JUDICIARY OF
ENGLAND AND WALES

THE HON MRS JUSTICE COCKERILL
Judge in Charge of the Commercial Court

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Keynote Speech:
Learning our ABC's: Thoughts about Commercial Dispute Resolution After Brexit and Covid

Back in March last year it seemed impossible that covid would bring our streets to silence. Back in March last year it looked Brexit still might not happen. Here we are in June 2021: both have happened – and we do all now know life will never be the same again.

The question which confronts us is this: What do we do next?

There are two obvious things I could talk about: technology and how well we have done. But you have heard all that before and you don't need to hear it again. Yes, we have done fantastically well; yes, we have proved technology can work; yes, we have moved to a post Brexit world without crisis.

But now we need to think about what we do in the future; and how we do that at least as well as we have managed the last couple of years.

For these purposes I'd like to focus on two main topics: (i) The personal touch and (ii) Our skills and the importance of not being complacent.

The personal touch

Evidence and the court experience

We have had a lot of focus recently on how trials can be done remotely. The Chancellor, Sir Julian Flaux, recently gave a speech[1] in which he highlighted judges across different divisions speaking of how it was perfectly possible to have full trials remotely; and how it is possible to assess a witness's evidence differently, but probably as well.

I agree with that - though I have a sidebar about what a judge learns from the wider reactions in court, which are totally lost in a remote hearing.

But I'd like to suggest we think about the question of whether that is a true like for like comparison? While we may be able to assess the evidence as well (or as badly – given some studies' indications about how reliably judges spot liars[2]), that does rather assume that the evidence given is the same evidence as it would have been if the witness were live. I am not so sure that this is the case.

There are two aspects to this – the first is that for most counsel cross examination remotely is not the same as cross examination live. I have certainly been very aware that

[1] https://www.judiciary.uk/announcements/speech-by-the-chancellor-of-the-high-court-to-the-scottish-civil-justice-conference/

[2] Eg. a study published in 1991 in American Psychologist by Paul Ekman and Maureen O'Sullivan called "Who can catch a liar?" suggested that judges were not markedly better at spotting a liar than the person in the street; and they performed worse than secret service agents..

the body language aspect between witness and counsel has an effect – the signals given to bring a witness to the end of a question, or to judge a good moment for interjection really are lost with the loss of vision of the rest of the body. I say for most - this is not a universal experience – I know a few cross examiners who say that there is no difference, or that there is possibly an advantage in that a certain amount of cross speaking is better tolerated by judges than it is in court.

The second is that the same can be said for the witness. Here the point is that they are at home or on safe territory – and critically they are separated by technology from the judge. The may prompt a sense of disinhibition which makes it easier for them not to tell the truth – or not to tell the whole truth.

Now let me start by making clear one thing - I regret to say that since coming on the bench I have encountered a number of witnesses who have lied. I am not pretending that this does not happen in court. But my sense is that live in court witnesses are less likely to do so and are more likely to think about telling the truth.

That makes sense: if you are trying to get out of going to an event that you don't want to go to, is it easier to do so by phone than explaining to the host standing a next to you? Of course it is.

Logic is supported by evidence. There have been a number of reports that witnesses prefer remote evidence-giving. There is a view that enabling witnesses to give evidence remotely from home means that they are more relaxed and at ease giving their evidence, which in turn improves the quality of the evidence. However ,as noted in the Chancellor's speech:

> *"That is all very well, but in a sense, it overlooks that the purpose of live evidence with cross-examination is not to make the witness feel more at ease, but, so far as possible, to arrive at the truth about the particular dispute."*

We can cross check the existence of this sense of disinhibition by looking at the problems we have encountered in terms of observing the rules – and particularly interestingly in the BBC case (*R(Finch) v Surrey County Council (Contempt)*)[3].

