M Leeming, "Penalties in Australia, the United Kingdom and Singapore – Storm-warnings, statutes and style" (2022) 51 *Australian Bar Review* 377-390

Penalties in Australia, the United Kingdom and Singapore – Storm-warnings, statutes and style

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An important aspect of the recent divergence in the law of penalties in decisions of ultimate appellate courts in three 'common law' jurisdictions reflects the pervading influence of statutes. 'Common law and statute are more fully integrated than has traditionally been thought', and in the area of penalties, the interaction is deep and operates in multiple dimensions. The main theme of this article is that rather than arguing which outcome is 'better', much that is of value may be observed from how the differences have emerged.

A perennial problem in presenting a paper at a seminar such as this is finding something interesting to say. So I shall begin with one of Lin-Manuel Miranda's anachronisms, and declare that, like Alexander Hamilton, I have skin in the game.[1] No one talked of skin in the game in the first years of the American Republic, or indeed, so it seems, until a couple of centuries later.[2] But the musical phenomenon that is *Hamilton* flaunts its anachronistic lyrics, music, dance and cast. Anachronism looms large in the law of penalties, too. No one talked of a requirement that there be a breach of contract before equity could intervene and preclude enforcement of a penalty for the first few centuries when the chancellors exercised this jurisdiction. Plaintiffs tended to sue in debt, because "the

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[1] The linking of law and *Hamilton's* success is not entirely original; see L Tucker, *Hamilton and the Law: Reading Today's Most Contentious Legal Issues through the Hit Musical* (Cornell University Press, 2020).

[2] See, for the etymology and numerous distractions, W Safire, "Skin in the Game", *The New York Times Magazine*, 17 September 2006.

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principal device for the framing of substantial contracts" from the 1350s until the 18th century was the conditional bond rather than a deed,[3] and because until *Slade's* case[4] there could be no claim for indebitatus assumpsit if debt were available. Thus actions were for debt, not **[378]** covenant or indebitatus assumpsit. More generally, as one historian put it, writing of the mid-eighteenth century, "[t]he modern division in English law between contract, tort and unjust enrichment would have appeared quite alien to Viner and his contemporaries".[5]

There is another Hamiltonian resonance. Much of *Hamilton* is about revolution, and in multiple senses. The law of penalties started as English law, and yet the results reached by ultimate appellate courts in Australia and the United Kingdom and Singapore have also produced a revolution of sorts. Speaking very broadly, Australia has returned to what (controversially) is maintained as historical authenticity; Singapore has adhered to orthodoxy, and the United Kingdom has chosen a third way. "The World Turned Upside Down" is one of the leitmotifs in *Hamilton*, and it may also be one way of describing the position reached in the law of penalties. Of course, as I wrote this over the Christmas vacation, I recalled that "the World Turned Upside Down" was also popularised by those complaining about Cromwell's restrictions on Christmas to make it more puritanical and less fun.[6] I shall leave it to you to guess how apt that seemed to someone writing a legal paper in a Sydney summer.

In the last decade there have been no fewer than four decisions at the ultimate appellate court level on penalties. In Australia two appeals arose from the same class action on so-called credit card late payment "fees" charged by banks to their customers: *Andrews v Australia and New Zealand Banking Group Ltd*[7] and *Paciocco v Australia and New*

[3] D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), p 30; for details see R Palmer, *English Law in the Age of the Black Death* (University of North Carolina Press, 1993), pp 62-91 and for much insight as to the wider context and with a theme based on how an Elizabethan audience would have reacted to Shylock's bond, see T Stretton, "Contract, Debt Litigation and Shakespeare's *The Merchant of* Venice" (2010) 31 *Adelaide Law Review* 111.

[4] (1602) 4 Co Rep 91a; 76 ER 1072. See also John Baker, 'New Light on *Slade's case*' (Pt 1) (1971) 29(1) *Cambridge Law Journal* 51; David Ibbetson, 'Sixteenth Century Contract Law: *Slade's* case in Context' (1984) 4(3) *Oxford Journal of Legal Studies* 295.

[5] See W Swain, *The Law of Contract 1670-1870* (Cambridge University Press, 2017), p 14.

[6] The classic work is C Hill, *Society and Puritanism in Pre-revolutionary England* (Secker & Warburg, 1964, reprinted Verso, 2018).

[7] (2012) 247 CLR 205; [2012] HCA 30.

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Zealand Banking Group Ltd.[8] In 2012, *Andrews* unanimously held, answering certain questions stated in advance of trial, that the fees could be a penalty notwithstanding they were not based on a breach of contract, if they amounted to punishing a party for non-performance of a stipulation. The matter accordingly went to trial. The bank adduced evidence of its operational costs, loss provisioning and increased cost of regulatory capital, and in the result one of the fees was found a penalty but the rest survived scrutiny by the primary judge.[9] In 2016, a majority of the High Court in *Paciocco* upheld the decision of the Full Federal Court,[10] concluding that none of the fees was penal.

