Women in Commercial Law

Mrs Justice Carr DBE[1]

Jill Poole Memorial Lecture

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History of women in law

In 1888, Eliza Orme became the first woman to earn a law degree in England, at University College London. However, although she "devilled" for a number of (male) conveyancing counsel, she was unable to be called to the bar or join the Law Society.[2]

In 1903, Bertha Cave applied to be admitted as a student to Gray's Inn to be called to the Bar. Although the initial response to her application was positive, some urged caution due to the "*legal implications*" of admitting the first woman to an Inn of Court. A special committee set up for the purpose decided on 24 April 1903 that, regardless of whether the Benchers wished to admit a woman as a student, it was not in the power of a single Inn of Court to do so. They looked to Dugdale's *Origines Juridiciales* (a work on the origins of the Inns of Court) and concluded that, according to Dugdale "*males and males alone*" were admissible students. Bertha Cave appealed the decision in the House of Lords, asking that they change the law to allow women to enter the legal profession. The judges would not make a precedent to allow women to enter the legal profession or make the Inns of Court alter their centuries-old practice. Lord Halsbury concluded that "*that is quite enough to justify the Inn in the course they have pursued and we do not think it necessary to give any other reasons than that there is no precedent for such a proceeding*".[3]

In 1911, Gwyneth Bebb completed her studies at St Hugh's College, Oxford, with a first-class mark. However, she was not awarded a degree. Women at Oxford at the time could not be. Nevertheless, she applied to the Law Society to take the solicitors' examination and was refused on the ground she was a woman. Undeterred, she brought an action against the Law Society for a declaration that she was a "*person*" within the meaning of the Solicitors Act 1843 and for an injunction requiring the Law Society to admit her to the examination or restraining it from refusing to admit her.

She had what would appear to be strong grounds for her case:

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[1] I would like to express thanks to Alyssa Stansbury, a tenant at One Essex Court and a former judicial assistant, for her help in preparing this lecture.

[2] https://first100years.org.uk/digital-museum/timeline/; the First 100 Years Project, founded by Dana Denis-Smith, aims to shed a light on female role models in the profession over the last century.

[3] graysinn.org.uk/history/women-the-inn/bertha-cave/application

S.2 of the Solicitors Act 1843 stated that "*No person shall act as an attorney or solicitor…unless such person shall after the passing of this act be admitted and enrolled and otherwise duly qualified as an attorney or solicitor*."

If the use of the word "*person*" was not sufficiently gender-neutral, it was combined with s.48, which provided that "*every word importing masculine gender only shall extend and be applied to a female as well as male…unless in any of the cases aforesaid it be otherwise specially provided*."

Despite this, in its judgment in Bebb v Law Society[4], the Court of Appeal, describing Bebb (accurately, though perhaps unnecessarily) as "*a spinster*", refused her appeal, holding that women were unable to become lawyers at the date of the passing of the Solicitors Act 1843 and that it conferred no fresh and independent right upon them to do so, because it did not destroy a pre-existing disability.

Of slight comfort, Cozens-Hardy MR added "*We have been asked to hold, what I for one quite assent to, that, in point of intelligence and education and competency women—and in particular the applicant here, who is a distinguished Oxford student—are at least equal to a great many, and, probably, far better than many, of the candidates who will come up for examination, but that is really not for us to consider. Our duty is to consider and, so far as we can, to ascertain what the law is, and I disclaim absolutely any right to legislate in a matter of this kind. In my opinion that is for Parliament, and not for this Court*."

Of less comfort was Phillimore LJ's statement that "*A difficulty—I only mention it incidentally—at once arises if a woman is to be admitted an attorney or a solicitor, because it is clear that married women, not having an absolute liberty to enter into binding contracts, binding themselves personally, would be unfitted either for entering into articles or for contracting with their clients. Well, it is true that that difficulty does not apply to single women, but every woman can be married at some time in her life, and it would be a serious inconvenience if, in the middle of her articles, or in the middle of conducting a piece of litigation, a woman was suddenly to be disqualified from contracting by reason of her marriage*."

This statement of Phillimore LJ was curious given that the Married Women's Property Act 1883 permitted a married woman to enter into contracts to the extent of her separate property (that is, the property she held separately to her husband – the same Act providing that a married woman was capable of acquiring, holding and disposing of property as her separate property).

[4] [1914] 1 Ch 286

It was only in 1919 - shortly after the Representation of the People Act 1918 saw women over 30 get the vote - that, with the passing of the Sex Disqualification (Removal) Act, women were permitted, amongst other things, to qualify and practise as lawyers.

