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The Commercial Bar Association

COMBAR Professional Education Series of Lectures

Advocacy in the Commercial Court

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The Hon. Mr Justice Teare

Last week was a normal week in the Commercial Court. I received a 100 page skeleton argument in support of continuing an injunction and opposing a challenge to the jurisdiction, in another application challenging the jurisdiction I had received skeleton arguments amounting in total to over 110 pages from one side and 117 pages from the other side. And for the closing written submissions in an action, I received 156 pages for one side and 175 for the other side, the latter being complemented by 980 footnotes.

An impartial observer might well conclude from that, that oral advocacy has a very limited role in the modern Commercial Court.

But despite the production of such lengthy examples of written advocacy the tradition of oral advocacy in the Commercial Court, as indeed in all our courts, remains strong. But the advocate requires skill at both oral and written advocacy and so I shall say something about both.

The skeleton argument is the first piece of advocacy to which the Judge is exposed in a case.

Written Skeleton Arguments were first introduced in the Commercial Court and the Court of Appeal by Lord Donaldson in the 1980s. Since then they have become an established practice in almost every field of law. But we are a long way from the American and European practice of severely limiting oral argument to very short periods of time. I regard oral argument, in common I think with many other judges (though not perhaps all), as a valuable way of identifying the right answer to a case. In particular, it enables the judge to put to the advocate the points in a case which are troubling him and gives the advocate the opportunity of persuading the judge that

those points are not the obstacles the judge thinks they are or might be. However, there are pressures on court time and so written skeleton arguments are a cost effective way of explaining the nature of the case, identifying the issues, summarising the most material facts and the relevant law and explaining the remedy which the advocate is seeking. If the judge has read and digested each side's skeleton argument there should be no need for any detailed opening in a trial save perhaps ensuring that the judge is familiar with the most important documents in the case.

It was never intended that skeleton arguments should be like written briefs in the American courts which, to a large extent, take the place of oral advocacy. That is not the English tradition. And the Commercial Court Guide urges you to be concise and to avoid arguing the case at length. However, as the length of documents which I mentioned earlier suggests there is a marked tendency towards providing written briefs on the part of counsel which the courts seek to discourage. Could I remind you of three judicial comments in the last year or so.

Lord Justice Mummery said this about skeleton arguments in the court of appeal.

> (In *Tombstone Limited v Raja* [2008] EWCA Civ 1444; [2009] 1 WLR 1143)
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> 126. We remind practitioners that skeleton arguments should not be prepared as verbatim scripts to be read out in public or as footnoted theses to be read in private. Good skeleton arguments are tools with practical uses: an agenda for the hearing, a summary of the main points, propositions and arguments to be developed orally, a useful way of noting citations and references, a convenient place for making cross references, a time-saving means of avoiding unnecessary dictation to the court and laborious and pointless note-taking by the court.
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> 127. Skeleton arguments are aids to oral advocacy. They are not written briefs which are used in some jurisdictions as substitutes for oral advocacy. An unintended and unfortunate side effect of the growth in written advocacy (written opening and closing submissions and "speaking notes", as well as skeleton arguments) has been that too many practitioners, at increased cost to their clients and diminishing assistance to the court, burden their opponents

and the court with written briefs. They are anything but brief. The result is that there is no real saving of legal costs, or of precious hearing, reading and writing time. As has happened in this case, the opponent's skeleton argument becomes longer and the judgment reflecting the lengthy written submissions tends to be longer than is really necessary to explain to the parties why they have won or lost an appeal.

128. The skeletal nature of written advocacy is in danger of being overlooked. In some cases we are weighed down by the skeleton arguments and when we dare to complain about the time they take up, we are sometimes told that we can read them "in our own time" after the hearing. In our judgment, this is not what appellate advocacy is about, or ought to be about, in this court."

Lord Justice Toulson referred in a judgment to a skeleton argument "which was a grotesque example of a tendency to overburden the court with documents of grossly disproportionate quantity and length". (Midgulf 2010 EWCA Civ 66)

And Sir Anthony May, the then President of the QB Division, warned that if counsel provide excessive written briefs rather than true skeleton arguments the costs may be disallowed or the time for oral submissions may be curtailed (Khadez v Asiz 2010 EWCA 716).

