

## Introduction

### GOING ABOVE AND BEYOND THE CALL OF DUTY? PARSING JUDGMENT AND *OBITER DICTA*

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‘The greatest value of a picture is when it *forces* us to notice what we never expected to see.’<sup>1</sup>

#### 1 Introduction

In the 2017–18 legal year, the UK Supreme Court (‘the Supreme Court’) continued to answer novel questions of law in disputes between determined litigants.<sup>2</sup> In accounts given by its President, Lady Hale, the Supreme Court’s caseload in the past year included ‘an unusually difficult case to resolve’,<sup>3</sup> a ‘protracted and deeply troubling case’,<sup>4</sup> ‘a judgment [...] given in unusual circumstances’,<sup>5</sup> ‘a very troubling case’<sup>6</sup> and, to balance the ledger to some extent, a case that was ‘great good fun’ and the ‘most fun recently’.<sup>7</sup>

It has become customary in the introductory chapter of this yearbook to comment on a theme, which will, hopefully, hold some interest to

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<sup>1</sup> John W Tukey, *Exploratory Data Analysis* (Addison-Wesley Publishing Co 1977), vi (emphasis in original).

<sup>2</sup> See eg *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119, [1] (Lord Sumption) (observing that the appeal raised ‘[two] truly fundamental issues in the law of contract’); for an analysis of *MWB*, see Ewan McKendrick QC, ‘Two “Truly Fundamental Issues in the Law of Contract”: An Analysis of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019).

<sup>3</sup> *Re Northern Ireland Human Rights Commission* [2018] UKSC 27, [2019] 1 All ER 173, [1] (Lady Hale).

<sup>4</sup> *Secretary of State for the Home Department v R (Bashir)* [2018] UKSC 45, [2018] 3 WLR 573, [1] (Lady Hale, Lord Mance, Lord Kerr, Lord Wilson, Lord Sumption, Lord Reed and Lord Carnwath (*per curiam*)).

<sup>5</sup> *R (Hysaj) v Secretary of State for the Home Department* [2017] UKSC 82, [2018] 1 WLR 221, [1].

<sup>6</sup> *Owens v Owens* [2018] UKSC 41, [2018] AC 899, [46] (Lady Hale).

<sup>7</sup> Lady Hale, ‘Dishonesty’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 243, 243 (commenting on *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, [2018] AC 391). The fun continues in this volume with a symposium on the *Ivey v Genting Casinos* case in Part II.

a broad readership. The introductory chapter often observes perceived inconsistencies in the judicial practices of the Court. The aim of doing so is not to criticise the Court. Perceived inconsistencies might provoke questions but of themselves convey very little. In relation to critiquing the judicial practices of the US Supreme Court, Frank Easterbrook<sup>8</sup> observed:

Inconsistency is inevitable, in the strong sense of that word, no matter how much the Justices may disregard their own preferences, no matter how skilled they may be [...] demands for perfect consistency cannot be fulfilled, and it is inappropriate to condemn the Court's performance as an institution simply by pointing out that it sometimes, even frequently, contradicts itself.<sup>9</sup>

Although one would hope that a court does not frequently contradict itself, and certainly not on serious issues in its jurisprudence, Easterbrook's observation is important insofar as it is directed toward critiquing peculiarities in judicial practice, especially over time. The unique role of a final court of appeal is that it may need to contradict itself, the House of Lords or the Privy Council if it considers a past decision is wrong – or, in the Supreme Court's euphemistic language, when it recognises that 'the law took a wrong turn.'<sup>10</sup> Inconsistencies may be benign—but they also may reveal something more consequential and, thus, worthy of further enquiry. Unless inconsistencies are first noticed and investigated, however, we will not know which it is.

Last year, I commented on a practice that seemed to me to be inconsistent in the Supreme Court's work: that is, the perceived importance of, and relationship between, panel size and the Court's willingness to decide some significant legal issues.<sup>11</sup> Some situations in which the Court declined to determine certain issues on appeal without an enlarged panel (i.e., >five Justices) were contrasted with cases in which the Court developed the law momentously with its 'basic' panel of five Justices.<sup>12</sup> I observed that there is

<sup>8</sup> Now, and since 4 April 1985, Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit, having served as Chief Judge of that Court from 27 November 2006 to 1 October 2013.

<sup>9</sup> Frank H Easterbrook, 'Ways of Criticizing the Court' (1982) 95 *Harvard L Rev* 802, 813.

<sup>10</sup> See eg *R v Jogee* [2016] UKSC 8, [2016] UKPC 7, [2017] 1 AC 387, [3], [82], [85], [87] (Lord Toulson), overruling *Chan Wing-Siu v The Queen* [1985] AC 168 (PC) and *R v Powell and R v English* [1999] AC 1 (HL).

<sup>11</sup> Daniel Clarry, 'Watching the British: Keeping House and Resourcing in the UK Supreme Court' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 8: 2016-2017 Legal Year* (Appellate Press 2018) 14, 44-45.

<sup>12</sup> *ibid* 44. In the 2017-18 legal year, 67 of its 71 judgments (94.4%) were given with a panel of five Justices, the remaining four cases were given by panels of seven (5.6%).

some apparent inconsistency in the Court's practice (and potential injustice) if the Court declined to decide legal points due to panel size without reconvening to hear the point with a larger panel.<sup>13</sup> Those apparent inconsistencies have continued in the 2017–18 legal year. In *Ivey v Genting Casinos (UK) Ltd ('Ivey')*,<sup>14</sup> for example, the Court constituted by five judges<sup>15</sup> gave *obiter dicta* on the correct test for 'dishonesty' having potentially wide ramifications across the civil and criminal law; whereas, in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd ('MWB')*,<sup>16</sup> the Court declined to venture further in its judgment to consider one of two 'truly fundamental issues in the law of contract' that was raised on the appeal – involving House of Lords authority<sup>17</sup> that was 'probably ripe for re-examination' – because it was 'undesirable' to do so without: a) an enlarged panel (i.e., >five Justices); and b) the decision being 'more than *obiter dictum*'.<sup>18</sup> Whereas I considered the former issue (panel size) in last year's introduction to this yearbook, I propose to consider the latter issue (*obiter dicta*) this year.

It is commonplace for the Supreme Court to go further in its judgments than that which the immediate case before it requires for its authoritative disposition, and not simply in *obiter dicta*. Dissenting opinions are also unnecessary for the authoritative disposition of an appeal.<sup>19</sup> That is not to suggest that dissenting opinions should not be given – many instances may be given to show the power and positive influence of a persuasive dissenting opinion, especially in law reform and the future development of the law.<sup>20</sup>

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<sup>13</sup> *ibid* 44–45.

<sup>14</sup> *Ivey* (n 7).

<sup>15</sup> Four of its full-time Justices (Lord Neuberger, Lady Hale, Lord Kerr and Lord Hughes) and Lord Thomas, who was the Lord Chief Justice of England and Wales when *Ivey* (n 7) was heard but had retired from that office and become a member of the Supplementary Panel of the Supreme Court when the judgment was delivered.

<sup>16</sup> *MWB* (n 2).

<sup>17</sup> *Foakes v Beer* (1884) 9 App Cas 605.

<sup>18</sup> *MWB* (n 2) [18] (Lord Sumption (with whom Lady Hale, Lord Wilson, Lord Lloyd-Jones and Lord Briggs agreed)).

<sup>19</sup> Indeed, for the better part of one century until 1966, it was prohibited for any person to publish a dissenting opinion in decisions of the Judicial Committee of the Privy Council. But see Judicial Committee (Dissenting Opinions) Order (UK (SRO 13 of 1966, 4 March 1966)) s 3 ('Any member of the Judicial Committee of the Privy Council present at the hearing of any appeal, cause or matter who shall dissent from the opinion of the majority of the members present as to the nature of the report or recommendation to be made to Her Majesty thereon shall be at liberty to publish his or her dissent in open Court together with the reasons.'). See also Lord Neuberger, 'The Judicial Committee of the Privy Council in the 21<sup>st</sup> Century' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 4: 2012–2013 Legal Year* (Appellate Press 2018) 28, 38–39.

<sup>20</sup> See also Lord Sumption, 'A Question of Taste: The UK Supreme Court and the Interpretation of Contracts', in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 8: 2016–2017 Legal Year* (Appellate Press 2018) 74, 88; cf *Nothman v London Borough of Barnet* [1979] 1 WLR 67 (HL), 69 (Lord Diplock).

Indeed, with the passage of time, dissenting opinions may be vindicated.<sup>21</sup> I cannot do justice to the topic of dissenting opinions in the present chapter. The point is that it is commonplace for appellate judges to go further than that which is necessary to resolve appeals. The general question is why and, more particularly, in what circumstances will they do so?

In addition to dissenting opinions and *obiter dicta*, appellate courts may also pronounce judgment where the effect of the judgment is neither to declare nor determine the rights of the parties to the appeal *per se* (i.e., in the sense of deciding the outcome of an appeal). For example, the outcome may have already been determined by the parties agreeing to settle their dispute before judgment or the circumstances giving rise to the appeal might materially change so as to render the appellate decision of no practical consequence for the parties to the appeal. In such situations, an appellate court may still proceed to judgment anyway.

The literature on ‘collective irrationality’ highlights some of the inherent problems of group decision-making (a common characteristic of appellate decision-making) and the difficulties with parsing multiple opinions to discern the authoritative value of judgments from appellate courts, especially pronounced in final appellate courts with enlarged panels. Lessons may be learnt from that literature in discerning the reasons for a decision – that which is necessary for appellate decision-making – and, perhaps even more so, in informing whether and, if so, when appellate judges should go further than only resolving live issues.

The occasions in which the Supreme Court goes further than that which is necessary to resolve a dispute is the focus of the two substantive sections of this chapter. Those sections consider *obiter dicta* and whole judgments that may, in some sense, be described as unnecessary. I consider the concept of ‘collective irrationality’ in the context of *obiter dicta* before making some concluding remarks. The aim of the chapter is not to conclude when appellate judges *do*, much less when they *should*, go further than what is necessary to determine an appeal.<sup>22</sup> The aim is to cast light on some practices of the Supreme Court, especially in its judgments delivered in the 2017–18 legal year. The Supreme Court often goes further than what is

<sup>21</sup> See eg *Secretary of State for Exiting the European Union v R (Miller)* [2017] UKSC 5, [2018] AC 61, [261]–[262] (Lord Carnwath (dissenting)) (on the revocability of a notice, given under art 50(2) of the Treaty on the Functioning of the European Union); and C-621/18 *Wightman v Secretary of State for Exiting the European Union* [2018] 3 WLR 1965 (Court of Justice of the European Union (*Grand Plenum*)). See also Aidan O’Neill QC, ‘European Union Law’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 518, 519, n 6.

<sup>22</sup> Indeed, such conclusions would be empirically unsound given the limited jurisprudence considered herein.

necessary to dispose of issues and it does so for good reasons. Instances in which the Justices do so may be understood by appreciating the broader role of the UK's top court in not only administering justice between litigants but also developing the law in doing so, thereby highlighting the general public importance of the Court's judgments.

## 2 The Logic in the Latin: *Obiter Dicta*, *Ratio Decidendi* and *Stare Decisis*

The doctrine of precedent (*stare decisis*) is the bedrock of the common law tradition.<sup>23</sup> Given the base quality of that doctrine, there is a well-entrenched bias toward what is sometimes described as 'decisional minimalism'<sup>24</sup> – that is, the idea that judges in common law jurisdictions limit the decisions they need to make, reasoning narrowly to support their decisions. The benefits of 'decisional minimalism' include avoiding the burden of judicial decision-making – and the concomitant advantages to the administration of justice by freeing up judicial resources – and reducing the risk of error in later cases where a tangential issue in an earlier case might then arise squarely for determination (where the issue, having been brought into sharp relief, may be fully argued and considered).<sup>25</sup> In constitutional terms, minimalist decision-making informs how the general law is (and ought to be) developed incrementally, thereby leaving further developments for another occasion when an issue actually arises before the Court or for Parliament to codify or reform in the meantime.<sup>26</sup> It also assists the rule of law imperatives of rendering the general law ascertainable and intelligible by avoiding discursive judgments and multiple opinions in which it may be difficult to discern what was decided and, more particularly, why it was decided.<sup>27</sup> Clear judgments, especially those which command unanimity of the judicial panel hearing the case, ordinarily exude

<sup>23</sup> See eg *Willers v Joyce (No 2)* [2016] UKSC 44, [2016] 3 WLR 534, [4] (Lord Neuberger (with whom Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed and Lord Toulson agreed)) ('In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known *stare decisis*, is fundamental.')

<sup>24</sup> Cass R Sunstein, 'Leaving Things Undecided' (1996) 110 *Harvard L Rev* 4; see generally Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard UP 1999).

<sup>25</sup> *ibid.*

<sup>26</sup> For the historical interaction in the mid- to late 1960s between the then newly established Law Commission in 1965 and the then new rule concerning the overruling of judicial precedent by the House of Lords in 1966, see MDA Freeman, 'Precedent and the House of Lords' (1971) 121 *New LJ* 551. cf Cass R Sunstein, 'Beyond Judicial Minimalism' (2008) 43 *Tulsa L Rev* 825.

<sup>27</sup> See Tom Bingham, *The Rule of Law* (Penguin Books 2011), ch 3.

greater authority and, in turn, may even be seen to enhance institutional reputation.<sup>28</sup>

Importantly, there is a degree of self-regulation built into a precedent-based system because, however far a judge goes beyond that which is necessary for their decision, the dominant method in legal practice is to distil the reasons for a decision (*ratio decidendi*) as binding authority from mere opinions (*obiter dicta*) for subsequent application and consideration (*stare decisis*).<sup>29</sup> ‘The propositions which bind’, as Justice Heydon observed extrajudicially, ‘are often much narrower than the totality of what was said.’<sup>30</sup> Identifying binding propositions is, thus, elementary to the method of judicial precedent practised in the common law tradition. Even so, it can be a difficult task. Single authored judgments tend to be easier to delineate *ratio decidendi* and *obiter dicta*; multiple opinions are often more of a challenge. Lord Justice Asquith once consulted ‘one of our greatest judicial luminaries’ on the ‘general problem of *ratio* and *obiter*’ who reportedly told him ‘in a light vein’:

“the rule is quite simple: if you agree with the other bloke you say it’s part of the *ratio*; if you don’t, you say it’s ‘*obiter dictum*,’ with the implication that he is a congenital idiot.”<sup>31</sup>

The subsequent use of precedent must also be approached cautiously. Karl Llewellyn tells us, ‘[t]here is a distinction between the *ratio decidendi*, the court’s own version of the rule of the case, and the true rule of the case, to wit what it will be made to stand for by another later court.’<sup>32</sup> That and similar accounts which rely on the subsequent analysis of lower courts to interpret legal precedent represent an odd legal method.<sup>33</sup> At best, it

<sup>28</sup> See eg John F Davis and William L Reynolds, ‘Juridical Cripples: Plurality Opinions in the Supreme Court’ (1974) 23 Duke LJ 59; Mark A Thurman, ‘When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions’ (1992) 42 Duke LJ 419.

<sup>29</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge UP 2008) 183 (“The value of the doctrine of precedent rests not in its capacity to commit decision-makers to a course of actions but in its capacity simultaneously to create constraint and allow a degree of discretion.”)

<sup>30</sup> Justice J D Heydon, ‘How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?’ (2009) 9 Oxford U Commonwealth LJ 1, 5; cf *Quinn v Leathem* [1901] AC 459, 506 (Lord Halsbury) (‘A case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to flow logically from it.’)