> S.1 provided that "*A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise)*"

Gwyneth Bebb did not benefit from this. She died in 1921, aged 31, from complications during childbirth.

Progress was not speedy. In 1920, Madge Easton Anderson became the first woman admitted to practice as a solicitor in the UK. In 1921, Frances Kyle and Averill Deverell were the first women called to the Irish Bar. It was only in 1922 that Ivy Williams became the first woman to be called to the English bar.

Other advances were being made for women around the same time - in 1923, the Matrimonial Causes Act was passed permitting women to apply for divorce on the ground of adultery. Previously, only men could make this claim.

It was in 1933 that the Bar Council allowed female barristers to practise under their maiden names, the rationale being that "*they are not deprived of the professional reputation acquired as spinsters*".

In 1945, Sybil Campbell became the first woman to be appointed to the professional judiciary full-time, when she became a stipendiary magistrate at Tower Bridge Magistrates' Court.

It was only two years later, in 1947, that Cambridge began to grant women the degrees they had earned.

The first female High Court judge was Elizabeth Lane, appointed in 1965. Lane was the third woman to be appointed King's Counsel (in 1950). She became the first female Bencher when she was appointed to Inner Temple in 1965. She states in her autobiography that being a woman led to some logistical problems – having tried to get a separate robing room (she was expected to share the men's), she records that in one County Court "*my persistence was rewarded by the exclusive use of a room on the door of which was a large notice 'GAS KEEP OUT'*".[5] Lane is also credited with finally introducing "Your Ladyship" into the legal vocabulary, having been addressed for years as "My Lord" in court.

[5] Dame Elizabeth Lane, *Hear the other side* (1985)

The first female partner in a law firm was Dame Catherine Fiona Woolf DBE JP, in 1981 at CMS Cameron McKenna.

The first woman appointed to the Law Commission was Baroness Hale in 1984.

Dame Elizabeth Butler-Sloss was the first woman appointed to the Court of Appeal, in 1988.

Finally, the first female Law Lord (and then Justice and then President of the Supreme Court), Baroness Hale, was appointed in 2004.

This history shows us the progress made by these amazing women in these all too recent years when equality has been extended in the legal world. Having only been allowed into the legal world 100 years ago, women are now at the forefront of legal change and development.

Jill Poole

One such woman was Jill Poole, who has inspired countless numbers of law students with her forward-thinking attitude and enthusiasm for teaching commercial law.

Her clear gift for teaching is shown in the attitude expressed in the Preface to her bestselling Textbook on Contract Law, where she says "*It is simply not true to say, as I sometimes hear, that 'anyone can teach contract law'; anyone can teach contract law badly, without enthusiasm, insight and knowledge of its practical application and relevance. This is a technical subject. It cannot be oversimplified without losing the fine distinctions in reasoning: equally, however, it should not be conveyed with the aim of intimidating or overwhelming*."[6] It is clear that Jill Poole had such enthusiasm, insight and knowledge.

Testament to her impact is that a book of Essays in Memory of Professor Jill Poole was published early last year.

Women at the forefront of legal change

Some of the most exciting recent developments in commercial law have been driven or inspired by women. I have selected a few examples of recent developments and cases, which I hope will be interesting from an academic perspective as well as highlighting the impact women are having on the law after only 100 years.

<u>Consideration</u>

[6] Jill Poole, Textbook on Contract Law (13th Ed.)

One area familiar to all law students where women have truly pushed the boundaries is that of contractual consideration.

In MWB Business Exchange Centres v Rock Advertising Ltd,[7] office premises managed by the claimants were occupied by the defendants under a licence agreement. The defendants fell into arrears on the payments. The parties orally agreed to vary their original agreement by rescheduling the payments due from the defendants, essentially giving them extra time to pay. One of the rescheduled payments was made on the same day, but a month later the claimants exercised a right under the original unvaried contract to lock the defendants out of the office premises. The claimants' claim for arrears succeeded at first instance. The judge held that, although the defendants' promise to pay in accordance with the revised payment schedule conferred enough practical benefit on the claimants to amount to good consideration for the oral variation, a clause of the original contract expressly precluded oral variations and the claimants were not estopped from enforcing their rights under the original contract. The defendants appealed.

