

Twenty Years a Judge: Reflections and Refractions

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1. In autumn last year, I chalked up 20 years as a judge and in autumn this year I will have become an ex-Judge. And, as my judicial adventure nears what property lawyers sometimes call its *terminus ad quem*, I thought that, in the best traditions of the civil service, it might be worthwhile to start thinking about lessons learned. Although, on reflection, it may be more propitious to use another expression because I have observed that lessons learned tends to be invoked as a method of deflecting blame after a disaster.
2. Some judicial careers are monochromatic while others are technicolour. A number of judges start and end their careers as trial judges – and none the worse for that; in my early days at the Chancery Bar, Sir John Pennycuik and Sir Robert Megarry (who will feature more than once in this talk) appeared to be outstanding judicial figures, and I think that most people would confirm that assessment. By contrast, I have had a relatively peripatetic judicial existence, and I hope you will not think it excessively self-centred if I consider the judge's role through the prism of that career.
3. The move from barrister to judge is self-evidently the biggest change, as it involves a fundamental functional shift. I found the change from poacher to gamekeeper relatively easy, at least in front of house. In each case, one was performing (in both senses of the word) a well-defined role whose rules and parameters were well established – and each role involved performing in the same sort of play on the same stage as before.

Additionally, the former role involved interacting with and observing over many years someone who was performing the new role.

4. Nonetheless, running a trial involves a relatively steep and occasionally (especially when giving an *ex tempore* judgment) exhilarating learning curve. It requires certain basic qualities, grip, authority, politeness, fairness, and an ability to simplify and an ability to express yourself. However, subject to that, each judge brings to the role his or her own particular character, and, subject to possessing and using the necessary qualities, a judge, like an advocate, does best by acting in character. In many ways, running a trial is like chairing a rather tense and rather formal meeting.

5. Behind the scenes, I found it a bit harder to adjust. Being a first instance Chancery Judge in the Royal Courts of Justice was much lonelier than being a barrister in chambers. With one court per floor, the Thomas More Building, where the Chancery Judges were housed, suffered from all the social drawbacks of a high-rise. If the then-newly appointed (and now late, lamented) Nicholas Pumfrey had not moved into the court above me a year after I started, I would have been very lonely indeed. But things are better now. The Rolls Building may be less imposing than the RCJ, but the internal design of the judiciary's area is somewhat reminiscent of Jeremy Bentham's Panopticon, albeit that the judges have privacy in their own rooms. However, the work of a High Court Judge, then as now, was fascinating and important. The role was very rewarding - provided that you at least didn't mind making decisions, and you liked writing judgments.

6. The powers of first instance judges in our common law system are different from those of their civil law counterparts. They have less power in the sense of trial management. Unlike many of their civil counterparts, they traditionally act as disinterested uninvolved umpires: for instance, they have no power to compel oral or documentary evidence off their own bat¹. Following the Woolf and Jackson reforms, trial judges are being given more powers in terms of trial and costs management, but their role remains detached from the fray. On the other hand, given that precedent has no or limited application in a civil law system, common law trial judges have both less power and more power when it comes to making law than their civil law counterparts. On the one hand, they are bound by precedent, but on the other hand their decisions on legal points become part of the law of the land², at least until it is reconsidered on appeal. But, when it comes to findings of fact, because appeals on fact are so difficult to mount in our system, unlike in most civil law systems, a common law trial judge's conclusions are very likely to be final. And, after a few trials, one comes to appreciate that making findings of fact, even in a moderately complex case, is often difficult. Each party's case often has holes and inaccuracies, and most witnesses who are not telling the truth are not actually lying, but have misremembered or have persuaded themselves of the truth of what they are saying.

7. Any trial judge worthy of the role quickly becomes conscious and worried about the level of litigation costs in this country. Of course most practising lawyers are aware and often concerned about costs. However, as their overriding concern is to do the best for their clients, and (I do not say this critically: it merely reflects human nature) as they benefit from the high level of costs, the concerns of lawyers on this topic are rather less acute

¹ *In re Enoch and Zaretzky, Bock & Co's Arbitration* [1910] 1 K.B.327, *Jones v National Coal Board* [1957] 2 All ER 157, 159

² *Willers v Joyce (No 2)* [2016] 3 WLR 534, para 9

than those of judges, anxious to do right by the parties and to ensure the rule of law and access to justice.

8. The high level of litigation costs coupled with a shrinking legal aid budget has led to an increase in the number of litigants in person in civil and family cases. Particularly in a common law, adversarial, system, there is a real risk of this reducing access to justice, the quality of justice, judicial well-being and court efficiency. It remains to be seen what the long-term effect of the increase in litigants in person will be, but it has already started drawing judges into assisting or at least focussing litigants in person, but this involves getting off the umpire's chair and stepping onto the court. This leads to longer hearings, which in turn leads to more delays in other hearings. Furthermore, with the Woolf and Jackson reforms and their equivalents in the Family Division, judges in this country may be developing an ever-increasing inquisitorial, civil law, function.