In the United Kingdom, in 2015 in *Cavendish Square Holding BV v Talal El Makdessi*,[11] the Supreme Court declined to follow the course taken by the High Court of Australia in *Andrews*, but nonetheless reformulated the doctrine, saying that "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the **[379]** enforcement of the primary obligation".[12] The court divided in the application of the reformulated doctrine.

Most recently, in Singapore just over a year ago, in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*,[13] the unanimous judgment of the Court of Appeal delivered by Andrew Phang Boon Leong JA resisted calls to adopt either the new Australian or United Kingdom approaches, maintaining fidelity to *Dunlop Pneumatic*.[14]

Back to my "skin in the game". I am a co-author of a book published before *Makdessi* and *Denka* which endorses the correctness of the result reached in *Andrews*, including an extensive review of the equitable history and the casually haphazard way in which the breach requirement became part of the common law,[15] swimming against the tide of

[8] (2016) 258 CLR 525; [2016] HCA 28.
[9] *Paciocco v Australia and New Zealand Banking Group Ltd* [2014] FCA 35; 309 ALR 249.
[10] *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199; [2015] FCAFC 50.
[11] [2016] AC 1172; [2015] UKSC 67.
[12] At [32].
[13] [2021] 1 SLR 631; [2020] SGCA 119.
[14] [1915] AC 79.
[15] *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed LexisNexis 2015), pp 547-559 (with J D Heydon and P G Turner). I should perhaps add that I also read in manuscript and recommended the publication of Dr Nicholas Tiverios' work "Contractual Penalties in Australia and the United Kingdom" (published by Federation

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forceful critiques of that view in Australia.[16] The book is not mentioned by the United Kingdom Supreme Court but it is very fairly acknowledged by the Singapore Court of Appeal.

I do not intend to comment on the merits and demerits of each decision, partly because previous speakers have addressed them in some detail, and partly because of the previous paragraph. Obviously there are arguments for and against the outcome each court has reached. As it stands, the law in each of Australia, Singapore and the United Kingdom is clear, although its application in any particular case may be another matter. Aspects of the decisions of the trial judges in Australia, the United Kingdom and Singapore were overturned on appeal, and in the case of Australia and the United Kingdom, the appellate courts were divided. There is nothing especially remarkable about that. One of the most famous judgments of the High Court of Australia is *Cole v Whitfield*,[17] which overturned dozens of decisions and decades of law on the mandate in s 92 of the Constitution that trade, commerce and intercourse among the States be absolutely free, and replaced it with a test directed to "discriminatory burdens of a protectionist kind". That momentous, unanimous decision was followed, five weeks later, with a 4:3 decision applying that newly formulated test.[18] It might be interesting to test what impact the divergent principles in Australia, Singapore and the United Kingdom have in practice, but that is a subject for a different paper. **[380]** There may be more subtle similarities, too. Indeed, it has been suggested that the label "the rule against penalties" may conceal the existence of two doctrines, namely, a rule against penalties and a rule against limiting security rights.[19] However, because the Australian approach does not presuppose a breach of contract, unquestionably there will be cases capable of engaging the doctrine in Australia which are outside the doctrine's scope in the United Kingdom and Singapore.

Press 2019), which responds to *Andrews* and *Makdessi* and which is given extensive treatment by the Singapore Court of Appeal. Indeed, it was very generously praised as "the most systematic and powerful scholarly defence of the approach adopted in *Andrews* to date", although the court ultimately disagreed with his conclusions.

[16] Including J Carter, W Courtney, E Peden, A Stewart and G Tolhurst, "Contractual penalties: Resurrecting the equitable jurisdiction" (2013) 30 *Journal of Contract Law* 99, A Gray, "Contractual Penalties in Australian Law After *Andrews*: An Opportunity Missed" (2013) 18 *Deakin Law Review* 1 and S Harder, "The Relevance of Breach to the Applicability of the Rule Against Penalties" (2013) 30 *Journal of Contract Law* 52.

[17] (1988) 165 CLR 360; [1988] HCA 18.

[18] *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411; [1988] HCA 27.

[19] M Arden and J Edelman, "Mutual borrowing and judicial dialogue between the apex courts of Australia and the United Kingdom" (2022) 138 *LQR* 217 at 219-220, by reference to N Tiverios, n 15 above.