<sup>31</sup> Lord Justice Asquith, ‘Some Aspects of the Work of the Court of Appeal’ (1950) 1 J of the Society of Public Teachers of Law 350, 359.

<sup>32</sup> Karl N Llewellyn, *The Bramble Bush* (Oceana Publications 1930), 52.

<sup>33</sup> See eg Thurman (n 28) 419 (‘When the Supreme Court decides a case, the Federal District Courts and Circuit Courts of Appeals are responsible for finding the governing rules of law

seems an awkward and inefficient way to become acquainted with legal precedent; at worst, it usurps the function of highest appellate courts to set legal precedent if those precedents are rehashed or reinterpreted by lower courts to then be taken as authoritative of what was previously decided on final appeal. As a method of legal practice, it would aggravate the problem of the ‘proliferation of authorities’ cited in argument to the Court, which Lord Carnwath has commented on judicially and extrajudicially.<sup>34</sup> In English law, it falls foul of Lord Judge CJ’s dictum in *R v Erskine* (adapting Viscount Falkland’s aphorism from 1641):

If it is not *necessary* to refer to a previous decision of the court, it is *necessary* not to refer to it. Similarly, if it is not *necessary* to include a previous decision in the bundle of authorities, it is *necessary* to exclude it. That approach will be rigorously enforced.

It follows that when the advocate is considering what authority, if any, to cite for a proposition, only an authority which establishes the principle should be cited. Reference should not be made to authorities which do no more than either (a) illustrate the principle or (b) restate it.<sup>35</sup>

Necessity has a central role to play in the development of legal precedent in the common law tradition – to become legal precedent, the reasons for a judicial decision must be built on a foundation of necessity. Naturally, therefore, necessity in judicial decision-making informs whether judges will go further than that which is necessary to decide a case and, if so, how far they will venture in their opinion of what the law is or should be – i.e., opinions on points of law that go further than that which is necessary to dispose of a matter in respect of which the court has jurisdiction. Appellate courts have an important role to play in developing the law, although the circumstances and degree to which they should do so is a perennial subject of debate, including in volumes of this yearbook.<sup>36</sup>

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in that decision. The first lower court to deal with the issue often “defines” the holding of the case by reviewing the reasoning found in the Supreme Court’s opinion.’)

<sup>34</sup> See *Poshteh v Royal Borough of Kensington and Chelsea* [2017] UKSC 36, [2017] AC 624, [45]-[47] (Lord Carnwath); Lord Carnwath, ‘Judicial Precedent – Taming the Common Law’ (NMLR Annual Lecture Series, 7 June 2012) <[https://www.supremecourt.uk/docs/speech\\_120607.pdf](https://www.supremecourt.uk/docs/speech_120607.pdf)> accessed 1 May 2019.

<sup>35</sup> *R v Erskine* [2009] EWCA Crim 1425, [2009] 2 Cr App R 29, [75]-[76].

<sup>36</sup> See eg Lord Walker, ‘How Far Should Judges Develop the Common Law?’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 4: 2012–2013 Legal Year* (Appellate Press 2018); Lord Sumption, ‘The Limits of Law’, Lord Hodge, ‘Judicial Law-Making in a Changing Constitution’, and Sir Patrick Elias, ‘Are Judges Becoming Too Political?’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 5: 2013–2014 Legal Year* (Appellate Press 2018).

Reasonable minds may differ over the extent to which judges should develop the general law or whether reform is best left for Parliament,<sup>37</sup> possibly informed by consultation and reporting of the Law Commission.<sup>38</sup> Indeed, there are (and ought to be) constitutional limits on the extent to which judges – even those in highest appellate courts – can change the law, especially in the face of a plain reading of a statute that leaves no ambiguity. Those limits apply even though a case may arise for determination on appeal where the view may reasonably be taken that the legislation has become outmoded – as, for example, in *Owens v Owens* (*Owens*) where Mrs Owens had failed to prove that her husband ‘ha[d] behaved in such a way that [she] cannot reasonably be expected to live with [him].’<sup>39</sup> Mrs Owens was required as a matter of law to remain married to her husband even though she had no wish to do so and had been separated from him for some time.<sup>40</sup> Many people may find it unacceptable that a woman must remain married against her wishes and that the court should be the arbiter of when it is no longer ‘reasonable’ for her to be ‘expected’ to live with her husband; not at all reflective of social values or the institution of marriage in modern society.<sup>41</sup>

<sup>37</sup> *Jogee* (n 10); compare *Miller v The Queen* [2016] HCA 30; cf Julian B Knowles QC, ‘Joint Enterprise After *Jogee* and *Ruddock*: What Next?’ and Chief Justice Robert French, ‘Australia and the United Kingdom: A Bit Like Family, Much in Common But a Lot of Difference’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 7: 2015–2016 Legal Year* (rev edn, Appellate Press 2018) 17, 22–23.

<sup>38</sup> See eg *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] 1 AC 657, [111]–[130] (Lord Neuberger (with whom Lord Mance and Lord Wilson agreed)), [230]–[235] (Lord Sumption (with whom Lord Clarke, Lord Reed and Lord Hughes agreed)), [324]–[325] (Lady Hale (dissenting (with whom Lord Kerr agreed))); cf *Carter v Canada (Attorney-General)* [2015] SCC 5 (*per curiam*). See also Lord Hodge, ‘Judicial Law-Making in a Changing Constitution’ (n 36) 70; Lord Justice Elias, ‘Are Judges Becoming Too Political?’ (n 36) 126–28.

<sup>39</sup> *Owens* (n 6) [2] (Lord Wilson); Matrimonial Causes Act 1973, s 1(2)(b).

<sup>40</sup> Mrs Owens could, however, divorce Mr Owens after five years: Matrimonial Causes Act 1973, s 1(2)(e).

<sup>41</sup> See eg *Ash v Ash* [1972] Fam 135, 140 Bagnall J (‘that a violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted; [...] and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other.’); cf *Owens* (n 6) [33] (Lord Wilson) (commenting that [Bagnall J’s suggestion in *Ash v Ash*] now seems almost comical. In the two specific examples quoted [i.e., violence and addiction], surely each spouse would nowadays be entitled to a decree against the other under the subsection.’). See also *Priday v Priday* [1970] 3 All ER 554, 557 (Cumming-Bruce J) (‘Up to 1968 [the husband] sometimes attempted intercourse by force in the hope that if he succeeded in intercourse, even by such method, that ... might stimulate her again emotionally to return to reality, but that was unsuccessful and he naturally abstained from such attempts. I am satisfied that his recourse to force in intercourse was not in any sense culpable but was a desperate attempt on his part to re-establish what might have been an important element in matrimonial consortium.’); cf *Owens* (n 6) [34] (Lord Wilson) (commenting that ‘[t]oday such an assessment [as that of Cumming-Bruce J in *Priday v Priday*] would be inconceivable.’).



The difficulty in *Owens* was that, whilst social values regarding marriage had changed over time, the legislation enabling divorce had not.<sup>42</sup> Despite being given the opportunity to develop the law to reflect a perceived change in social values, the Supreme Court declined to do so in *Owens*,<sup>43</sup> for the very good reason that the statute was clear. The Justices applied it accordingly – albeit signalling that Parliament may wish to reconsider it.<sup>44</sup>

The ability of the general law to adapt to reflect societal change may easily be overstated. Take this view of judge-made law in the United States: ‘the common law is not static; its life and heart is its dynamism – its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.’<sup>45</sup> One can perhaps follow the sentiment underlying the view of the common law as ‘dynamic’:<sup>46</sup> common law judges do perform an important function in developing the general law incrementally with due deference given to the legislature to enact more radical reform if need be. Occasionally, judicial decisions may spur Parliament into action, especially where an appellate court is not willing to exercise restraint if the continuation of the *status quo* is itself unlawful as was the case this past year in *R (Steinfeld and Keidan) v Secretary of State for International Development (‘Steinfeld and Keidan’)*.<sup>47</sup> In *Steinfeld and Keidan*, the Supreme Court was not persuaded to stay its hand from making a declaration that legislation empowering same sex couples to register as civil partners was incompatible with human rights law in that

<sup>42</sup> *Owens* (n 6) [34] (Lord Wilson) (‘the relevant social norm which has changed most obviously during the last 40 years has, I suggest, related to our society’s insistence upon equality between the sexes; to its recognition that marriage is a partnership of equals’), [47] (Lady Hale) (‘Expectations of whether it is reasonable to expect one spouse to continue to live with the other, in the light of the way the latter has behaved and its effect upon the former, have indeed changed over the 47 years since the Divorce Reform Act 1969 came into force.’).

<sup>43</sup> See Deirdre Fottrell QC and Eleri Jones, ‘Family Law’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 559, 571–573.

<sup>44</sup> *Owens* (n 6) [45] (Lord Wilson (with whom Lord Hodge and Lady Black agreed)) (‘Parliament may wish to consider whether to replace a law which denies to Mrs Owens any present entitlement to a divorce in the above circumstances.’), [46] (Lady Hale) (‘I have found this a very troubling case. It is not for us to change the law laid down by Parliament – our role is only to interpret and apply the law that Parliament has given us.’).

<sup>45</sup> *Harrison v Montgomery County Board of Education*, 295 Md 442 (Court of Appeals of Maryland, 2 March 1983), 460 (Murphy CJ delivering the judgment of the Court (Davidson J dissenting)) (citations omitted). The issue in *Harrison* was whether the common law doctrine of contributory negligence should be replaced by the doctrine of comparative negligence.

<sup>46</sup> *ibid* 459 (‘Notwithstanding the great importance of the doctrine of *stare decisis*, we have never construed it to inhibit us from changing or modifying a common law rule by judicial decision where we find, in light of changed conditions or increased knowledge, that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people.’).

<sup>47</sup> [2018] UKSC 32, [2018] 3 WLR 415.

it discriminated against different sex couples.<sup>48</sup> Hard cases, however, beget bad law occasionally and judges may lament having gone too far, thereby precipitating legislation to address that change.<sup>49</sup>

For the most part, judicial decision-making is conservative. Judges do not actively set out to find, let alone search for, answers to societal problems. An innate conservatism may also inform what the Justices regard as the preferred path to solving a problem, even if they agree on the outcome. In *MWB*, for example, Lord Briggs gave a separate opinion (concurring in the result but citing different reasons to those given by Lord Sumption who wrote for the majority).<sup>50</sup> In doing so, Lord Briggs said:

In proposing this perhaps cautious solution to the problem thrown up by this case I am comforted by the perception that it represents an incremental development of the common law which accords more closely with the conceptual analysis adopted in most other common law jurisdictions, as Lord Sumption has described. By contrast the more radical solution which he proposes would involve a clean break with something approaching an international common law consensus, unsupported by any societal or other considerations peculiar to England and Wales. There may be cases where a pressing need to modernise the common law justifies such a break, perhaps in the expectation that other common law jurisdictions will in due course follow, but this case is not, in my opinion, one of them.<sup>51</sup>

Aside from the question of how far appellate judges should go in develop-

<sup>48</sup> *ibid* [50], [54]-[61]; see Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019, ss 2(1) and (2); see also Jens Scherpe, 'Family Law, Ideology and the Recognition of Relationships: *R (Steinfeld and Keidan) v Secretary of State for International Development*' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017-2018 Legal Year* (Appellate Press 2019) 150.

<sup>49</sup> Lord Hoffmann 'Constitutionalism and Private Law' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 6: 2014-2015 Legal Year* (rev edn, Appellate Press 2018) 160, 162-64 ('Why did the House of Lords think it could change the law? The reason, of course, was that *Fairchild* was a hard case. They say that hard cases make bad law. [...] *Fairchild* was wrong because it introduced an arbitrary distinction into what had been a clear principle. [...] I think that in *Fairchild* we assumed we alone could do something to put right an injustice to mesothelioma victims. We did not consider that Parliament might intervene. [...] I think that if we had realised when we decided *Fairchild* that Parliament would be willing to pounce upon the problem in the way it later did, we would have left well alone.');

<sup>50</sup> *MWB* (n 2).

<sup>51</sup> *ibid* [32].

ing the law, which may affect how legal problems are solved<sup>52</sup> and whether more radical revision of extant public policy should be left for the legislature,<sup>53</sup> the characterisation of the common law as ‘dynamic’ in its responsiveness to societal change can easily be overstated.<sup>54</sup> It fails to acknowledge that appellate judges may go a long time before an opportunity arises to revise or revitalise legal precedent. In the past legal year, for example, the Supreme Court was presented with an opportunity to consider a solicitor’s equitable lien in *Haven Insurance Co Ltd v Gavin Edmondson Solicitors Ltd*.<sup>55</sup> As Jonathan Crow QC and Karl Anderson observe, ‘[t]his was the first time the remedy had come before the UK’s highest court, having never managed to find its way either to the House of Lords or the Supreme Court since it was first discovered by Lord Mansfield in the last quarter of the 18th Century.’<sup>56</sup> From the viewpoint of ‘dynamism’, the common law may also be regarded as inefficient and ineffectual insofar as addressing ‘pressing societal problems’ not least as a matter of expediency as it may take some time for litigation to be finally resolved at the highest level.<sup>57</sup>

<sup>52</sup> *ibid.*

<sup>53</sup> Notably, in *Harrison* (n 45), the Court of Appeals in Maryland went on to cite various instances in Maryland jurisprudence (460–61) in which the Court has ‘declined to change well-settled legal precepts established by our decisions, in each instance expressly indicating that change was a matter for the [legislature]’, observing (at 461) that ‘[t]hese cases plainly reflect our initial deference to the legislature where change is sought in a long-established and well-settled common law principle’ and ultimately going on to hold (at 463):

‘All things considered, we are unable to say that the circumstances of modern life have so changed as to render contributory negligence a vestige of the past, no longer suitable to the needs of the people of Maryland. In the final analysis, whether to abandon the doctrine of contributory negligence in favor of comparative negligence involves fundamental and basic public policy considerations properly to be addressed by the legislature.’

<sup>54</sup> Account should be given to the different jurisdictional context in assessing the validity of the remark; it is considered in abstract terms herein. For a comparative critique from the outside-in, see HLA Hart, ‘American Jurisprudence through English Eyes: The Nightmare and the Noble Dream’ (1977) 11 *Georgia L Rev* 969.

<sup>55</sup> [2018] UKSC 21, [2018] 1 WLR 2052.

<sup>56</sup> Jonathan Crow QC and Karl Anderson, ‘Equity’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 510, 511, citing *Welsh v Hole* (1779) 1 Dougl KB 238, 99 ER 155; see also *Haven Insurance* (n 55) [11] (Lord Briggs (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Sumption agreed)).

<sup>57</sup> See eg *Bashir* (n 4) [1] (*per curiam*) (in which the Court expressed regret at ‘the delay in reaching a final disposal of this protracted and deeply troubling case’); see also Malcolm Shaw QC and Penelope Nevill, ‘International Law and Jurisdiction’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 627, 639 (noting that ‘[R (*Bancoult* (No 3)) v *Secretary of State for Foreign and Commonwealth Affairs*] [2018] UKSC 3, [2018] 1 WLR 973] was a further instalment in the long-running litigation over the removal of the Chagossian population from the Chagos Islands or British Indian Ocean Territory [...] in the late 1960s and early 1970s.’).