It will be recalled that in November 2020, the BBC made a video and audio recording of a hearing in the Planning Court in a case about "fracking" operations at a site in Surrey. The BBC used a six second "scene-setting" clip from the court footage in two of its BBC South East Today evening news bulletins. All of this was done without the court's consent and despite the fact that the link sent to the journalist expressly prohibited this, or passing it on (as was also done). What the Court said was very interesting in this connection:

> *"25. Both the reporter and the news editor frankly accept that they knew that there was a prohibition on recording and broadcasting court hearings, both physical and remote, and that if anyone had raised a query about the legality of what they were proposing to do, the penny might have dropped. However, against a background where most of their reports included online interviews and footage from virtual meetings, the fact that they should not have been recording the hearing of the... proceedings, let alone broadcasting it, simply did not occur to either of them."*

[3] [2021] EWHC 170 (QB) https://www.judiciary.uk/wp-content/uploads/2021/02/R-Finch-v-Surrey-CC-judgment.pdf

The key point here is that the court found that none of the journalists concerned "would have dreamed of making a video or audio recording inside the courtroom. It should have been obvious to them that the fact that it was possible to view the proceedings remotely made no difference". It should have been – but plainly it was not. This is part of what is known as “the online disinhibition effect”, which has many components – one of which is minimisation of authority[4]. There is therefore a difference and we must not lose sight of this.

Add then to that what I like to think of as the numinous qualities built into court rooms and which are stripped away by the covid paradigm. I did some work for a speech I gave a while ago looking at court layouts - across jurisdictions and history. What I found was surprisingly consistent: a raised dais, space, fields of vision, so the judge can see what is going on, sound proof (a point close to our hearts with the experience of remote hearings).

We have been creating this paradigm for courtrooms for years. Why? It is because the creation of that still safe place, where the rest of the world does not intrude, means there is somewhere where we can focus on the human interaction at the heart of the dispute. In addition that place is one inhabited by a sense of authority, control and respect which creates an ability to accept and respect decisions which are of great importance to people.

So where does this take me? Simply to say this. We need to weigh carefully the balance between convenience and optimising the process. Of course we cannot go back to where we were before covid, but what we had has a lot of merits which we should not take for granted and which we should look to enshrine at the heart of the post covid justice system – including the world of commercial dispute resolution.

The Court experience and learning

The second aspect of the personal touch which I regard as of huge importance is one I have mentioned repeatedly though lockdown - it is the effect on the learning experience of remote working and remote hearings. Since I think we must assume that more remote working will take place for the foreseeable future, this is something we need to grapple with for the longer term – a point to which I will return in the second part of this speech. This “personal touch” learning deficit extends to all those involved in the process – our junior lawyers, our clerks, our staff.

When I look back over my career I can see two major sources of learning which are at risk and which we must find ways to preserve in some form.

The first is being in court – watching cross examination work or fail, watching the interaction with the judge, or her reactions. Watching the interaction of leader with leader, the other team amongst themselves and so on. One came out of court shattered, from having drunk in so many items of information. We have tried to help with this with the Pupils in Court scheme[5], but that can only go so far, because the learning experience is all embracing. And even the waiting outside court provides opportunities for learning and for parties to interact. Ted Greeno spoke feelingly at the last Users' Group meeting [6] about how many settlements he has seen reached during that time spent about outside court.

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[4] Suler "The Online Disinhibition Effect" CyberPsychology & Behavior Vol. 7, No. 3

[5] https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf

[6] https://www.judiciary.uk/wp-content/uploads/2021/05/Commercial-Court-User-Group-Meeting-April-2021-minutes.pdf

This links to the second aspect - there is the embedded learning inherent in in person interaction. The sitting with your pupilmaster or supervising partner, the walking with them to and from court. Because fundamental to our learning experience has been the ability to ask the dumb question. To have that casual interaction when one can drop into the conversation the question about what is a bill of lading or the ISDA Master Agreement. We have managed for over a year – we have worked out ways round. But our juniors and trainees and newly qualifieds have lost learning just as much as those in school – we need to find a way to make it up to them. And because this isn't going away we need to put systems in place to minimise this debit factor in the hybrid working world.