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All jurisdictions proceed on the basis that freedom of contract is not sacrosanct, and that there are some clauses which even though the parties have agreed to them can not be enforced because they are penal.[20] The fact that ultimate appellate courts have reached different conclusions in articulating the circumstances when courts will intervene, far from being a weakness, is instead in my view a strength. I do not for a moment suggest that that view is original. It was the view stated by Sir Victor Windeyer in 1966 – when divergence in the common law was far more controversial, when appeals still lay from Australian courts to the Privy Council, when Australia was a Dominion and Singapore had only just ceased being a Crown Colony, and after the High Court had dramatically distanced itself from the House of Lords in *Parker v The Queen*[21] and *Uren v John Fairfax & Sons Pty Ltd*.[22] Windeyer did so in a paper given at the 13th Dominion Law Conference in Dunedin titled, revealingly, "Unity, Disunity and Harmony in the Common Law". In it he said:[23]

> The greatest quality of our system of law is in its capacity for development, "in response", as Lord Radcliffe put it, "to the developments of the society in which it rules". And that is the point, for it rules in different societies whose ways, conditions and needs differ. Why then is uniformity still spoken of as good in itself?

This was a change. Only two decades earlier, Dixon J had written that diversity in the development of the common law "seems to me to be an evil".[24] But as Andrew Burrows has explained, it is now clear that the unity of the common law is no more.[25] Unity is distinct from harmony, and while unity can be very powerful, it can be unsettling.[26] Most people with a musical ear will agree that harmony is more subtle and more complex that

[20] Cf (by way of example) S Worthington, "Common law Values: The Role of Party Autonomy in Private Law" in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016), 301 at 315-322.

[21] (1963) 111 CLR 610; [1963] HCA 14.

[22] (1966) 117 CLR 118; [1966] HCA 40.

[23] [1966] *New Zealand Law Journal* 193, republished in B Debelle (ed), *Victor Windeyer's Legacy – Legal and Military Papers* (Federation Press 2019).

[24] *Wright v Wright* (1948) 77 CLR 191 at 210; [1948] HCA 33.

[25] A Burrows, "The Influence of Comparative Law on the English Law of Obligations" in A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart Publishing, 2016), 15 at 16-20.

[26] Cf the opening of Britten's "Rejoice in the Lamb", of which one scholar wrote "The resultant lack of harmony (there is only one note) is rather unsettling for the listener, since it gives no clue as to the sound-world that might develop. ... Britten's genius is to provide music that is intrinsically mysterious — as a result of the lack of harmony": T Wilkinson, "Composing for a Non-Professional Chapel Choir: Challenges and Opportunities" in G Corbett (ed), *Annunciations: Sacred Music for the Twenty First Century* (Cambridge, Open Book Publishers, 2019). It is only fair to add that the work is derived from Christopher Smart's *Jubilate Agno*, which was at least partly composed while confined in St Luke's Hospital for insanity.

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unity, and it may be that most **[381]** people will also agree that in the subtle and complicated world in which the legal systems operate, there is ample room for harmony as opposed to unity. The main theme of this paper dwells upon one important reason – the prevalence of statute – for that being so, and the multiple ways in which statute influences the "common law". Sir Victor Windeyer's rhetorical question reminds that the common law may be seen as a tradition, with a shared approach to legal reasoning, a shared language and a shared history, but with ample room for divergence in the vastly different nations where it operates.[27]

Curial storm-warnings

The first matter is what I call a "curial storm-warning" – a statement that a weather change may be coming through in the near future. In *Ringrow Pty Ltd v BP Australia Pty Ltd*,[28] seven years before *Andrews*, the High Court of Australia spoke presciently:

> Neither side in the appeal contested the foregoing statement by Lord Dunedin of the principles governing the identification, proof and consequences of penalties in contractual stipulations. The formulation has endured for ninety years. It has been applied countless times in this and other courts. In these circumstances, the present appeal afforded no occasion for a general reconsideration of Lord Dunedin's tests to determine whether any particular feature of Australian conditions, any change in the nature of penalties or any element in the contemporary market-place suggest the need for a new formulation. It is therefore proper to proceed on the basis that *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* continues to express the law applicable in this country, leaving any more substantial reconsideration than that advanced, to a future case where reconsideration or reformulation is in issue.

That is a remarkable instance of saying one thing but meaning the opposite.[29] Despite the reiteration of how conventional and established the approach in *Dunlop Pneumatic* was, no careful reader could avoid concluding that all six members of the High Court of Australia were saying that *Ringrow* was *not* confirming the correctness of *Dunlop* and a review might be timely. Passages like that are far from uncommon in courts presented with leeways of choice in the development of the law.[30] They are a gift to an advocate

[27] This is a theme in H Patrick Glenn, *On Common Laws* (Oxford University Press, 2005) esp at pp 63-69.

[28] (2005) 224 CLR 656; [2005] HCA 71 at [12].

[29] In *Gregg v R* [2020] NSWCCA 245; 355 FLR 348 at [714] this was termed "curial paralipsis": "pointedly reminding the reader of what a decision is *not* authority for".

