MASTER OF THE ROLLS

LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS

A JUDICIAL PERSPECTIVE ON THE CONDUCT OF CLAIMS IN THE CURRENT CLIMATE

BUTTERWORTHS' FINANCIAL INSTITUTIONS LITIGATION CONFERENCE

KEYNOTE ADDRESS

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1. In the preface to his latest book, *The Idea of Justice*, Amartya Sen – Noble Prize winning economist, philosopher and all round polymath - reminds us what one of our greatest writers said about injustice:

> "'*In the little world in which children have their existence,*' says Pip in Charles Dickens's *Great Expectations*, '*there is nothing so finely perceived and finely felt as injustice.*' *I [says Professor Sen] expect Pip is right: he vividly recollects after his humiliating encounter with Estella the* '*capricious and violent coercion*' *he suffered as a child at the hands of his own sister. But the strong perception of manifest injustice applies to adult human beings as well. What moves us, reasonably enough, is not the realization that the world falls short of being completely just – which few*

of us expect – but that there are clearly remediable injustices around us which we want to eliminate."[1]

2. Charles Dickens knew a lot about injustice. *Bleak House* with its sustained blast against the ineffectiveness and lethargy of the 19th century Court of Chancery is well known. But Dickens also knew a lot about the injustice caused by the collapse of financial institutions. The collapse of Merdle's Bank, in *Little Dorrit*, due to the fraudulent working of what is now known as a Ponzi scheme, is a case in point. We no longer have debtors' prisons such as Marshalsea, in which Dickens's own father, John, was incarcerated, memorably saying to the 12-year old Charles as he entered its depressing portals, that 'the sun was set on [him] for ever'. Nor, thanks to government intervention in this country, have we witnessed the collapse of banks. Other countries have. We are all familiar with Lehman Brothers – although as I heard one appeal arising out of its insolvency last week, and am due to hear another next week, perhaps I should not comment on that particular little matter further. We might not have witnessed the collapse of banks, but that is not to say that we have not felt, and felt deeply, the effects of the global financial crisis.

3. Home owners, people with savings in various banks, those who have saved for pensions, pension funds, individual shareholders, institutional investors, small, medium and large businesses, employers and employees have – they, we, have all suffered. There is perhaps no sector of society that has not already been affected, or will not in some way be affected in the future, by the credit crunch and its aftermath. It is probably fair to say that the current financial climate is one which has left a large number of people not just with the perception but, in very many cases the manifest reality of injustice.

[1] Sen, *The Idea of Justice*, (Allen Lane) (2009) at vii.

4. Given the nature and extent of the credit crunch's adverse effects, the justice system has a heavy duty to do its utmost to soften, or even to ameliorate, those effects, when it is called upon to assist. Of course, there is a limit to what the justice system can do. It has, of course, a fundamental duty to determine disputes and claims in accordance with the law, but that doesn't prevent us dealing with cases efficiently and commercially – on the contrary. However, the justice system cannot, of course, remedy the structural and societal causes of the financial crisis – the credit crunch. That is a matter for Parliament and global policy makers. Indeed, I suspect that there is even a limited amount those institutions can do: it is inherent in the capitalist system that it will have booms and busts. I suspect you may just as well try and cure the weather system to prevent tornados and flash floods as to try and mend the financial system by preventing bubbles and crashes.

5. Like the courts, the financial system is devised and run by people, so it is inevitable that there will not only be idealism, planning, honesty and intelligence, but also short-termism, greed, errors, collective hysteria, for these are all ineradicable features of the human condition. Failure to recognise that fact will lead to error. That is not to say that there is nothing to be done. On the contrary. It does mean that one's aims and one's solutions have to be realistic – preferably simple, tested, coherent and practical.

6. It may be the case, for instance, that regulatory structures will in due course have to operate in a somewhat more robust manner than previously. The FSA (or its successor if it is replaced) may well take a different approach to regulation than heretofore. Regulation may well adopt, not only a more critical, but also a more risk-