One route is via more formal mentoring schemes, pending people establishing their own organic mentoring relationships. Another is via those of us who are more senior actively offering to be there for those who are learning. We should also maybe ask tech companies, where remote working has been more normalised for longer, how they deal with this – it is interesting to see that some Apple workers are currently advocating for remaining fully hybrid on the basis that some teams have ways of working which are more fruitful conducted fully remotely. If so, it would seem that they have answers[7].

Resisting complacency

One reason why this is so important is that Brexit and covid are making people think, as never before, about why they litigate here. We knew this was coming with Brexit – our being outside Europe was always going to raise questions about whether we were any longer the "go to" jurisdiction. We know that former European partners have developed their own commercial courts and commercial litigation systems and that the emphasis on them has been increased since we left the EU.

However my sense is that covid itself has caused a certain amount of this thinking. It is not simply that we are outside Europe, it is that lockdowns and travel restrictions have created a more parochical feel. Some people who happily accepted an exclusive jurisdiction clause for English Courts or English seated arbitrations now feel more comfortable at home.

In the Commercial Court we have seen an unprecedented number of anti suit injunctions so far this year. While we don't have figures for anti suits in particular at the end of April we had already seen 29 on notice injunctions and 46 without notice in the 2021-2022 year. That this is considerably up on the number of injunctions which the court has seen in previous years. It is higher than the full year figures for each of the 3 previous years[8]. And the perception of the judges of the Court is that it has been heavily skewed to anti suit injunctions. Let's be clear: these are not the Brexit/*West Tankers* anti-suits we were waiting for, they are global. What they tend to be is apparently clear breaches of exclusive jurisdiction clauses. For now we can hold the line with anti suits. But it perhaps suggests that people may think more in future about such clauses.

And this simply reinforces what we all know: if London is to remain a pre-eminent dispute resolution venue we need to provide reasons for this. We mustn't be complacent.

I say again: Yes, we have done well – but we should not forget that we weren't just good, we were lucky. We had a combination of judicial tech, judicial willingness, staff willingness,

[7] https://www.bbc.co.uk/news/technology-57385999

[8] For example 2019-2020 saw 32 pre-action injunctions and 24 s. 44 Arbitration Act injunctions : https://www.judiciary.uk/wp-content/uploads/2021/05/6.7302_Commercial-Courts-Annual-Report_Final_WEB.pdf (pages 10 and 21)

a statutory basis permitting remote hearings (which was not the case in all jurisdictions), tech savvy lawyers, adaptable and skilled litigation service providers. And we had the right cases – don't underestimate the importance of the *Kazakhstan* case[9] – the fact that we had a major trial going on as lockdown happened sent the right message. All of this was required to make things work.

So we cannot think we did so well just because we were brilliant. And to keep our position we need to be every bit as good and as adaptable, and as innovative. We need to ask ourselves the question – why do people come here to litigate?

The answers to that question have been fairly consistent over the medium to long term. Research by MoJ in 2015[10] revealed the reasons for choosing London:

- Quality of the judges
- Well established reputation of English Law – quality, certainty, efficiency
- Efficient remedies,
- The responsiveness of English law to the requirements of modern commercial transactions
- Procedural effectiveness and speed
- Forum neutrality

Mention was also made of legal infrastructure – and professional support services. There was also some mention as a positive factor of the disclosure regime.

As for negative factors, there were:

- High costs (albeit with "Rolls Royce service/Rolls Royce price" rider)
- Cumbersome nature of the adversarial system
- Judicial proceedings not always being streamlined.

Respondents then spoke of a delicate balance in favour of English courts

Similar results were revealed by LSLA "Litigation Trends and Predictions" survey earlier this year[11]. The top factor noted was the quality of the judiciary, followed by: Judicial independence and other procedural advantages. But again issues of cost are concern – 20% said it was a factor. One respondent said:

> *'English dispute resolution is becoming a luxury reserved for the rich. Very few can litigate in England these days without buying very expensive ATE insurance.'*

So we need to look at these factors and make sure that we are focussing on how we can keep doing better. Looking at these factors – on one level there is not a lot we can do about the skills of judges, though I know Lady Justice Carr would want me to emphasise the degree of commitment which the JAC brings to this process and how hard it is working to ensure that the most talented people from all backgrounds do apply to become judges.