[30] See for example the anticipation of *Patel v Mirza* [2017] AC 467; [2016] UKSC 42 in *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1; [2015] UKSC 23. Other examples may be seen in *Chen v Ng* [2017] UKPC 27 at [29], noted (2018)

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seeking special **[382]** leave to appeal to a court where appeals do not lie as of right, or to the academic wishing to write something having all-important "impact".[31] Indeed, the High Court granted special leave to appeal on the scope of the penalties doctrine in 2009,[32] with counsel pointing to what had been flagged in *Ringrow*, only for the parties disobligingly to settle the appeal before it was heard.[33] Such passages are also useful to the profession more broadly, flagging the possibility of a future change in the law. Changes in judge-made law are thereby made less jarring, especially in jurisdictions which eschew prospective overruling. It is an important, albeit under-appreciated, aspect of judicial technique.

Part of the common law tradition shared by Australia, the United Kingdom and Singapore is that once the High Court of Australia embarked on a change in principle, it was natural for the question to arise in the other jurisdictions. This too recurs in law. An example may be seen in the removal of the distinction between mistakes of fact and mistakes of law in the recovery of mistaken payments, in Australia, the United Kingdom and Singapore,[34] all in a ten year period from 1992 until 2002 which is, if you think about the time-frame over which the common law operates, and the tiny number of appeals heard and determined by those ultimate appellate courts, a remarkably prompt achievement. The review of the law of penalties produced different outcome, that of the law of payments made under a mistake of law produced the same outcome, but in some ways the most significant feature is that in each case each jurisdiction became engaged in the same updating review at around the same time and informed, in part, by what had occurred elsewhere.

Common law and statute

Much of what we think of as common law is in fact derived from statute. The law of

134 *LQR* 171, and in the gradual way in which *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309; [1999] NSWSC 539 was criticised in *Capital Securities XV Pty Ltd v Calleja* [2018] NSWCA 26 at [99]-[102] (and the authorities there cited) and finally overruled in *Gregg v R* [2020] NSWCCA 245; 355 FLR 348 at [368] and [714].

[31] The opportunity was taken up by W Newland, "Equitable relief against penalties" (2011) 85 *ALJ* 434. But it is to be regretted that the outpouring of Australian academic writing occurred after the *Andrews* horse had bolted, rather than in the previous six years.

[32] In the *Interstar v Integral* litigation, [2009] HCATrans 87, summarised in W Newland, "Equitable relief against penalties" (2011) 85 *ALJ* 434.

[33] See [2009] HCATrans 166.

[34] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; [1992] HCA 48; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2002] 2 SLR 1; [2002] SGCA 13.

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penalties is a fine example, and shows the role of statute in two quite distinct ways, each of which illustrates the simplification involved in labelling the "common law" as uniform.

First, there are the statutes of 1696 and 1705. They do not make easy reading. The 1696 statute (8 & 9 Will 3 c 12) relevantly provided:[35]

> in all actions, which … shall be commenced or prosecuted in any of his Majesty's courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained … and if judgment shall be given for the plaintiff … and in case the defendant or defendants, after such judgment entred, and before any execution executed, shall pay unto the **[383]** court where the action shall be brought, to the use of the plaintiff … such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods or the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entred upon record.

The 1705 statute (4 Ann c 16) relevantly provided:

> where an action of debt is brought upon any bond which hath a condition or defeazance to make void the same upon payment of a lessor sum at a day or place certain, if the obligor … before the action brought, paid to the obligee … the principal and interest due by the defeazance or condition of such bond, though such payment was not made strictly according to the condition or defeazance; yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof, as if the money had been paid at the day and place, according to the condition or defeazance, and had been so pleaded.
>
> And be it further enacted … That if at any time, pending an action upon any such bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money, and interest due on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly.

These ancient statutes do not bear *directly* upon the current law of penalties as practised. These days very few plaintiffs sue on conditional bonds. Their influence is more subtle.

Everyone accepts that historically, equity relieved against penalties which the common law would enforce. David Ibbetson gives a lucid account.[36] The main application was in

[35] The text is reproduced in W Newland, "Equitable relief against penalties" (2011) 85 *ALJ* 434 at 442.

[36] Ibbetson, n 3 above, pp 213-214.

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conditional bonds, which framed many commercial transactions, as Brian Simpson influentially explained.[37] One may ask whether the common law courts came to adopt the approach of equity prior to the enactment of those statutes, or alternatively whether those statutes forced the common law courts' hand. This bears upon a seemingly arid question, namely, whether the law against penalties is an aspect of "common law" as opposed to "equity". Perhaps surprisingly, a deal of authority supports the proposition that common law courts adopted the equitable approach prior to the enactment of the statutes. But I think we should now accept, following the primary research undertaken by Peter Turner, that the idea that common law somehow by osmosis came to follow the Chancellors' practice is not supported by any weighty evidence, and such that survives points to procedural innovation rather than some rule of law.[38] I do not propose to summarise it here. My **[384]** simple point, echoing Turner, is that it is reasonable to proceed on the basis that the statutes did some work. Lord Mansfield described the position thus:[39]

> It was extraordinary, that after it was settled in equity, that the forfeiture might be saved by the performing the intent, and that this was the nature of a bond, the courts of law did not follow equity, but still continued to do injustice as of course, and put the parties to the delay and expense of setting it right elsewhere as of course.