7. Increased regulatory scrutiny and a more risk-averse climate may well see an increase in the number of claims for negligently managing investments or companies, for providing negligent financial advice – or even dare I say, for negligent legal advice. (On the other hand, risk aversion may reduce the enthusiasm for suing, but I doubt it.) The same must also be true in the criminal sphere. Greater regulatory scrutiny might well bring to late matters that require investigation and prosecution by the SFO. Both courts and lawyers will have to consider the implications in terms of costs, court time and complexity. In doing so, the courts can, and must, ensure that they provide an effective means to ensure that what Professor Sen describes as '*redressable injustice*' is indeed redressed through the efficient and effective determination of civil claims and criminal prosecutions. The question that I want to look at today though is how best the civil courts can do so, in relation to claims arising out of insolvencies and claims for losses arising out of the credit crunch. In addressing this question I eschew the issue of costs. Not because it is a tricky issue – we all know it is – but because the best man to shed light on this issue – Sir Rupert Jackson – is, as we speak, working hard on his final report into costs. I await that report – publication copies available in January 2010 I believe – as I am sure do you all.

8. Having side-stepped costs, I turn to delay. We have to minimise the delay between issue of proceedings and ultimate resolution, the vice which Bleak House is famous for attacking. Consider a claim arising from the 1998 Russian debt crisis, *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1886 (Comm). As Mrs Justice Gloster put it in her judgment at [15] – [16]:

> "*On 9 April 2001 Chase issued its claim … against Springwell,... .. Springwell counterclaimed for damages and compensation arising out of Chase's alleged failure properly to advise it in relation to its emerging market investments. The counterclaim also included the allegation that, for about a year, Chase had acted dishonestly in mis-selling Springwell certain investments.... These claims in fraud and dishonesty were persisted in for six years, but … were [largely] abandoned shortly before the start of the trial. …*
> *[T]he trial of this case began on 17 April 2007 and concluded on 17 October 2007, after some 68 days in court. …. I received roughly 232 pages of written opening submissions, and over 520 pages of closing submissions, from Springwell, together with numerous appendices. I received roughly 81 pages of written opening submissions, and over 2,310 pages of written closing submissions, from Chase, again with various appendices. The … trial bundles ran to … some 390-odd lever arch files in all, including some 22 lever arch files of authorities...*"

9. Gloster J's summary here highlights a number of important points. First, it strongly supports the view that claims arising out of the present crisis may well take a number of years to reach judgment. Secondly, they are likely to be legally and factually complex. They will no doubt involve a number of different claims: negligence, misrepresentation, breach of contract, breach of fiduciary duty perhaps as in the *Springwell* case, allegations of fraud and dishonesty. Thirdly, they will almost certainly give rise to cross-border issues. Fourthly, they will be very costly. The *BCCI* liquidation is even now not complete, and it started over 18 years ago The ramifications of the Madoff scandal will no doubt fuel litigation in many countries for many years to come. They will also, again almost certainly, require large quantities of oral, documentary and expert evidence as well as detailed and lengthy submissions.

10. Investor claims are only perhaps the tip of the iceberg, and if the press is to be believed the potential claim RBS shareholders' action group at £9bn points to how large the iceberg may well be.[2] On the commercial side, we are likely to see an increase in securities claims. Insurance and reinsurance work is bound to increase. We may well see claims arising out of commercial property deals, from debt finance agreements where parties seeking, for instance, seek to rely on defaults or on material adverse change clauses. We may well see misrepresentation claims or negligent advice claims relating to securitisation and allegedly over-optimistic property and asset valuations. Claims for and against pension funds are likely. Commercial property deals won't be the only property deals that will no doubt arise. Home loans – mortgage claims will no doubt be considerable. The list of potential litigation goes on.

11. We will undoubtedly see insolvency, bankruptcy and restructuring work increase. Such work will focus on both domestic and international issues. It will no doubt be as legally and factually complex as litigation can be. It will have an effect on very many people. The administration of Kaupthing, Singer & Friedlander Ltd in October 2008, which involves creditors claims running into the billions is an obvious case in point. Ensuring that KSF's assets are maximised in the administration will undoubtedly give rise to a multitude of considerations and claims, potential and actual over the coming years both here and abroad. Difficult questions of jurisdiction will no doubt arise. Such issues are, of course, already arising in respect of claims arising from the Lehman Brother's bankruptcy.

[2] http://news.bbc.co.uk/1/hi/business/8300539.stm

12. All of this suggests to me that, despite recent reports that '*[domestic] litigation has failed to reached epidemic proportions*', it will increase and will do so even if it hasn't as yet increased at the pace it has in, for instance, the United States.[3] And it will be more complex than ever before. This increase will also arise, crucially, in an environment which had already seen an upturn in litigation. As Reynolds Porter Chamberlain noted, commercial cases before the High Court increased by 25% in 2006. This was after six years of decline.[4] The litigation environment over the coming years will be a testing one for us judges, as well as for the lawyers and litigants.

