Editorial

A careful path!

It is often argued by those who wish to extol the virtues of the common law and the advantages that it offers in promoting trade and commercial activity, in terms of its certainty – it trumps all other systems of law. It is contended that those in the way of business and especially for those that advise them, certainty in the legal obligations that they have assented to or which might be imposed upon them, is an over-riding benefit. They know where they stand, and they can properly appreciate the risks and take action, whether by insurance or avoidance, to mitigate them. Indeed, this quality was invoked by many a judge in the formative period of our commercial and, in particular, contract law with an almost missionary zeal. More recently a central plank – believe it or not, of our relationship with China, at least in the context of the prosperity initiative, is to persuade them of the virtues – practical and conceptual of the common law – not just as a platform for better trade, but also as the rule of law.

In the domain of criminal law, where the consequences for the individual of violating the law might be dire, certainty has been elevated to almost beyond a virtue – it is a prerequisite upon which notions of autonomy and free will can only appear convincing. Of course, notwithstanding all this jurisprudence, there have been other agendas, perhaps not always as well justified. For example, the simple rule that a contract effected by post was complete and binding as soon as the acceptance went into the mail box, irrespective of whether it ever arrived in Calcutta or some other exotic reach of the Empire, it had the practical and perhaps chauvinistic advantage, of establishing that the deal was governed by English law as applied in the Strand! Indeed, in practice many areas of law, especially in its administration, there has been built-in "wiggle room" and, when things were all a little too clear-cut and, thus, arguably inflexible, there was at least for some, access to equity.

When considering what is acceptable conduct in trade, the financial markets or simply in personal dealings, perhaps what the law is taken to say should only be a factor. Obviously in the vast majority of cases, what the law provides, when clear, is non-negotiable, at least in terms of consequence. However, it can and probably should in its coercive guise, only provide a minimum indication of acceptability. In other words we should, in many contexts aspire to a greater obligation, whether it is to the market or to those with whom we deal. Of course, such a generalisation is limited and in dealings with the once all powerful, but perhaps increasingly suspect – state, it has long been accepted that the law is finite and determinative. Hence, the increasingly ambiguous divide between evading tax or simply avoiding it – albeit manifestly contrary to what was intended. There are a number of issues related to integrity and especially its promotion, where there are graduations well beyond and above the law. Indeed, good governance structures aspire to systemically and procedurally promote conduct at a level higher than the mundane law. Compliance, both in its educative and normative roles, also facilitates higher standards – albeit in practice rather more as a tripwire. We have also incorporated into "secondary" bodies of law – which increasingly govern relationships in finance and business, standards and concepts which smack of good practice rather than bright line obligations. There was a time, not too long ago, when those operating in the City of London were almost entirely, as far as the law was concerned, subjected only to the injunction of honesty. In fact, given the complexity of the environment within which such issues might have to be determined in retrospect, this was not even entrusted to common juries. The impact of standards within the civil law was also,

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in practice, minimal. It might be argued that vested interest among the lawyers who made any pretence of practice within the Square Mile together with the emphasis that was placed on doing business – and that largely within a privileged class of players, inhibited the development of effective legal remedies or even the realisation of potential issues, such as conflicts of interest and insider dealing. While today the Court of Appeal had no problem in describing insider dealings as a species of fraud, until comparatively recently, there were those in positions of great influence in the City and its institutions, who roundly defended the use of privilege price-sensitive information – at least for the benefit of their clients. It is also arguably pertinent in what some see as still a class-based bias, that over the past 5 years the Financial Conduct Authority has prosecuted only eight cases of insider abuse, while in the same period, the Department of Work and Pensions has pursued more than 10,000 individuals for benefits-related fraud!

There are many other examples. We have never really conceptualised the issues relating to money laundering. While there have been odd cases that have come before the courts, there remains, notwithstanding pragmatic forays by the Treasury, resolution – as to the risks – legal, regulatory and to repute, that arise when a fiduciary, by will or circumstance, that forms a suspicion as to the source of funds under its control. Indeed, before the then Lord Chief Justice underlined the dilemma that a bank might well find itself in, the advice of the then legal adviser to the Treasury, was that the civil law was largely irrelevant! There are also issues with, for example, obligations of care, interference with third-party contractual rights and even the legal viability of "Chinese Walls." Those who raise such inconvenient issues invariably find themselves kicked off relevant advisory committees, not invited to conferences and in the end largely unemployable! Indeed, persistent litigants have been bought off or "taken care of" and even the odd commentator "discouraged". Of course, the desire not to see "boats unduly rocked", especially when the financial services industry is so important to us all, is not limited in time or place. Similar and even more robust outrage has focussed on the very few who have raised issues in regard to murky areas of Islamic finance – and in particular to conflicts of interest.

Notwithstanding, all this pragmatism, particularly since the financial crisis, there is much evidence of criticism being levied at individuals and in particular institutions that is both woolly, ill-conceived and potentially unfair. Indeed, it smacks of the very criticism that some have made of the spector of Party' discipline in China. Whether it has manifested itself in other areas of public and, for that matter, private life well beyond what would normally be considered the remit of those concerned with integrity; we will leave to the tabloids. While bad behaviour today should not be excused on the basis that 20 years ago, those who could have done something about it either did not want to know or perhaps even thought it "acceptable" in considering the application of our law, including our "soft" laws, it is pertinent to bear in mind that there have been changes in the way conduct is viewed. This is particularly so in regard to the financial markets, trade and possibly the governance of companies and the balancing of stakeholders' interests. We need to be a lot more thoughtful in awarding the tile of "crook" to only those who are really deserving candidates. A senior Chinese official, in a leading bank, recently said, "Self-interest is what motivates us to do business – not Lenin" – and the following day he was arrested! We do need to watch out for those double standards!

Barry Rider
Jesus College, Cambridge, UK