9. After seven years as a trial judge, I found myself having the rather heretical view as to the ways in which litigation costs could be reduced. It seemed to me that the value of the expensive and well-established practices of disclosure of documents and of cross-examination of witnesses was highly questionable. I am very sceptical about the notion that many cases are decided by a "smoking gun" found on the often enormously time-consuming and expensive exercise of disclosure and inspection of documents. Of course, any lawyer will point to one or two such cases in which he or she was involved. However,
 - (i) I suspect most of those cases would have been decided the same way and more cheaply without disclosure,
 - (ii) further down the litigation road, apparently smoking guns frequently turn out not be smoking or even guns, and
 - (iii) I question whether the odd case

where full disclosure really has made all the difference justifies the pointless expenditure in the countless other cases where it makes no difference.

10. As for cross-examination, most of the best points that emerge from questioning can be made much more shortly in argument. I am very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions. Honest people, especially in the unfamiliar and artificial setting of a trial, will often be uncomfortable, evasive, inaccurate, combative, or, maybe even worse, compliant. And our assessments of people are inevitably based on our particular experiences and subconscious biases. Sometimes it might appear that factual disputes are being resolved by reference to who calls the best-performing witness, not who calls the more honest witnesses. Indeed, there is an argument for saying that, at least in some cases, it is safer to assess the evidence without the complicating factor of oral testimony.

11. Of course, both these points are based on impression and experience, and at best on anecdotal material, whereas in the present world of evidence-based assessments, one would hope for a statistically reliable analysis. I suspect that it would be hard to devise a practically feasible experiment which could convincingly establish whether my impressions about the value of disclosure and cross-examination are correct. But it might be interesting to try and devise an experiment, and it would be fascinating to see the results.

12. Whatever one's view of cross-examination and disclosure, I believe that it is fitting that the trial judge is, within the parameters of rationality, the final arbiter of fact. The poor

prospect of appealing against a trial judge's findings of fact assists the cause of finality and it provides some capping of costs. That is because it should ensure that the parties put their all into the first instance trial rather than treating it as some sort of expensive dress-rehearsal. And it helps ensure that our already-overburdened Court of Appeal is not landed with a mass of appeals on fact with hundreds or even thousands pages of transcripts of evidence.

13. Talking of the Court of Appeal, one of the features of becoming a judge is that your legal opinions are subject to public assessment. A barrister who loses a case can always say that he told his clients that they would lose or that the judge made a mess of it. Neither escape route is open to a trial judge whose decision is overturned by the Court of Appeal. As Sir Robert Megarry said in a judgment³: “No human being is infallible, and for none are there more public and authoritative explanations of their errors than judges”.

14. Indeed, it is not merely when you are appealed that your judgments are publicly scrutinised by other judges. In our precedent-based system, you may find your judgments being cited in argument in later cases, and then being considered by other judges. Sir Robert Megarry again comes to mind – this time of his valedictory when retiring from the Bench. Having explained that many of his judgments had been cited in appellate tribunals, he said that he had been recorded in headnotes of Court of Appeal decisions in the law reports as being “upheld”, “reversed” “distinguished”, “approved”, “considered”, “overruled”,

³ *Erinford Properties Ltd. v Cheshire County Council* [1974] Ch 261, 268 A-B.

“disapproved”, even “doubted”, but that he had “never, but never had the indignity of being ‘explained’”⁴.

15. When I was reversed, I could never make up my mind whether it was better to think “yes, I see where I went wrong: *they* are right”, or “no, they’ve got it wrong: *I* was right”. And, in truth, there is rarely any opprobrium in being reversed. The first time I was reversed, the judgment was given by Lord Justice Mummery, who characteristically got in touch and said that I should not take it amiss: the Court of Appeal saw many excellent judgments which they nonetheless overruled. When I got to the Court of Appeal, I discovered that this was true; I also discovered that the Court of Appeal saw quite a few poor judgments which they nonetheless upheld.

16. That brings me to the next stage in my judicial career. Promotion to the Court of Appeal represents quite a change. While there is the initial elation at not having to deal with witnesses and manage trials, most appellate judges miss not seeing and assessing witnesses and juries, and regret never having to preside over a trial again. More immediately, the big change is in your role. From running things on your own, you have to adjust to being number three in a committee. But it has the compensating advantage that one can learn from watching one’s colleagues in court. I found myself in the Court of Appeal, particularly early on, seeing what the presiding judge did or said and thinking “I wouldn’t have done that” or “I wouldn’t have done it in that way”. As with watching other advocates when I was at the bar, I often ended up thinking “But I would have been

⁴ I cannot trace this one, but I have heard it from a number of barristers who were present. It is the sort of thing Megarry would have said.

wrong”. In other words, one had an opportunity to learn from other, more experienced judges and improve what might be called one’s appellate judgecraft.

17. Sitting in the Court of Appeal of course involves a more collegiate role than sitting as a trial judge. The dynamics between you and your other colleagues in and out of court inevitably depends on their particular personalities – and yours. A hearing tends to take its character from the presiding judge, although sometimes, especially when the issues are within the particular expertise of one of the other two, the presider may in practice yield the floor to the expert. But again that depends on the personalities involved. One quickly learns that different judges have different attitudes to reading the papers ahead of the hearing, which does not make life easy for appellate advocates. In a talk given a few years ago, I mentioned that some Judges, whom I called Pre-Raphaelites, read the written material very carefully ahead of the hearing, while others, whom I dubbed Impressionists, adopt a more light-touch approach. I incautiously admitted to being an Impressionist, and a few days later a national newspaper carried an article with the headline: “Britain’s most senior judge admits that he doesn’t read all papers in a case”⁵.