Statute was required, as Lord Mansfield memorably explained. In *Wyllies v Wilkes* Lord Mansfield explained that the 1705 statute was:[40]

> an Act made to remove the absurdity which Sir Thomas More unsuccessfully attempted to persuade the Judges to remedy in the reign of Henry VIII. For he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs; and when they said they could not relieve against the penalty, he swore by the body of God, he would grant an injunction. This is a remedial law, and, if a case is within the mischief, the remedy ought to extend to it.

That is perhaps merely tradition,[41] although it accords with a near contemporaneous account.[42] In any event, as Turner has explained, there is no evidence to suggest that the

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[37] AWB Simpson, "The Penal Bond with Conditional Defeasance" in AWB Simpson, *Legal Theory and Legal History – Essays on the Common Law* (Hambledon Press 1987), originally published in (1966) 82 *LQR* 392.

[38] P Turner, "*Lex Sequitur Equitatem:* Fusion and the Penalty Doctrine" in J Goldberg, H Smith and P Turner, *Equity and Law: Fusion and Fission* (Cambridge University Press, 2019), 254 at 256-267.

[39] *Bonafous v Rybot* (1763) 3 Burr 1370 at 1373; 97 ER 878 at 880.

[40] (1780) 2 Doug 519 at 522-523; 99 ER 331 at 333.

[41] The Court's judgment was reserved but nonetheless delivered orally, and lacks footnotes.

[42] An account to the same general effect may be found in the biography published by More's son-in-law, published in 1626 but written soon after More's death: see A Rowse (ed), *A Man of Singular Virtue being A Life of St Thomas*

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statutes of 1696 and 1705 "regulated" or "confirmed" the position already reached at common law.[43] That is not how it is described in Blackstone,[44] or the 1847 eighth edition of Archbold's Queen's Bench Practice by Thomas Chitty,[45] or in Haynes' 1873 work on equity.[46] And if the common law had taken that course, why enact the 1696 statute, and, especially, why enact a *second* statute in 1705?

[385] In short, the 1696 statute presupposed that the common law court had entered a judgment in favour of the plaintiff, and prevented execution if damages were paid, while the 1705 statute gave a defence which could be pleaded in bar. The object of both statutes was the same. It was to preclude the plaintiff from recovering the penalty, and to permit the plaintiff only to recover damages for breach. This compelled the common law courts to do what Sir Thomas More had apparently failed to persuade them to do, and stop entering judgment in the amount on the bond, leaving it to chancery to prevent the action or the execution of the judgment. Instead it became necessary to apply the statute, which in turn meant engaging with the doctrine developed by the chancery court.

When the legislation was still well remembered, there were arguments about whether a conditional bond fell outside the statute. Thus in *Ex parte Winchester,*[47] Lord Hardwicke had said that the words "at a day or place certain" precluded the statute from extending to a bond securing an annuity, in what was recognisably an exercise in statutory construction. Equally revealing is s 26 of the United States *Judiciary Act 1789*. English Equity was not

More by his son-in-law William Roper (Folio Society, 1980), p 63. To be fair, that account does not single out the law of penalties as the subject of More's failed attempt to persuade the judges.

43 Cf *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 189, 202; [1986] HCA 63.

44 *Commentaries*, Bk III ch 27 ("the inconvenience as well as injustice, of putting different constructions in different courts upon one and the same transaction, obliged the parliament at length to interfere, and to direct by the statutes 4&5 Ann c 16 and 7 Geo II c 20 that, in the cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be followed in the courts of law").

45 Vol II, p 901 ("Before the 8 &9 W 3 c 11, [the plaintiff in an action on a bond could obtain judgment for the full penalty], and the defendant could only obtain relief against this by application to a court of equity").

46 "In these cases of forfeited bond, before the reigns of William III and Anne, when the Legislature interfered to regulate the proceedings at common law, the only remedy for an obligor who had allowed the time for payment to elapse, was to file a bill in equity offering payment of principal and interest." He adds, "It is clear that, had the scene of Shakespeare's play been laid in England, and not in Venice, the proper advice for Portia to have given, would have been, to file a bill in Chancery. But it must be admitted that the play would not have been improved": F Haynes, *Outlines of Equity* (Maxwell & Son, 1873), p 21. The haphazard methodology employed in selecting this work and those in the previous two footnotes should perhaps be explained: they were readily to hand at home during the January 2022 lockdown caused by the Covid-19 pandemic.

47 The decision is hard to find, because it is reported under the name *Ex parte Groome* (1744) 1 Atk 115; 26 ER 75, separate proceedings with which it was heard (1744) 1 Atk 118; 26 ER 77.

