

Lord Neuberger at the ARBRIX Annual Conference, London

Address to property arbitrators

12 November 2013

1. It is a great pleasure to be back where, in many ways, I feel I belong – in the world of property, and in particular in the world of property disputes. It is where I grew up as a lawyer – I sometimes wonder whether I ever grew up, but I suppose I must have done so as I am President of the Supreme Court. It was in October 1996, seventeen years ago, that I became a judge and stopped practising as a property law barrister. And, as is so usual with memories, it seems at one and the same time no more than a few minutes ago and a positive eon ago. Looking round the room reinforces this dichotomy – I see many familiar faces of people I called as witnesses, cross-examined, advised, appeared in front of, and with whom I had conferences, discussed problems, shared platforms, and enjoyed a drink – or two. And most of you don't look a day older. And yet I see many faces which are both unfamiliar and disconcertingly youthful-looking, many of whom were probably still at school when I became a judge. So, in the language of the Landlord and Tenant (Covenants) Act 1995, which distinguished between post-1996 leases and pre-1996 leases, I see a mixture of “new” ARBRIX members and “other” ARBRIX members.
2. Although you have been good enough to listen to me once or twice since I became a judge, I thought that this morning it might be of a little interest to consider where we have travelled since 1996. At first sight, at any rate, one may think that there has not been much change. But that reaction reflects what seems to be a common human characteristic: people tend to regard prospective change as much more significant than it really will be and often oppose it vehemently because of a natural comfort with the status quo, but once it has occurred, they tend to adapt to it and take it for granted within a very short period. In the property world, I seem to recall almost every residential planning application being vehemently opposed by neighbours often on the basis that it represented the end of civilization as we all knew it, but, if permission was granted and the

development went ahead, the same neighbours would normally act and talk as if they were wholly unaffected by it; indeed they would quickly forget it was new. So, too, I think that we have seen real changes over the past seventeen years, which we have quickly subsumed.

3. Of all those changes, probably the most obvious which would strike a Rip van Winkle who had fallen asleep in 1996 and woken up in 2013 would be the role of IT. It was already well under way in 1996, but now, unlike then, we have almost universal use of instant forms of communication (emails, texts, mobiles, skype, tweeting, facebook), and of laptops, ipads, kindles and the like, and immediate access to enormous quanta of information (the web, Wikipedia, attachments, clouds), and the almost universal use of laptops, ipads and the like. It was, of course, Marshall McLuhan who coined the almost iconic phrase “the medium is the message”. It seemed appropriate in the light of my observations to quote Wikipedia’s explanation that this means that “a medium affects the society in which it plays a role not only by the content delivered over the medium, but also by the characteristics of the medium itself”. Although McLuhan expressed this view in 1964, it could not be more apposite in the electronic age.
4. There have been a number of other significant general changes for those living in this country. Four significant, and not interconnected, general trends which were already under way in 1996, and which have continued apace, occur to me, but you no doubt may well think of others. The ones I have in mind are the growing gap between rich and poor, the stuttering development of the European Union, the increasing prominence of London as a world capital city, some might say **the** world’s capital city, and the increasing economic power of the Far East. On the purely economic front since 1996, there have been extraordinary ups and downs – the creation and vicissitudes of the Euro, twelve years of financial plenty, some would say financial excess, followed by a financial collapse and a rather unpredictable and uneven mini-recovery, shadowed by bankers’ enormous bonuses and ensuing bankers’ grovelling apologies. Politically, we have seen the rise and fall of New Labour and the first non-wartime coalition government for more than 150 years, the perceived rise of international terrorism, and an increase in foreign adventures.

5. In relation to what may be called the United Kingdom constitution, there have also been some relatively big changes. I say “what may be called” our constitution, as we famously have no written constitution, and an unwritten constitution may be thought to suffer from the same problems as an oral contract according to Sam Goldwyn, namely not to be worth the paper it’s written on. Be that as it may, there have been some real constitutional changes. We have got Scottish and Welsh devolution, the Human Rights Convention has been incorporated into our domestic law, there has been a radical transformation of the House of Lords, the Lord Chancellor has morphed into a minister of justice, there is a new UK Supreme Court, and judges are no longer appointed by a minister.

6. More parochially but also importantly, when it comes to civil litigation, we have seen the Woolf reforms and now the emerging Jackson reforms. Both these reforms are ultimately concerned with improving access to justice, which means cutting the costs of, and delays in, civil litigation. We have also seen the rise of mediation, almost unheard of in 1996, which I think is also attributable to the costs and delays involved in litigation. Even arbitration has become subject to a new consolidating and amending statute, the Arbitration Act 1996. From the point of view of the professions, there has been an increase in regulation, much of it, I fear backside-protecting and box-ticking.