18. The mood of a hearing in the Court of Appeal tends to be more hurried than that in the House of Lords which was my next port of call. That is scarcely surprising: with the welter of immigration appeals and indeed of applications to appeal against first instance judgments generally, the pressure of work, in terms of the sheer number of cases per judge, in the Court of Appeal is substantially greater than in the House of Lords, and that remains the case with the Supreme Court. Having said that, the pressure in the House of

⁵ <http://www.telegraph.co.uk/news/uknews/law-and-order/11028942/Lord-Neuberger-Britains-most-senior-judge-admits-he-doesnt-read-all-papers-in-a-case.html>

Lords was greater in the sense that the Law Lords were conscious that they were the last port of call, with the responsibility of definitively laying down the law.

19. In some ways the move from the Court of Appeal to the Appellate Committee of the House of Lords was a small one: you became one of five rather than one of three, but the basic function was the same: membership of a common law judicial appellate panel. However, the move from sitting in a court in the familiar legal world of the RCJ near the Inns of Court, to sitting in a committee room in the political environment of the House of Lords and Westminster required some mental adjustment. The seminar atmosphere which involved the Law Lords sitting in suits at the same level as the advocates, unlike the Court of Appeal where judges sit in robes at a physically higher level than the advocates, was a novelty. And a realisation that you were in the top court carried with it feelings of both achievement and responsibility, self-congratulation and self-doubt. More prosaically, the Law Lords did not discuss the case amongst themselves until the argument was finished, whereas in the Court of Appeal there was always a pre-hearing discussion. Similarly, allocation of the lead judgment was done by the presider ahead of the hearing in the Court of Appeal, whereas it was done after the post-hearing discussion in the House of Lords.

20. The fact that the UK's top court was part of the legislature was thought by many to offend the principle of separation of powers, as developed by Montesquieu, on a somewhat idealistic notion of the 18th century UK constitution⁶. While the idea of a UK Supreme Court had been mooted in some quarters for many decades, its time had come by the early

⁶ Montesquieu, *The Spirit of the Laws*, Book 11, Chapter 6, "Of the Constitution of England"

21st century⁷, possibly assisted by the introduction of Convention rights into our legal system.

21. Accordingly, in October 2012, my eleven colleagues relocated from the House of Lords to the new Supreme Court, eleven Lords a-leaping over Parliament Square, while I trudged back to the rather buzzier Court of Appeal, as Master of the Rolls. My colleague in the House of Lords, Lord Brown, teased me by saying that the MR's function was really that of a glorified judicial assistant, as he simply prepared a note, albeit in the form of a judgment, for the Supreme Court to consider when a case got to them. Like many statements made in jest, it has some force: the MR takes many of the most significant cases in the Court of Appeal, and it is only the most significant cases which go to the Supreme Court. However, a large number of important cases do not go further than the Court of Appeal, and that court has many more cases.
22. One of my tasks as MR was allocating appeals among colleagues. At least in my view, this involved ensuring that there was at least one, and normally two, judges who knew about the topic involved and at least one judge who was able to bring a relatively fresh mind to bear on the topic. It also involved trying to ensure that every member of the court got a fair share of interesting and high profile cases. I also thought that the MR should hear many of the more important appeals, and sat with all members of the court over the year. I had to keep an eye on delayed judgments and tried to ensure that my name was never on that list.
23. Unsurprisingly, not much had changed in the court work in the RCJ in the short time I had been away. However, what I did discover, as a result of having what is now called a

⁷ The Constitutional Reform Act 2005

leadership role, was the enormous change which had been wrought on the functions of senior English and Welsh judges as a result of the Constitutional Reform Act 2005. Even as recently as when I had become a judge in 1996, the Lord Chief Justice had very limited administrative responsibilities, as is demonstrated by the fact that working for him were one secretary and one clerk. With the abolition of the traditional Lord Chancellor's role as head of the judiciary, the Lord Chief Justice was given a veritable empire of responsibility (albeit partly shared with the Lord Chancellor), organising (both administratively and financially) the judges, the courts, judicial education and judicial discipline, and in an era of change, tight money and IT. The LCJ's role was almost immediately expanded with the absorption of the magistrates and tribunals into the judiciary. And, of course, the LCJ is expected to sit on important cases, as well as sitting outside London.

24. This has inevitably meant that other senior members of the English and Welsh judiciary, from the Master of the Rolls downwards, have also been landed with substantial managerial and leadership roles to a degree which would have been unimaginable fifteen years ago. The consequence is that senior judges have jobs with greater pressures and requiring a much greater mix of skills than previously. And this is at a time when the traditional workload on judges at all levels has increased substantially thanks to the sheer pressure of cases, various reforms to litigation procedures (such as Woolf and Jackson in the civil field), the reduction in legal aid, and numerous other developments. A judicial career still seems immensely rewarding to the great majority who do the job, but there is no doubt that the heavy workload of a judge coupled with the increasing gap between judicial pay and the rewards of successful private practice means that appointment to the High Court is significantly less attractive than it was.

