



MASTER OF  
THE ROLLS

**LORD NEUBERGER OF ABBOTSBURY MR**

**DEVELOPING EQUITY – A VIEW FROM THE COURT OF APPEAL**

**CHANCERY BAR ASSOCIATION CONFERENCE 2012**

**LONDON, 20 JANUARY 2012**

**(1) Introduction<sup>1</sup>**

1. It is a great pleasure to be invited back whence I came - to the Chancery Division, and to speak at this year's Chancery Bar Association conference, with its title of 'Cracking Disputes'. On the assumption that the first word is a verb not an adjective, it is a very appropriate theme for the current situation in which we judges and advocates find ourselves. Namely, a developing post-Woolf, imminent pre-Jackson world, a world of stringent financial constraints.
2. Whether we are judges, mediators, arbitrators, or litigators, we should all aim to be cracking disputes as efficiently and cost-effectively as possible. Woolf and Jackson are but the most recent initiatives in a centuries-long sequence of reports seeking to make litigation more cost-effective. However, the fact that they have predecessors does not devalue them – on the contrary. And the present financial problems render this aim more important and more urgent than ever.
3. How often have we all heard a clarion call to more cost-effective litigation? Repeating a point is meant to be a rhetorical device which is meant to ram home the importance of the point. Sadly, the fact that a point is often repeated actually devalues it: just as novelty renders a point attractive and interesting so does familiarity breed boredom and indifference, which of course is an anathema for any speaker. It reminds me of the enthusiastic young linguistic philosophy professor who was lecturing in Berkeley. He explained that his detailed research across the world had shown that there were languages where a double negative meant a positive and there were languages where a double negative meant an emphatic negative. However, he said, when it came to double positives, there was no language where it meant anything other than an emphatic positive. At that point a voice from the back was heard to say softly 'Yeah yeah'. Yeah yeah me as you will, efficiency of resolution is vital, whether for ordinary citizens or wealthy corporations, both as a matter of principle, and for national our well-being.
4. It is a fundamental principle of any civilised society that its citizens should have genuine access to the courts. Our precious and much vaunted legal rights are of no value if we cannot enforce them. And if we cannot enforce our rights through the courts, society will

---

<sup>1</sup> I wish to thank John Sorabji for all his help in preparing this lecture.

eventually break down. The cost of going to court has always represented a problem in this connection. With the ever-increasing demands on household income thanks to the present economic climate, and ever-increasing pressure on legal aid, it is incumbent on us all to ensure that litigation costs are kept as low as possible, and thereby help to secure as best as we can, that access to justice does not wither away.

5. A successful capitalist economy, as Adam Smith pointed out, depends on a trusted and effective legal system. That is particularly true of an economy with an emphasis on financial and associated services. In that connection, the high reputation of our legal services, our courts and our law has served us very well since the 18<sup>th</sup> century. But we cannot afford to sit on our laurels. High legal costs do not always present the same problem for large businesses and a few very rich individuals, but legal costs are rarely an irrelevant factor even to them. So competition from other jurisdictions must always be in our minds. And it's not just arbitration and the new courts in Singapore, Dubai, Qatar and the like: there are now courts in Germany and the Netherlands which offer English language hearings. The threat to the British economy if we cease to be pre-eminent in the commercial legal world is self-evident.
6. This evening, I was intending to deal with a number of issues but this vital feature is the background against which all those issues should be set. The Chancellor suggested that my 40 minute slot meant that I was expected to talk about a single substantive legal topic. Even though I have been out of the Chancery Division for eight years, I still think of the Chancellor as my headmaster, so it is with some trepidation that I am going to disobey him, and cover a few topics rather than just one.
7. As this is a gathering of Chancery lawyers, let me start with two general points about the equity jurisdiction, one conceptual, the other practical.
8. So far as the conceptual point is concerned, as you will all no doubt recall, Francis Bacon, when not allegedly writing Shakespeare's plays, or sitting as Lord Chancellor, concentrated on science and philosophy. In his great work, the *Novum Organum*, he drew a distinction between the ant, the spider and the bee, in these terms:

