable service that the Justices should speak to students, universities and the wider public: as the editors of *Lord Sumption and the Limits of Law* observe, ‘the public conversation about the nature and limits of judicial power has long been enriched by the extra-judicial reflections of our leading judges’.<sup>271</sup> The Supreme Court has its own policy on extra-curial activity in its *Guide to Judicial Conduct*,<sup>272</sup> which notes that Justices must bear in mind the risk of bias, but it also explicitly recognises the importance of Justices engaging, with the aim being ‘to enhance professional and public understanding of the issues and of the role of the Court’.<sup>273</sup>

There is nothing necessarily remarkable about a judge relying on their own previous work. For example, Findlay Stark has recently pointed out that Lord Toulson drew upon an essay in an edited collection in his joint judgment with Lord Hughes in the joint enterprise decision in *R v Jogee*.<sup>274</sup> In *Twinsectra v Yardley*,<sup>275</sup> for example, Lord

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<<https://www.supremecourt.uk/docs/speech-161109.pdf>>. This was her Ladyship’s own Sultan Azlan Shah Lecture – the 2013 lecture had been given by Lord Sumption, entitled ‘The Limits of Law’, and also attracted some controversy: see above n 6.

<sup>268</sup> The Supreme Court, *A Response to Reactions to Lady Hale’s Explanation of the Article 50 ‘Brexit’ Case* (15 November 2016) <<https://www.supremecourt.uk/news/lady-hales-lecture-the-supreme-court-guardian-of-the-constitution.html>>.

<sup>269</sup> Frances Gibb, ‘Judge Bows Out of Europe Lecture ahead of Hearing’, *The Times* (online), 30 November 2016 <<http://www.thetimes.co.uk/article/judge-bows-out-of-europe-lecture-ahead-of-hearing-0k20wj30l>>.

<sup>270</sup> Transcript of Proceedings, *R (on the Application of Miller and Dos Santos) v Secretary of State for Exiting the European Union and Associated References* (UKSC, 5 December 2016) <<https://www.supremecourt.uk/docs/draft-transcript-monday-161205.pdf>>.

<sup>271</sup> NW Barber, Richard Ekins and Paul Yowell, ‘Introduction’ in NW Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of Law* (Hart Publishing, 2016) 1.

<sup>272</sup> United Kingdom Supreme Court, ‘Guide to Judicial Conduct’ (2009) <[https://www.supremecourt.uk/docs/guide-to-judicial\\_conduct.pdf](https://www.supremecourt.uk/docs/guide-to-judicial_conduct.pdf)>.

<sup>273</sup> *Ibid* [3.4]. See also at [3.14]: ‘Previous participation in public office or public debate on matters relevant to an issue in a case will not normally be a cause for a Justice not to sit, unless the Justice has thereby committed himself or herself to a particular view irrespective of the arguments presented to the Court’. See also Lord Rodger’s observations in *R (Al-Hasan) v Secretary of State for the Home Department* [2005] 1 WLR 688, 691 [9]:

People who are called on to adjudicate will often have substantial experience in the relevant field and will therefore be familiar with the background issues which they may have encountered previously in various roles. Indeed, the individuals concerned will often be particularly suited to adjudicate on the matter precisely because of the experience and wisdom on the topic which they have accumulated in those other roles.

<sup>274</sup> [2016] 2 WLR 681; Findlay Stark, ‘The Demise of “Parasitic Accessorial Liability”’: Substantive Judicial Law Reform, Not Common Law Housekeeping’ (2016) 75 *Cambridge Law Journal* 550, 551.

<sup>275</sup> [2002] 2 AC 164.

Millett considered the proper theoretical basis of a *Quistclose* trust<sup>276</sup> and came to the conclusion that he himself had been correct in a 1985 article analysing the issue.<sup>277</sup> Lord Millett concluded that '[as] Sherlock Holmes reminded Dr Watson, when you have eliminated the impossible, whatever remains, however improbable, must be the truth':<sup>278</sup> in this case, the 'improbable' was that Lord Millett was still right. Lord Sumption is neither the first nor will he be the last to draw upon his judgments in his speeches or vice versa.

With respect, though, it is difficult to heed Lord Sumption's admonition that we ought not to compare his judgments and extra-curial speeches, if his Lordship espouses not just the same views, but even uses the same phrases and metaphors. At the very least, a Justice's choice of topics for extra-curial lectures can tell us something about their legal interests or preoccupations: it is significant that Lord Sumption selected the law of illegality as his first such speech, and that is borne out by the saga of the cases considered in Part V above. Reading Lord Sumption's corpus of jurisprudence together also enables us to identify him as a juridical<sup>279</sup> conservative on the UKSC.