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greatly loved in the first decades of the American Republic, yet s 26 provided:[48]

> That in all causes brought before either of the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other speciality, where the forfeiture, breach or non-performance shall appear, by the default or confession of the defendant, or upon demurrer, the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity.

That provision (which reflected New England colonial precursors),[49] was only necessary if it was perceived that, almost a century after the English statutes, it was still necessary to pass a law to force the outcome at common law to reflect the position in equity.

But it seems uncontroversial that as time passed, and the statute receded into the distance, more and more litigants and courts came to rely on decisions, until, more than two centuries later, it was said, obiter, in *Elsey & Co Ltd v Hyde*, an *ex tempore* unreported[50] judgment of a Divisional Court hearing an appeal from the Bloomsbury County Court from a trivial case worth something less than £25[51] about a hire purchase agreement, that the doctrine was only available where there was a breach of contract. On the one hand it is obvious that that restriction is difficult to justify historically – nothing in a doctrine based on granting relief against actions on a bond **[386]** confines itself to those claims that were breaches of contract, and nothing in a remedial statute authorising courts to give relief to a person faced with the execution of a penal bond warrants *shrinking* the cases in which the doctrine applies. On the other hand, the law does not lie still, and English courts at the highest level came to accept that limitation on the doctrine.

But it is revealing to go back to statute, because the legislative history in Australia is quite different from that in the United Kingdom. After the Judicature legislation, there was little occasion for the application of the statutes of 1696 and 1705. In the United Kingdom, the

[48] It also added, consistently with an enthusiasm for juries and a distrust of judges, "And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury".

[49] See J Goebel, *History of the Supreme Court of the United States – Antecedents and Beginnings to 1801* (Macmillan, 1971), p 484.

[50] It was reproduced extensively in *In re Apex Supply Co* [1948] Ch 108 at 114-116, copied from a text on hire-purchase law. See further *Integral Home Loans Pty Ltd v Interstar Wholesale Finance Pty Ltd* [2007] NSWSC 406 at [20]-[21].

[51] The claim was for the difference between the original £5 paid and later sums paid, and £25.

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1705 statute was repealed in 1948.[52] A decade later in 1957, the 1696 statute was repealed and replaced by a provision in the Supreme Court Rules that in an action on a bond, the amount claimed by the plaintiff is to be stated with "regard being had to the rules of equity relating to penalties, and not the penalty provided for by the bond".[53] What had been a matter of substance became procedural, and so far as I can see it did not survive the Woolf reforms at the end of the 20th century.

The situation in Australia is different. Plaintiffs sued on penal bonds from an early time, and courts confined remedies to proof of damage,[54] consistently with the statutes being received. Far from being repealed, the substance of the statutes from the time of Queen Anne were re-enacted at around the same time they were being repealed in the United Kingdom. The test cases presented in the *Andrews/Paciocco* litigation arose in Victoria, where the legislation has been re-enacted as s 30 of the *Instruments Act 1958* (Vic). In New South Wales, it may be found as ss 33 and 34 of the *Imperial Acts Application Act 1969* (NSW), within Part 3.

The British repeal and Australian re-enactment of legislation first enacted more than three centuries ago informs a different curial approach. The statutes were scarcely relied upon in *Makdessi.*[55] In contrast, in *Austin v United Dominions Corporation Ltd*,[56] Priestley JA wrote that in New South Wales the position was made clear by s 33 of the *Imperial Acts Application Act 1969* (NSW), namely, that judgment could be obtained for the full amount, with relief against the penalty being restrained by statutory prohibition upon execution.

An insightful contribution from Menon CJ when this paper was presented returns to the *seemingly* arid question whether this branch of the law is regarded as part of equity or of common law. If one treats the law of penalties as a part of the common law, as a restriction upon the secondary obligations available for breach of contract, it is more natural to regard a breach as an indispensable precondition. If one treats it as part of

[52] *Statute Law Revision Act 1948* (UK).
[53] RSC O 53G, r 1(2), inserted by SI 1957/1178.
[54] See for example *Woolley v Bryant* [1837] NSWSupC 28.
[55] They are mentioned at [6] by way of historical background to explain how the common law courts came to treat the statutory procedures as mandatory.
[56] [1984] 2 NSWLR 612 at 626-627.

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equity, then it is natural to prevent form from prevailing over substance, and for the scope of the parties' primary obligations to be within the doctrine's scope. The way in which a rule or principle is understood is apt to have a powerful influence on the development of that rule or principle.

[387] There is another way in which the divergent approaches in Australia, the United Kingdom and Singapore may be viewed, which is informed by Cardozo's summation of the contributors to legal change. An historical perspective is unquestioningly essential in any case where a submission is made to change the law, but equally clearly it is not the only way in which legal analysis must proceed, and it is certainly not conclusive. This was anticipated precisely 101 years and one week ago by Benjamin Cardozo. His fourth and final lecture at Yale on 18 February 1921 – relocated to a larger lecture theatre which could seat 500[57] – explained the different ways in which that minority of decisions which shaped the future law (after emphasising that the bulk of the business of the courts was where the controversy turned not upon the rule of law but upon its application to the facts),[58] and after having addressed the methods of "Philosophy" and "History, Tradition and Sociology", said that all combined:[59]

> "One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements."