I recognise that these statements, though clear and unambiguous in their tone and content, present a difficulty for the advocate. Skeleton arguments, particularly at first instance, tend to have two functions to perform. First, they are skeleton arguments in the original sense of a brief introduction to the case and the issues, which saves time in oral openings. But secondly they provide assistance to the judge when writing his judgment. This second function is increasingly common. Witness statements are now almost always taken as the witness's evidence in chief. The judge has to read them before the witness is called but inevitably he cannot take in all the fine detail. Only parts of them may be subject to cross-examination and so receive attention during the trial. In the old days cases proceeded at the pace at which a judge could absorb the evidence and think about it. Today trials proceed at a much faster pace. There is usually much thinking to be done after a hearing is over. Those parts of a skeleton

argument which set out a chronology of the relevant events with references to the detailed evidence are therefore often of great assistance. The same goes for expositions on the law with references to the authorities. And perhaps for detailed argument. But all such material means that skeleton arguments tend to become unwieldy documents which is contrary to their original purpose. Perhaps the best way of resolving the tension between these two uses of the modern skeleton argument is to prepare the Skeleton Argument in a form in which there are two parts. The first is the skeleton argument in the short form originally envisaged by Lord Donaldson, desired by Lord Justice Mummery and required by the Commercial court guide. The second is an annex which sets out the detailed and cross-referenced chronology and exposition of the law to which the judge can dip into as required, during and after the hearing. Since the judge is the consumer of the skeleton argument it is essential that it be judge friendly and in a form which he finds helpful and not tiresome. Anyone drafting a skeleton argument should envisage the judge coming out of court at about 4.15 or 4.30 pm after struggling with a difficult case and, perhaps, with advocates anxious to ensure that he understands every detail of that difficult case. He gets back to his room and there on his desk are several boxes of lever arch files topped of by 2 thick and indexed skeleton arguments. He feels very weary and wonders how on earth he is going to find the time or the energy to read sufficient of the case before 1030 am the next day. If the next day is a Friday summons day he may have skeleton argument in 4 or 5 cases. It is therefore essential that the skeleton argument should, at the very least, contain a short and simple introduction to the case. Anything too complex will only elicit a judicial groan. The motto must be "keep it simple". By all means have appendices which contain the useful material which the judge can peruse at a later stage but do not ignore the simple introduction to the case and to the issues which will arise. Always be mindful of keeping the judge on your side. Do not antagonise him by detail which will at first sight appear impenetrable.

The listing office does pay attention to the estimated reading time but there is rarely enough time in the judicial day to allot those numbers of hours suggested by counsel. A Commercial court judge is not just doing your case. He has judgments in other cases to write, he has paper applications to consider and, like every QB judge, he has paper applications for leave to appeal in criminal cases to consider. In addition he may have a role in the administration of the courts which eats into his time.

Estimates of reading time are very often underestimates. That is often because too much is put in the reading list. So what should be in them ?

Be merciful. Never ask the judge to read the pleadings. By the time of hearing they should have served their purpose. If the skeleton is for an interlocutory hearing the judge should have the benefit of the Case Memorandum. If the skeleton is for a trial you will have summarised the issues which arise on the pleadings and which remain in issue in the skeleton.

Documents: It is only necessary to ask the judge to read those which are truly essential to assist him in understanding the issues. It is quite unnecessary to ask the judge to read those documents which witnesses are going to be taken through in XX. Yet many detailed documents are often put on the list, quite unnecessarily.

Witness statements: If possible, summarise what is agreed and ask the judge to read only those parts of the evidence which remain in issue. This is particularly necessary these days when witness statements tend to me a vehicle for stating the entirety of a party's case complete with comments on, and explanations of, a great many documents. Point out when witnesses are due to be called so that the judge can stage the reading of witness statements throughout the trial. What is the purpose of asking the judge to read all the statements in a case before the start of the trial ? It may be a week or more before some witnesses are called.

Experts Reports: It is rarely, if ever, necessary to invite the court to read the entirety of the expert's reports – yet counsel often do. I usually content myself with the expert's memorandum of what is agreed and what is not agreed – and then go to the summary of the experts' opinions at the end of their report. If it is really necessary for the Judge to read the detail of the reports the reading list should be carefully constructed around what is in issue, identifying those parts which of the report which relate to each issue.

I recognise that this requires more work on the advocate's part than simply listing everything but it will enable the Judge to read and concentrate on what truly matters. Which must, or at any rate ought to be, to the advocate's advantage.

Oral advocacy

What appeals must often depend on the individual judge; I can only speak for myself – you will develop your own views as to what appeals to judge A and what appeals to judge B and you must tailor your oral address accordingly

The task of an advocate is to persuade – but of course only by fair means, not foul.

May I just dwell on that for a moment.

The Bar Council's Code of Conduct makes clear that the advocate's overriding duty is to the court

> "to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court."