## IX CONCLUSIONS

In a 2004 newspaper review of Richard Barber's, *The Holy Grail: Imagination and Belief*,<sup>280</sup> the historian Jonathan Sumption QC remarked that: 'As a symbol of something unattainably good, the grail is a cumulative product of the imagination of different individuals at different times, continually re clothed and reinterpreted, but always representing the same challenging human aspiration'.<sup>281</sup>

This article has sought to illustrate the challenges of judging as an individual on a collective apex court by focusing on the jurisprudence of one individual Justice. Some of those challenges are particularly exaggerated on the UKSC because of its adjudicative structures. I do not intend to understate the contributions of the other Justices in the relevant cases, but Lord Sumption's peculiar position as a direct appointee from the Bar has also informed his distinctly individual approach. A barrister's forensic skill in reformulating arguments is certainly apparent in the areas of law considered here: indeed, it is perhaps his Lordship's disposition to do so while judging. And yet that creative capacity may be contrasted with Lord Sumption's approach to precedent, and more broadly to settled principles of the law; his Lordship is clearly more cautiously conservative than some of his judicial colleagues (such as Lord Toulson, who led the majority in both *Patel* and *Willers (No 1)*). His Lordship's approach to public law has provoked controversy and academic scrutiny;<sup>282</sup> the analysis here has drawn attention to his Lordship's contribution in the area of private law by using two key case studies, which I have argued are representative of wider

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<sup>276</sup> Ibid 187 [80]. See generally at 186–93 [77]–[103]. The Quistclose trust is named after *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

<sup>277</sup> PJ Millett, 'The *Quistclose* Trust: Who Can Enforce It?' (1985) 101 *Law Quarterly Review* 269. [2002] 2 AC 164, 192 [100].

<sup>278</sup> I use 'juridical' here deliberately to speak to Lord Sumption's wider conception of law(yering).

<sup>279</sup> Richard Barber, *The Holy Grail – Imagination and Belief* (Allen Lane, 2004). The Monty Python team, of course, starred in *Monty Python and the Holy Grail* (Directed by Terry Gilliam and Terry Jones, Python (Monty) Pictures, 1975), as well as *Life of Brian*, above n 1.

<sup>280</sup> Jonathan Sumption, 'Holy Smoke and Mirrors', *The Guardian* (online), 28 February 2004 <<https://www.theguardian.com/books/2004/feb/28/history.highereducation>>.

<sup>281</sup> See Barber, Ekins and Yowell (eds), above n 6.

themes in his Lordship's jurisprudence. We have also seen the entrenched trenchancy of Lord Sumption's views on certain substantive areas of law.

Lord Reed, who was appointed to the Court one month after his colleague Lord Sumption, has commented upon the nature of teamwork between the individuals on the Supreme Court: 'It is a curious team because the value of the team depends on everybody using their own individual intelligence and their own experience and so forth and bringing all that to the party, but our working method is very collaborative'.<sup>283</sup>

We have seen that Lord Sumption, though 'individual', is nonetheless able to bring colleagues with him in his analyses. Lord Sumption's workload (which, as we have seen was amongst the highest on the court in the most recent full year) and intellectual ambition have made him arguably one of the most influential Justices on the UKSC (after the President and Deputy President). We have further noted his Lordship's willingness to join in authorship of (and responsibility for) lead judgments, such as in *Cavendish* and *Miller*. Lord Sumption has emphasised (both in and out of court) that the common law is not an uninhabited island, but we might also note that, on the UKSC, no *judge* is an island; each is 'a piece of the continent, a part of the main',<sup>284</sup> a member of a collegial and imaginative institution.

In conclusion, we may view the common law as also being the 'cumulative product of the imagination of different individuals at different times, continually re clothed and reinterpreted',<sup>285</sup> and that poses challenges for its coherent development. We have seen that the UKSC is a collective and collegial court, and yet the Justices are all individuals, who have got to think for themselves. Through his unusual career and his judicial record, Lord Sumption has proven himself to be a very different and very individual judge.

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<sup>283</sup> Paterson, *Final Judgement*, above n 2, 141.

<sup>284</sup> With apologies to John Donne's *Devotions upon Emergent Occasions* (1624).

<sup>285</sup> Sumption, 'Holy Smoke and Mirrors', above n 281.