*'Those who have handled sciences have been either men of experiment or men of dogmas. The men of experiment are like the ant, they only collect and use; the reasoners resemble spiders, who make cobwebs out of their own substance. But the bee takes a middle course: it gathers its material from the flowers of the garden and of the field, but transforms and digests it by a power of its own. Not unlike this is the true business of philosophy; for it neither relies solely or chiefly on the powers of the mind, nor does it take the matter which it gathers from natural history and mechanical experiments and lay it up in the memory whole, as it finds it, but lays it up in the understanding altered and digested.'*<sup>2</sup>

9. Applying the metaphor to the law, the ant is the common lawyer, collecting and using the forms of action, seeing what works and what doesn't, developing the law on an incremental, case by case, basis. The spider is the civil lawyer, developing intricate, principle-based codes, which can be logically and rigidly applied to all disputes and

---

<sup>2</sup> F. Bacon, *Novum Organum* (1620) Book One at (XCV).

circumstances. And the bee is the Chancery lawyer steeped in equity, and not relying purely on the common law method or on the civil law's approach, but picking and choosing the best of both, blending the two approaches.

10. Equity took its process from the canon law, the basis of civil law, but developed it by reference to the common law, which it supplemented and completed. For instance, equity lifted the power to require documentary discovery from canon law procedure<sup>3</sup>, and shaped it, as a means to facilitate justice in the common law courts, into what we now call disclosure: the centrepiece of English civil procedure, which has now been exported to so many other countries. The doctrine of uses, from which those medieval lawyers began to fashion what is now the law of trusts, injunctive relief, which ensured that individuals, who asserted their strict legal rights at common law acted consistently with their duties<sup>4</sup>, and the power to compel attendance before court through the subpoena all originated in canon law.<sup>5</sup> And they were all shaped into English Equity, originally, as Maitland pointed out, not by specialist chancery lawyers – not least because at the time there were no Chancery lawyers - but by English lawyers (and from the time of Henry VIII, Lord Chancellors<sup>6</sup> and Masters of the Rolls) steeped in the common law<sup>7</sup>.
11. English lawyers like industrious bees, fashioned equity in the Court of Chancery from the best of two different legal traditions and created something unique. Indeed, as Bacon might have said, they thereby fashioned a new tradition which some may say is better than that which the ant fashioned in the common law, or the spider fashioned in the civil law, and others may see as a new tradition providing a vital and substantial add-on to the common law.
12. As for the practical point, Chancery litigation is often portrayed as removed from real life, on the basis that it is in the Family Division and the Queen's Bench Division, above all in the criminal courts, where real human life is to be found. We all know that's not true, but I am glad to be able to tell you that, only yesterday, I came across some corroborative evidence. One of the unexpected bonuses of being Master of the Rolls is that you get to chair two committees concerned with National Archives, or Public Records as the more traditional minded may prefer to put it. One of the proposals considered at the quarterly meeting of the Lord Chancellor's Forum on Historic Manuscripts and Research yesterday was the funding of research programme into 'the Court of Chancery and its Records'.
13. The proposal was supported by a briefing paper which stated, among other things that the study would:

*'be looking at how the court ran its business, how it needed and coped with reform, and the effect of reforms on court and litigants. In addition, we want to investigate Dickens' blighted lands', by looking at the size and the nature of estates administered by the Court during the course of lengthy litigation.*

---

<sup>3</sup> Haskett, *The Medieval Court of Chancery*, 14 *Law & History Review* (1996) 245 at 265.

<sup>4</sup> Yale (ed), *Lord Nottingham's Two treatises*, (CUP) (1965) at 20, fn 2.

<sup>5</sup> Haskett, *ibid* at 265; Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, (1955) 71 *Law Quarterly Review* 223 at 235.

<sup>6</sup> Cardinal Wolsey being, as Maitland puts it, the last of the great ecclesiastical Lord Chancellors: F. Maitland, *ibid* at 9.

<sup>7</sup> F. Maitland, *Equity: a course of lectures*, (Cambridge) (1909, 2011 reprint) at 8.