In reality, external factors play an important role in whether a (test) case will make its way up to a final court of appeal, thereby presenting an opportunity to develop the law. For example, litigation funding and the willingness of litigants to sustain a dispute between them, rather than settle. In a related way, alternative dispute resolution – such as arbitration, expert determination and mediation – also play a role in limiting the number of cases that may present opportunities for appellate courts to develop the law.<sup>58</sup> The aim here is not to be exhaustive but simply to show the influence of externalities. In many jurisdictions, an appeal may also not lay as of right but may itself be the subject of judicial discretion. ‘Permission to appeal is granted’, in the Supreme Court, ‘for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.’<sup>59</sup>

In truth, a constellation of factors influences whether and, if so, when the general law will be developed. Only once the stars have aligned is a highest appellate court truly given the opportunity to consider (and possibly revise or set) a legal precedent. And those factors often stand quite apart from the gravity or urgency of social need for legal change or even the general impact a decision might hold. In a recent case concerning the date from which the notice period runs when an employee is dismissed on a written notice posted to his home address, Lady Hale observed, ‘[g]iven the vast numbers of working people who might be affected by this issue, it is perhaps surprising that it has not previously come before the higher courts.’<sup>60</sup> In *MWB*, which involved what some people might regard as the well turned field of contract law, Lord Sumption observed, ‘[m]odern litigation rarely raises truly fundamental issues in the law of contract. This appeal is exceptional. It raises two of them.’<sup>61</sup>

Necessity is a dominant theme in identifying that which is *obiter dicta*. Many definitions have been proffered over the years. According to Arthur Goodhart, ‘a conclusion based on a fact the existence of which has not been determined by the court’ is *obiter dictum*.<sup>62</sup> Taken at face value, that

<sup>58</sup> See Lord Thomas CJ, ‘Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration’ (Baillii Lecture 2016, 9 March 2016) <<https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-baillii-lecture-20160309.pdf>> accessed 1 May 2019, paras 22, 23.

<sup>59</sup> UK Supreme Court, Practice Direction 3, para 3.3.3.

<sup>60</sup> *Newcastle upon Tyne Hospitals NHS Foundations Trust v Haywood* [2018] UKSC 22, [2018] WLR 2073, [2].

<sup>61</sup> *MWB* (n 2) [1].

<sup>62</sup> Arthur L Goodhart, ‘Determining the Ratio Decidendi of a case’ (1930) 40(2) Yale LJ 161, 179; Arthur L Goodhart, *Essays in Jurisprudence and Common Law* (CUP 1931) 22.

definition might be too narrow as it tends to diminish the authoritative nature of judicial decisions where a fact is admitted in pleadings or the court is asked to assume that a fact is proven for certain purposes – for example, in determining a preliminary question of law. In neither of these cases can a court really be said to ‘determine’ the fact before arriving at a legal conclusion and yet both are commonplace in modern litigation. The aim at present, though, is to demarcate the inclusion of reasons necessary for the determination of a legal issue and those which are unnecessary with a view to considering instances of the latter.

### 3 Notable *obiter dicta* in the 2017–18 legal year

Against the background of the preceding discussion, some case examples are considered below that bear out that discussion in practical instances of *obiter dicta* in recent judgments.

#### 3.1 *SM v Entry Clearance Officer*

In some cases, it may be clear where an appellate court will draw the line and why it will not venture further to comment on ancillary issues by way of *obiter dicta* in its judgment. In *SM v Entry Clearance Officer*,<sup>63</sup> for example, the Supreme Court held that it would be ‘inappropriate’ to comment further than to simply identify a legal issue over which there was some residual uncertainty. The reason for restraint was that the Upper Tribunal had referred questions bearing on that issue to the Court of Justice of the European Union (‘CJEU’), an oral hearing had taken place before the CJEU and its decision was reserved.<sup>64</sup>

#### 3.2 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*

The real reason why the Supreme Court may choose not to go further may be less obvious. As noted earlier, Lord Sumption commenced his lead judgment in *MWB* observing not only that ‘[m]odern litigation rarely raises truly fundamental issues in the law of contract’ but also commenting that the appeal in *MWB* was ‘exceptional’ in that it raised ‘two of them.’<sup>65</sup> What is interesting for present purposes is that, despite acknowledging the fundamental importance of those two issues in the appeal in *MWB* and that such basic questions rarely arose, the Supreme Court only answered

<sup>63</sup> [2018] UKSC 9, [2018] 1 WLR 1035.

<sup>64</sup> *ibid* [40]–[41] (Lady Hale (with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Hughes agreed)), citing *Secretary of State for the Home Department v Banger* [2017] UKUT 125 (IAC).

<sup>65</sup> *MWB* (n 2) [1].

one of them in its judgment. The Court gave two reasons for declining to answer both questions, the first less convincing than the second. The first reason was that as the second issue on the appeal (concerning the doctrine of consideration) likely involved a re-examination of the House of Lords decision in *Foakes v Beer*<sup>66</sup> – and a judgment could overrule or substantially modify its effect – ‘it should be before an enlarged panel of the court’.<sup>67</sup> The judicial panel of the Supreme Court hearing *MWB* was convened with five judges. Panel size is a weak reason not to address the issue when it is recalled that: (i) the Court delivers landmark judgments changing the law, including overruling existing House of Lords authority with judicial panels of five Justices;<sup>68</sup> (ii) panel size is not only a matter for the Supreme Court itself to determine but it may also rehear a case with a larger panel if it considers it required<sup>69</sup> (with the evident advantages for the administration of justice in the instant appeal and ensuring the law is corrected sooner rather than later<sup>70</sup>); (iii) the Court acknowledged that ‘[*Foakes v Beer*] is probably ripe for re-examination’, thereby adding impetus for doing so.<sup>71</sup>

The second reason given for not deciding the second issue raised in *MWB* was that it ought to be decided in ‘a case where the decision would be more than *obiter dictum*’.<sup>72</sup> In other words, as the Supreme Court unanimously allowed the appeal on the first issue (the validity of a no oral modification clause), it was unnecessary to take the further step of, potentially, overruling House of Lords authority in *Foakes v Beer*. By itself, the fact that consideration of the second issue would be *obiter dicta* as a reason given for declining to go further appears to evidence some inconsistent practice – at least, having regard to the Court’s willingness to consider significant legal developments in *obiter dicta* in its other jurisprudence.<sup>73</sup> It is (and ought to be) a matter for the Supreme Court to decide whether it will go into *obiter dicta* in its judgments where it has resolved an appeal by the determination

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<sup>66</sup> *Foakes* (n 17).

<sup>67</sup> *MWB* (n 2) [18].

<sup>68</sup> *Jogee* (n 10), overruling *Chan Wing-Siu* (n 10); *Powell and English* (n 10). See also *Ivey* (n 7), effectively overruling *R v Ghosh* [1982] QB 1053, clarifying *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, and affirming *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476 (and all in *obiter dicta*).

<sup>69</sup> *International Energy Group v Zurich Insurance plc* [2015] UKSC 33, [2015] 2 WLR 1471, [147] (Lord Hodge (with whom Lord Mance, Lord Clarke and Lord Carnwath agreed)); *R v Waya* [2012] UKSC 51, [2012] 1 AC 294, [1] (Lord Walker and Sir Anthony Hughes (with whom Lady Hale, Lord Judge, Lord Kerr, Lord Clarke and Lord Wilson agreed)).

<sup>70</sup> Clarry (n 11) 44–45.

<sup>71</sup> *MWB* (n 2) [18].

<sup>72</sup> *ibid*.

<sup>73</sup> See eg *Ivey* (n 7). See also *Reyes v Al-Malki* [2017] UKSC 61, [2017] 3 WLR 923 (for a recent example of Lord Sumption’s *obiter dictum*); see also section 3.8 below (for a brief discussion of Lord Sumption’s *obiter dictum* in *Reyes*); Shaw QC and Nevill (n 57) 630–633 (for a critique of Lord Sumption’s *obiter dictum* in *Reyes*).

of another issue (as in *MWB*). The Supreme Court will no doubt have regard to the circumstances of each case in deciding whether to do so and, more importantly, whether the Court considers that it is in a position to do so. In *MWB*, the Court considered that the second issue was better left for another day, but it is not entirely clear why from the reasons given for not doing so.

A common factor for deciding whether to give *obiter dicta* is whether the Court has heard full argument on the relevant point. That question is influenced by the ability of the parties to an appeal to fund potentially expensive legal representation and extensive legal research, especially mindful of an adverse costs order should they lose. The Supreme Court may also be assisted by intervenors, whose contribution may be made by written submissions only. Borrowing comparatively from Singaporean judicial practice, Professor McKendrick QC observes one possible solution to the problem of resourcing to be the appointment of a friend of the court to assist as required.<sup>74</sup> *MWB* is notable in that not only were no intervenors before the Court but neither party was represented by Queen's Counsel – *MWB* was one of only two cases decided in the 2017–18 legal year in which an appeal was heard by the Supreme Court without an appearance of Queen's Counsel.<sup>75</sup> Although the dispute in *MWB* was commercial in nature, the money at stake was relatively modest – arrears of £12,000 were owed under a 12 month license agreement, the monthly fee of which was £3,500 per month for the first three months and £4,433.34 per month thereafter, though each party claimed and cross-claimed damages for losses that they said they had suffered.<sup>76</sup>

### 3.3 *Reilly v Sandwell Metropolitan Borough Council*

*Reilly v Sandwell Metropolitan Borough Council* ('*Reilly*'), the only other case in the 2017–18 legal year in which no party before the Supreme Court was represented by Queen's Counsel (and also with no friend of the Court or intervenor on record), is also notable for its absence of *obiter dicta*. It, however, provides a good example of when the Supreme Court will not tread further than that which is necessary: where the parties have not themselves raised a point or points on appeal and, thus, the Court does not have the benefit of having heard full legal argument to assist it in reasoning through the relevant issue or issues.

*Reilly* concerned the conduct of a head teacher of a primary school in failing to inform the school's governing body that a person, Mr Selwood,

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<sup>74</sup> McKendrick QC (n 2) 222.

<sup>75</sup> The other case was *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16, [2018] 3 All ER 477.

<sup>76</sup> *MWB* (n 2) [2]-[3] (Lord Sumption).

with whom she had a ‘close relationship’,<sup>77</sup> had been convicted of making indecent images of children. Upon learning of the conviction and aware of Ms Reilly’s relationship with Mr Selwood, Ms Reilly was dismissed. Relevantly, the Employment Tribunal dismissed Ms Reilly’s claim alleging unfair dismissal. On appeal, the question was not whether Ms Reilly ought to be dismissed but whether the disciplinary decision was within the range of reasonableness having regard to the investigation undertaken.<sup>78</sup> The decision was upheld at three tiers of appellate review.<sup>79</sup> The question which arose before the Supreme Court was whether Ms Reilly owed a duty to disclose Mr Selwood’s conviction to the governing body and whether her failure to do so warranted her dismissal. On both scores, the Supreme Court found in the affirmative.

In her concurring opinion in *Reilly*,<sup>80</sup> Lady Hale noted that ‘[t]he case might have presented an opportunity for this court to consider two points of law of general public importance which have not been raised at this level before.’<sup>81</sup> First, whether it is fair to dismiss an employee based on conduct which was not in breach of the employee’s contract of employment.<sup>82</sup> Second, whether the approach to be taken by a tribunal as to the facts and the decision to dismiss an employee is correct under the current law.<sup>83</sup> In respect of both, Lady Hale observed, ‘it is not difficult to think of arguments on either side of this question but we have not heard them.’<sup>84</sup> The Supreme Court was ‘only asked to decide whether there was a duty to disclose and there clearly was.’<sup>85</sup> Having decided that issue, the Justices refrained from going any further. In addition to not hearing argument on those issues, Lady Hale also noted three points of present relevance in terms of demarcating the bounds of *obiter dicta* – the first two convincing, the third perhaps less so. First, the relevant Court of Appeal decision which would need to be reviewed<sup>86</sup> had been applied in ‘thousands of cases [...] for 40 years now’, such that ‘[d]estabilising the position without a very good reason would

<sup>77</sup> Ms Reilly neither lived with nor was in a sexual relationship with Mr Selwood: *Reilly* (n 75) [1].

<sup>78</sup> *ibid* [19]-[22] (Lord Wilson (with which Lady Hale, Lord Carnwath, Lord Hughes and Lord Hodge agreed)), citing *British Home Stores Ltd v Burchell* [1980] ICR 303; *Foley v Post Office* [2000] ICR 1283; *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, [2013] ICR 525.

<sup>79</sup> Employment Appeal Tribunal per Wilkie J, Baroness Drake of Shene and Mr P Gammon MBE, 20 February 2014; *A v B Local Authority* [2016] EWCA Civ 766, [2016] IRLR 779 (Black and Floyd LJ (Elias LJ dissenting)); *Reilly* (n 75).

<sup>80</sup> *Reilly* (n 75) [31]-[35].

<sup>81</sup> *ibid* [32].

<sup>82</sup> *ibid*; Employment Rights Act 1996, s 98(2)(b).

<sup>83</sup> *Reilly* (n 75) [33]; see Employment Rights Act 1996, ss 98(1)-(4).

<sup>84</sup> *Reilly* (n 75) [32]-[33].

<sup>85</sup> *ibid* [32].

<sup>86</sup> *Foley* (n 78).



be irresponsible.<sup>87</sup> Second, Parliament had the opportunity to clarify the correct approach to be taken and had not done so.<sup>88</sup> Third, ‘those who are experienced in the field, whether acting for employees or employers, may consider that the approach is correct and does not lead to injustice in practice.’<sup>89</sup> The third point seems irrelevant. No evidence appears to have been before the Court as to what practitioners thought one way or the other and it does not appear as though judicial notice was being taken of some well-known fact. The point seems to be that the issue had not been tested at the highest level and, so, practitioners may think it is right – if so, that seems odd for the reasons observed earlier regarding the external factors that influence decisions to appeal and the consequent infrequency and unreliability of test cases. In any case, it is for the Supreme Court to declare what the law is in a given case and, in doing so, it does not generally poll the opinion of practitioners as to what is correct or just.

#### 3.4 *Four Seasons Holdings Inc v Brownlie*

The Supreme Court often transitions smoothly, almost seamlessly, into *obiter dicta* but it may also signal *obiter dicta* very clearly in some cases. In *Four Seasons Holdings Inc v Brownlie* (*‘Brownlie’*),<sup>90</sup> issues arose for determination as to whether Lady Brownlie was able to proceed with a claim against Four Seasons Holdings Inc (*‘Four Seasons Holdings’*), a company incorporated in Canada with respect to a fatal accident which had occurred in Egypt whilst Lady Brownlie and members of her family were staying at the Four Seasons Hotel Cairo. The accident had killed her husband, Sir Ian Brownlie QC, and his daughter, Rachel, and seriously injured Lady Brownlie and Rachel’s two children. The Supreme Court took the ‘exceptional course’<sup>91</sup> of inviting further evidence on corporate responsibility for the Four Seasons Cairo Hotel. That evidence revealed that the Hotel was in fact operated by an Egyptian subsidiary of Four Seasons, FS Cairo (Nile Plaza) LLC, by assignment from a Dutch subsidiary of Four Seasons Holdings, Four Seasons Cairo (Nile Plaza) BV. Consequently, Lady Brownlie’s claim against Four Seasons Holdings had no reasonable prospect of success, thereby failing to satisfy the requirements for service out of the jurisdiction.<sup>92</sup> The Supreme Court unanimously allowed Four Seasons Holdings’ appeal on that basis.