25. Of course, there have always been first class advocates who have not wanted to become judges, and not all of them would make first class or even particularly good judges. But the proportion of refuseniks is increasing, and while it is not yet, it could become a real problem if it continues. The concern is not only that it will undermine one of the two fundamental pillars of our society, the rule of law, if we do not have a first class judiciary. It is also because a first class judiciary underpins the whole financial and professional services industries which are so vital to the fortunes of this country, perhaps particularly in the post-Brexit world.

26. A more positive development is the accelerating endeavours to achieve greater diversity in the senior judiciary. (My reference to senior judiciary is not meant to belittle the rest of the judiciary: on the contrary, it is largely because diversity is so much better in the tribunals and magistracy that I concentrate on the higher echelons). We should look outside the independent bar, and expand our recruitment to solicitors, employed lawyers, academics and any other group where one could realistically expect to find potential judges. And the serving judiciary should be encouraging members of under-represented groups, women and ethnic minorities are obvious examples, to apply. This is true at all levels of the judiciary. The Supreme Court, which is notably undiverse, is about to start recruiting new members, and we are trying our best to have a wide a pool of candidates as possible. That said, merit (albeit a slightly slippery concept) has to be the ultimate standard by reference to which successful candidates are selected to be judges. The primary duty to the country of any judicial selection panel is to select the best qualified candidate for the post: to dilute the quality of our judiciary would be to erect a milestone on the road to perdition. But, of course, merit and diversity are not mutually exclusive: on the contrary.

27. I also became closely involved with judicial recruitment and promotion for the first time on becoming MR. And, of course, that was another aspect of judicial life which had changed greatly as a result of the 2005 Act. The Lord Chancellor's tap on the shoulder may have been understandably thought to be unacceptably secret and clubby in the 21st century world, but it was speedy, cheap and efficient. Selection and promotion of judges is a far more bureaucratic and time-consuming process now, and it can take up a remarkable amount of senior judges' time. This is intended neither as a suggestion that we return to the old system, which would be quite inappropriate, nor as a criticism of the Judicial Appointments Commission, who have done a lot of good work.

28. After three years as MR, I moved into my present post of President of the UK Supreme Court. I found an organisation whose powers and formal procedures were largely unchanged from the Appellate Committee I had left three years earlier, but whose internal character and public profile were very different. I have talked publicly about the Supreme Court before⁸, so I will summarise the changes. The Supreme Court undoubtedly has a clearer identity to the world, and indeed a clearer self-identity, than the Appellate Committee, thanks to its new title, and, even more, its own building and its dedicated staff. It is far more publicly accessible, both physically and electronically, and we are now free to choose how to present our work to the public. We encourage the public to attend our hearings and to visit the building for guided tours whether or not a court is sitting, including open days. Virtually every case is live-streamed on our website, and there is a written case summary available on the website - and in hard copy for people coming to watch the argument, and every judgment is accompanied by a clear summary of the facts, issues and decision, available on line and in hard copy, and there is a shorter televised oral

⁸ The Role of the Supreme Court Seven Years On – Lessons Learnt: Bar Council Law Reform Lecture 2016, <https://www.supremecourt.uk/docs/speech-161121.pdf>

summary. Our Twitter service informs any follower of forthcoming judgments, as well as speeches and other events involving any of the Justices. And the Justices give many more talks and lectures and visit many more schools and universities than the Law Lords did. Internally, we discuss cases and draft judgments much more than the Law Lords did; thus, we now always have a pre-court meeting to discuss the forthcoming appeal.

29. The unusual degree of public interest in the *Miller*, or *Brexit*, case⁹ led us to take additional measures. The proceedings in court room 1 were screened in our two other court rooms which represented an overflow for the many members of the public who could not be accommodated in court 1. Infographics setting out the legal procedures during and after the hearing, and announcing the hand-down of the judgment, were posted on social media, and of course the hearing and the hand-down were live-streamed as usual (though extra care was taken to ensure sufficient capacity to cope with the greater than average number of viewers).

30. I also made the decision that all eleven serving Justices should sit *en banc* - the largest panel since the Law Lords were created in 1876. Sitting in panels of five, occasionally seven, very occasionally nine, enables us to get through around twice as many cases as we otherwise would. And hearings with five judges are normally more manageable both for the judges and for the advocates. A system in which all the judges of a particular court do not regularly and exclusively sit together has real benefits. I suspect that judges' outlooks will become more entrenched if they are always sitting with the same colleagues rather than if their fellow judges are subject to a degree of variation. And ensuring that Justices sit in different combinations, rather than in a single immutable group, is good for

⁹ *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

intra-judicial collegiality. Further, I suggest that a limited degree of variation in the identity of the membership of appeal panels, by permitting any five (occasionally more) from twelve Justices, represents a good balance between consistency and diversity.

31. Nonetheless, bearing in mind the intense public interest in the case and also in the Supreme Court itself, it seemed to me appropriate that all the Justices sat on *Miller*. Sitting a full panel was important to ensure that there was public confidence in the legitimacy of the decision, particularly in the event of a close decision. As it was, we were split 8-3, and, as I am glad to say is standard in the UK Supreme Court, disagreement between Justices, even in a high-profile case, and even where strong feelings are engaged, in no way undermines the good relations and mutual respect that exist between the members of the Court. Thus, although I did not agree with the leading dissenting judgment of Lord Reed, I thought it a very impressive piece of analysis, and indeed we in the majority described it as “powerful” in our judgment¹⁰. The maintenance of mutual respect between Justices of the Court, both internally in fact and externally in public utterances, seems to me to be essential for maintaining a good working environment and public respect for the court and its decisions.