One of the issues before the Court of Appeal was whether the claimants' promise to give the defendants extra time to pay was supported by consideration. The Court held that it was, applying the reasoning of Williams v Roffey Bros & Nicholls (Contractors) Ltd[8], namely that the requirement of consideration was satisfied because the variation agreement had conferred a practical benefit on the claimants. The Court distinguished Foakes v Beer[9] – where the House of Lords approved the rule in Pinnel's Case[10] that "*payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction of the whole*" - on the basis that it applies only in cases where the sole benefit to the creditor from the performance of the variation agreement took the form of receiving part payment of a debt already legally due to him. The Court of Appeal held that, although a creditor is not in general bound by a promise to accept part payment in full settlement of a debt, the performance by the debtor of some other act he was not bound by the contract to perform may constitute good consideration.[11] The practical benefit conferred by the varied agreement in this case was that the defendants would continue in occupation and the claimants would avoid a void and unproductive property.[12] The Court thus considered that the claimants obtained a benefit "*over and above that simply derived from accommodating the debtor*".[13]

[7] [2017] Q.B. 604; [2019] A.C. 119
[8] [1991] 1 QB 1
[9] (1884) 9 App Cas 605
[10] (1602) 5 Co. Rep. 117
[11][2017] Q.B. 604, Kitchen LJ at [41]
[12] *ibid* Arden LJ [72]
[13] *ibid* Arden LJ [75]

Arden LJ suggested that the requirement of consideration "*is satisfied where the promise shows that his renewed promise to perform an existing obligation results in the promisor receiving a benefit which he requested or at least indicated he wanted from the renegotiation*"[14] and suggested that any concerns that this might result in the enforcement of a contract that had been made ill-advisedly or under improper pressure could be remedied through the doctrine of economic duress.[15] The key was that, to be enforceable, there would need to be consideration in the form of a practical benefit to the creditor which he sought and which is an identifiable benefit over and above the mere fact of accommodating the debtor and not having to enforce payment of the debt. Arden LJ considered that this may well "*strike a satisfactory balance between on the one hand enforcing promises and enabling debtors to rely on their creditors' promises and on the other hand of protecting creditors from debtors who seek unfairly to gain an advantage from their creditors*".[16]

Jill Poole had previously suggested that the concepts of practical benefit consideration and duress could be interpreted as a "*single 'integrated principle' whereby the existence of duress in this alteration context will prevent a conclusion that there is consideration for the alteration promise despite the existence of factual benefits. In other words, absence of duress may be seen as a qualifying condition for such a conclusion.*" She went on to say, however, that "*this poses a conceptual difficulty since duress is a vitiating factor and it might be argued that, unless there is a binding contract in principle (i.e. consideration exists), there is no contract to set aside for duress. It follows that, logically, the existence of consideration should be determined first and only then should the question of duress arise. In practice, the opposite approach seems to apply, i.e. duress is ruled out and then consideration can be found in the form of practical benefits resulting from an alteration promise that was freely given.*" She went on to note that the "integrated analysis" "*does not fit easily with any arguments suggesting that duress has replaced consideration as the key requirement to determine the enforceability of an alteration promise*".[17]

Arden LJ went on in her judgment to suggest that the variation agreement could be seen as a collateral unilateral contract. The Court had not heard submissions on this point; however, Arden LJ considered that this could reconcile the fact that the defendants were not bound to continue as licensee of the property for more than the contractual term, which was shorter than the period over which the arrears were rescheduled and the fact that the advantage conferred by the variation agreement – avoiding the property being empty – meant that the defendants had to be the occupier. The result of the "collateral unilateral contract" was that, collaterally to the licence

[14] *ibid* Arden LJ [78]
[15] *ibid* Arden LJ [81]
[16] *ibid* Arden LJ [87]
[17] Jill Poole, *Textbook on Contract Law* (13th ed.), p.141

agreement, for so long as the defendants occupied the property and paid the renegotiated fee, the claimants would be bound on payment of the initial instalment, to accept the deferral of the arrears.[18] Arden LJ adopted the concept of a "collateral unilateral contract" from Mindy Chen-Wishart.[19] The other judges (Kitchen LJ and McCombe LJ) did not opine on this point.

The Supreme Court overturned the Court of Appeal's judgment in MWB on other grounds, holding that an oral variation of the contract was not binding where there was a no oral modification clause; however, Lord Sumption also expressed some doubt as to the result of the consideration analysis on the facts. However, there was a hint that the Supreme Court would be willing to reconsider Foakes v Beer in the future.