13. So the justice system must work on the assumption that the volume, and indeed the complexity, of claims is likely to increase, and do so significantly over the coming years. There will be insolvency law disputes, some of which will already be the subject of issued claims, and many others will be near to issue. On the other hand some investor claims, for instance, may well not find themselves before the courts for some years to come. Equally, there will most likely be a large number of claims that will take a number of years to reach trial once issued. But I can readily imagine that there may well be very many such claims and that they will reach the courts.

14. Structured products going wrong is an example. Initially, there is the problem as to how to deal with the immediate consequences of insolvency as between failure and winding up – pay as you go or *pari passu*? There have already been, I believe, at least five cases on that issue, most of which have gone to the Court of Appeal, and one is

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[3] Dowell, *Altogether now'* The Lawyer, 07 October 2009 (http://www.thelawyer.com/altogether-now/1002214.article)

[4] Cited in Sweet & Maxwell, *Boom in credit crunch litigation puts expert witnesses in short supply*, (22 September 2009)

noted that a total of around £38bn had been invested in structured products.

15. Also last week, following a trend in the US, a second UK institution, Burford Capital, announced it had set up a fund (in this case £80m) to underwrite the costs of legal proceedings to be brought by those who have lost money as a result of financial institutions' activities, misjudgements, fraud and the like. The motive is, of course, not charitable; Burford will share the proceeds of its investment made by funding the legal costs. Some years ago, this would have probably been prohibited in this country. Such a transaction between funders and litigants would, to use a rather quaint expression, "smack of maintenance and champerty". But the law on this topic has become more relaxed.

16. The traditional view was that such arrangements should be stopped, as they encourage litigation and could represent the "thin end of the wedge", leading to litigation being bought and sold. And in many of these cases, there will be many potential claimants, so the costs liability of each of them would normally be manageable, even if the claim fails. But the current, better, view is that, on the contrary, that, particularly after ten years of reducing civil legal aid, and especially where the claim is purely financial in nature (as opposed to, say, personal injury or clinical negligence), it is right to enable such litigation for people who have lost

t least the claimants would recover a large proportion of what they are entitled to.

17. It is interesting to note that Burford anticipate that, initially at any rate, the money will be used to fund litigation on US and international arbitrations. That suggests that the UK is either less fertile ground for such litigation, or the spate of claims is taking more time to get off the ground. Either way, these litigation funders are going to serve to increase the volume of litigation even in this jurisdiction.

18. I think and hope we have the Judges to cope with the work, but it is worth pointing out that the Chancery Division, where insolvency related issues are normally dealt with, has eighteen full-time Judges, and has a volume of work which necessitates five or six deputy judges (i.e. part time judges who are practising lawyers) most days. If the volume of work were significantly to increase, something would have to be done to change the present situation.

19. New York has specialised bankruptcy judges to deal with insolvency-related claims. It has been suggested that we should do the same. I do not agree. We already have the bankruptcy registrars, who deal with small and relatively routine insolvency claims, and the Judges of the Chancery Division are all familiar with the insolvency laws and practice (and if, like me, they were not familiar with those matters on appointment,

insolvent companies under the Chapter 11 procedure. I do not see that coming here.

20. Our philosophy is slightly different from that on the other side of the Atlantic. They are, I think, interested in saving the company as well as the assets and the business, whereas we concentrate on saving the assets and the business. However, it is fair to say that, with the introduction of the administration system little more than 20 years ago, we were to an extent, following the US example. Until then, saving the business as a going concern had not really been part of the insolvency law culture in the UK. So it is not impossible, particularly with the cross-border element assuming ever increasing importance, that we will follow the Americans down the road of seeking to save the company as well.

21. There are not only procedural and philosophical differences between the US and the UK on insolvency issues; there are, of course, also significant differences in the substantive law. These differences will probably be highlighted as a result of current conditions and problems. It is inconceivable that the present financial climate will not result in an ever increasing amount of cross-border insolvency actions, as well as other cross-border litigation. Legislation, precedent, international treaties, judicial comity and co-operation across borders will be something that we will all have to become familiar with – or perhaps I should say even more familiar with. Parties and courts will have to work together to ensure that cross-border claims, that jurisdictional conflicts and parallel proceedings can be dealt with properly and efficiently. Technology is likely to play an important role here.