[9] [2020] EWHC 916 (Comm)

[10] Lein et al " Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts" (Ministry of Justice Analytical Series)

[11] https://www.newlawjournal.co.uk/content/litigation-trends-predictions

But this point does also feed right back in to what I was saying earlier about the crucial importance of supporting and training our young lawyers.

We need, it seems to me, to focus on two other aspects, and I offer these to you as things to ruminate on as you proceed through this important conference.

We need to maintain and improve our procedural effectiveness. The recent FCA covid test case[12] was a shining example of what can be done. It has been applauded around the world – indeed at least one other jurisdiction stayed its own cases pending the outcome of the FCA case – making it effectively an international lead case. It was also monitored closely by other jurisdictions as the "first past the post" determination.

We need to think actively about whether other disputes can be brought within this paradigm – and whether the test case scheme needs any "tweaks" to make that feasible. We are currently actively managing the remaining covid business interruption cases in a mini list under the direction of Butcher J, and monitoring a potential group of cases and asking lawyers involved in such cases to give active consideration to suitable further test cases.

In a sense that is the glossy end of the business; but looking at the day to day coal face there is much that we can do too. Of course this is going to be the point when I talk about Disclosure and Witness Statements. But before doing so I'd like to take a step back.

There is a tendency to think of these as rules which make life more complicated. But in fact both sets of reforms really aim at what was there in the White Book anyway and reassert what was – regrettably - being ignored on a regular basis. Both have the same ultimate motivation – the motivation which lay at the heart of the foundation of the Commercial Court - to strip away what is not relevant and focus on what is relevant[13].

Turning then to the Disclosure Pilot: What we have seen in terms of the difficulties in dealing with the disclosure pilot is actually people struggling to do this, to focus on the key issues – that is why we see the disclosure list of issues becoming far too granular. We need to get back to what the Master of the Rolls said (as CHC) in *McParland*[14] – this is supposed to enable orderly review of documents. In other words it is supposed to help junior or temporary members of the team, or the external contractors with limited knowledge of the case, to understand what they are looking for.

It is the same with witness statements – we need to analyse what we really need to prove by witness evidence and confine the evidence to that. Oddly this is perhaps something that remote hearings, and the issues with remote cross examination have helped with in the last year. I do sense something of a step change already here.

If we can do this in both these areas it will be a huge contribution to making this jurisdiction an even better more efficient place to litigate.

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[12] *FCA v Arch* [2020] EWHC 2448 (Comm) [2020] Lloyd's Rep. I.R. 527 (Div Ct Comm); [2021] UKSC 1 | [2021] 2 W.L.R. 123 (SC)

[13] "From the outset the Commercial Court has been in the vanguard of introducing flexible procedures to deal with the disputes before it as effectively as possible. One of the original judges, Mathew J, would, where appropriate dispense with formal pleadings and disclosure and decide issues of principle on agreed facts." https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/about-us/

[14] *McParland v Whitehead* [2020] EWHC 298 (Ch) [2020] 2 Bus LR 699. See [49]:"… the Issues for Disclosure have an important function beyond the CMC. Having framed the scope of the documents to be located and reviewed by the disclosing party, they enable the review of documents to be conducted in an orderly and principled manner." One can see from [48] that Vos CHC saw there being three issues for disclosure, in contract to the 16 settled on by the parties.

It is not easy – and the Disclosure Pilot has showed that it is not instinctive to the way we litigate now. We are in a process of recalibrating.

With this in mind I'd like to suggest that we give consideration to reviving a step in litigation which has fallen into abeyance, possibly because it is not part of any court mandated procedure. And yet it can have a key role both in this process – and also in the teaching of junior members of the team.