Shareholder remedies

A topic which was clearly important to Jill Poole was the promotion of effective shareholder remedies. In 1999, Jill Poole published an article with Pauline Roberts entitled "*Shareholder remedies – efficient litigation and the unfair prejudice remedy*",[20] commenting on the Law Commission's proposals for the unfair prejudice remedy - a remedy for a minority shareholder unhappy with the conduct of the business of the company of which he or she is a member - which proposed the introduction of conduct presumed to be unfairly prejudicial to shareholders. Poole and Roberts were broadly supportive of the proposal but suggested it appeared to be a "*"half-way" measure*". They advocated a more far-reaching approach, that "*if and when shareholder remedies are considered together with directors' duties an opportunity would be presented to debate the approach taken in New Zealand, namely the identification of specific circumstances in which a breach of statutory duties is automatically deemed prejudicial*". In a further article published the same year, Poole and Roberts were critical of the Law Commission's proposals on the new derivative action, in particular that the review of the remedies available to shareholders (including both the derivative action and unfair prejudice remedy) had been undertake in isolation, rather than as "*part of a more fundamental review of the position of directors*", where directors' duties and remedies are considered together.[21]

[18] [2017] Q.B. 604, Arden LJ, [89]
[19] M Chen-Wishart, "Reforming Consideration—No Greener Pastures" in *Contract in Commercial Law* (2016) eds S Degeling, J Edelman and J Goudkamp; M Chen-Wishart, "A Bird in the Hand: Consideration and One-sided Contract Modifications" in *Contract Formation and Parties* (2010), pp 89–113, eds A S Burrows and E Peel
[20] (1999) JBL 38
[21] (1999) JBL 99

One of the most recent steps forward in controlling the actions of directors has been taken by Cockerill J in Recovery Partners GB Ltd v Rukhadze,[22] where she examined the scope of a fiduciary's (in this case a director's) duty not to divert a "*maturing business opportunity*" from a company and the effect of a resignation of a company director on the continuation of their fiduciary duties.

The duty not to divert a "*maturing business opportunity*" away from your principal was established in Canadian Aero Service v O'Malley;[23] however, there had been limited guidance in the authorities as to what this meant. Cockerill J clarified the position saying that "*Such limited guidance as the authorities provide indicate to me that a business opportunity may be regarded as "maturing" so long as there is contact between the principal and a third party with regard to future business and that contact has progressed to the stage where some outlines of future contractual relations are in place. There need not be a draft contract or any imminence of agreement*". There were limits on this concept, that the opportunity must have come to the fiduciary purely by reason of his position as a fiduciary[24] and it must be an opportunity the company is "*actively pursuing*".[25] The judgment is helpful in clarifying the scope of this concept, which it is now clear will be broadly interpreted and will constitute part of the increasing armoury of remedies available to shareholders to keep their directors in check.

Cockerill J also clarified that as, in general, fiduciary duties do not extend beyond the end of the fiduciary relationship. Where liability arises from post-resignation conduct, it arises not because duties persist post resignation but because of breaches of fiduciary duties prior to resignation which manifest only post resignation.[26]

Duress and international relations

A further case of particular interest is Ukraine v Law Debenture Trust Corp Plc.[27] Russia held debt-bonds with a face value of USD 3 billion, issued in December 2013. In 2014, Russia seized the Crimea and backed separatists in the civil war in eastern Ukraine. Ukraine's economy nearly collapsed and it defaulted on the repayment of the bonds in 2015. Law Debenture, the bond trustee acting on Russia's behalf, brought a claim for payment against Ukraine.

Law Debenture applied for summary judgment, saying that Ukraine's defence - that it was justified in not making repayment because it had issued the bonds following unlawful and illegitimate threats

[22] [2018] EWHC 2918 (Comm)
[23] [1971] 1 WLUK 77
[24] [2018] EWHC 2918 (Comm) [65]
[25] *ibid* [66]
[26] *ibid* [76]
[27] [2018] EWCA Civ 2026

by Russia - had no real prospect of success. At first instance, summary judgment was granted. The Commercial Court held that the subject matter of the duress defence – acts by the Russian state – was essentially political and therefore not justiciable, although it also held that there would have been sufficient evidence of such acts to justify a trial.

The main argument before the Court of Appeal (presided over by Gloster LJ) concerned whether Ukraine could run a defence of duress, namely that Ukraine had issued the bonds and become unable to repay them because of illegitimate Russian pressure.

The Court of Appeal agreed that the acts Ukraine alleged to constitute duress were "*acts of high policy by Russia in the sphere of international relations in the exercise of sovereign authority*", that is to say acts that are generally not considered to be within the province of the Courts.[28] However, the Court held that there were exceptional reasons of UK public policy which justified a trial.

This is one of the few cases where the courts have accepted that they can examine foreign acts of state in cases where the alleged wrongdoing falls within the military sphere.

There is of course somewhat of a parallel between this judgment and the recent decision of the Supreme Court in Miller II which has reassessed the boundary between the political and legal spheres.

Jurisdiction and freezing orders

One of my own recent cases demonstrates the extent to which women continue to grapple with some of the biggest cases around.