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<sup>87</sup> *Reilly* (n 75) [34].

<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*

<sup>90</sup> [2017] UKSC 80, [2018] 1 WLR 192.

<sup>91</sup> *ibid* [14] (Lord Sumption).

<sup>92</sup> Civil Procedure Rules, Practice Direction 6B, para 3.1.

Although there was no need to consider any further jurisdictional issues in relation to Lady Brownlie's claim – that is, where the relevant contract was made and where damage was sustained – the Justices nevertheless went on to provide *obiter dicta* on jurisdiction. Signposts were erected in doing so. At the outset of his *dictum* on the jurisdictional aspects of the claims in tort, Lord Sumption noted that 'the correct interpretation of the tort gateway [under the Civil Procedure Rules] does not arise, and anything that may be said on the subject is *obiter*.'<sup>93</sup> In her separate opinion, Lady Hale also prefaced her discussion: '[a]s we agree that this action cannot continue against the current defendant, everything which we say about jurisdiction is *obiter dicta* and should be treated with appropriate caution.'<sup>94</sup> Whilst the careful discussion on the jurisdictional issue may rightly be regarded as 'illuminating',<sup>95</sup> the persuasiveness of the *dicta* is undermined by lack of unanimity, with a three<sup>96</sup> to two<sup>97</sup> split.

### 3.5 *District Council v CPRE Kent*

Before the Supreme Court will give lengthy *obiter dicta*, it is usually a prerequisite that the Court has received full argument on the relevant issue – where, for example, the relevant point is an additional or alternative point on appeal. In such cases, the Court may feel well-placed to provide *obiter dicta*, especially if it takes the view that it may assist in quelling controversy in a field of law and practice. In *Dover District Council v CPRE Kent*,<sup>98</sup> the Supreme Court held unanimously that the local planning authority, Dover District Council, had a legal duty to give reasons for a decision to grant permission for a controversial development against the advice of its professional advisers by virtue of the relevant statutory provisions.<sup>99</sup> Having unanimously dismissed the appeal on this basis, it was 'strictly unnecessary' for the Court to consider whether a local planning authority owed a duty to give reasons for granting a planning permission at common law.<sup>100</sup> The Court did so, however, 'since it has been a matter of some controversy in planning circles, and since we have heard full argument, it is right that we should consider it.'<sup>101</sup> Whilst Lord Carnwath began his *dictum* by observing that '[p]ublic authorities are under no general common law

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<sup>93</sup> *Brownlie* (n 90) [17].

<sup>94</sup> *ibid* [33].

<sup>95</sup> O'Neill QC (n 21) 552.

<sup>96</sup> Lady Hale, Lord Wilson and Lord Clarke.

<sup>97</sup> Lord Sumption and Lord Hughes.

<sup>98</sup> [2017] UKSC 79, [2018] WLR 108.

<sup>99</sup> *ibid* [21]-[34] (Lord Carnwath (with whom Lady Hale, Lord Wilson, Lady Black and Lord Lloyd-Jones agreed)).

<sup>100</sup> *ibid* [50].

<sup>101</sup> *ibid* [50]-[60].

duty to give reasons for their decision', he went on to consider that 'fairness may in some circumstances require it'<sup>102</sup> and, further, that the common law may have a role to play in 'filling the gaps' but that such intervention would be limited to 'circumstances where the legal policy reasons are particularly strong'.<sup>103</sup> The question that then arises, of course, is what circumstances trigger the duty at common law to give reasons (a difficult question to answer in the abstract but it at least would have arisen on the facts of the case). Stephen Hockman QC and Nicholas Ostrowski note in their analysis of the case that Lord Carnwath's *dictum* is 'bold' insofar as it posits that the common law duty is consistent with the legislative position as local planning authorities were released from the statutory duty to give reasons in 2013.<sup>104</sup>

### 3.6 *Ivey v Genting Casinos (UK) Ltd*

At times, a judgment of the Supreme Court may be especially notable for the predominance of its *obiter dicta* and its impact in developing the law. *Ivey* is one of those cases.<sup>105</sup> In *Ivey*, the Supreme Court held that dishonesty was not an element of the offence of cheating.<sup>106</sup> Mr Ivey had cheated because he had, by his own admission, used a technique known as edge-sorting which, through a combination of an extraordinary ability to detect minute variations in the pattern on the backs of cards caused by machine cutting and the assistance of an accomplice with an affected superstition who asked the croupier to rotate 'good' and 'not good' cards, managed to win £7.7 million at Crockfords in a single session of gambling over two days. Punto Banco Baccarat was, however, a game of 'pure chance' and a punter, even a savvy professional gambler like Mr Ivey, could not increase their chances of winning in this way without cheating.<sup>107</sup> The decision would have been less remarkable had the Supreme Court have stopped there – and it could have conceivably done so given that it had decided that which was necessary to unanimously dispose of the appeal.

In venturing further in *Ivey*, the Supreme Court considered a significant issue as to the correct test for dishonesty in the civil and criminal law.<sup>108</sup> The civil test prevailed, thereby effectively overruling *R v Ghosh*<sup>109</sup> (a decision

<sup>102</sup> *ibid* [51].

<sup>103</sup> *ibid* [56] and [58].

<sup>104</sup> Stephen Hockman QC and Nicholas Ostrowski, 'Planning, Development and environment Law' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 678, 686–87.

<sup>105</sup> *Ivey* (n 7).

<sup>106</sup> Gambling Act 2005, s 42.

<sup>107</sup> *Ivey* (n 6) [50] (Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed)).

<sup>108</sup> *ibid* [62]–[63].

<sup>109</sup> *Ghosh* (n 68).

of some 35 years standing) and raising the prospect that juries had been misdirected over many years on the basis of the wrong two-stage test for offences involving dishonesty. In doing so, the Supreme Court ironed out a wrinkle in the civil law arising from an ambiguous remark of the House of Lords some 15 years earlier in *Twinsectra Ltd v Yardley*<sup>110</sup> (in which the House of Lords had seemingly favoured a subjective test for dishonesty<sup>111</sup>), which had later been ‘reinterpreted’ by the Privy Council in *Barlow Clowes v Eurotrust Ltd*<sup>112</sup> (to reaffirm the objective approach to dishonesty<sup>113</sup>) and applied in its reinterpreted form in English law thereafter.<sup>114</sup> *Ivey* is, therefore, regarded as a landmark case even though its real significance lies in its *obiter dictum* on dishonesty.

*Ivey* raises some difficult issues in terms of the doctrine of *stare decisis* and, more particularly, whether the Supreme Court in *Ivey* modified that doctrine by effectively overruling prior Court of Appeal authority in its *obiter dictum*. Professor Gardner observes in a ‘constitutional postscript’ to his chapter in this volume:

[The doctrine of *stare decisis*] helps to inhibit law-reform opportunism by our highest tribunal. It thereby helps to police the line between adjudication and legislation. It may be that *Ivey* marks the death of the doctrine. But if so, the desirability and legitimacy of its being put to death should have been discussed by the Court [in *Ivey*]. And if there is no such doctrine, as some may say, then some reflection is needed on how law-reform opportunism by our highest tribunal is

<sup>110</sup> *Twinsectra* (n 68) [20] (Lord Hoffmann), [27] (Lord Hutton).

<sup>111</sup> An interesting note of an interview by Alan Paterson with Lord Millett (who dissented in *Twinsectra* (n 68)) records an insight into a campaign by Lord Millett to persuade Lord Hoffmann to adopt the objective test in *Twinsectra* (n 68), a position he ultimately accepted was correct in *Barlow Clowes* (n 68) (and affirmed in the *obiter dictum* in *Ivey* (n 7) to be correct): Alan Paterson, ‘Decision-Making in the UK’s Top Court’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 4: 2012–2013 Legal Year* (Appellate Press 2018) 75, 90–91.

<sup>112</sup> *Barlow Clowes* (n 68) [10] (Lord Hoffmann).

<sup>113</sup> See *Royal Brunei Airlines v Tan* [1995] AC 900, 387–89 (Lord Nicholls).

<sup>114</sup> Had the Privy Council given its decision in *Barlow Clowes* (n 68) after *Willers (No 2)* (n 23), a direction could perhaps have been issued along the lines contemplated by Lord Neuberger in *Willers (No 2)* (n 23) [21]. However, even without such a direction having been given by the Privy Council in *Barlow Clowes* (n 68), English courts nevertheless appeared to be content to follow the Privy Council’s ‘interpretation’ of *Twinsectra* (n 68) in subsequent cases anyway: *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] 1 Lloyd’s Rep 115, [26] (Rix LJ), [68]–[69] (Arden LJ), [94] (Pill LJ); *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314, [2011] Lloyd’s Rep FC 102, [19]–[30] (Sir Andrew Morritt C).

supposed to be contained by law.<sup>115</sup>

*Ivey* will hopefully stimulate further debate and reflection on the doctrine of precedent, especially judicial activism in effectively reforming the law in *obiter dicta*. That debate will occur at a level of abstraction above whether the Supreme Court's decision in *Ivey* was technically correct;<sup>116</sup> rather, the question is whether it was appropriate for the Supreme Court, having already decided the appeal in *Ivey* on the dishonesty-free test for 'cheating',<sup>117</sup> to go further and effectively declare the civil law test for dishonesty and then project that test across dishonesty offences in the criminal law generally in circumstances where that reasoning was unnecessary. If it was appropriate to do so, what parameters guide judicial law-making (and re-making) in *obiter dicta*?

### 3.7 *Re Northern Ireland Human Rights Commission*

In *Re Northern Ireland Human Rights Commission*, the Northern Ireland Human Rights Commission ('NIHRC') applied for declarations that the law in, and applicable to, Northern Ireland insofar as it criminalises abortion in certain cases – particularly, fatal foetal abnormality, rape and incest – was incompatible with the European Convention on Human Rights ('ECHR') and, in particular, arts 3 (prohibiting torture and inhuman or degrading treatment), 8 (the right to respect for private and family life) and 14 (prohibiting discrimination).<sup>118</sup> Aside from those substantive issues, the Attorney General for Northern Ireland raised a procedural issue: whether the NIHRC had standing to bring the case. By a majority (4:3), the Supreme Court held that the NIHRC lacked standing to bring the case and, therefore, the Court lacked jurisdiction to make any declarations sought by the NIHRC even if the Court was of the view that Northern Ireland's abortion laws were incompatible with the ECHR.<sup>119</sup> The question, then, was whether the Justices should express their opinions on the substantive issues even though any such opinions would be *obiter dicta*.

<sup>115</sup> John Gardner, 'Ordinary Decent Honesty' in Daniel Clarry, *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 290, 310–11.

<sup>116</sup> See eg Richard Spearman QC, '*Ivey v Genting Casinos* and Dishonesty: New Dawn or False Horizon?' and David Ormerod QC and Karl Laird, '*Ivey v Genting Casinos* – Much Ado About Nothing?' in Daniel Clarry, *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019).

<sup>117</sup> Gambling Act 2005, s 42.

<sup>118</sup> *Northern Ireland Human Rights Commission* (n 3). See Offences Against the Person Act 1861 (UK), ss 58 and 59; Criminal Justice Act 1945 (NI), s 25(1); Human Rights Act 1998, ss 4 and 6.

<sup>119</sup> *Northern Ireland Human Rights Commission* (n 3) [48]–[73] (Lord Mance (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agreed (Lady Hale, Lord Kerr and Lord Wilson dissenting)).

Any opinion expressed by the Justices of the Supreme Court would likely prove influential, not only in individual cases that might be taken subsequently but also in providing the impetus for law reform. The issues in the case were, of course, highly controversial, which was reflected by an enlarged panel of seven Justices.<sup>120</sup> More explicitly, Lord Reed observed in his opinion (with which Lord Lloyd-Jones agreed):

It is difficult to envisage a more controversial issue than the proper limits of the law governing abortion. Diametrically opposed views, and every shade of opinion in between, are held with equal sincerity and conviction. Each side of the debate appeals to moral or religious values which are held with passionate intensity. In a democracy on the British model, the natural place for that debate to be resolved is in the legislature.<sup>121</sup>

The three Justices who considered that the NIHRC had standing – Lady Hale, Lord Kerr and Lord Wilson – proceeded from jurisdiction to the substantive issues without explicit consideration of whether they should do so where a plurality of the judges on the panel had held that the NIHRC lacked standing (and, therefore, the Court did not have jurisdiction to make any declarations of incompatibility). They considered that the relevant law criminalising abortion in Northern Ireland was incompatible with art 8 of the ECHR insofar as abortion in cases of rape, incest and fatal foetal abnormality was prohibited. Lord Kerr and Lord Wilson considered that the relevant statutory law was also incompatible with art 3 of the ECHR. Even though Lady Hale made some comments in relation to art 3 of the ECHR, she stopped short of giving *obiter dicta* on whether the relevant law was compatible because ‘it is unnecessary to decide the point, in the light of my conclusion that the present law is incompatible with article 8’<sup>122</sup> – a pragmatic approach with a nod to decisional minimalism.

Given the willingness of three Justices to venture further, could a majority coalesce around incompatibility in *obiter dicta*? This would, of course, require at least one of the Justices who had held that the NIHRC lacked standing in the case to decide that he or she would nevertheless venture further. Lord Mance played a pivotal role. He decided to venture further. Having led the majority on the jurisdictional point (Lord Reed, Lady Black

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<sup>120</sup> Only three other cases (out of 71 in total) were heard with an enlarged panel of seven Justices in the 2017–18 legal year: *Bashir* (n 4); *Bancoult (No 3)* (n 57); *Scotch Whiskey Association v The Lord Advocate* [2017] UKSC 76, 2018 SC (UKSC) 94.

<sup>121</sup> *Northern Ireland Human Rights Commission* (n 3) [336].

<sup>122</sup> *ibid* [34].

and Lord Lloyd Jones agreeing with him), Lord Mance sided with Lady Hale, Lord Kerr and Lord Wilson on incompatibility in his *obiter dictum*. He stated his reason for expressing an opinion on the substantive issues despite his conclusion on the jurisdictional point (that the NIHRC lacked standing) to be that:

that challenge [by the NIHRC] has been fully argued, and evidence has been put before the Court about a number of specific cases. It would, in the circumstances, be unrealistic and unhelpful to refuse to express the conclusions at which I would have arrived, had I concluded that the Commission had competence to pursue the challenge.<sup>123</sup>

When Lord Mance says the substantive issues were ‘fully argued’ (as he does twice in his opinion<sup>124</sup>), he really does mean that the case was fully argued. The oral hearing took place over three days (only one less than the landmark case of *Secretary of State for Exiting the European Union v R (Miller)* (*‘Miller’*)<sup>125</sup> in the 2016–17 legal year). In addition to the NIHRC, the Department of Justice and the Attorney General for Northern Ireland were parties to the appeal and named as the first and second respondents respectively. Ten separate groups of intervenors were represented by different counsel and instructors. The intervenors included the United Nations Working Group on the Issue of Discrimination Against Women in Law and Practice, the Equality and Human Rights Commission and Bishops of the Roman Catholic Dioceses in Northern Ireland (to name a few – one group of intervenors comprised 7 organisations). 27 barristers, including 13 Queen’s Counsel, made submissions to the Court in one way or another. And, as observed earlier, the panel size was enlarged to seven Justices.