7. Many of these economic, technological, constitutional, legal changes and political which I have described may be more fairly characterised as developments rather than sharp changes. Whether or not that is right, because property is so fundamental and central to socio-political and economic life, it is unsurprising that developments in the property world reflect, and are reflected by, changes in the general economy and social order.

8. There seems to be less property litigation than when I was in practice. This is, I think, not merely due to the increasing cost of fighting as opposed to settling, and the increased prominence of mediation, although I would be surprised if they were not significant factors in many cases. The removal of significant security of tenure for residential tenants has reduced the number of contested residential

possession actions, and the same point applies to agricultural tenancy litigation. The reduced rate of inflation, coupled with the main issues having been now resolved, has cut the number of court hearings and arbitrations in relation to commercial property disputes, including conflicts on valuation issues.

9. Apart from this, my impression from reading law reports and talking to members of the property bar and property litigators is that, again as one's general experience of life would suggest, over the past seventeen years, some things have changed but many things remain much the same. Unsurprisingly, the basic structural features are unchanged. Property, whether houses and flats, retail, office, or industrial, or agricultural, extractive or leisure, still retains its vital role in the United Kingdom, both in socio-political and in economic terms. Property law remains divided between judge-made law, with its residue of with ancient feudal rules and modernising features, and substantial statutory amendments – many of them well drafted (Part II of the 1954 Act and the Leasehold Reform Act 1967) and many of them are pretty awful (the 1996 and 2005 Enfranchisement Acts).
10. And it is clear that, as one would expect, the various economic, technological, constitutional and forensic developments which I have identified have had their effect on property in general and on property litigation in particular. Thus, the demands on the professions, surveyors and lawyers, are certainly greater as they were when I was in practice, and their contributions remain as important as ever.
11. Having discussed matters at a rather general level, may I say a word or two about aspects of the Supreme Court. The revolution in IT is quite well reflected by the fact that, when I joined its predecessor, the Law Lords, in 2007, draft judgments were sent round in paper – there were so many copies of different Law Lords' judgments and different versions of one judgment that the system was known as the snow storm. And we communicated with each other by written memoranda: emails between us were unknown. No Law Lord brought a laptop into court and we normally only got hard copies of the papers. Now we receive a memory stick with the papers on each case, and many of us bring a laptop into court - and we regularly email each other our thoughts and copy draft judgments. Having said that, we are demonstrably at an intermediate stage. The parties to an appeal are

required to provide us with a memory stick containing all the court papers, but they also have to provide us with the hard copies as well; we do circulate our draft judgments to each other by email, but we still have the hard copy snowstorm.

12. To the outside world, we have led the way in filming our hearings – the Court of Appeal has followed; we print and read out on you-tube summaries of our decisions for the media and the public; we tweet information about imminent and past decisions and other matters, and we have many public visitors. I hope that we are showing McLuhan to be right: all these changes in external and internal communication, coupled with obtaining our own identity and our move into a new building, should be helping to change and improve our contribution – for instance to encourage us to work together more collaboratively, to be more aware of the needs of society in terms of what we decide, to be better at communicating our decisions, to maximise our contributions to the rule of law, and to help increase public appreciation of its importance.

13. I turn to what in management-speak would be called our core activity, deciding appeals. At a time when the rule of law is becoming ever more important, our laws are getting ever more complex, and the cost of litigation is ever more expensive, it seems to me that the role of the Supreme Court is, more than ever, to lead the way in ensuring that the law is as principled, as practical and as simple as possible. While acknowledging that there is sometimes a degree of tension between these three requirements, I think we are unlikely to go very wrong if we bear in mind the central importance of principle, practicality and simplicity, when making all our decisions – which cases to take, how to approach the issues, how to decide the issues, whether to have multiple judgments etc. This is not a call to my colleagues never to write a concurring judgment – ie a judgment which does not merely agree with the main judgment but also discusses the issues. In some cases – eg when telling trial judges how to deal with procedural matters, such as human rights issues in possession actions - it is normally essential to have a single clear judgment to minimise any risk of confusion. However, concurring judgments often add value; sometimes to summarise the effect of a longer more detailed leading judgment, sometimes to add a more controversial but important

point, and sometimes one judge has strongly held views which justify the same result for different reasons. Further, in some new or very difficult areas, it is better for the law to be developed in a tentative basis, on the basis that academic articles and subsequent cases may lead to further consideration, so a number of slightly different possibilities are worth canvassing in a judgment; in such cases one must sacrifice short-term certainty for achieving a satisfactory result in the longer term.