*Chancery records are becoming increasingly popular with a very wide readership as they become more easily found. They are seen as immensely rich sources of information about people, business, and lands - life as it was lived. However, the meaning of a law suit can be opaque to general researchers, and the immense amount of data to be found in related court records is still very difficult to access.'*

14. And from equity I turn now to common law, an expression which is confusingly used either to include equity or not merely to exclude equity, but in contradistinction to equity. When in ant and bee territory (oh happy childhood memories), I had the latter meaning in mind; now I have the former. In recent years, some Australian Judges, lawyers and academics have started to claim bragging rights regarding the common law. Thus, while Lord Judge was in Australia last year, somebody stood up after he concluded a lecture and claimed that Australia was the '*repository of the common law*'<sup>8</sup> The rationale for this claim is that English jurisprudence is no longer an island unto itself, but is infected by EU law and European Human Rights law and continental European law and practice. The common law, and equity, in Australia, and by extension other common law jurisdictions, retains a purity that we, it is claimed, have lost through contamination.
15. This argument rests on a fundamentally flawed premise, namely that the common law was a purely English construct developed in isolation. It never was pure and it didn't develop in isolation. The common law was not developed solely by the purely Anglo-Saxon ant, but by the cosmopolitan bee. Quite apart from the fact that equity developed from Roman, canon law, Lord Mansfield, no less, expressly borrowed from Justinian, just as he borrowed, or tried to borrow, from equity in developing the common law<sup>9</sup>; just as later lawyers took the doctrine of consideration from Pothier's *Traite des Obligations*<sup>10</sup>.
16. The great strength of English law is that it has drawn its sources from many traditions and many sources. It has taken the best, the most practical and the most effective from those sources and fashioned them into the intricate honeycomb which our law is today. We continue to draw from many sources, Commonwealth, European, the United States, and in doing so we are not, as Lord Cooke of Thorndon put it, '*submitting*'<sup>11</sup> to such influences. We are enriching our law from them, just as English law, has – to its great strength – always done.
17. Since the enactment of the European Communities Act 1972 and the development of human rights' jurisprudence from 2000 following the coming into force of the Human Rights Act 1998, the English bee has been particularly busy. Once more mutual influence has been playing its part in developing our legal system. As Sir Francis Jacobs put it recently, '*English law has shown itself flexible and receptive to these branches of*

---

<sup>8</sup> Lord Judge, Evidence to the House of Commons and House of Lords Joint Committee on Human Rights (15 November 2011) at 7 (<http://www.parliament.uk/documents/joint-committees/human-rights/JCHR%2015%20November%20transcript.pdf>); and see Lord Judge, *The Judicial Studies Board Lecture 2010*, at 8 (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-jsb-lecture-2010.pdf>).

<sup>9</sup> See for instance, Oldham, *English Common Law in the Age of Mansfield*, (University of North Carolina Press) (2004) at 2, 99.

<sup>10</sup> J. Baker, *An Introduction to English Legal History*, (Butterworths) (2002) at 352 – 353; *Cox v Troy* (1822) 5 B & Ald 474.

<sup>11</sup> R. Cooke, *The Road ahead for the Common Law in Tom Bingham and the Transformation of the Law, A Liber Amicorum*, (Andenas & Fairgrieve eds.) (Oxford) (2009) at 688.

*European law*.<sup>12</sup> It might be said to have been as flexible and receptive as English law was in its formative period, and throughout the period of Mansfield and then the great Victorian reformers. We have, for instance, seen the creation and development of the Competition Appeals Tribunal (the CAT), the procedure of which ‘*follows closely the procedure and working methods of the Court of First Instance*’<sup>13</sup> in Luxembourg. In this respect we have modelled our specialist Competition law tribunal on that of a European institution, just as our national competition law is modelled on, and is reflective of, European Competition law. In this, through the work of Sir Christopher Bellamy and now Sir Gerard Barling, we have, in the words of Sir Francis Jacobs, combined ‘*some of the best features of English and European practices*.’<sup>14</sup> Unsurprisingly, it has been the Chancery Division, its practitioners and judges which have led the way in doing so.