With the benefit of hindsight, it was just as well that Lord Mance chose to go further on the substantive issues because, in doing so, he crystallised a majority around the incompatibility of the relevant law with art 8 of the ECHR in cases of rape and incest (4:3). Lady Black (along with Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) considered that the relevant law was incompatible with art 8 of the ECHR insofar as cases of fatal foetal abnormality are concerned (thus, 5:2). In relation to the *obiter dicta* of the Justices on the substantive issues of incompatibility, the Supreme Court’s press summary for the judgment (but not the judgment itself) records:

### Article 8

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<sup>123</sup> *ibid* [42(c)].

<sup>124</sup> *ibid* [42(c)], [48].

<sup>125</sup> *Miller* (n 21).

The court's decision on standing means that there is no possibility of making a declaration of incompatibility under s.4 HRA 1998. However, a majority of the court (Lady Hale, Lord Mance, Lord Kerr and Lord Wilson) considers that the current law in Northern Ireland on abortion is disproportionate and incompatible with Art 8 insofar as it prohibits abortion in cases of (a) fatal (as distinct from serious) foetal abnormality (b) pregnancy as a result of rape and (c) pregnancy as a result of incest. *If an individual victim did return to court in relation to the present law, a formal declaration of incompatibility would in all likelihood be made.*<sup>126</sup>

The Supreme Court's press summaries are, of course, provided for assistance only and are not authoritative.<sup>127</sup> Even so, the final line in the Court's press summary above appears to be a bold prediction given the slender margin constituting the majorities of the Court on these issues and that the opinions were expressed in *obiter dicta* – perhaps explaining the qualified remark as to what would occur 'in all likelihood'. That is not to detract from the value of the opinions in themselves for subsequent cases or law reform initiatives. As Mrs Justice Lieven<sup>128</sup> observes, 'it is possible that the fact that the Supreme Court made no declaration of incompatibility makes very little difference to the political arguments that are now taking place in Westminster on the issue' and 'Parliament and the courts will inevitably return to the issue again soon and the battle lines are clearly drawn when they do.'<sup>129</sup>

Returning to Lord Mance's opinion, an orthodox justification is given for declining to go further in his *dictum vis-à-vis* the applicability of international law materials in domestic proceedings.<sup>130</sup> Similarly to Lady Hale's disinclination to consider compatibility of the relevant law with art 3

<sup>126</sup> UK Supreme Court, Press Summary: In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland) (UK Supreme Court, 7 June 2018) <<https://www.supremecourt.uk/cases/docs/uksc-2017-0131-press-summary.pdf>> accessed 1 May 2019 (emphasis added).

<sup>127</sup> *ibid* ('NOTE This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.').

<sup>128</sup> Mrs Justice Lieven led the appeal to the Supreme Court for the NIHR in *Re Northern Ireland Human Rights Commission* (n 3) in what was her final appeal to the Supreme Court as Queen's Counsel before her appointment as a full-time Judge of the High Court of England and Wales.

<sup>129</sup> Mrs Justice Lieven, 'A Pyrrhic Defeat in "an unusually difficult case": Incompatibility of Northern Ireland's Abortion Law with Human Rights Law' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 124, 149.

<sup>130</sup> *Re Northern Ireland Human Rights Commission* (n 3) [327]-[330].



of the ECHR (unnecessary due to incompatibility with art 8), Lord Mance said it was ‘unnecessary’ to consider the ‘far from straightforward’ issue of the ‘status and relevance’ of the international law material on the substantive issues and it was ‘prudent to defer consideration of those matters to a case where they are more directly in issue.’<sup>131</sup>

Toward the beginning of his opinion, Lord Reed (with whom Lord Lloyd-Jones agreed) made some general observations, identifying cogent reasons for not going any further than that which was necessary to the dismiss the appeal (i.e., the conclusion on the procedural ground that the NIHRC lacked standing, reasoned by Lord Mance for the majority). He said:

Given that conclusion, it would ordinarily follow that the court should express no view on whether the laws challenged by the Commission are or are not compatible with Convention rights. Since Parliament has not conferred on the Commission the power to bring proceedings challenging in the abstract the compatibility of legislation with Convention rights, it follows that it cannot have intended that the courts should determine that issue in proceedings of that nature. That conclusion is supported by the practical difficulties involved in attempting to carry out an abstract assessment of compatibility, unanchored to the facts of any particular case.<sup>132</sup>

The point about *obiter dicta* floating in abstraction from facts requiring the determination of legal issues is also evident in Lord Mance’s opinion where he rejected the NIHRC’s ‘general case’ that the relevant law was incompatible with art 3 of the ECHR.<sup>133</sup> There, Lord Mance went on to emphasise that his rejection of the abstract point did not mean that on particular facts a breach may not be found in a future case but ‘only that the legislation by itself cannot axiomatically be regarded as involving such a breach.’<sup>134</sup> In this way, one can see the limits of asking general questions detached from facts before the Court and that *obiter dicta* may lack any real value in abstraction. Turning back to Lord Reed’s opinion, we find that, having expressed cogent reasons for not giving an *obiter dictum* on the substantive issues (as quoted in the passage above), Lord Reed goes on anyway. His reason for doing so is prosaic:

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<sup>131</sup> *ibid* [330].

<sup>132</sup> *ibid* [334].

<sup>133</sup> *ibid* [95]-[103].

<sup>134</sup> *ibid* [103].

Those members of the court who take a different view of the Commission's standing to bring these proceedings are however expressing their opinion on the question which it has placed before the court; and Lord Mance also considers it appropriate to do so for the reasons which he has explained. In those circumstances, it is as well that I should explain my own view.<sup>135</sup>

In choosing to also provide her own *obiter dictum* (observing incompatibility insofar as abortion was prohibited for fatal foetal abnormality), Lady Black said similarly:

Despite this conclusion [on the NIHRC's lack of standing], I feel I should express my view as to the substance of the Commission's appeal, as other members of the court have done.<sup>136</sup>

There are important lessons to be learnt from *Re Northern Ireland Human Rights Commission* in terms of how far the Supreme Court will go in *obiter dicta*. One finds that reasonable minds may differ as to how far the Court should go in *obiter dicta*. The decision is an individualised one and should reflect the legitimate views of the Justices themselves as to whether they feel it appropriate to go further than what is necessary to dispose of an appeal. Even though he chose to go further in his opinion, Lord Reed's cogent reasons for not going further in *obiter dicta* also bear remembering. Although the Justices were ultimately inclined to give *obiter dicta* in *Re Northern Ireland Human Rights Commission*, the nuances across their opinions may be thought to be a reason not to go further. *Re Northern Ireland Human Rights Commission* was, however, a special case and, for the reasons identified by Lord Mance, one can see why it was appropriate to do so. Furthermore, the problem of parsing the judgment to discern what the *obiter dictum* of the Supreme Court was in *Re Northern Ireland Human Rights Commission* is ameliorated by both Lady Hale and Lord Mance making clear in their opinions the division of opinion on the substantive issues.<sup>137</sup> The Court's press summaries also provide a useful map to navigate through each of its judgments.<sup>138</sup>

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<sup>135</sup> *ibid* [335].

<sup>136</sup> *ibid* [366].

<sup>137</sup> [1]-[4] (Lady Hale); [42] (Lord Mance).

<sup>138</sup> See eg UK Supreme Court, Press Summary (n 126).

### 3.8 *Reyes v Al-Malki* (contrasting *Benkarbouche v Embassy of the Republic of Sudan*)

Another case in which a division of opinion in *obiter dicta* calls into question the utility of going further than what is necessary to decide an appeal is *Reyes v Al-Malki* ('*Reyes*'). The background facts are that Mr Al-Malki, a Saudi Arabian diplomat, and his wife employed Ms Reyes as a domestic servant in their London residence between January and March 2011. Ms Reyes commenced proceedings in the Employment Tribunal alleging that Mr and Mrs Al-Malki had mistreated her during the course of her employment and also that she was the victim of human trafficking. Relevantly, the question on appeal to the Supreme Court was whether Mr Al-Malki (and by extension as a family member, Mrs Al-Malki) was entitled to diplomatic immunity.<sup>139</sup> The focal point of the argument on appeal was whether an exception to diplomatic immunity applied,<sup>140</sup> such that Ms Reyes's claim against Mr and Mrs Al-Malki could proceed. Rather than determining the appeal on the basis of that point, the Supreme Court considered another point was fatal to Mr and Mrs Al-Malki's claim to diplomatic immunity: Mr Al-Malki's posting in London had come to an end and he could only claim to be entitled to 'residual immunity' for acts performed in the exercise of 'official functions'.<sup>141</sup> Ms Reyes' employment as a domestic servant was held not to be an official function.<sup>142</sup> Thus, diplomatic immunity did not apply.

What to do, then, about the main point that the parties had taken on appeal in *Reyes*? The Supreme Court had the benefit of full argument on the 'commercial activity' exception: the appeal was heard over three days (again, only one less than the landmark case of *Miller*<sup>143</sup> the previous legal year); two intervenors gave submissions on appeal, including the Secretary of State for Foreign and Commonwealth Affairs; and all parties had excellent representation with preeminent Queen's Counsel appearing for all parties. The Supreme Court had little hesitation in deciding that *Reyes* was an appropriate case for *obiter dicta*. In his leading judgment, Lord Sumption noted that, as 'there is some evidence that human trafficking under cover of

<sup>139</sup> Vienna Convention on Diplomatic Relations 1961, art 31. Mr and Mrs Al-Malki cross-appealed unsuccessfully as to whether they had been validly served with the claim form – an interesting point more fully considered by Professor Malcolm Shaw QC and Penelope Neville in this volume: Shaw QC and Neville (n 57) 628–34.

<sup>140</sup> Diplomatic Privileges Act 1964 (UK), s 2, Schedule 1; Vienna Convention on Diplomatic Relations 1961, art 31(1)(c) (i.e., civil claims 'relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions').

<sup>141</sup> Vienna Convention on Diplomatic Relations 1961, arts 31(1) and 39(2).

<sup>142</sup> *Reyes* (n 73) [48] (Lord Sumption).

<sup>143</sup> *Miller* (n 21).

diplomatic status is a recurrent problem, this is a question of some general importance.<sup>144</sup> Lord Sumption also noted the two interventions signified the ‘broader significance’ of the point that became *obiter dictum*, which issue had been argued before for the Court of Appeal<sup>145</sup> and the Supreme Court.<sup>146</sup> In summary, Lord Sumption (with whom Lord Neuberger agreed) considered that Mr Al-Malki would have been entitled to immunity if he had still been in his post in London; the relevant exception would not have applied.<sup>147</sup>

Lord Wilson was more circumspect as to whether the exception would have applied to Mr Al-Malki and expressed some relief that the Supreme Court did not need to decide the point in *Reyes*.<sup>148</sup> The reason for his relief was not that the point had not been ably argued before the Supreme Court.<sup>149</sup> His relief is perhaps better explained by the fact that the Court may not, on a full consideration of the issue, be able to give a unanimous view on the point (a cogent reason for restraint in *obiter dicta* due to its perceived lack of usefulness). In this respect, Lady Hale and Lord Clarke, in a brief concurring opinion, said that ‘had [the ‘commercial activity’ exception] arisen [for decision], we would associate ourselves with the doubts expressed by Lord Wilson as to whether the construction adopted by Lord Sumption in this particular context is correct especially in the light of what we would regard as desirable developments in this area of the law.’<sup>150</sup> The unpalatable outcome of deciding that the exception would not have applied was observed by Lord Wilson to be that ‘it is difficult for this court to forsake what it perceives to be a legally respectable solution and instead to favour a conclusion that its system cannot provide redress for an apparently serious case of domestic servitude here in our capital city.’<sup>151</sup>

The fact that the Supreme Court did not need to decide the point allowed what Lord Wilson regarded as the ‘far preferable’ course to be taken – giving the International Law Commission an opportunity ‘to consider, and to consult and to report upon, the international acceptability of an amendment of article 31 which would put beyond doubt the exclusion of immunity in

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<sup>144</sup> *Reyes* (n 73) [3].

<sup>145</sup> *Reyes v Al-Malki* [2015] EWCA Civ 32, [2016] 1 WLR 1785.

<sup>146</sup> *Reyes* (n 73) [3].

<sup>147</sup> *ibid* [21]-[51].

<sup>148</sup> *ibid* [57] (‘I am pleased that the court will not answer that question in any binding form. Lord Sumption’s emphatic answer to the question is “no”. His answer is (if he will forgive my saying so) the obvious answer. It may be correct. But my personal experience has been that, the more one thinks about the question, the less obviously correct does his answer become.’).

<sup>149</sup> *ibid* [56] (‘[i]t follows that this court will not answer in any binding form the central question presented to it in such detail and with such conspicuous ability’).

<sup>150</sup> *ibid* [69].

<sup>151</sup> *ibid* [62].

a case such as that of *Ms Reyes*.<sup>152</sup> Thus, the 10 substantive paragraphs of Lord Wilson’s *obiter dictum* were largely directed at explaining the difficulties in concurring in the ‘obvious answer’ given by Lord Sumption. In doing so, Lord Wilson said:

I am pleased that the court will not answer that question in any binding form. Lord Sumption’s emphatic answer to the question is “no”. His answer is (if he will forgive my saying so) the obvious answer. It may be correct. But my personal experience has been that, the more one thinks about the question, the less obviously correct does his answer become.<sup>153</sup>

Whatever might be said in favour of *obiter dicta* contributing to the development of the law where a unanimous judgment ventures further into the unnecessary, its persuasive value is diluted by division. Professor Shaw QC and Penelope Neveill critique the *obiter dicta* of Lord Sumption and Lord Wilson, observing beforehand that:

Whether the Supreme Court should have gone beyond the dictates of judicial economy in this way is worth asking. The 3:2 split in the reasoning results in an analysis that, while illuminating, does not resolve the issue and can be used by future parties in the UK and elsewhere to pull in opposite directions.<sup>154</sup>

They go on to observe the broader impact that the *obiter dicta* may have in practical terms, commenting that ‘if the Supreme Court’s discussion supports a shift in State practice or soft law developments, it will have been valuable.’<sup>155</sup> They also perceptively observe that the willingness of Lord Sumption to provide *dictum* in *Reyes* may be contrasted, at a level of abstraction at least, with the Supreme Court’s decision in the joined appeals in *Benkarbouche v Embassy of the Republic of Sudan and Secretary for Foreign and Commonwealth Affairs and Libya v Janah* (*‘Benkarbouche’*),<sup>156</sup> which was delivered the same day and with the same judicial panel as in *Reyes*.<sup>157</sup> Like *Reyes*, *Benkarbouche* involved employment claims brought by domestic workers relating to their employment in diplomatic embassies

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<sup>152</sup> *ibid* [68].

<sup>153</sup> *ibid* [57].

<sup>154</sup> Shaw QC and Neveill (n 57) 632.

<sup>155</sup> *ibid* 633.

<sup>156</sup> [2017] UKSC 62, [2017] 3 WLR 957.

<sup>157</sup> Shaw and Neveill (n 57) 634–39.

in London that raised issues of immunity, albeit this time state immunity. Before the Supreme Court, the Secretary of State raised a threshold issue of jurisdiction, inviting the Court to choose between conflicting views that had been expressed by the House of Lords in *Holland v Lampen-Wolfe*<sup>158</sup> and *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*,<sup>159</sup> on the one hand, and by the European Court of Human Rights in *Al-Adsani*,<sup>160</sup> on the other. Although Lord Sumption observed that ‘there may well come a time when this court has to choose between the view of the House of Lords and that of the European Court of Human Rights on this fundamental question’, he said he ‘would not be willing to decide which of the competing views about the implications of a want of jurisdiction is correct, unless the question actually arose.’<sup>161</sup> Lord Sumption gave the judgment for a unanimous Court, so case closed and no *obiter dictum* was given on that point.