32. I have always been much taken with Lord Asquith’s famous dictum that the role of the first instance judge is to be quick, courteous,¹¹ and wrong, which is not to say that the Court of Appeal should be slow rude and right, because that would usurp the function of the House of Lords. It is perhaps worth seeing where the Supreme Court is on the Asquith

¹⁰ *Miller*, para 77

¹¹ The Oxford comma – of which I am a supporter, and it is particularly appropriate for a speech given in Oxford

scale. We are undoubtedly less slow than the Law Lords were in terms of the length of our hearings, although we are slow compared with the appellate courts in mainland European countries and the United States. There, appellate hearings seldom last longer than an hour, and some appeals are dealt with on paper only. By contrast, our appellate hearings, often last a day, and in complex cases can last longer. In my experience, the absolute maximum is four days, and that would almost always be a case with more than two parties and with many points. The *Miller* case is a recent example: we heard from a total of thirteen advocates, and there were two main issues and around six sub-issues. The notion of an appellate hearing lasting sixteen days, which was still happening thirty years ago in House of Lords¹², is a thing of the past. In my experience, there are undoubtedly some cases where one profits from a fairly long hearing, days rather than hours, but there are others where oral argument really adds nothing much to the written submissions. Unfortunately, it turns out to be quite hard to predict ahead of a hearing which cases will fall into which category.

33. While our hearings are significantly shorter than they used to be, there are still cases where we can take what may seem to many people to be an unconscionable time to produce a judgment. This is sometimes because the issue is very difficult or contentious, and, quite apart for the need to reflect and consider, there are often many exchanges of draft judgments and notes, and many meetings, and, on occasions, this can lead to our calling for further submissions, even a further hearing¹³, which holds things up further. In other cases, the delay is caused by the fact that we think that the judgment should not be

¹² See eg *British Leyland Motor Corp v Armstrong Patents Company Ltd* [1986] AC 577

¹³ As in *Zurich Insurance PLC UK Branch v International Energy Group Ltd* [2016] AC 509

delivered until we have decided a subsequently argued appeal, as it covered the same or a related point¹⁴.

34. As for Lord Asquith's second aspect, I hope and believe that we are not rude. In that connection, while I accept that there is a risk that, as a serving judge, I am deceiving myself, it does seem to me that judges at all levels are considerably politer and considerably less unpleasant in court than when I started at the bar in the mid-1970s. Of course, there were many pleasant judges then, and there are a few unpleasant ones now. However, a reduction in the culture of respect coupled with the growth in political correctness and increasing awareness of human rights has led to an expectation that judges will demonstrate greater empathy towards advocates, and indeed to everyone in court, than was expected in previous generations. Judges are increasingly aware that they have to earn respect by what they do rather than expecting respect simply because of who they are.

35. As to the third of Lord Asquith's characteristics, I hope and believe that the Supreme Court is normally right. I suppose that, until 1966 the House of Lords were right by definition, because they could not go back on previous decisions which therefore were ineluctably the law of the land, unless reversed by the legislature. However, that changed 50 years ago with the 1966 Practice Statement¹⁵, which enabled the Law Lords, and now the Supreme Court, to refuse to follow earlier decisions. No longer are we the voices of infallibility, as McKinnon LJ described us¹⁶. Over the past fifty years the Practice Statement has been successfully invoked on a few occasions. However, as the House of Lords

¹⁴ As in *Belhaj v Straw* [2017] 2 WLR 456, *Al-Waheed v Ministry of Defence* [2017] 2 WLR 327 and *Rahmatullah v Ministry of Defence (No 2)* [2017] 2 WLR 287

¹⁵ *Practice Statement* [1966] 1 WLR 1234

¹⁶ Per McKinnon LJ in *Salisbury v Gilmore* [1942] 2 KB 38, 51 (adding the words "by a narrow majority")

decided and the Supreme Court recently affirmed, because of the “importance of consistency in the law, ... the *Practice Statement* should not be invoked to depart from an earlier decision, merely because a subsequent committee of Law Lords take a different view of the law: there has to be something more”¹⁷.

36. Judges not only have their judgments considered by appellate courts. Even the unappealable Supreme Court judges have the benefit of seeing their judgments subsequently analysed in academic articles and discussed in judgments in later cases. This can be a salutary experience. Indeed, when I read some articles I wonder about the accuracy of referring to the “benefit of seeing my judgments analysed”, and wonder if the “pain of seeing my judgments trashed” would be a more accurate description¹⁸. Some topics seem to inspire an almost religious zealotry in the groves of legal academe. As I mentioned in the 2014 *FHR* case¹⁹, over the previous twenty years, there had been a welter of articles on the somewhat recherché question of whether an agent who accepted a bribe held it on trust for his principal. The articles represented what one member of the Court of Appeal had referred to as a “relentless and seemingly endless debate”, and another suggested that the issue had revealed “passions of a force uncommon in the legal world”. There were highly respectable arguments both ways, as was clear from the quality of the arguments in the various articles and the quality of the academic protagonists on each side who wrote them. And, as the unkind might add, by the fact that in the *FHR* case itself, for reasons in a judgment given by me, the Supreme Court reached precisely the opposite conclusion from that reached in a recent decision of the Court of Appeal in a judgment given by me.