That step is the Advice on Evidence –seeking formal advice as pleadings close - often in parallel with the settling of a Reply - as to what evidence is needed on what issues. This discipline enables the senior members of the team to engage and define the key issues early. In the modern world it also means that they can maybe outline, with the building blocks of the case fresh in mind, the way that the List of Issues, DRD and witness statements need to go. I would certainly say from experience that Lists of Issues and Disclosure Lists of Issues would hugely benefit from being engaged in right after pleadings have closed, and not some months later, shortly before the CMC.

This should have an impact not just on those aspects I have mentioned but on the general business of the case – enabling better earlier evaluation of prospects, better approaches to consensual settlement – and, by stripping out unnecessary material and marginal disputes, ultimately better judicial decision-making.

What of the other aspects highlighted by these surveys?

We need to make sure that we develop our law in a way that is responsive to modern commercial transactions. A key point here, and one that we all know is close to the current Master of the Rolls' heart is technology – both in the contractual and litigation context. Here it is important to get ourselves in a position to deal with new questions such as cryptocurrencies and blockchain.

There is also the current focus on electronic transferable records – following from the UNCITRAL model law in 2017 only three jurisdictions have moved to enact legislation to deal with this: Bahrain, Abu Dhabi and Singapore. Here, following the Law Commission report[15] we have a working group under Birss LJ, Deputy Head of Civil Justice with multi-disciplinary membership to consider practical issues relating to the electronic execution of documents and deeds; and there will be a further consultation paper from Law Comm later this year on electronic documentation.

It is extremely important that we all think about and feed into this as much wisdom as we can – and do what we can to enable this jurisdiction to move early to set out well thought out rules which will again help to make us as attractive a venue for modern contracts as we have been for the more traditional forms

Finally – and in line with the nature of this conference – I'd like to speak about a key attraction of this jurisdiction: it is home to world class litigation and arbitration business. This symbiosis between the two markets is important and should neither be forgotten or taken for granted.

The relationship between the courts and arbitration is something which has been part of the dynamic since before the Commercial Court was founded – indeed one reason for its foundation was to stop all the cases going to arbitration[16]!

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[15] Law Com 386, Electronic Execution of Documents: https://www.lawcom.gov.uk/project/electronic-execution-of-documents/

[16] "A glance at the [Queen's Bench] list reveals the entire disappearance of the old commercial causes... It is notorious that such causes have long gone to arbitration... Thus a silent revolution has taken place in the

Since then we have developed a close relationship which in modern terms one might say is "carefully curated". That was only emphasised with the expedition of arbitration cases to SC last year: *Enka* and *Kabab-Ji* as well as the less expedited *Halliburton*[17]. At the same time the Law Commission is currently reviewing the Arbitration Act which lies at the heart of that relationship and is actively seeking input on whether there are any areas of arbitration law which they should (or should not) be considering for inclusion in their programme of law reform[18]. Again it is vitally important that we do not miss this opportunity to think about and feed into Law Commission review.

It is also important that, as the Master of the Rolls has said in his speech at the opening of University of Hull's Mediation Centre,[19] we think about promoting and bringing within the mainstream portfolio the important and increasingly sophisticated forms of "ADR" . He has urged us to think about moving away from calling such processes "alternative".

I entirely agree with him that it is important that we think about how to locate what he has called "the sweet spot for consensual resolution" and ensure that such mechanisms are properly integrated with both court based and arbitration based dispute resolution processes. That is economically efficient – and again it is a way of improving our already excellent systems and providing leadership in the years ahead.

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common law business of the Courts." The 'Times', 5th January 1895. Source: https://www.commercialcourt.london/origins2 accessed 15.06.21

[17] *Enka Insaat Ve Sanayi v OOO Insurance Company Chubb* [2020] UKSC 38 [2020] 1 WLR 4117, *Kabab-ji Sal v Kout Food Group* [2020] EWCA Civ 6, Supreme Court hearing 30 June 2021, *Halliburton v Chubb Bermuda* [2020] UKSC 48 [2020] 3 WLR 1474

[18] https://www.lawcom.gov.uk/arbitration/

[19] https://www.judiciary.uk/announcements/speech-by-sir-geoffrey-voss-master-of-the-rolls-speech-to-hull-university/