Why is the advocate's overriding duty to the court ? It is because the court and the advocate have a common interest in the administration of justice. The judge relies upon the advocate in this regard and trusts him. Without that reliance and trust the administration of justice would be less fair and less effective.

This duty was emphasised by Lord Neuberger, the Master of the Rolls, at the Bar Conference in 2010. Speaking of the advocate's duties he said:

> "they are all duties which require the consumer interest to take second place to the public interest. It should also be said those duties not only flow from our

commitment to the public interest, but equally from our commitment to the constitutional principle of the rule of law. The rule of law would be little more than a phrase for idle moments, if lawyers – in the interests of the consumer – acted as if anything goes. The rule of law is a rule of integrity. It supports the foundations of our society, without which reference to the consumer interest would be utterly empty of content and meaning.

…… without the rule of law and a robustly independent legal profession committed to its core values and the public interest we would have no civil society."

Now let me return to the practicalities of Oral Advocacy -

(1) How should your oral address relate to the Skeleton Argument - are you following the Skeleton Argument or ignoring it ?

- There is no rule about this. It is a matter for your judgment which you think more effective in the particular case. But whichever you decide to do, tell the judge.
- It is irksome for the judge to try to find the point being made by counsel orally in his skeleton argument only to be told, when the judge asks, that it is not there
- Similarly if the point is in the Skeleton Argument, it is helpful to know that because the judge need not then take a full note; I often add manuscript notes on the skeleton argument

- Should you read the skeleton argument ?

- Usually not; it is very boring and the impartial observer would be astonished to realise that a document which the judge has already been asked to read (and probably has read) is now being solemnly read out to him

- If you are going to read it, tell the judge and ask him whether he would find it helpful – if he has not had time to take it on board (as you suspect may be the case) he might well say it is

- But even if you do read it, it is better to emphasise what you regard as the best points and what you wish the judge to concentrate on – if he has not read the others he will do so before writing his judgment

- That makes it more interesting for the judge which makes it more likely that you will persuade him

Whatever you plan to do you must be flexible – because the Judge may not have had time to read, let alone digest, the skeleton arguments. The advocate therefore has to be ready for the Judge who has read and understood everything, the Judge who has been so pressed that he has only glanced at the skeleton arguments and the Judge who has dipped into some passages but not all and may perhaps have a distorted view of the case. The appropriate opening will differ for each of those judges.

2. Should you assume the Judge has the relevant facts in mind and has understood them ?

-My advice is never assume that the judge has in mind all the facts that you, who have lived with the case for days, weeks or even months, have fully in mind. I am always surprised by what counsel think I have absorbed, or ought to have absorbed, from pre-reading.

-even though you have given the Judge a chronology and asked him to read the witness statements factual , it is unsafe to assume that the judge has taken it all on board

-so take the judge to essential facts of the case even though they may be obvious to you and set out in the Skeleton Argument – if the judge has them in mind and thinks what you are doing is unnecessary he will tell you

This applies both to applications and trials

-but particularly to applications – when a judge has read, hurriedly, the skeleton arguments in 4 or 5 applications between say 3 and 7 the day before and before 1030 the following morning, it is impossible (at any rate for me) to have instant recollection of the facts of each case throughout the Friday

-for trials, the judge will have had more time to read; but nevertheless, the judge has had little time compared with what you have had; and an urgent application for a freezing order may, unexpectedly, have taken up much of his reading time in any event

-much the same applies to documents - no doubt they were on the reading list; but still take the judge to them and point out the important passages – if the judge already knows and understands them he will tell you

3. Make simple and concise submissions

-Why should you do so? Because they will be much easier for the judge to take on board –

-of course more work is required to produce a short and simple submission than a longer, rambling one – but the time is well spent and the product is much more likely to persuade the judge

-remember the wise words of Lord Bingham

> You should concentrate on "winnowing out the essential and crucial from the inessential and peripheral" –

"to distil the point that really matters is greatly to strengthen the effectiveness of the argument. That is after all the stock in trade of the outstanding advocate".

-if a point has to be developed because is it in truth a complex point it can of course be developed- but it is easier for the judge to understand the development of the point if he has first understood the basic point on which you are relying

4. When should you seek to demolish the argument of your opponent ?

-you will have your own views on this but my advice is to concentrate on your own argument; -never assume that the judge has understood your case merely because you have asked him to read it

-you have your answers to your opponent's case and you may be very anxious to tell the judge what they are; but it is surely essential for the judge to understand your own case first

-if you are the claimant, you will have a right of reply and the last word

– you lose nothing by saving your response to your opponent's argument until your reply; indeed the force of a response is often all the greater if the judge has already been persuaded by the defendant that he might be right;

-if you are the defendant, you will have to reply to the claimants' points but do so after you have set out your own case with clarity

5. what use should you make of adjectives and adverbs ?