¹⁷ *Willers v Joyce (Re: Gubay (deceased) (No 2))* [2016] 3 WLR 534, para 9

¹⁸ An example of what some may think is a rather over-the-top article see Graham Virgo on the *Menelaou* decision mentioned below - <http://private-law-theory.org/?p=8127>

¹⁹ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] 1 AC 250, paras 10, 11, 23 and 29

37. Another area which has excited much academic discussion is that of unjust enrichment, or restitution as it used to be known. The prevailing judicial approach in this country to the topic had long been one of hostility, despite the bold call of Lord Wright in *Fibrosa* that “any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment”²⁰. Even as late as 1978, Lord Diplock stated that “there is no general doctrine of unjust enrichment recognised in English law”²¹.
38. What is now the leading book on the topic, *Goff and Jones*, first introduced English lawyers to the topic in 1966, and it was first formally recognised by the House of Lords in 1991 (per Lord Goff) in the *Lipkin Gorman* case²². Subsequently, aspects of the topic have been considered by the House of Lords in a number of cases²³, but only two have discussed the thorny question of when a claimant can show that the enrichment has been “at his expense”, namely in the 1998 *Banque Financiere* (subrogation)²⁴ and *Kleinwort Benson* (mistake of law)²⁵ cases. Since then, the “at his expense” issue has been the subject of a great deal of academic argument and controversy, of such intensity that even the nomenclature has changed, so that between 2011 and 2016 *Goff and Jones* changed its name from “The Law

²⁰ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61 (H.L.), influenced by the U.S. *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* of 1937, though this in general received a muted reception in the United Kingdom, see A.T. Denning *The Restatement of the Law: its Place in the English Courts* (1951) 37 A.B.A.J. 329, and Mc Innes, *The Canadian Law of Unjust Enrichment and Restitution* (2014) p73.

²¹ *Orakpo v. Manson Investments* [1978] A.C. 95 at 104

²² *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548

²³ *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, *Kleinwort Benson Ltd v Glasgow City Council* [1999] 1 AC 153, *Stocznia Gdanska SA v Latvia Shipping Co* [1998] 1 WLR 574, *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, *Foskett v McKeown* [2001] 1 AC 102, *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 3 WLR 1021, *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558, *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561, and *Cobbe v Yeoman’s Row Management Ltd* [2008] 1 WLR 1752 – the list covers all cases which could fairly be said to be concerned with unjust enrichment: I am grateful to Professor Andrew Burrows QC for suggesting it.

²⁴ *Banque Financiere De La Cite v. Parc (Battersea) Ltd* [1999] 1 AC 221,

²⁵ *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 AC 349

of Restitution”²⁶ to “The Law of Unjust Enrichment”²⁷. However, it had not been addressed in the House of Lords or Supreme Court. And, then just in the past two years or so, the Supreme Court has had four cases on the topic, two of which have resulted in decisions which have caused some fluttering in the academic dovecote, *Benedetti*²⁸ and *Menelaou*²⁹, and two of which have yet to be decided, the *Investment Trusts*³⁰ and *Lowick Rose*³¹ cases. So, just like buses, for a long time there are no “at the expense of” cases, and then four come all at once.

39. Given that there are two decisions pending, it is inappropriate for me to discuss the issue further today, save to say that the topic of unjust enrichment casts a sharp focus on the perennial judicial problem of resolving the tension between principle and certainty on the one hand and flexibility and fairness on the other. The very expression “unjust enrichment” appears to some judges to be an invitation to do what is fair in the particular case before them, whereas to other judges it is an expression which cries out for the application of strict principles to avoid the risk of palm tree justice.

40. Robert Goff, a highly impressive judge, and Gareth Jones, a brilliant academic, sadly both died last year. But the publication of the first edition of their seminal work in 1966 was a very significant milestone on the long route which was required before judges in this country paid academic writings the respect which they deserved. Compared with the position 50 years ago, judges pay far more attention to academic articles and books than they used to, and the law is much the better for it. As Professor Neil Duxbury has written,

²⁶ First to eighth editions (1966-2011)

²⁷ Ninth edition (2016)

²⁸ *Benedetti v Sawiris* [2014] 1 AC 938

²⁹ *Bank of Cyprus UK Ltd v Menelaou* [2016] AC 176;

³⁰ On appeal from *Investment Trust Companies v Revenue And Customs* [2015] STC 1280

³¹ On appeal from *Swynson Ltd v Lowick Rose LLP* [2016] 1 WLR 1045

judges and academics live in ‘two distinct legal worlds and are engaged in different enterprises’³². The judge is more focussed, but more limited, because he or she is deciding a case on particular facts and is constrained by the arguments which the advocates advance – of course, he can go outside those arguments but pressures from other cases often rules that out as a realistic possibility. The academic has longer to consider the matter and can also do so more widely, and, despite the regrettable length of some judgments (including my own) can do so at greater length and in greater depth than would be appropriate or practicable in a judgment.