18. In matters of substantive law, this receptive approach has manifested itself in a number of ways. When I started in practice proportionality – the relationship of two variables the ratio of which is constant – was something I remembered from studying mathematics: I’m sure we all remember, and perhaps shudder at the thought, having to work out questions such as: a car travels 140 miles in two hours, how many miles does it travel in eight hours. With the advent of European Union and Human Rights law, the introduction of the concept of proportionality has had a profound effect on the development of English law. This has been most clearly felt in the arena of public law, especially administrative law, but as Wade & Forsyth note it is perhaps becoming ‘*ever more prominent*’ even ‘*perhaps indirectly in the common law*.’<sup>15</sup> Its influence has particularly been felt in the arena of civil procedure: what is the overriding objective except a commitment to proportionality. In this I think we can see a return to our equity roots, and I return to this procedural point shortly. Equally it seems to me that it may indirectly have a role to play in the development of substantive Chancery law.
19. One clear area where the English bee may well adapt chancery law in the light of Convention jurisprudence is property law. It has, as we all know, had a profound effect on the House of Lords and Supreme Court, which have been kept busy with what, perhaps to many commentators, seemed like an extended game of judicial ping-pong (as Judge Madge in his excellent blog has described it) between our courts and Strasbourg; a game which culminated, hopefully, in *Manchester City Council v Pinnock*<sup>16</sup>.
20. That decision leads me to the topic of judgment-writing. One of the more difficult questions is whether appellate courts should produce multiple judgments or a single judgment. At least on the civil side, I would defend to the last the right of a judge to give a reasoned judgment in the terms which he or she wants. But tell that to the CACD, where single judgments are *de rigueur*. So, if you disagree with your colleagues on an appeal, you still have to subscribe to the judgment of the court – sometimes, I am told, a judge even has to give a judgment with which he or she does not agree.

---

<sup>12</sup> F. Jacobs, *European Law and the English Judge* in Tom Bingham and the Transformation of the Law, *A Liber Amicorum*, (Andenas & Fairgrieve eds.) (Oxford) (2009) at 419.

<sup>13</sup> F. Jacobs, *ibid* at 436.

<sup>14</sup> F. Jacobs, *ibid* at 436.

<sup>15</sup> W. Wade & C. Forsyth, *Administrative Law*, (OUP) (2009) at 148.

<sup>16</sup> [2011] UKSC 6, [2011] 2 WLR 220.

21. Multiple judgments have been described by Russell Fox, former judge of the Australian Federal Court, as ‘one of the glories of the system’<sup>17</sup>; one of the glories because through diverse reasoning, *obiter dicta* and concurring and dissenting judgments the common law can develop properly and incrementally as it always has. It has also been explained as an expression of judicial independence, in the sense of decisional independence, and accountability by Dame Mary Arden<sup>18</sup>. Again it was explained by Lord Reid, as leading to clarity. As he put it in *Broome v Cassell*

‘When there are two or more speeches they must be read together and then it is generally much easier to see what are the principles involved and what are merely illustrations of it.’<sup>19</sup>”

22. There is truth in each of these points. It is a truth which the continental spider has slowly and steadily been learning from us, in the European Court of Human Rights, where concurring and dissenting judgments have been increasing in recent years. The single judgment approach too often looks as if it is a work of profound compromise: drafting by committee is rarely a happy or, from the law’s perspective, a helpful experience. All too often reasoning can be jettisoned on the road to agreement; thus producing a judgment gnomonic in brevity and founded on the lowest common denominator. Such judgments impede rather than develop the law, and reduce its clarity and predictability. And in this way too decisional independence and accountability is lost. The gentle adoption of our approach in Europe is something which we should welcome and foster. As disputes become ever more multinational, with cross-border elements, and European elements, it seems to me that we should be active in advancing the interests of justice in this way by demonstrating the benefits of our approach far and wide.

23. This is not to say that our approach is perfect. We have, just as we always have had, something to learn from the European approach, and the approach of the US Supreme Court or Australian High Court. Greater brevity, and with it clarity, could be obtained through adopting the single majority judgment approach, with a reasoned dissent and short, reasoned concurring judgments. That is to say an approach which is neither purely European nor purely English: again we see shades of the bee. This approach seems to be on the increase in the UK Supreme Court. It is an approach which still provides for the development of the law.

24. The undoubted right of each appellate judge to write his or her own judgment, like all rights, carries with it responsibilities, one of which is to provide clear, practical guidance. In such cases a single judgment is highly desirable. *Pinnock* was such a case. The Supreme Court was seeking not only to lay the ghost of previous decisions that Article 8 could not be invoked as a defence to a claim for possession by a residential occupier who had no domestic defence. It was also seeking to give such guidance as it could to Judges in the County Courts as to how to exercise their jurisdiction in that connection. It was, in our view, essential that we spoke with one voice – especially as there were seven of us on the case. That case also seemed to me to demonstrate the value of genuine judicial collaboration: very substantial amendments were made to the first draft, as a result of proposals and points made by all members of the court, so that the final version was a vast improvement on the first draft. As the judgment went out under my name, I am not

---

<sup>17</sup> R. Fox, *Justice in the Twenty-First Century* (2000) (Cavendish) at 107.