22. There should certainly be dialogue between courts. The traditional ways of communication through letters of request, and judgments, is not very satisfactory: it is almost as if the UK ambassador in Washington was still having to communicate with the Court at St James's by letter carried by ship. The dialogue I am referring to is two-way discussion on the telephone, by video-link, or even, I suppose, face to face. The extent to which two judges in different jurisdictions can discuss matters in the absence of the parties is a matter of debate. If a domestic two-judge court is a fair analogy, then they should be free to do so, but I suspect that it is not a fair analogy, as each judge is ultimately deciding what is right in his or her jurisdiction. And the issue at stake may go on appeal. So the parties should probably be present, or at least provided with a transcript.

23. Indeed, it may well go further than cross-border dialogue. I suspect that we will start to see joint hearings across borders via videolink. We may very well see a dialogue between courts in, say the US and England and Wales, by way of such video links, with the parties before one court but making submissions to both simultaneously and with both courts ruling at the same time, as Barrett J of the Supreme Court of New South Wales as recently suggested.[5] Will we see the development of new co-operation protocols between states and courts, under the auspices of UNCITRAL perhaps? Whatever developments there are, it is apparent that the courts and lawyers both here and abroad will have to innovate. They will have to adapt to the changing times and the nature of litigation arising from financial events unprecedented in the breadth, complexity and magnitude.

[5] Barrett, *Thoughts on Court-to-Court Communications in Insolvency Cases*, Closing address to the Current Issues in Insolvency Conference (31 July 2009) University of Sydney.

24. The most sensible starting point should in very many cases be a proper consideration of how to avoid litigation. Litigation can be expensive, effort-diverting and drawn out, and it is particularly likely to be so when the case raises complex factual, technical and legal issues, and, human nature being what it is, when there is a lot of money at stake. Litigation is also often fraught with uncertainty; even when the facts are agreed, the expert evidence may conflict, opinions may differ, and, although I do not enjoy admitting it, the law is often unclear: even if the House of Lords have unanimously pronounced on a point, the decision may be arguably distinguishable, wrong, or overtaken by new developments in, for instance, statute law. And when the facts are not agreed, uncertainty is normally even greater. Expense, delay, diversion of effort and uncertainty are four things which many parties involved in credit-crunch claims can ill-afford. The wider business interests of both parties to a potential claim may suggest that a reasoned, dispassionate, early, relatively cheap assessment might well produce a settlement. Protracted litigation is often of benefit to no-one except the lawyers. Equally, it might be in the interests of one or both parties not to have a determination of the legal issues involved; not least due to the potential effect such a determination might have in respect of other potential claims. A disputed boiler plate clause in a commercial contract might, if given a definitive interpretation by the courts, have a much wider impact for the immediate parties than the case in hand. Wider commercial considerations might well outweigh immediate considerations. In such circumstances as all these litigation may well not be the answer. Or at least, it may, or rather should not be the first answer offered to litigants by their legal advisors.

A lot has of course been said about the importance of ADR in recent times by Lord Phillips, Lord Clarke, Sir Alan Ward, Sir Henry Brooke, and Sir Gavin Lightman. Its importance was, of course, underlined by Lord Woolf in his two Access to Justice reports. I am conscious that, like me, they became Judges before mediation had really come on the scene in this country. However, in many ways, that emphasises the value of mediation. I believe that there will be many cases where it will be right for parties and their representatives to consider ADR in its various forms. They should do so during the pre-action stage of litigation. They should consider it after proceedings have been issued. And they should continue to consider it while the claim progresses to judgment. It is often said that it is never too late to settle. Equally, in some cases it may well never be too earlier to settle. A lot of course will depend on the nature of the claim. But in the field of commercial litigation I can see no good reason why parties should not routinely, in almost all cases, consider adjudication, arbitration or some form of mediation. I suspect that in many cases this is already second nature to many commercial lawyers; not least those faced with the type of commercial considerations I outlined earlier. For those to whom it isn't yet second nature, it ought to be.

26. Of course, not all cases will be suitable for resolution through ADR, and, because of the character or relationships between the parties, not all cases that are suitable will settle. Even the most passionate advocates of ADR must accept that. What then for those claims that are issued and must progress to trial and final determination?