My advice is not to use either

When dealing with your opponent's argument, give the judge reasons for rejecting it; it is not persuasive to denigrate it by describing it as hopeless, completely hopeless or utterly hopeless, any more than it is persuasive to describe your own argument as plainly right –

- I am instinctively on my guard when an advocate makes excessive use of adjectives; if he has a good case they are unnecessary; I am persuaded by reasoning, not by abuse

-if it is appropriate to use adjectives – and it sometimes is - remember Lord Bingham's advice

> "The effective advocate is not usually he or she who stigmatises conduct as disgraceful, outrageous or monstrous but the advocate who describes it as surprising, regrettable or disappointing."

6. authorities

I have observed at least 2 different approaches

– one is to take the judge to the passage in the authority which sets out the principle relied upon without explaining how the issue arose in that case in order to see it in context –

- the other is to summarise the facts, the issues and the decision – and then refer to the statement of principle which led to that decision

I find the first approach unhelpful - without knowing the context in which a statement of principle was made, I will not be persuaded that the statement of principle, however clearly expressed, is applicable to the case I am deciding; in law context is all

If I am merely referred to the statement of principle I will have to study its context myself; surely the advocate should tackle that to ensure the judge gets the right end of the stick

– These days, when so many cases are cited which are not reported in the law reports but are found on Bailii without a headnote, is it particularly necessary for the advocate to put the statement of principle in context.

7. in argument, you must engage with the judge

-I often put to counsel what I think may be the answer to a case in order to see what, if anything, there can be said against it. That is the great advantage of oral argument. Some counsel, admittedly few in the commercial court, do not appear to recognise that I am inviting a reply and think that it is my final and concluded view and meekly say "well, if that is the way your lordship sees it, there is nothing to add." But it is essential for a just resolution to a case that where the judge makes a comment or advances a view with which counsel disagrees that he or she robustly, but politely, advances the contrary view

I am grateful when counsel tells me I am wrong and why, whether or not I am wrong, because the opposing arguments are then clearly delineated – and I can go away decide what I think the right answer is

8. closing submissions at the end of a trial

In substantial cases closing submissions are often put in writing and sometimes there is a short adjournment for them to be prepared and for the judge to read them. Oral closings will usually in those circumstances be given a limited amount of time. Some suggest they are unnecessary because the judge has the benefit of full written submissions. But, as I said earlier in this talk, I find oral argument at the end of a trial helpful because I can seek answers to what I consider to be difficult points. But apart from being prepared to answer

> questions from the judge on any part of the case, what should counsel plan to say on such occasions ? There is no time to read out the written submissions and in any event that would be absurd. Nor is anything to be gained by hurriedly mentioning as many of the topics covered in writing as can be mentioned in the time available. In my view, the advocate has to concentrate on what he considers to be the point or points most likely to win the case and make sure the judge has them well in mind. If his opponent has a point which the advocate considers particularly dangerous he may also wish to make sure the judge has in mind the reasons why the advocate says that point is wrong. What those points are requires an exercise of judgment by the advocate. Lord Donaldson used to say that there was only one point in every case. The difficulty, of course, is to decide what that point is. It is an occasion when the advocate has the opportunity to display his judgment and his skill.

In conclusion, whether you are preparing oral or written submissions, I urge you to heed Lord Neuberger's advice:

> A skilled advocate follows George Orwell's rules: they never use a long word where a short one will do; wherever it is possible to cut a word out, they always cut it out. Their submissions are well prepared. They know their brief. They know which points have merit. They concede where concession is proper.

Finally, let me finish by mentioning an exchange in court which perhaps illustrates the respect which the bench and the bar have for each other and the easy manner in which they can and should address each other in court. A circuit judge, HH Judge Dean, was hearing his last case and before commencing his last summing up he wished to mark the occasion by thanking the bar for their assistance over a great number of years. In particular he wished to thank the counsel before him that day who had appeared before him in a great many cases and whom he knew very well, Mr. Smith for the

prosecution and Mr. ……At that point the judge's memory went a complete blank and he could not remember the name of defence counsel. The silence grew longer but the judge could not remember counsel's name. It was eventually broken by defence counsel getting to his feet and saying. "The name is Spittal. And if it assists, your Honour's name is Dean."