<sup>18</sup> M. Arden, *A Matter of Style? The form of judgments in common law jurisdictions: a comparison*, (Oxford) (20 June 2008) at (6).

<sup>19</sup> [1972] AC 1027 at 1084.

sure whether that is humility or arrogance, but it's certainly a hostage to fortune for when the decision comes to be considered by the Court of Appeal.

25. An earlier example of how not to do it may be found in *Vernon v Bosley*<sup>20</sup>, where the Court of Appeal had to give guidance as to what a barrister should do when he knows of new documentary material which, if not disclosed to the court, may well lead to the court being misled, and which the client refuses to disclose to the court. Stuart-Smith LJ said that counsel could not himself disclose, but should simply cease to act; Thorpe LJ said that counsel's duty was to disclose the material to the other side; Evans LJ said that there was no duty on counsel at all. No doubt, the Bar Council tried to sort out this mess, but what on earth was a barrister caught in that situation to do? And to be fair on the judges concerned, if they had different views, what were they to do? I suggest that they should have perhaps considered a CACD approach: hard though it is to believe, there are times when civil procedure can learn from criminal procedure.
26. As importantly however, by providing a clear ratio in a single majority judgment, we reduce legal costs – and in this the courts fulfil their duty to the development of the law, and their duty to society to ensure that legal costs are no more than necessary. In this I agree with Russell Fox: multiple judgments, in that they lead to uncertainty and unpredictability, give rise to '*extra work for lawyers and, in some cases, [are] responsible for the cost of avoidable litigation.*'<sup>21</sup> In such straitened times, it seems to me that any source of additional, unnecessary litigation and legal costs should be avoided. Both on grounds of principle then, and practical utility, it seems to me that in the future the courts are going to have to think carefully about the structure of judgments.
27. Any discussion about judgments cannot ignore dissenting judgments. In terms of a modern dissenting judgment, there is little to beat Ward LJ's recent effort in a case involving the admissibility of without prejudice correspondence. In a case in 2010 he disagreed with Longmore LJ and with Stanley Burnton LJ, who himself had previously at first instance taken the same view which Ward LJ took. At the end of his very short dissenting judgment, Ward LJ said this:
- There is little point in expanding upon these reasons for I am outnumbered, nay outgunned, by the commercial colossi seated either side of me. I prefer the instincts of the youthful Stanley Burnton J. before he became corrupted by the arid atmosphere of this Court. It goes to prove what every good old-fashioned county court judge knows: the higher you go, the less the essential oxygen of common sense is available to you. So I am unrepentant. With, of course, great respect to my Lords, I dissent. In my judgment Andrew Smith J. was absolutely correct for the reasons he gave. I would dismiss the appeal.*<sup>22</sup>
- It got all the sweeter for Ward LJ as his view triumphed in the Supreme Court.
28. More generally, when it comes to judgment-writing, legal clarity is essential. Where the law is clear it can be predictable. I say can, because clarity and predictability do not always go hand-in-hand. But without the former you certainly cannot have the latter. Lack of clarity and predictability in the law creates, as Professor Atiyah put it, '*more*

---

<sup>20</sup> [1999] QB 18

<sup>21</sup> R. Fox *ibid* at 107 – 108.

<sup>22</sup> *Oceanbulk Shipping v TMT Asia* [2010] EWCA Civ 79 at [41].

litigation.<sup>23</sup> Good for lawyers and judges. Not so good for society, as more litigation means more litigation cost. It is essential therefore that as far as it can reasonably and properly be the law is clear, certain and predictable. Equity well knew this. It was all very well for Wright LK to state in *Lord Dudley & Ward v Lady Dudley* in 1705 that

*'Equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, and is a universal truth . . . [which protects] . . . the common law from the shifts and crafty contrivances against the justice of the law.'*<sup>24</sup>

Such moderation, through the application of conscience rather than law, was, of course, notoriously ill-defined in scope, ambition and application; a point not lost on Selden in his ironical comment that