In Tugushev v Orlov,[29] a case between two wealthy Russian businessmen, a jurisdiction challenge was brought by the defendant, Mr Orlov, claiming that the claimant, Mr Tugushev, could not bring an action against him in England as (in simple terms) he was not domiciled in the jurisdiction. The main question I had to determine was whether Mr Tugushev had a good arguable case that Mr Orlov was domiciled in England. I determined that he did – although Mr Orlov's connections were substantially to Russia, and the claim mainly concerned a Russian company, he had substantial connections to England. The case raised the question of the gateway that foreign parties must satisfy to bring their claims in England, one that is not uncontroversial.

In a further application, Mr Orlov sought to set aside a worldwide freezing order granted against him after an *ex parte* application by Mr Tugushev. One of Mr Orlov's arguments was that the WFO

[28] *ibid* [173]
[29] [2019] EWHC 645 (Comm)

should be set aside on the basis of Mr Tugushev's material non-disclosure – parties are under an obligation to make full and frank disclosure when applying *ex parte* for a freezing order. Although I was not persuaded by a number of the allegations of non-disclosure made by Mr Orlov, I decided that there had been a material failure in the duty of full and frank disclosure in that Mr Tugushev had failed to disclose certain declarations and statements he had made in relation to an asset, that were central to Mr Orlov's defence. This failure was a serious one which I determined justified discharge of the WFO. I also found that there was no real risk that Mr Orlov would dissipate his assets such as to justify continuation of the WFO and that, in any event, even if the position on risk of dissipation were borderline, I would not have been persuaded that it would be in the interests of justice, given Mr Tugushev's non-disclosure, to regrant the WFO in the absence of a clear and compelling as to the existence of a real risk of dissipation.[30]

Where to next for commercial law? Women lead the way

One of the biggest next areas for legal development is to confront new areas of technology, such as AI, blockchain and cryptocurrencies. The law will have to keep up with the regulation of disruptive and exponentially changing technology, which will likely move to render much regulation swiftly outdated.

Sarah Green, who has been at the forefront of academia, on subjects like causation and negligence, has now been appointed to the Law Commission as the Commissioner for Commercial and Common Law. Sarah Green's focus is now on the future of law in the area of technology. As she has said "*Technology poses a series of complex problems for lawmakers and wider society. The work the Law Commission is undertaking on such matters as intermediated securities and smart contracts can help unlock obstacles to business, which will be especially important in the trading environments of the future*."[31] Her work includes virtual currencies, blockchain issues surrounding intermediated securities, smart contracts and sale of goods law as applicable to digitised assets.

Smart contracts in particular present problems for the traditional law of contract, a subject on which Sarah Green has written.[32] Smart contracts are self-executing agreements that exist as a set of instructions to a computer. The general objectives are to satisfy common contractual conditions, minimise exceptions and minimise the need for trusted intermediaries. They should lower losses suffered through fraud, transaction costs and arbitration and enforcement costs. Sarah Green notes that "*one of the most pressing issues is how the forensic process of interpretation needs to change in order to accommodate contracts written in computer code*", suggesting that the development of a

[30] [2019] EWHC 2031 (Comm)
[31] Lawcom.gov.uk/new-commissioners-announced-at-the-law-commission/
[32] Sarah Green, "Smart contracts, interpretation and rectification" (2018) 2 LMCLQ 234

'reasonable coder' test may be a viable means of proceeding. She also suggests that, given the self-executing nature of smart contracts, in cases of executory agreements, rectification may become a more widely-used remedy. She gives an example where the literal interpretation of a contract given by a computer would be different to the human interpretation. If a smart contract said "*Go to the shop and buy a newspaper. If there are any eggs, get a dozen*", a human would, in the event the shop had eggs, purchase one newspaper and a dozen eggs. The computer would, in the event the shop had eggs, purchase a dozen newspapers.

Louise Gullifer is also working on the legal implications of blockchain, recognising the potential advantages which blockchain might offer (for example security of transfers and the need for a centralised system) and assessing the potential legal and regulatory implications this may have, including issues of conflict of laws.

Conclusion

To conclude on the theme of women in commercial law, it is clear that there has been huge progress over the years. We have the first female President of the Queen's Bench Division, Sharp P., and three women in the Supreme Court.

Nevertheless, we cannot be complacent. I was only the second female Commercial Court judge and the first female Technology and Construction Court judge. The proportion of female QCs hovers around 15%[33] and that of female partners around 30%. There is still much room for improvement.

It has been a pleasure to reflect on some of the journey that women have travelled and to reflect on the enormous impact of Jill Poole's teaching and writing on women in commercial law in the past, present and future.

[33] Bar Council, *Diversity at the Bar 2018*