#### 4 Giving Judgment Anyway

In addition to the provision of opinions on points of law that are not necessary to dispose of an appeal, the Supreme Court occasionally gives judgments in circumstances where the entire judgment may be regarded as unnecessary. In light of its recent jurisprudence, four situations may be identified where the Supreme Court will hand-down judgment anyway. First, where the judgment is essentially a pronouncement on practice and precedent.<sup>162</sup> Second, where the parties to the appeal compromise the relevant dispute at some point before judgment is delivered (and sometimes before the appeal is even heard).<sup>163</sup> Third, where the facts underlying the relevant appeal have so materially changed that the outcome of the appeal is moot.<sup>164</sup> Fourth, where the judgment delivered is described as an ‘interim judgment’.<sup>165</sup> Each of those situations in which the Supreme Court has given judgment anyway are considered in light of recent cases.

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<sup>158</sup> [2000] 1 WLR 1573.

<sup>159</sup> [2006] UKHL 26, [2007] 1 AC 270.

<sup>160</sup> (2002) 34 EHRR 11.

<sup>161</sup> *Benkharbouche* (n 156) [30].

<sup>162</sup> See *Willers (No 2)* (n 23).

<sup>163</sup> See eg *Nuclear Decommissioning Authority v EnergySolutions EU Ltd* [2017] UKSC 34, [2017] 1 WLR 1373; *Belhaj v Director of Public Prosecutions* [2018] UKSC 33, [2018] 3 WLR 435; *Hysaj* (n 5).

<sup>164</sup> *Regional Court in Lodz, Poland v Zakrewski* [2013] UKSC 2, [2013] 1 WLR 324; *Y v An NHS Trust* [2018] UKSC 46, [2018] 3 WLR 751.

<sup>165</sup> *Bashir* (n 4).

#### 4.1 *Willers v Joyce* and *Willers v Joyce (No 2)*

The Supreme Court rarely gives a discrete judgment on a point of practice and precedent. In *Willers v Joyce (No 2)*,<sup>166</sup> the Supreme Court delivered a separate judgment from the judgment in which the substantive issues were resolved in the appeal (i.e., *Willers v Joyce (No 1)*<sup>167</sup>). The second judgment that the Court gave was, in effect, a pronouncement on precedent and the status of decisions of the Judicial Committee of the Privy Council in the courts of England and Wales – more particularly, whether lower courts should follow decisions of the Privy Council that contradict House of Lords or Court of Appeal authority. The Supreme Court considered that lower courts should follow such decisions of the Privy Council and that the members of the board of the Privy Council ‘can, if they think it appropriate, not only decide that the earlier decision of the House of Lords or Supreme Court, or of the Court of Appeal, was wrong, but also can expressly direct that domestic courts should treat the decision of the [Privy Council] as representing the law of England and Wales.’<sup>168</sup>

There is a degree of pragmatism in the view that the lower courts of England and Wales should follow decisions of the Privy Council: although the Privy Council is not a final court of appeal in England and Wales and cannot technically bind judges in the UK,<sup>169</sup> the President of both institutions is the same person and the judges who comprise the panels are largely the same, so a decision of the Privy Council is a good indication of how the Supreme Court would decide the issue.<sup>170</sup> Indeed, the then President of the Supreme Court, Lord Neuberger, reasoned in *Willers v Joyce (No 2)* that the Court could ‘take advantage’ of these institutional facts.<sup>171</sup> The decision in *Willers v Joyce (No 2)* may also be commended for its practicality in that it assists in overcoming perceived inefficiencies in developing the general law of England and Wales by increasing the opportunities for cases raising certain issues to go before the Justices (whether on a judicial panel of the Supreme Court or as members of a board of the Privy Council);<sup>172</sup> indeed,

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<sup>166</sup> *Willers (No 2)* (n 23).

<sup>167</sup> [2016] UKSC 43, [2018] AC 779.

<sup>168</sup> *Willers (No 2)* (n 23) [21].

<sup>169</sup> *ibid* [12].

<sup>170</sup> *ibid* [19].

<sup>171</sup> *ibid*.

<sup>172</sup> It might also be said that such an approach also reduces inconsistency in the decisions of the Privy Council and the Supreme Court, although such an explanation may be regarded by some as outmoded, possibly even regressive, in an era of decolonialization if that principle was considered to justify the tide of authority flowing the other way (from the Supreme Court developing the law in England and Wales to be automatically projected across those jurisdictions in which the Privy Council remains their final court of appeal). See Daniel Clarry, ‘Institutional Judicial Independence and the Judicial Committee of the Privy

a pragmatic steer of this nature would not be required if the common law was truly 'dynamic' in keeping pace with societal developments and need.

The main point for present purposes, though, is that *Willers v Joyce (No 2)* as a discrete judgment of the Supreme Court was unnecessary. The same remarks could have been made in the main judgment in *Willers v Joyce (No 1)*, which judgment was handed-down the same day.<sup>173</sup> Should they wish to do so, the Justices do occasionally include practice notes in their opinions without delivering a discrete judgment, even if the relevant subject is already addressed in one of its practice directions.<sup>174</sup> Moreover, points of practice and, relevantly, precedent may be stated in practice directions of the Supreme Court;<sup>175</sup> similarly, in the Privy Council<sup>176</sup> and, before the Supreme Court was established, in the House of Lords.<sup>177</sup> In some respects, the Supreme Court has opted for a softer approach with practice statements than its predecessor.<sup>178</sup> In any case, *Willers v Joyce (No 2)* may be regarded as a judgment that was, having regard to these other options, unnecessary.

#### 4.2 *Nuclear Decommissioning Authority v EnergySolutions EU Ltd*

*Nuclear Decommissioning Authority v EnergySolutions EU Ltd* ('*Nuclear Decommissioning Authority*')<sup>179</sup> is an example of the second situation where the parties to the appeal compromise the relevant dispute after the appeal has been heard but before judgment is delivered and the parties wish that judgment be given by the Supreme Court anyway. Thus, Lord Mance (with whom Lord Neuberger, Lady Hale, Lord Sumption and Lord Carnwath agreed) observed toward the beginning of a unanimous judgment in *Nuclear Decommissioning Authority* (in which the Supreme Court allowed the appeal

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Council' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 4: 2012–2013 Legal Year* (Appellate Press 2018). See also *Willers (No 2)* (n 23) [10] (Lord Neuberger) ('the JCPC is not a court of any part of the United Kingdom.')

<sup>173</sup> *Willers v Joyce (No 1)* [2016] UKSC 43, [2016] AC 779; *Willers (No 2)* (n 23).

<sup>174</sup> *Poshteh* (n 34) [45]–[47] (Lord Carnwath (with whom Lord Neuberger, Lord Clarke, Lord Reed and Lord

Hughes agreed)); cf UK Supreme Court Practice Direction 6, para 6.5.5; see also Clarry (n 11) 40–45.

<sup>175</sup> See eg UK Supreme Court Practice Direction 3, para 3.1.3; UK Supreme Court Practice Direction 6, para 6.6.10.

<sup>176</sup> Judicial Committee of the Privy Council, Practice Direction 3, para 3.1.3; cf Judicial Committee (Dissenting Opinions) Order (UK (SRO 13 of 1966, 4 March 1966)), s 3.

<sup>177</sup> See eg House of Lords, *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

<sup>178</sup> UK Supreme Court Practice Direction 3, para 3.1.3; cf House of Lords, *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; see *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, [2011] 1 AC 355, [24]–[25] (Lord Hope (with whom Lord Brown and Lord Kerr agreed)). See also UK Supreme Court Practice Direction 6, para 6.6.10; cf House of Lords, *Practice Statement (Appearance of Counsel)* [2008] 1 WLR 1143.

<sup>179</sup> *Nuclear Decommissioning Authority* (n 163).



on one issue and dismissed the appeal on another) that '[a]n agreement of compromise has been reached in respect of the claim, but the parties wish this judgment to be issued nonetheless.'<sup>180</sup> A full judgment was given on both of the issues that had been taken on appeal, thereafter.

In some cases, parties may urge the Court to deliver judgment anyway (as in *Nuclear Decommissioning Authority*), but this may not always be so. It is perhaps more difficult for the Court to proceed to give judgment anyway where the parties do not wish that judgment to be given in light of the fact that there is no longer a dispute between them on appeal. In such cases, appellate courts may choose to deliver judgment irrespective of what the parties wish.<sup>181</sup> The perceived importance of the delivery of the judgment to the general public will inform the Court's decision whether to proceed to judgment despite the judgment being rendered moot due to the parties settling their dispute.<sup>182</sup> The occasions upon which appellate courts will do so are rare; even more rare are appeals in which the parties have settled their dispute before the appeal is heard or even taken (i.e., where there is no live dispute when the appeal is lodged). Ordinarily, litigation ends upon the settlement of a dispute.<sup>183</sup> One of the reasons for this is that, the dispute having been resolved, any legal issues may no longer be the subject of full argument if the question has become hypothetical. However, there are exceptions to this general rule and the court still has a discretion whether to hear an appeal even where the underlying dispute has been resolved; but it will generally not do so 'unless there is a good reason in the public interest for doing so' and there is 'a good basis for the matter to be raised as a general principle, the particular *lis* having gone.'<sup>184</sup>

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<sup>180</sup> *ibid* [3].

<sup>181</sup> See eg *McBains Cooper v Prudential Assurance Co Ltd* [2000] EWCA Civ 172, [2000] 1 WLR 2000, [29]-[33] (Brooke LJ (with whom Robert Walker and Peter Gibson LJJ agreed)); see also *Voss v Suncorp-Metway Ltd (No 1)* [2003] QCA 252, [2004] 1 Qd R 212, 212-13 (Davies JA); *Osborne v Auckland City Council* [2014] NZSC 67, [2014] 1 NZLR 766, [39]-[44] (William Young J giving the judgment of the court).

<sup>182</sup> *ibid*.

<sup>183</sup> See eg *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111, 113-14 (Viscount Simon LC (with whom Lord Atkin, Lord Thankerton, Lord Russell and Lord Porter agreed)); *Ainsbury v Millington* [1987] 1 WLR 379 (HL), 380-81 (Lord Bridge (with whom Lord Brandon, Lord Ackner, Lord Oliver and Lord Goff agreed)).

<sup>184</sup> *R v Home Secretary, ex p Salem* [1999] AC 450, 456-57 (Lord Slynn (with whom Lord Mackay, Lord Jauncey, Lord Steyn and Lord Clyde agreed)); see also *Bowman v Fels* [2005] EWCA Civ 226, [2005] 1 WLR 3083, [6]-[18] (Brooks LJ, delivering the judgment of the court); *AA v Secretary of State for the Home Department* [2006] EWCA Civ 1550, [4] (Laws LJ (with whom Gage and May LJJ agreed)).

#### 4.3 *Belhaj v Director of Public Prosecutions*

The core reason for giving judgment after the dispute that frames the issue or issues on appeal has settled is the broader public importance of the Court expressing its views on the topic. The Supreme Court is especially cognisant of this reason because it is a pre-condition to enlivening its appellate jurisdiction that an appeal raises an arguable point of law of ‘general public importance’.<sup>185</sup> In *Belhaj v Director of Public Prosecutions* (*‘Belhaj’*),<sup>186</sup> the Supreme Court considered the use of a ‘closed material procedure’ whereby a court may sit in private without a party or their legal representative present in order to prevent disclosures that may be damaging to the interests of national security. A closed material procedure can only be used in ‘relevant civil proceedings’ and not ‘proceedings in a criminal cause or matter’.<sup>187</sup> In *Belhaj*, the question was whether the particular proceeding was of the latter kind and, therefore, unable to be the subject of a closed material procedure. The press summary for *Belhaj* records that ‘[t]he proceedings were settled after argument before the Supreme Court, but the Court gives judgment in view of the importance of the legal issue.’<sup>188</sup> Indeed, the importance of the issue of closed material procedures in *Belhaj* was such that it went to the Supreme Court as a leapfrog appeal from the Divisional Court, hopping over the Court of Appeal.<sup>189</sup> A full judgment was given in *Belhaj* due to the importance of the issues involved, although the issue was moot after the parties agreed to settle their dispute and even though the Court was not unanimous, dividing three to two across three opinions.<sup>190</sup>

#### 4.4 *R (Hysaj) v Secretary of State for the Home Department*

By its own account, the Supreme Court gave judgment in *R (Hysaj) v Secretary of State for the Home Department* ‘in unusual circumstances’.<sup>191</sup> Essentially, those circumstances were as follows. Two Albanian nationals, Mr Hysaj and Mr Bakijasi, had obtained indefinite leave to remain and British citizenship by naturalisation on the basis of false statements they

<sup>185</sup> UK Supreme Court Practice Direction 3, para 3.3.3.

<sup>186</sup> *Belhaj* (n 163).

<sup>187</sup> Justice and Security Act 2013, ss 6(1)-(5), (11).

<sup>188</sup> UK Supreme Court, Press Summary: *Belhaj* and another (Appellants) v Director of Public Prosecutions and another (Respondents) [2017] UKSC 33 <<https://www.supremecourt.uk/cases/docs/uksc-2018-0011-press-summary.pdf>> accessed 1 May 2019.

<sup>189</sup> See Administration of Justice Act 1969, ss 12-16; UK Supreme Court Practice Direction 1, paras 1.2.17-19.

<sup>190</sup> *Belhaj* (n 163) (Lord Sumption gave the lead judgment, with whom Lady Hale agreed; Lord Mance gave a concurring judgment. Lord Lloyd-Jones gave a dissenting judgment, with whom Lord Wilson agreed).

<sup>191</sup> *Hysaj* (n 5) [1] (Lady Hale).

made concerning, *inter alia*, their place of birth (Kosovo) and nationality (Federal Republic of Yugoslavia). When these fraudulent representations came to light, the Secretary of State decided that the grants of citizenship were a nullity, such that Mr Hysaj and Mr Bakijasi were not and had never been British citizens. Those decisions were made applying Court of Appeal authority and were subsequently upheld by the High Court and Court of Appeal.<sup>192</sup>

On further appeals to the Supreme Court by Mr Hysaj and Mr Bakijasi, the Secretary of State took the view (favourably to the appellants and terminal to its own position in responding to the appeals) that ‘the law took a wrong turning’ in some of the earlier cases.<sup>193</sup> The Secretary of State accepted not only that the appeals ought to be allowed by the Supreme Court but also that it was appropriate for the Court to make an order with a preamble recording that ‘her decisions [...] were wrong in law’.<sup>194</sup> Even though the Supreme Court has power to set aside an order appealed from by consent and without an oral hearing<sup>195</sup> (as in *Hysaj*), the Court must still be satisfied that it is appropriate so to do.<sup>196</sup> As the making of an order by consent involves the exercise of judicial discretion, the Court may consider that it is appropriate to publish reasons for making an order by consent in the interests of public accountability and transparency. A further justification for the Court giving judgment in *Hysaj* is that, in doing so, the Court was able to overrule two earlier Court of Appeal cases that the Court accepted were wrongly decided.<sup>197</sup> Thus, despite the outcome of the appeals having been conceded by the Secretary of State, a broader public importance arose in correcting the law. The Court needed to be satisfied that the approach taken by the Secretary of State was correct but was also justified in publishing its reasons for overruling Court of Appeal authority.<sup>198</sup> The Court was so satisfied and the draft order, which the parties had agreed, was made accordingly.