*'Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience.'*<sup>25</sup>

29. Equity overcame such imprecision and unpredictability. It developed clear principles through the development of a body of precedent; from judgments and from the oral argument which informed and influenced those judgments. Clarity is as important now as it was then. Indeed, it is more important now, as society is far more complex than it was in that agrarian, pre-industrial, age.
30. Clarity should help avoid something all judges dread; something most clearly, and famously, articulated by Megarry V-C in his valedictory. He said that in his many years as a first instance judge, he had been upheld, reversed, not followed, disapproved, overruled, distinguished, followed, considered, approved, and doubted, but he had never, but never, had the indignity of being explained. If a judge needs to be explained, his judgment has failed the clarity test, and rendered the law vague, uncertain and no proper guide to lawful conduct. That is something we must all seek to avoid.
31. Clarity does not however mean lengthy: on the contrary if a judgment is too long, it loses its punch. Our judgments are in many cases now too long; that is because we feel we must deal with every point and every authority, we must show that we have understood and dealt with all the arguments, we are concerned to show the loser that he or she has had a fair trial, and perhaps above all to protect ourselves from criticism or reversal on appeal. Judgment-writers should be braver and appeal courts should be more robust. They should particularly call to mind the words of Russell Fox, when commenting that in so far as the length of reasoning in a judgment was concerned, *'the shorter . . . the better.'* It was not, he rightly noted,

---

<sup>23</sup> P. Atiyah, *Justice and Predictability in the common law*, (1992) 15 New South Wales Law Journal 448.

<sup>24</sup> (1705) Prec.Ch. 241 at 244.

<sup>25</sup> *Table Talk of John Selden*, (Pollock, ed.) (1927) at 43.



*‘. . . in the public interest for judges to display their learning, or results of their historical research, unless these are clearly and directly related to conclusions. An essay on the law is a selected sphere is not requisite.’<sup>26</sup>*

In this connection, the Lord Chief Justice always refers to what his history teacher used to write at the foot of over-eager show-off essays – APK, which meant ‘anxious parade of knowledge’.

32. An allied lesson is that one should not be too clever. I recently wrote a judgment in a case on acquisition of easements, in which I wrote a couple of lines about the Prescription Act 1832 which I felt rather pleased with. Addressing the Statute Law Society about poorly drafted Acts of Parliament a couple of weeks later, I said this: ‘In a recent judgment I wrote *‘The law pursuant to which easements can be acquired through long use ... has been complicated rather than assisted by the notoriously ill-drafted Prescription Act 1832, whose survival on the statute book for over 175 years provides some support for the adage that only the good die young’*<sup>27</sup>. As soon as I read it out, I realised how wise the late lamented Lord Bingham was when he gave this advice on judgment-writing: *‘Whenever you write a sentence with which you feel particularly pleased, cross it out.’* Put another way, as it was for Robert Graves, the waste-paper basket should be your best friend<sup>28</sup>.
33. Tomorrow you are going hear from Etherton LJ. Amongst other things I believe he is going to discuss is oral argument, and what judges want from it. Oral argument, of course, goes before judgment. You might say that my talking about judgments the day before he talks about oral argument is a fine instance of carts being put before horses. It is as it is, as it seems people say rather redundantly now. I cannot stress to you more the importance of good, cogent, economical oral argument: a cogent oral argument greatly assist the production of a cogent judgment.
34. I started with the need for cost-effective litigation, so I now return to that need, and would like to deal with two aspects, one feature of the Jackson reforms and one more radical proposal. As we all now since 1998 England has had a new civil procedure code, which replaced what Maitland referred to in his lectures on Equity, as our *‘Code of Civil Procedure’*: the RSC. As Maitland put it that RSC was *‘supposed to combine all the best features of the two old systems, the system of the common law, and the system of equity.’*<sup>29</sup> Once more we see the bee at work. The simplified procedure of the RSC was heavily influenced by chancery procedure. The same approach was adopted in the US when its Federal Code was revised<sup>30</sup>. In the US chancery influence went further than here. It went further because it adopted equity’s historically more activist approach to litigation; in other words it fashioned equity’s canon law inquisitorial heritage, after a long hiatus, into what was to become modern case management, and it adopted an express overriding objective. We caught up to a degree in 1999, when we introduced case management and our own overriding objective. But it is only now with the Jackson reforms, and the introduction of docketing as part of judicial case management, that the English bee is catching up with his American cousin

---

<sup>26</sup> R. Fox, *ibid* at 107.

<sup>27</sup> *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356 at [20].

<sup>28</sup> R. Graves, *Goodbye to all that*, (2000 reprint) (Penguin) at 53, 281.

<sup>29</sup> F. Maitland, *ibid* at 16.