41. Sir Robert Megarry, who was of course an impressive author as well as an impressive judge, explained it in this way in a judgment, when disagreeing with what he had said as an author in his excellent book, *Megarry and Wade on the Law of Real Property*

‘The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he . . . lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law.’³³

That this is a slightly one-sided view is supported by the fact that in a decision six years later³⁴, Court of Appeal said that Megarry J had got the law wrong but *Megarry* the author had got it right.

42. Appellate judges do not only have the benefit of seeing their final judgments subsequently analysed on appeal, in academic articles and in judgments in later cases Because we sit in

³² N. Duxbury, *Jurists and Judges: An Essay on Influence*, (Hart) (2001), p 74.

³³ *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch. 9, 16-17.

³⁴ *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468, 478-480

benches of three or more, we benefit from exchanging views. A bench of judges has the advantages and the disadvantages of group thinking. Surowiecki's *The Wisdom of Crowds*³⁵ would eponymously suggest that three judges are more likely to get the answer right than one judge, on the basis that group thinking tends to be more reliable than a single person. However, in the experiments on predictions reported in Tetlock and Gardner's *Superforecasting*³⁶ suggest that the position is a bit more nuanced and that "groups can be wise, or mad, or both". If everyone in a group agrees, if there is a "cosy unanimity" or "groupthink", because everyone thinks the same or there is a dominant personality to whom others defer, errors may be more likely to be made. At the other extreme, if there is "rancour and dysfunction", the benefits of more than one mind can be lost. What is needed, the authors suggest on the evidence they have collected, is "constructive confrontation".

43. While I would not go so far as to encourage confrontation among judges sitting on appellate benches, these observations strike a real chord at least with me so far as sitting on appeals with other judges over the past thirteen years. More specifically, these observations highlight a benefit of dissenting judgments which has not, I think, been much discussed. We all know that a well-reasoned dissent can (but by no means always does) provide real assistance to the development of the law. Indeed, it can sometimes assist in showing that the majority view has gone off in the wrong direction, although a dissenter can only dream of playing Lord Atkin's role in a modern day version of *Liversidge v Anderson*³⁷.

³⁵ James Surowiecki, *The Wisdom of Crowds* (2005)

³⁶ Philip Tetlock and Dan Gardner *Superforecasting – The Art and Science of Prediction* (2015), chapter 9

³⁷ [1942] AC 206

44. But dissenting judgments have other, less obvious, benefits as well. The recent *Miller* case³⁸ provides a very good example. In the normal way, the Justices had discussed the case and exchanged views after the argument had concluded, and the majority judgment was then written and circulated in draft to all Justices. The draft dissenting judgments followed a few days later. They inevitably contained expressed or implied criticisms of the majority judgment. Some of those criticisms were then accepted and others were then answered in a revised version of the majority judgment, which, whether you agree with it or not, was definitely an improvement on the first draft. (At the risk of appearing defensive, I add that the revised majority judgment contained criticisms of the minority judgments which led to corresponding improvements in those judgments). There is, I think, no better way to test and improve a judgment one has written than to read a colleague's judgment which not merely supports the opposite conclusion, but answers the points made in one's own judgment.

45. Although in the *Miller* case, there were no changes of mind as a result of draft judgments being exchanged, it is by no means unknown for such changes to occur. In other words, the legal arguments do not only take place in court. Sometimes, in the course of writing or exchanging draft judgments, new points emerge, and this can lead to the parties being invited to make further submissions, normally in writing, but exceptionally orally. Thus dissenting judgments reflect Megarry's notion that "argued law is tough law"³⁹. It may be a step too far, but it is tempting to consider introducing a practice, in a case where all the judges appear to be agreed, of appointing one of our number an *advocatus diaboli* to write a draft dissenting judgment for the purpose of maximising the quality of the ultimate judgment of the court.

³⁸ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5

³⁹ See para 40 above

46. Judges were famously described by Bacon as the lions under the throne⁴⁰, a description which has been taken as the title of a fascinating recent book⁴¹ and which carries with it a wonderful ambiguity. The leonine comparison suggests that the judges should be fearless, independent “big beasts” fighting for fundamental rights and freedoms – in a word activist. But placing them under the throne, the seat of what we now see as the executive, suggests that we are there to protect the establishment, and that is what I think Bacon meant. The essay concerned begins with the words “Judges ought to remember that their office is ... to interpret law, and not to make law, or give law”. He was writing at a time when the power of the executive was very much in play, and his attitude was rather different from that of his contemporary and rival, Edward Coke, who famously said that “the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm”⁴².

47. Whatever the position in the 17th century, the past fifty years have undoubtedly seen a significant growth in perceived judicial influence. Judges have undoubtedly come to play a more prominent part in decision-making than they did, most notably in the areas of judicial review, human rights and constitutional law. Given the ever-increasing powers of the executive over the lives of individuals, it is scarcely surprising that the frequency with which the courts exercise their judicial review powers has been increasing concomitantly. And it was not judicial expansionism but Parliamentary decision-making which gave judges their powers in relation to human rights. As to constitutional powers, the courts have exercised them recently primarily because of constitutional developments determined by the legislature – most notably thorough the UK joining the EU in the 1970s and devolution within the UK which largely started in the 1990s.