<sup>192</sup> *Kaziu v Secretary of State for the Home Department* [2014] EWHC 832 (Admin), [2015] 1 WLR 945; *R (Hysaj) v Secretary of State for the Home Department* [2015] EWCA Civ 1195, [2016] 1 WLR 673.

<sup>193</sup> *ibid* [9]–[19]. In the Secretary of State’s view, *R v Secretary of State for the Home Department, Ex p Sultan Mahmood* [1981] QB 58 and *R v Secretary of State for the Home Department, Ex p Ejaz* [1994] QB 496 were rightly decided; whereas, *R v Secretary of State for the Home Department, Ex p Parvaz Akhtar* [1981] QB 46, and *Bibi v Entry Clearance Officer, Dhaka* [2007] EWCA Civ 740, [2008] INLR 683, were wrongly decided.

<sup>194</sup> *Hysaj* (n 5) Annex.

<sup>195</sup> UK Supreme Court Rules 2009, r 34(2).

<sup>196</sup> *Hysaj* (n 5) [1] (Lady Hale).

<sup>197</sup> *ibid* [20] (accepting that *Akhtar* (n 193) and *Bibi* (n 193) must be overruled).

<sup>198</sup> *ibid* [1].

#### 4.5 *The Regional Court in Lodz, Poland v Zakrewski*

*The Regional Court in Lodz, Poland v Zakrewski* ('Zakrewski')<sup>199</sup> is an example of the third situation where the Supreme Court may decide to give judgment anyway – that is, where the facts underlying the relevant appeal have materially changed after the appeal was lodged, thereby rendering the appeal moot for the parties. In *Zakrewski*, the question was whether a European arrest warrant seeking Mr Zakrewski's arrest was invalid in that it did not give the particulars required of it.<sup>200</sup> The Administrative Court held that the relevant warrant was invalid.<sup>201</sup> On another 'leapfrog' appeal directly to the Supreme Court, the unanimous view was taken that the alleged defects in the warrant were not fatal and, thus, the warrant was valid.<sup>202</sup> However, after the appeal was heard and before the handing down of its judgment, the Supreme Court was informed that Mr Zakrewski had returned to Poland voluntarily and the warrant had been withdrawn by the issuing court. The appeal to the Supreme Court on the validity of the warrant had, therefore, become moot. The Supreme Court delivered judgment anyway, with the consequence that, given its findings on the issue of validity, the appeal would have been allowed but, formally, the appeal was dismissed.<sup>203</sup>

#### 4.6 *Y v An NHS Trust*

Another example of an appeal that was moot owing to a material change in the underlying facts giving rise to the dispute may be drawn from the past legal year in *Y v An NHS Trust*.<sup>204</sup> Mr Y had suffered severe cerebral hypoxia and brain damage from cardiac arrest, such that he was no longer conscious and required clinically assisted nutrition and hydration ('CANH') to keep him alive. The question on appeal to the Supreme Court was whether a court order must be obtained before CANH can be withdrawn. Mr Y died before a 'leapfrog' appeal could be made directly to the Supreme Court.<sup>205</sup> The Court heard and determined the appeal anyway.

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<sup>199</sup> *Zakrewski* (UKSC) (n 164).

<sup>200</sup> Extradition Act 2003, s 2(6)(e).

<sup>201</sup> *Zakrewski v District Court in Torun, Poland* [2012] EWHC 173 (Admin), [2012] 1 WLR 2248, [11]-[32] (Lloyd-Jones J).

<sup>202</sup> *Zakrewski* (UKSC) (n 164) [16] (Lord Sumption (with whom Lord Neuberger, Lord Kerr, Lord Clarke and Lord Wilson agreed)).

<sup>203</sup> *ibid* [17].

<sup>204</sup> *Y* (n 164).

<sup>205</sup> *NHS Trust v Y* [2017] EWHC 2866 (QB), [2017] 4 WLR 222, [51]-[55] (O'Farrell J).

#### 4.7 *Secretary of State for the Home Department v R (Bashir)*

*Secretary of State for the Home Department v R (Bashir)* ('*Bashir*')<sup>206</sup> heralded a new practice for the Supreme Court in delivering an 'interim judgment'. This is the fourth situation described above in which a judgment may be unnecessary. Substantively, *Bashir* concerned a number of complex issues arising out of the applicability of the United Nations Convention Relating to the Status of Refugees 1951, as modified by the Protocol Relating to the Status of Refugees 1967, to six refugees who had been rescued by Royal Air Force helicopters and taken to the Sovereign Base areas in south-western Cyprus (sovereignty of which remained with the UK). After hearing oral argument over two days, the Supreme Court considered that 'some critical and difficult issues had not been clearly identified in the agreed statement of facts and issues, nor adequately covered by the written or oral submissions.'<sup>207</sup> In those circumstances, the Court said that '[i]n fairness to the parties, and to enable it to reach a fully informed conclusion, the court sees no alternative to inviting further submissions on the matters to be identified at the end of this judgment.'<sup>208</sup> One alternative, rather than delivering an 'interim judgment', might have been to invite the parties to further address the Court as required in correspondence and then hold a subsequent hearing for that purpose before delivering any judgment. Exceptionally, the Court may invite the parties not only to give supplementary submissions, but also further evidence, as it did in *Brownlie*.<sup>209</sup>

However, the evident advantages in the Supreme Court delivering an interim judgment in *Bashir* were that: a) whilst interim insofar as the final disposition of the appeal was concerned, it was final as to the threshold issues it addressed;<sup>210</sup> and b) it served as an encouragement for the parties to settle their dispute without the need for a further oral hearing or final judgment. In this latter respect, the Supreme Court noted in its concluding comments that '[i]t may of course be that, with the benefit of this interim judgment, the parties will be able reach agreement without further argument on the position of the respondents, or at least on some of the above questions.'<sup>211</sup> Thus, a further oral hearing would be held 'as soon as practically possible' and only if absolutely necessary. As it turns out, the parties settled their dispute before another hearing before the Supreme

<sup>206</sup> *Bashir* (n 4).

<sup>207</sup> *ibid* [1] (*per curiam*).

<sup>208</sup> *ibid*.

<sup>209</sup> *Brownlie* (n 90) [14] (Lord Sumption).

<sup>210</sup> *Bashir* (n 4) [1] (*per curiam*) ('This is an interim judgment dealing with certain threshold issues on this appeal. It is final as to the issues covered, but interim in the sense that other issues will have to be decided before the appeal can be finally determined.').

<sup>211</sup> *ibid* [115].

Court. The settlement of the dispute, therefore, left unresolved issues of ‘some importance and difficulty’ as to the interaction of the Refugee Convention and domestic public law – in respect of which issues an enlarged panel of seven Justices had been convened to hear and determine *Bashir* – for another day.<sup>212</sup>

## 5 Collective Irrationality in Judgments with Multiple Opinions

Although the small subset of recent cases considered in the preceding sections would be a precarious footing upon which to base any grand theory of when the Supreme Court will, or indeed should, go further in its judgments than that which is necessary, one theme may be mentioned in light of the literature on ‘collective irrationality’. The problem of ‘collective irrationality’ has been helpfully sketched by Justice Gageler and Dr Lim:

Decision-making by groups, because it depends upon aggregating decisions by individuals, is inherently susceptible to internal inconsistency. Decision-making by adherence to precedent, because it strives to treat like cases alike, is inherently committed to achieving consistency over time. The common law system of decision-making utilises both groups (multi-member appellate courts) and adherence to precedent (*stare decisis*). The common law system of decision-making is therefore inherently susceptible to inconsistency *within* particular decisions, yet inherently committed to consistency *between* those decisions.<sup>213</sup>

It is important to note the use of terminology (and appropriate caveats) in this context. In this context, ‘irrational’ may be taken ‘to denote the simultaneous acceptance of propositions that are logically inconsistent with each other.’<sup>214</sup> Thus, the concern is with:

a form of *collective* irrationality that can arise in a group decision-making context even if each individual member of the group reasons perfectly rationally. Collective irrationality is a

<sup>212</sup> [114]-[115]; see *Shaw QC and Nevill* (n 57) 651-55 [pinpoint to where they say the case settled].

<sup>213</sup> Justice Stephen Gageler and Brendan Lim, ‘Collective Irrationality and the Doctrine of Precedent’ (2014) 38 *Melbourne U L Rev* 525, 526.

<sup>214</sup> *ibid* 527.

function of *aggregating* individual judgments. It is an incident of the decision-making *procedure* and not an incident of any faulty reasoning by individual decision-makers.<sup>215</sup>

Recognising inherent problems in group decision-making, especially in the literature on ‘collectively irrationality’,<sup>216</sup> it can be fairly said that a factor influencing whether *obiter dicta* will be given by appellate judges may be the extent to which a *dictum* commands the authority of the judicial panel hearing the case. In their work on precedent in English law, Sir Rupert Cross and JW Harris deplored the ‘failure of judicial technique’ when the principle on which the court acted is ‘unascertainable’.<sup>217</sup> Whilst that observation has particular force in a precedent-based system in terms of ascertaining the reasons for the decision, it must also inform whether and, if so, how far appellate judges will go in extending themselves to making any further observations. Put another way, and extending the logic underlying the comments of Cross and Harris, if it be a failure in judicial method if reasons for a decision are unascertainable, it must surely be even more undesirable for *obiter dicta* to be difficult to discern across multiple opinions. Indeed, the problems with respect to ‘collective irrationality’ in *ratio decidendi* seem worse, perhaps exponentially so, with *obiter dicta*.

Thus, the problem of ‘collective irrationality’ takes on a different emphasis in the context of appellate *obiter dicta*: group decision-making is *essential* in the exercise of appellate jurisdiction by panels with a plurality of judges in order to conclude, ultimately, whether an appeal will be allowed or dismissed and, in doing so, determining the reasons for the dispositive adjudication of an appeal, so the inherent problems in reaching consensus across appellate judges will inevitably arise. However, the difficulties of forming a consensus among appellate judges to give an *obiter dictum* lack the same degree of necessity or immediacy because, by definition, an *obiter dictum* is itself *inessential* to the decision.

The recent case examples from the Supreme Court that have been considered in this chapter are more fully analysed by leading commentators (many of whom appeared in the cases heard in the 2017–18 legal year) in this volume. It is, however, apparent even from the limited discussion of a cross-section of cases decided by the Supreme Court recently that there are different kinds of *obiter dicta*, perhaps best viewed along a graduated scale of authority or, in a more practical sense, persuasiveness. At one end of that

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<sup>215</sup> *ibid* 528.

<sup>216</sup> See eg Linda Novak, ‘The Precedential Value of Supreme Court Plurality Decisions’ (1980) 80 *Columbia L Rev* 756, 763.

<sup>217</sup> Sir Rupert Cross and J W Harris, *Precedent in English Law* (Clarendon Press, 4th ed, 1991) 93.

spectrum, there are, to borrow a term from the High Court of Australia, ‘seriously considered *dicta*’,<sup>218</sup> in which a point has been fully argued before an appellate court and subsequently worked through in its judgment. Even though not binding as a matter of precedent, their persuasive value is high, especially if they command the unanimity (or a strong majority) of the judicial panel hearing the case. *Obiter dicta* of this nature can readily be expected to be followed and usually will be (as has proven to be the case with the Supreme Court’s dictum in *Ivey*, for example<sup>219</sup>). At the other end of that scale are *obiter dicta* in passing remarks<sup>220</sup> or, worse, ‘very wide divaricating *dictum*.’<sup>221</sup> Thus, there are degrees of persuasive value in *obiter dicta*;<sup>222</sup> the weight of influence embedded in any *dictum* may vary over a plane of time as circumstances influencing the opinion, and the context in which it was made, change; and *obiter dicta* must be treated with caution in terms of subsequent reliance and use.<sup>223</sup> With these caveats in mind, *obiter dicta* have an important role to play in the common law tradition. It may also be that the Court can provide some guidance as to the subsequent usage of *obiter dicta* (and one occasionally finds signals to this effect within the relevant judgment).<sup>224</sup>

The Justices of the Supreme Court, like their predecessors in the House of Lords, are aware of the inherent difficulties of group-decision-making, and indeed the underlying problems of ‘collective irrationality’ in discerning principles expressed by a plurality of judges in multiple opinions. Views have varied over time as to the merits of unanimity in judgment-writing.<sup>225</sup> As I observed in last year’s volume, ‘[t]here is, however, a virtue in a

<sup>218</sup> *Farah Constructions v Sayde* [2007] HCA 22, (2007) 230 CLR 89, [134], [158] (*per curiam*); see also Matthew Harding and Ian Malkin, ‘The High Court of Australia’s Obiter Dicta and Decision-Making in Lower Courts’ (2012) 34 Sydney L Rev 239. The aim here is not to engage with the associated remarks as to the proper role of intermediate appellate courts in developing the law: see Justice Keith Mason, ‘President Mason’s Farewell Speech’ (2008) 82 Australian LJ 768; cf Heydon (n 30).

<sup>219</sup> *Ivey* (n 7); see eg *Signia Wealth Ltd v Vector Trustees Ltd* [2018] ewhc 1040 (Ch), [561] (Marcus Smith J); *Raychaudhuri v General Medical Council* [2018] EWCA Civ 2027, [54] (Sales LJ); *Solicitors Regulation Authority v James* [2018] EWHC 3058 (Admin), [2018] 4 WLR 163, [7], [79] (Flaux LJ); *DPP v Patterson* [2017] EWHC 2820 (Admin), [2018] 1 Cr App R 28, [16]-[17] (Sir Brian Leveson P); see also Richard Spearman QC, ‘*Ivey v Genting Casinos* and Dishonesty: New Dawn or False Horizon?’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019) 256, 285–87.

<sup>220</sup> See *Y* (n 164) [86] (Lady Black); cf *N v ACCG* [2017] UKSC 22, [2017] AC 549, 38] (Lady Hale).

<sup>221</sup> *Sunbolf v Alford* (1838) 3 M and W 218 (Exchequer), 252 (Lord Abinger CB).

<sup>222</sup> Cross and Harris (n 217) 77.

<sup>223</sup> See eg *Brownlie* (n 90) [33] (Lady Hale).

<sup>224</sup> See Harding and Malkin (n 218) 256–67.

<sup>225</sup> See eg *Broome v Cassell* [1972] AC 1027, 1084–85 (Lord Reid); cf Louis Blom-Cooper and Gavin Dewry, *Final Appeal* (Clarendon Press 1972), 93; see also Alan Paterson, *Final Judgment* (Hart Publishing 2013), 99–110.



clear, discernible majority judgment and any real differences in opinions, even concurring opinions, to be intelligible.<sup>226</sup> The Supreme Court takes steps to mitigate the difficulties that may arise from group decision-making (and ‘collective irrationality’) by, for example, holding an initial conference after the hearing in which preliminary views can be shared and discussed by the judges on the panel deciding the case, allocating authorship of a lead opinion (in respect of which the other Justices may agree and, if they wish, add something separately) and circulating draft opinions and judgments.<sup>227</sup> Such steps promote unanimity in judgment writing.<sup>228</sup> As did her predecessor,<sup>229</sup> the President of the Supreme Court, Lady Hale, has suggested a ‘flexible approach’ to judgment writing that acknowledges an individual Justice’s liberty to write if they wish to do so but observes that ‘a climate of collegiality and co-operation in plurality judgments is encouraged.’<sup>230</sup> The trend toward unanimity in judgment-writing in the Supreme Court is also evident from the remarks of Lady Hale, observing the ‘usual practice’ (and a departure from it) in *Re Northern Ireland Human Rights Commission*:

In these unusual circumstances, it is not possible to follow our usual practice and identify a single lead judgment which represents the majority view on all issues. We have therefore decided to revert to the previous practice of the appellate committee of the House of Lords and print the judgments in order of seniority. It is for that reason only that my judgment comes first. Far more substantial judgments on all issues follow from Lord Mance and Lord Kerr.<sup>231</sup>

Of the 71 cases in which judgment was given by the Supreme Court in the 2017–18 legal year, the relevant judicial panels were unanimous as to the outcome in 59 of those judgments (83%) (meaning that dissenting opinions

<sup>226</sup> Clarry (n 11) 46. See also Penny Darbyshire, ‘The UK Supreme Court—Is There Anything Left To Think About?’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 6: 2014–2015 Legal Year* (rev edn, Appellate Press 2018) 134, 138–44.