<sup>30</sup> T. O’Main, *Traditional Equity and Contemporary Procedure*, (2003) Washington Law Review 429.

35. Docketing has been a central feature of US procedure for many years now. It is a part of case management, through which individual cases are allocated to specific judges throughout the life of the proceedings. And it is now part of the practice in the Commercial Court, as explained in last year's Admiralty and Commercial Court Guide, in respect of the procedure for designating judges. Docketing will however become more of the norm than the exception in future. In that we will see perhaps shades of old equity return, in a much more active, hands-on approach to proceedings than has been the case even under post-Woolf case-management. The benefits will, it is anticipated be manifold in ensuring that the Jackson recommendations bed in effectively, and help to bring litigation cost down. It is, also, to be hoped that a robust approach to docketing brings with it the clear benefits in respect of delay reduction, and the reduction in costs-attendant on delay, which has been experienced in the United States through its effective operation<sup>31</sup>.
36. We are therefore borrowing not only from our history, as case management was something which early chancery knew well, in adapting our process, but from an element of our history which developed in the United States. Bacon would have been truly proud, I'm sure.
37. And the more radical proposal? It is this, that we look open-mindedly and critically at two of our cherished common law practices, disclosure and live evidence. In today's electronic world, disclosure is very often an enormously expensive and time-consuming exercise, and with the benefit of the photocopier, soon to be replaced by electronic courts we hope, there is no practical limitation on the number of documents available at trial. I accept that here will be cases where a document is crucial to the outcome of a case, and if that document had not been disclosed pursuant to our disclosure rules, the decision would have gone the other way. But that, I suggest, would be a rare case. Is it right that such a rare case justifies the enormous effort and time which is now required in any big case, and indeed in some small cases? And in most of the Rolls Building litigation, it may be said that you have quite enough documentation available without disclosure. Whatever system of justice you have, however full your disclosure, you will never get the right answer in every case. And the fact that you may get the odd extra wrong result if you get rid of disclosure is not necessarily much of an argument. And, who knows, there may be cases where full disclosure means that there are so many documents that they obfuscate, rather than help reveal, the truth.
38. And live witnesses – are they really much use in the sort of cases most of you do in the Rolls Building? Once you have the witness statements, there is considerable force in the point that inherent commercial probability, consistency with the contemporaneous documentation, and internal inconsistency are the best guides to the truth. It sometimes seems to me that most brilliant cross-examinations ultimately involve showing that there is contemporary documentary evidence or an internal inconsistency which shows that the witness is not telling the truth. That, some may think, can be far more efficiently established by showing the judge the witness statement and any relevant documentary evidence and then making the point. A good witness, it may be thought, is someone who

---

<sup>31</sup> See for instance, T. Church, *Justice delayed – The Pace of Civil Litigation in urban Trial Courts*, (1978) Williamsburg, Virginia: National Center for State Courts.

is good at giving evidence, an exercise of extraordinary artificiality, not someone who is especially likely to be telling the truth. Just like a good interviewee for a job is someone who is good at interviews, not necessarily someone who will be good at the job.

39. Mainland Continental Europe manages largely without disclosure and live witnesses, and the result is not the collapse of society. More important the result is much cheaper litigation. And in these days of increasing cost-consciousness, with that is very important, and it is something which should make us sit up and think – especially when some of those courts are offering English language hearings. Why is it that there is so very much more European patent litigation in German courts than in our courts, despite the very high quality of our specialist patent judges, patent barristers, patent solicitors and patent agents? It is, I suggest, at least in part, the disproportionate difference in legal costs of patent proceedings here when compared with Germany.
40. I do not suggest that we should abandon or even cut down disclosure or live evidence, but what I do suggest is that we at least consider it. Challenging times require challenging ideas. And perfect justice may have to yield to access to justice and maintaining our legal reputation.
41. I was asked to talk to you tonight on the basis that it would be a View from the Court of Appeal; a view *sub specie aeternitatis*. I hope I have done so, at least to some degree. It is a view which hopes that both judges and Chancery practitioners continue to develop and apply the substantive and procedural law, as we always have, flexibly and creatively in order to do uphold and enforce legal rights and duties, to develop the law properly and incrementally, and to draw inspiration from wide sources, but always in accordance with the bee's approach rather than that of the ant or spider. I am sure that we will.
42. Thank you.

---

**Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Office Communications Team.**

---