27. The first issue here it seems to me is one which will require the parties to engage in a properly planned and executed pre-action stage. Most firms already manage claims properly pre-action. There is always however room for improvement. The efficient

[6] The increase in banking litigation has, it is reported, meant that experts are having to turn work down as they are already committed to as much as they can handle.[7] If this is happening now, we can well anticipate the consequences later on when more claims arise in many different areas.

28. Law firms will have to ensure that the conduct of claims is properly planned right from the moment the client walks through the door. If they fail to, they may well be unable to secure the services of the right expert at the right time: delaying the progress of the claim, or an arbitration or adjudication, unnecessarily. Equally, I would hope that law firms, working with the court during the active case management face of litigation, take such steps as are necessary to ensure that claims progress efficiently and cost-effectively. I can see no reason why each claim should not progress consistently with the approach taken by those who instructed in the *Springwell* case. As Gloster J put it at paragraph 742 [!] of her judgment:

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[6] Dowell, *Altogether now*' The Lawyer, 07 October 2009 (http://www.thelawyer.com/altogether-now/1002214.article)

[7] Cited in Sweet & Maxwell, *Boom in credit crunch litigation puts expert witnesses in short supply*, (22 September 2009)

". . . I could not end this judgment without complimenting the respective legal teams on both sides as to the exemplary way this long and complex commercial trial has been conducted. The presentation of evidence and argument was concluded within the indicated time limits. The written arguments, although perhaps tending on occasions to be overly long, were of invaluable assistance, and I express my gratitude for the assistance which I have received from them. The use of information technology was highly efficient. Whilst, with the benefit of hindsight, I consider that it might have been preferable to have tried some key issues as preliminary issues, that is perhaps an easier call to make at the end of a trial, rather than at the beginning. Finally, and importantly, I should also say that, although this was a hotly contested case, raising difficult, and, at times, unpleasant issues, the clients who participated in the trial process, were unfailingly polite and courteous, not only to the Court, but also to opposing counsel."

29. Gloster J's judgment underlines an approach that should I think be taken in all claims. It becomes a particular imperative however when the number of claims increase, and they are of increasing degrees of complexity such that they carry the potential to take up ever greater amounts of court time. It does because court time is a finite resource. As with all finite resources it has to be shared fairly and equitably between all those who have a claim to it. The only real way that can occur, consistently with the overriding objective, is if both the courts – that is to say judges – and litigants and their advisors accept that there are genuine limits on the amount of time that the court can properly spend on each claim. It seems to me that this must mean that reasonable time limits must be set and adhered to. There must be genuine co-operation between the court and the parties.

30. Parties are, of course, required to co-operate in the progress of claims in order to further the overriding objective. Expert evidence should be obtained in good time and should be confined to the real issues. This will, of course, require the parties to focus their attention on the real issues. It will require them to make proper concessions. Skeleton arguments should remain skeletal. They must focus on the issues and not descend, as some have a tendency to, into academic discussions.

Submissions and questioning must be properly focused. They must stick to the point.

31. I accept we must be realistic. Complex claims will always lead to complex litigation, and complex litigation will inevitably involve blind alleys and what turn out to be mistaken or misconceived allegations or procedures. As Gloster J said, one can always see how an outcome could have been achieved quicker and cheaper once one has got to the end. So I am not advocating a counsel of perfection, only a sensible and proper way to conduct claims. The civil justice system cannot afford the luxury of any other approach. Proper planning and case management are it seems to me as pressing concerns as they ever have been. And while the CPR encourage judges to be proactive, the primary duty has to lie with the lawyers, who know the details of the case in a way a judge will not, at least until the hearing.

32. I started off by referring to the need to ensure that, insofar as it can, the justice system is able to ensure that manifest injustice is capable of being redressed. Otherwise you might ask, what is the justice system for? The justice system has not yet had to cope with the influx of all the potential claims that could arise from the credit crunch. It is likely to do so over the coming months and years. When it does it will need to assistance and the co-operation of the parties and their lawyers if it is to ensure that justice can be done and be seen to be done. Proper case management will be essential. Proper consideration of alternatives to litigation will be essential. And, when it comes out towards the end of this year or the start of next year, proper consideration of the Jackson review's proposals regarding the costs of litigation will need to be given. I await those conclusions. But in the meantime, if we are to ensure

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[8] Sen, *The Idea of Justice*, (Allen Lane) (2009) at vii.