14. Having briefly talked about my world, let me talk a little about yours. The importance to businesses of having disputes resolved in private by an expert selected by the parties, rather than by judges in public, appears to be as great as ever. There appear to me to be a number of reasons why people prefer arbitration, and two of them are obvious in the description I have already given – privacy and expert tribunal. Expertise may be a very important matter in property disputes, as many disputes involve technical issues, and some such disputes are assigned to judges with no experience whatever of property. I well recall trying to explain ITZA to a circuit judge who had failed his maths O level, and whose closest experience of retail property was paying his wife's Peter Jones bills.

15. Cost was said to be another reason for preferring arbitration, but I doubt that: advocates, solicitors and experts cost the same, I would have thought, in court or in arbitrations, and you have to pay much more for your arbitrator and hearing room than you do by way of court fees. Further, I suspect that judges are more concerned to keep costs down than are many arbitrators, as an arbitrator who is reputed to be critical of legal and other fees may find himself rather short of appointments. Concerns about judicial national bias or worse are, I understand, an important reason for a preference for arbitration in connection with international disputes, but that has limited application – I hope – to UK property disputes. Of course, many disputes go to arbitration because it is assumed that they have to, such as rent review and other contractual valuation issues. And many disputes go to arbitration because they are of a type which have always gone to arbitration – if it works, don't mend it is a perfectly respectable adage.

16. Whatever the reason for choosing arbitration, arbitrators perform a very important function. While, unlike judges, they are private appointees, they are like judges in that they have a duty to act judicially - and this very important duty is not merely owed to the parties to the arbitration, but it is also, I would suggest, owed to the public. When performing their function, arbitrators are participating in the rule of law: they are giving effect to the parties' contract in accordance with substantive and procedural legal principles. If they perform, and appear to perform, that role honestly, impartially, expeditiously, and openly, confidence in the rule of law will be maintained. And the reputation of arbitrators in the UK is of particular significance in maintaining London's international standing as the dispute-resolution centre of the world, which is so important to the UK economy. The importance of confidence in arbitrators to the rule of law and to the UK's economy has been reinforced in recent times by changes in the law, which have extended the powers of arbitrators, made it harder to challenge awards, and rendered it easier to enforce awards in the courts.

17. More specifically, the role of arbitration in property disputes has not been seen in much of the arbitration world as having the same importance as commercial arbitrations, involving shipping, banking, insurance, commodities, and investment disputes. I am afraid that that has been the fate of property law to some extent generally. It is unfair in that an effective property market is fundamental to the rule of law in the UK and to our fundamental economic and social well-being. However, it is perhaps inevitable in a country which is outward-looking, and wanting to compete in a global market. Indeed, it may be something of a compliment that the efficacy of property investors, property developers, property professionals, whether lawyers or surveyors, is taken for granted in this country.

18. And that brings me, finally, to ARBRIX itself. Your organisation was conceived in 1985, at a time when a number of far-sighted surveyors realised that Fellows of the Society were increasingly being asked to fill the role of arbitrator, a role which required considerable skills and expertise, a role for which most surveyors had no qualifications, education or experience. The idea was then laudably implemented, in that an effective and well thought out education and training programme was

developed and then offered to any surveyor who wished to be an arbitrator. I can say that the standard of surveyor arbitrators increased phenomenally between 1985 and 1996, and I have no doubt that this was largely attributable to ARBRIX. Of course, there were and always will be people who make good arbitrators with little if any training, and there will always be people who will never be good at arbitration even with training: the same is true of judges and many other jobs. But ARBRIX-type training will make a naturally good arbitrator even better, and a naturally poor arbitrator, at least if he or she is prepared to learn, a competent arbitrator.

19. From what I hear from my friends in property law, ARBRIX continues to perform its work as well as ever. That is important for the standing of the surveyors profession, a profession where the UK appears to have a, indeed the, genuine world-wide representation and reputation. But, bearing in mind the importance of property and arbitration to the reputation and well-being of this country, it is very important work in an even broader sense. So I am very glad to have been invited here this morning to express my support for, and appreciation of, its continuing commitment to training surveyors as arbitrators.

David Neuberger

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