One way of comparing the different approaches in Australia, the United Kingdom and Singapore is simply that it reflects the truth to which Cardozo referred. The Australian High Court placed greater weight on the point of view of history; the Singapore Court of Appeal placed greater weight on social utility. It has after all been said that "[t]he dominant theme and thread of the history of the common law is neither continuity nor change, but the two in combination" and that "the history of the common law is a manifestation of the

[57] See J Goldstein, "The Nature of the Judicial Process: The Enduring Significance of a Legal Classic" 34 *Touro L Rev* 159 at 162-163 (2018). The lecture was advertised in that day's Yale Daily News with the subheading "Equity First Consideration: Yale Daily News, 18 February 1921, which may be viewed at https://web.library.yale.edu/digital-collections/yale-daily-news-historical-archive.

[58] B Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), p 163.

[59] Ibid, p 177.

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evolution of ideas".[60]

Secondly, there are *other* modern Australian statutes which bear on the penalties doctrine. They represent another dimension of the role statutes play in formulating what we so glibly[61] call the "common law". The reasoning in *Andrews* commences with an observation that the clauses in the contracts between banker and customer were impugned as amounting to engaging in "unconscionable conduct" contrary to federal and state law, were "unfair terms" **[388]** under statute and were "unjust transactions" under the federal and state credit code. Their Honours added:[62]

> These aspects of the litigation are not before the Court. But it may be observed that this pattern of remedial legislation suggests the need for caution in dealing with the unwritten law as if laissez faire notions of an untrammelled 'freedom of contract' provide a universal legal value.

The first footnote gave references to High Court decisions where it had been said that "[t]he interrelation and interaction between common law and statute may trigger varied and complex questions requiring full argument in cases where they arise".[63]

The meaning of the passage in *Andrews* is tolerably clear. If every Australian Parliament has legislated against conduct which falls into this general area, a submission that the penalties doctrine needs to be kept under careful watch because of "freedom of contract" is of diminished force. This may be seen as an aspect of coherence. While typically one asks whether a posited common law duty coheres with a statutory provision,[64] one may also ask whether a common law precept such as freedom of contract accords with the statutory terrain. It is probably true that Australian legislation (notably, the misleadingly named "Australian Consumer Law" which extends far beyond transactions involving consumers) is more intrusive than United Kingdom or Singaporean legislation. To return to

[60] V Windeyer, "History in Law and Law in History" (1973) 11 *Alberta L Rev* 123 at 137, reproduced in B Debelle (ed), *Victor Windeyer's Legacy, Legal and Military Papers* (Federation Press 2019), 132 at 147.

[61] Cf *Gammage v The Queen* (1969) 122 CLR 444 at 462; [1969] HCA 68 ("it is misleading to speak glibly of the common law in order to compare and contrast it with a statute").

[62] At [5].

[63] Referring to *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 at [20], [24]-[25] and *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539; [2010] HCA 42 at [22].

[64] See *Miller v Miller* (2011) 242 CLR 446; [2011] HCA 9 and *Bevan v Coolahan* (2019) 101 NSWLR 86; [2019] NSWCA 217.

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the point made by Sir Victor Windeyer, if the Commonwealth Parliament and the Legislatures of every Australian State and Territory have repeatedly enacted laws conferring discretionary powers upon courts to set aside or refuse to enforce contractual provisions which are "unjust" or "unconscionable" or "unfair", then why may not the Australian common law of penalties be broader than its counterpart in jurisdictions where there are many fewer laws undermining freedom of contract? This is an aspect of the "gravitational effect" of statutes to Traynor CJ memorable referred.[65]

All this reinforces Andrew Burrows' observation that "common law and statute are more fully integrated than has traditionally been thought".[66] Commercial law is not immune from this. It is worth reiterating that a leading text on the Uniform Commercial Code commences with the provocative observation that "In our system of law statutory law tends to be transformed into case law".[67] It seems to me that if one were to seek to compare and contrast, and especially if one were to seek to criticise, the different **[389]** approaches in Australia, Singapore and the United Kingdom, it would be wrong to do so in the abstract, without regard to the statutory context which is quite different in the three jurisdictions, and which has played a key role in the history of the principle.

Judgment writing style

Judgments don't exist in the abstract. They respond to particular submissions exchanged between litigants, and will inevitably in large measure be contingent upon the way the dispute has been crystallised. For example, the emphasis on history in the reasons in *Andrews* corresponds with the historical submissions advanced to that court.[68] That does not prevent some comparisons being made.