⁴⁰ Francis Bacon *Of Judicature* Essays, Civil and Moral, Ch 56 (1625)

⁴¹ Sir Stephen Sedley, *Lions Under the Throne - Essays on the History of English Public Law* (2015)

⁴² *Case of Proclamations* (1611) 12 Co Rep 74, cited in *Miller op cit* para 44

48. It is only right to add that, particularly when it comes to issues such as national security, protection of British interest abroad, and the allocation of financial resources, we have been very conscious of the particular expertise and responsibility of the executive as against the judiciary. So, we refused to interfere with a decision by the Home Secretary and Foreign Secretary to refuse entry into the UK of an Iranian national, because, it was said on not very full evidence, the presence in the UK would harm British interests and former embassy employees abroad⁴³. Similarly, we refused to interfere with a basis of allocation which between different regions of EU funds by the UK government, even though the criticisms of the basis “had force”⁴⁴, and indeed were held to be sufficiently strong to quash the allocation according to three of the seven Justices who heard the appeal⁴⁵.

49. In this connection, it is, of course, important to distinguish between the unelected executive, ministers, and the democratically elected legislature, Parliament. As I have just mentioned, for various reasons, over the past fifty years the courts have been significantly more active when it comes to decisions or actions of the executive. However, by contrast, the Supreme Court has been at pains to emphasise the fundamental importance of Parliamentary sovereignty in the UK’s constitutional arrangements. Thus, in the *HS2* case⁴⁶, we emphasised “the constitutional importance” of article 9 of the Bill of Rights which “precludes the impeaching or questioning in any court of debates or proceedings in Parliament”. And in the *Public Law* case⁴⁷, we reaffirmed the principle that “it is not

⁴³ *R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2015] 1 AC 945

⁴⁴ *R (on the application of Rotherham Metropolitan Borough Council) v Secretary of State for Business, Innovation and Skills* [[2015] PTSR 322, para 85

⁴⁵ *Ibid*, para 113-187

⁴⁶ *R (on the application of HS2 Action Alliance Ltd) v The Secretary of State for Transport* [2014] 1 WLR 324, para 203

⁴⁷ *R (on the application of The Public Law Project) v Lord Chancellor* [2016] AC 1531, paras 20 and 25

open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so” and invalidated a proposed ministerial order because it was not authorised by Parliament. And in the *Miller* case, we emphasised that only Parliament could change the law, and that, unless authorised by Parliament, ministers could not exercise any of their powers if, by doing so, they changed the law, and indeed that any ministerial powers could be abrogated by Parliament⁴⁸.

50. Maintaining an appropriate balance between judicial intervention and judicial restraint is key to the role of any court when carrying out its public law functions. The Supreme Court, as the final appeal court, hearing only cases of general public importance, is particularly sensitive to the delicate balance of functions between the branches of the state, particularly given the informality and flexibility of our constitutional arrangements. Parliamentary Sovereignty is undoubtedly the foundational principle of our constitution, and indeed that was reinforced and upheld by the recent decision in *Miller*, emphasised by both the majority⁴⁹ and the minority⁵⁰ judgments. However, an important aspect of this is that a court should be able to exercise control over executive action where it might be seen to disturb this balance – in the recent case of *Belhaj* considering the somewhat thorny doctrine of act of state, we warned against the possibility of affirming a legal principle which might permit the executive to “dictate” to the judiciary in the absence of “clear legislative sanction”⁵¹.

⁴⁸ *Miller op cit*, paras 48 and 50. There was no disagreement between the majority and dissenting Justices on any of this: the issue was whether section 2 of the European Communities Act 1972 authorised ministers to serve a notice to withdraw from the EU Treaties – see the excellent summary in Lord Hughes’s judgment, paras 275-281

⁴⁹ At para 43; 48; 67.

⁵⁰ Per Lord Carnwath at para 275.

⁵¹ *Belhaj v Straw* [2017] 2 WLR 456, para 149.

51. But in our common law system, we should not lose sight of the fact that judges can make the law, although Parliamentary sovereignty requires that judge-made law is not inconsistent with statutory law. As Lord Reid once famously said, “We do not believe in fairy tales any more, so we must accept the fact that for better or worse judges do make law.”⁵² Quite so; however, it is important to emphasise that at the Supreme Court we are well aware of our duty to respect the boundaries of our role. A recent example is to be seen in the recognition by Lord Toulson in the *Paulley*, which concerned the extent of the statutory duty of a bus operator to insist on a mother with a pram vacating a space intended for wheelchair users. Rather than making new law, we felt that, in this difficult area, fresh legislative intervention would be desirable.⁵³ An additional safeguard against judicial law making which is subsequently thought to be wrong exists in the fact that, where the law has been developed by a judge through a decision which is thought to be inappropriate, Parliament can always reverse the decision by legislation.

52. And, in a speech concerned with the role of judges under a constitutional system based on Parliamentary sovereignty, it is perhaps appropriate to end with a reminder that any judicial decision can be revoked by Parliament through a statute.

53. Thank you very much.

David Neuberger

Oxford, 10 February 2017

⁵² Lord Reid *The judge as lawmaker* (1972) *The Journal of Public Teachers of Law*, p 22 .

⁵³ *FirstGroup Plc v Paulley* [2017] 1 WLR 423, para 87,