<sup>227</sup> See Paterson (n 225) 83–99.

<sup>228</sup> For a critique of such approaches, see Dyson Heydon, ‘Threats to Judicial Independence: the enemy within’ (2013) 129 LQR 205.

<sup>229</sup> See Lord Neuberger, ‘The Role of the Supreme Court Seven Years On – Lessons Learnt’ (Bar Council Law Reform Lecture 2016, 21 November 2016) <[www.supreme-court.uk/docs/speech-161121.pdf](http://www.supreme-court.uk/docs/speech-161121.pdf)> accessed 1 May 2019, para 40; see also Clarry (n 11) 45–46.

<sup>230</sup> Lady Hale, ‘Judgment Writing in the Supreme Court’ (UK Supreme Court, First Anniversary Seminar, 30 September 2010) <[https://www.supreme-court.uk/docs/speech\\_100930.pdf](https://www.supreme-court.uk/docs/speech_100930.pdf)> accessed 1 May 2019, 3.

<sup>231</sup> *Northern Ireland Human Rights Commission* (n 3) [4].

were written in the other 12 judgments (17%). Of those 59 judgments in which the Justices were unanimous as to the outcome, 46 featured a single opinion<sup>232</sup> (meaning that concurring opinions were written in the other 13 judgments).<sup>233</sup> Objectively, the frequency with which the Supreme Court reaches complete unanimity in its judgments (65% of the total judgments given in the 2017–18 legal year featuring a single opinion only) tends to suggest that the Supreme Court strives for unanimity, where possible. The practical steps taken internally by the members on each of the judicial panels to reach consensus in their judgments are difficult to discern from the outside looking in. Illuminating comments from the judges themselves<sup>234</sup> and scholarly research on that process, typically informed by interviews with the Justices themselves as to judicial conclaves and the process of judgment writing, also reveal that the Supreme Court strives to achieve unanimity.<sup>235</sup> At times, such unanimity might arise serendipitously as when Lord Brown and Lord Rodger moved across Parliament Square to share a wall and a judicial assistant in the Supreme Court, subsequently voting together in 97% of 28 cases they heard together in the 2010–11 legal year.<sup>236</sup>

A fortunate by-product of unanimity across appellate judges may also be brevity of the judgments themselves, thereby enhancing readability for a broader audience.<sup>237</sup> In the 2017–18 legal year, the average page length of judgments was 27 pages across 71 judgments with an average paragraph count of 68 paragraphs<sup>238</sup> (slightly shorter than the counts from the previous year<sup>239</sup>). For the most part, therefore, the judgments of the Supreme Court have kept to a manageable length given the complexity of the issues resolved by the Court. In terms of access and readability, the general public also have the great benefit of a press summary prepared and published by the Supreme Court, which gives a neat briefing on the facts and points determined in the appeals, as well as a general map to navigate

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<sup>232</sup> Of those 46 judgments featuring a single opinion, 41 were single authored and 5 were jointly authored.

<sup>233</sup> Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019), Pt IV ('Statistics').

<sup>234</sup> Lord Neuberger (n 229) para 40.

<sup>235</sup> See Paterson (n 111) 82–85. See also Paterson (n 225) 91–94 (on 'The Allocation of the Lead Judgment'), 99–110 (on 'Multiple Judgments and the Pursuit of Unity'); cf Alan Paterson, *The Law Lords* (Palgrave Macmillan 1982), 84–121 (on 'Law Lord Interaction and the Process of Judgment').

<sup>236</sup> Paterson (n 111) 92.

<sup>237</sup> See Darbyshire (n 226) 138–44.

<sup>238</sup> Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019), Pt IV ('Statistics').

<sup>239</sup> cf Clarry (n 11) 34, n 92 (noting the average page length across the 71 judgments handed-down by the Supreme Court in the 2016–17 legal year was 29 pages and the average paragraph count was 76 paragraphs): see Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 8: 2016–2017 Legal Year* (Appellate Press 2018), Pt V ('Statistics').

one's way through the judgment and delve further.<sup>240</sup>

Ultimately, judgment writing is a personal experience not readily susceptible to dogmatic rules as to what should and should not be addressed. As I observed last year, '[j]udges are not automatons who decide cases in precisely the same way all of the time.'<sup>241</sup> Diversity is, and is to be, championed in the judicial appointments process.<sup>242</sup> It follows that a flexible approach to judgment writing, as Lady Hale has suggested,<sup>243</sup> affords a healthy margin of difference in judicial attitudes and outlook. There are sensible limits, observed by convention, on the extent to which an appellate court will go in giving *obiter dicta*. There is little to be gained by judges assuming the role of a pandectist, synthesising vast tracts of law in their opinions. The Justices are generally conservative when it comes to proffering *obiter dicta*, which suggests an innate sense that guides judgment writing and keeps it within reasonable bounds.

The fact that final appellate courts tend to keep their judgments to a manageable length may also be seen to reflect the combined experience of the judges who are elevated to highest judicial office. In the Supreme Court, the combined experience of the full-time Justices across their esteemed careers amounts to some 235 years in superior courts in the United Kingdom, including on the Supreme Court<sup>244</sup> (with a further 70 years of full-time UK superior court experience across the members on its Supplementary Panel<sup>245</sup>). A robust judicial appointments process exists for the selection of Supreme Court Justices.<sup>246</sup> Through the selection of experienced persons who have already served as judges and written many judgments, the regulation of judgment-writing is moderated well before any of the Justices begin writing.<sup>247</sup> There is little evidence to suggest that

<sup>240</sup> See eg UK Supreme Court (n 126).

<sup>241</sup> Clarry (n 11) 20; compare Baron de Montesquieu, *The Spirit of Laws* (Nugent tr, 3rd edn, Nourse and Vaillant 1758) 226 ('judges are no more than the mouth that pronounces the words of the law, mere passive beings incapable of moderating either its force or rigour').

<sup>242</sup> Erika Rackley, *Women, Judging and the Law* (Routledge 2013) 164; Lady Hale, 'Appointments to the UK Supreme Court' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 7: 2015–2016 Legal Year* (rev edn, Appellate Press 2017).

<sup>243</sup> Lady Hale (n 230) 3.

<sup>244</sup> UK Supreme Court, 'Biographies of the Justices' (*UK Supreme Court*, 1 May 2019) <<https://www.supremecourt.uk/about/biographies-of-the-justices.html>> accessed 1 May 2019.

<sup>245</sup> UK Supreme Court, 'Supplementary Panel' (*UK Supreme Court*, 14 January 2019) <<https://www.supremecourt.uk/about/supplementary-panel.html>> accessed 14 January 2019.

<sup>246</sup> See Lord Neuburger, 'A Glance in the Judicial Rear-View Mirror' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 8: 2016–2017 Legal Year* (Appellate Press 2018) 1, 9–11.

<sup>247</sup> Lord Sumption, who was elevated from the Bar directly to the Supreme Court, is the obvious exception in terms of full-time judicial experience in superior courts; however, Lord Sumption was not without judicial experience before his appointment to the Supreme Court, having been appointed as a Deputy Judge of the High Court of England and Wales

judgment writing is not kept within reasonable bounds in the Supreme Court; even if, on occasion, it may take some time to discern the *ratio decidendi* and *obiter dicta* across a plurality of opinions of the Justices.<sup>248</sup>

In light of recent cases, it may also be observed that decisions on contentious issues of public policy, especially those that bring moral issues into sharp relief, seem to be inherently ill-suited to appellate decision-making in terms of developing the law, at least from the perspective of doing so in strongly authoritative judgments with unanimity. This is not only because the views of the individual judges might differ on the substantive issue in dispute but also because the judges might differ on whether that issue is one the court ought to decide as a matter of ‘institutional competency’ (i.e. whether the issue is better left for Parliament).<sup>249</sup> Abortion, euthanasia and religion are paradigms. Indeed, so much so that three landmark cases of the Supreme Court on each of those topics – i.e., *Re Northern Ireland Human Rights Commission*,<sup>250</sup> *R (Nicklinson) v Ministry of Justice* (‘*Nicholson*’)<sup>251</sup> and *R (E) v Governing Body of JFS* (‘*JFS*’)<sup>252</sup> respectively – show the difficulties that may be encountered in appellate decision-making on legal issues with strong moral dimensions. All three cases were decided with enlarged panels (7, 9 and 9 respectively), produced lengthy judgments (143 pages (371 paragraphs), 131 pages (366 paragraphs) and 91 pages (259 paragraphs) respectively) and involved diverse views across the judges (in all three cases, the judicial panels split in different ways and in the latter two cases, *Nicholson* and *JFS*, all nine judges delivered their own opinion in the respective judgments). Notably, as well, questions of ‘institutional competence’ (i.e., Court vs. Parliament) featured in all three of those cases. This observation is not made to suggest that such issues ought not to go before a court for determination but simply to note that, in those instances in which such issues have gone before the Supreme Court, problems of ‘collectively irrationality’ may be heightened.

## 6 Conclusion

The Princeton polymath, John Tukey, once observed that ‘the greatest value of a picture is when it *forces* us to notice what we never expected to

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in 1992 and as a Judge of the Courts of Appeal of Guernsey and Jersey from 1995, positions he held for some time before his appointment to the Supreme Court on 11 January 2012.

<sup>248</sup> See Ali Malek QC and Dr Cameron Miles, ‘International Dimensions’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 8: 2016–2017 Legal Year* (Appellate Press 2018) 447, 455.

<sup>249</sup> See eg Mrs Justice Lieven (n 129) 144–49.

<sup>250</sup> *Re Northern Ireland Human Rights Commission* (n 3).

<sup>251</sup> [2014] UKSC 38, [2015] 1 AC 657.

<sup>252</sup> [2009] UKSC 15, [2009] 2 AC 728.

see.<sup>253</sup> Whilst we do not often have pictures to aide legal comprehension, judgments may nevertheless be a lens through which doctrinal data is coherently arranged beyond that which is necessary to reason an outcome. Accumulated experience over time advances the theory and practice of law. The use of judicial precedent as a dominant mode of legal reasoning in the common law tradition, as well as doctrinal methodology in incrementally developing the law, is a testament to the value of learning from experience. The past legal year has seen the retirement of the former Deputy President, Lord Mance, and Lord Hughes. In the great tradition of the common law, their judgments, both *ratio decidendi* and *obiter dicta*, in the past legal year (and many years before) will assist jurists to see further, both now and in the future.

The provision of *obiter dicta* in judgments, by definition, requires judges to go further than that which is necessary for the determination of the issues before them. Reasonable minds may differ on whether they should go further and, if so, to what extent they should do so. Individual juristic perspectives will also be informed by an *ad hoc* assessment of the circumstances of each case as to whether it is appropriate to do so. It is, however, possible to observe common factors that affect whether judges will go further. One of those factors is whether the relevant issue has been fully argued before the Court.<sup>254</sup> There is a virtue in common law principles being forged in the furnace of adversarial argument.<sup>255</sup> For this reason, appellate courts usually have the benefit of a *contra dicta*, even if that person is an *amicus curiae*. The Supreme Court has also been remarkably open to interventions.<sup>256</sup> To ensure interventions are not burdensome, the Court may impose sensible limits— for example, giving leave for written submissions only.<sup>257</sup>

Conversely, a factor that weighs against going further is where the Justices consider that Parliament has already considered an issue and declined to act<sup>258</sup> (or reform may be in the pipeline<sup>259</sup>). Given that an *obiter dictum*

<sup>253</sup> Tukey (n 1) vi (emphasis in original).

<sup>254</sup> See eg *Dover District Council* (n 98) [50]-[60] (Lord Carnwath); *Re Northern Ireland Human Rights Commission* (n 3) [42(c)] (Lord Mance); *Reyes* (n 73) [3] (Lord Sumption).

<sup>255</sup> Thus, enlivening the virtue of an old principle stated by Hankford J in 1409 and translated in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16–17 ('Today, as of old, by good disputing shall the law be well known.').

<sup>256</sup> Interventions occurred in 22 of the 71 judgments in the 2017–18 legal year (31%) – of those *Re Northern Ireland Human Rights Commission* (n 3) held the record for most intervenors this past legal year with 10 groups of intervenors separately represented and comprising 19 different organisations; cf *Miller* (n 21).

<sup>257</sup> See eg *Miller* (n 21); *Re Northern Ireland Human Rights Commission* (n 3); *Cartier International AG v British Sky Broadcasting Ltd* [2018] UKSC 28, [2018] 1 WLR 3259.

<sup>258</sup> See eg *Reilly* (n 75) [34] (Lady Hale).

<sup>259</sup> See eg *Reyes* (n 73) [68] (Lord Wilson).

is, by definition, inessential to the disposition of live issues on appeal, the Court might also be swayed by the degree of unanimity across its Justices in deciding whether to venture further.<sup>260</sup> Such restraint may be seen to mitigate the problems identified in the literature on ‘collective irrationality’ in appellate decision-making but cannot be taken too far as it remains a matter for each judge as to how far they go.

The justifications for the Justices venturing further than that which is necessary to adjudicate appeals, especially the perceived general public importance of going further, is a reminder that the Supreme Court is not simply a forum for dispute resolution but is actively concerned with the administration of justice, which requires it to act as the circumstances require in each case with a view to the efficient use of its resources and to ensure that doctrines in the general law remain in good and serviceable repair. However, the view of the common law as capable of keeping pace with societal developments and responding to social need is overstated. It fails to observe the practical limitations that inhibit the development of the general law, including external factors that affect whether and when a highest appellate court will be given an opportunity to develop the law. Caricatures obscure more than they illuminate.

The provision of unnecessary opinions does not evidence appellate judges going above and beyond the call of duty (unless ‘duty’ is narrowly and unrealistically understood). In truth, the role of appellate judges, including the Justices of the Supreme Court, is nuanced and pragmatic. In providing a number of illuminating *obiter dicta* in its judgments during the 2017–18 legal year (and in some cases declining to do so), it can be seen that the Justices appreciate that their opinions may influence law reform and legal practice beyond setting judicial precedent. Sensible limits regulate the breadth and depth of *obiter dicta* in judgments, which the Court observes by convention. Given the benefits *obiter dicta* may hold in the coherent development of the law, as well as the fact that an innate conservatism seems to self-regulate how far the Justices feel they should (and should not) go in their judgments, the provision of *obiter dicta* is better left for the judges on the relevant panels to determine having regard to the circumstances of each case.

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<sup>260</sup> *ibid* [56]-[57].