Each of *Andrews*, *Cavendish Square* and *Denka* is co-authored, but in quite different ways. The High Court of Australia spoke unanimously and collectively. The Singapore

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[65] R Traynor "Statutes Revolving in Common-Law Orbits" (1968) 17 *Catholic University Law Review* 401; the issue is discussed in M Leeming, "Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room" (2013) 36(3) *UNSWLJ* 1002.

[66] A Burrows, "The Relationship between Common Law and Statute in the Law of Obligations" (2012) 128 *LQR* 232 at 233.

[67] J White and R Summers, *Handbook of the Law under the Uniform Commercial Code* (St Paul, Minn, West Publishing Co, 1972), 3rd sentence of the preface.

[68] See *Andrews & Ors v Australia and New Zealand Banking Group Limited* [2012] HCATrans 181.

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Court of Appeal delivered a judgment of the court but with a single acknowledged author. The United Kingdom Supreme Court produced five judgments, all agreeing on principle, but with a dissent by Lord Toulson on the facts. The leading judgment is co-authored by Lords Neuberger and Sumption, with the agreement of Lord Carnwath. It is apparently written by two separate individuals who – in my view to their credit – haven't much attempted to suppress their individual styles. The first 43 paragraphs, which reject the submission that *Andrews* should be followed, are written with considerable verve, and then follows an account of the background and the submissions in an entirely different tone. The Ciceronian crescendo at the outset in [3] about the difficulties with the existing doctrine is a superb instance of understated rhetoric:

> The test for distinguishing penal from other principles is unclear. As early as 1801, in *Astley v Weldon* (1801) 2 Bos & Pul 346, 350 Lord Eldon confessed himself, not for the first time, "much embarrassed in ascertaining the principle on which [the rule was] founded". Eighty years later, in *Wallis v Smith* (1882) 21 Ch D 243, 256, Sir George Jessel MR, not a judge noted for confessing ignorance, observed that "The ground of that doctrine I do not know". In 1966 Diplock LJ, not a judge given to recognising defeat, declared that he could "make no attempt, where so many others have failed, to rationalise this common law rule": *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1446. The task is no easier today.

The author who writes a draft of what is hoped will become a joint judgment may be tempted to deaden his or her style and tone, and perhaps also to steer clear where possible of more controversial issues, in order to produce a draft which is agreeable. But not always. At the level of transparency, the Singapore approach carries with it the candid acknowledgement that one member of the court has contributed most to the court's reasoning. On the other hand, it is cases like *Andrews* and *Cavendish Square* and *Denka* where courts are changing the law of which Lord Reid said in *Broome v Cassell & Co Ltd*,[69] regretting what had occurred **[390]** in *Rookes v Barnard*,[70] that "it is never wise to have only one speech in this House dealing with an important question of law". I doubt that was intended literally (indeed, the gravamen of the reasoning was a complaint against the literalness with which Lord Devlin's earlier speech had been construed); instead Lord Reid was stating a strong preference for separate speeches. I would not go so far as Alan Paterson, writing of the United Kingdom Supreme Court, who said:[71]

[69] [1972] AC 1027 at 1084.
[70] [1964] AC 1129.
[71] A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013), p 315.

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> "The glory of the common law and its final court has included the individuality and idiosyncrasy of its top judges. The myth of judicial fungibility which sustains the arid judgment style of the European Court of Justice is not a feature that hitherto has attracted many supporters in the United Kingdom."

The truth of the matter, in my view, is that even when all members of the Court agree as to the disposition on an appeal, there is a place for joint judgments and there is a place for individual judgments and a one-size-fits-all approach is as bad for the law as it is for shoes.

One final striking feature of the *Denka* judgment is its engagement with academic writings. I think I have never read an ultimate appellate judgment which addresses academic writings so extensively. *Denka* does not neglect other courts' decisions; far from it, but it gives very substantive time and presumably weight to the reasoning in articles and books. To be fair, *Andrews* and *Makdessi* prompted a deal of academic commentary, and presumably at least one of the parties in *Denka* relied upon it. Despite dealing with a vast range of decisions and academic commentary, *Denka* accords with Justice Goldberg's advice to Justice Breyer and does not resort to footnotes,[72] and especially not the distracting asides which punctuate this paper.[73]

Hamilton concludes with an emphasis on the revolution being unfinished.[74] None of the three judgments mentioned in this paper will stand as the last word on the law of penalties, nor will this paper be the last word on storm warnings, statutes or style.

[72] Justice Breyer recounted to Bryan Garner: "[A]fter I had been a federal judge for a year or two, and [Goldberg] said, "There's no point using a footnote. If you want to put something in a footnote, make a decision: Is it relevant and important or not? If it's important to your argument, put it in the text. And if it's not important, throw it out." See *The Scribes Journal of Legal Writing* (2010) pp 154-155.

[73] Especially those mentioning Shakespeare and Britten.

[74] Notably, Hamilton's dying reference to "America, you great unfinished symphony".

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