CHANCERY BAR CONFERENCE

14 JANUARY 2022

UPDATE ON THE CHANCERY DIVISION

1. Thank you for asking me to speak at your conference and to give an update on the Chancery Division towards the end of my first year as Chancellor. The Division is in good shape. It has almost a full complement of judges for the first time for some years. Many if not most of those judges are relatively new appointments, younger than was historically the case, with a wide range of backgrounds as solicitors and barristers. We also have a substantial group of deputies both judges from the business and property courts in the regional centres who sit as section 9(1) deputies and barristers and solicitors who sit as deputies primarily pursuant to section 9(4), including your own chairman Amanda Hardy QC appointed last term. As you know the Chancery Masters also do much of the case management. In more substantial cases, joint case management by a judge and a Master has become more frequent and within resource limitations I am keen to encourage that approach which seems to work well. Chancery Masters also have an extensive trial and disposal hearing jurisdiction. There should be six Masters but they are two down at present so dependent on deputies. There will be a competition later this year to replace the two masters who retired and I would encourage members of the Association who are interested to give serious consideration to applying. It is an interesting and varied role.

2. Both here in London and in the regional centres the Chancery work fits within the overall umbrella of the Business and Property Courts and there is a considerable overlap between the work in the Division and that of the other Business and Property Courts particularly in the case of the Business List, where it is often happenstance where the case is issued. There are also courts or lists which could be described as a joint venture between the Chancery Division and the Commercial Court in which judges from both jurisdictions sit such as the Financial List and Competition Appeal Tribunal, both of which are increasingly busy.

3. In terms of cross-deployment we have a Chancery Judge who is also authorised to sit in the TCC and some Chancery judges also have tickets to sit in the Administrative Court. The Media and Communications List in which QB media judges and some Chancery Judges sit is another example of a form of joint venture. There are also certain QB judges with some Chancery experience who sit in the Chancery Division from time to time usually in three week stints. I am keen to encourage cross-deployment because it enhances judicial skills to sit in courts or jurisdictions which are outside your comfort zone and it also seems to be good for morale.

4. In view of the overlap of work between the various Business and Property Courts, steps are being taken to harmonise the various guides to ensure a similarity of approach as regards practice and procedure. Some of you will know from personal involvement that a working group headed by Fancourt J and Master Kaye is engaged in a major revision of the Chancery Guide with a view to bringing it up to date and into line where appropriate with the Commercial Court and TCC Guides.

5. However, I should emphasise that I fully appreciate that there are areas of work in the Chancery Division, trusts and probate and insolvency are the obvious examples, but there are others, where a set of specific and different rules applies which are not replicated in other Business and Property Courts. I also recognise the importance of ensuring that areas of specialist work such as Intellectual Property and Insolvency are dealt with by judges with appropriate levels of specialist experience.

6. I wanted to say a few words about what I see as the likely pattern of work in the Division in the near future although I am aware that forecasting such matters can be haphazard. We were told at various times from 2016 onwards that with Brexit there would be a blizzard of Brexit related cases and various contingency plans were put in place. Maybe the storm will come but it certainly hasn't come yet.

7. Despite the pandemic, the work in the Division and in the Business and Property Courts generally has held up and in some areas has increased. So far as specifically pandemic related work is concerned, leaving aside the business interruption insurance disputes, there are a number of disputes concerning rent arrears and other landlord and tenant disputes arising out of the pandemic, one of which, Bank Mellon, is going to the Court of Appeal later this term. To what extent we see these pandemic related landlord and tenant disputes being litigated, at least in the commercial sphere, may depend upon the success of the government's arbitration scheme for commercial rent disputes assuming that passes through Parliament by 25 March, the date until which commercial tenants are protected from eviction. The scheme will lead to the stay of any proceedings not settled before that date so that they can be submitted to arbitration under the scheme. What is proposed seems at first blush to be more akin to a species of mediation. It seems

unlikely to give rise to issues of law which could lead to applications for permission to appeal awards under section 69 of the Arbitration Act but I can see scope for challenges under section 68. It will be interesting to see how the scheme works out.

8. One of the things which puzzled me when I was appointed Chancellor and became responsible for the day to day running of the Business and Property Courts was the distinct lack of much in the way of property cases in the High Court. As you will all know, at least in the context of London based work that is attributable to the financial limits which mean that nearly all the cases go to Central London County Court where of course there are a number of judges with considerable experience of landlord and tenant, leasehold enfranchisement and other property disputes. Nonetheless some members of your Association and other specialist associations have expressed concern that there are not more property cases in the High Court, particularly where issues arise on which an authoritative ruling setting a precedent is required. It is also the case that there at least three Chancery Division judges who are specialists in the field. It is hoped to redress the balance somewhat by ensuring that where an appropriate case arises, the Chancery Masters will either keep it in the Division or transfer it in from the County Court when asked to do so.

9. An area of the work where an increase in cases was expected as Coronavirus Act restrictions were lifted was insolvency and bankruptcy for obvious reasons, but rather surprisingly and perhaps giving some cause for optimism, there has not been a major surge in cases. Likewise we had anticipated a surge in applications for approval of restructuring plans under Part 26A of the Companies Act 2006 as inserted by the Corporate Insolvency and Governance Act 2020 in view of the pandemic and its

economic effects. However, although there was a furry of applications when the new scheme was introduced, there have not been many since. It remains to be seen whether there is an increased use of these plans over the next few years.

10. An area of the work which has definitely expanded is intellectual property and specifically patents. There are a substantial number of patent trials coming up in the near future. Fortunately we now have two specialist IP judges and a number of section 9(4) deputies with specialist experience who have patent tickets including three of the deputies appointed last term.

11. No update on the work of the Division would be complete without saying something about technology. I suspect that we have all had more than our fill talking about how we coped, at the height of the pandemic and during lockdowns, with the need to switch over at short notice to court hearings being heard remotely over platforms like Skype for Business and Teams. However, as I have said before, that was all a process which would not have been possible without the cooperation and hard work of the members of the Bar, specifically of the members of this Association despite all their other personal and domestic commitments. Some good things will surely come out of what has otherwise been a gruelling two years, one of which is an appreciation of the importance for all of us of our health and wellbeing and of ensuring an appropriate balance between work and home life and relaxation. The importance of ensuring the right balance for everyone is not lost on me or on the other judges.

12. As for how hearings will be conducted in future, remote will remain the default position for short hearings of half a day or less, interlocutory hearings or appeals where there

are no witnesses since we have found that hearings can be conducted more quickly and cost effectively by doing them remotely. However, as is always the case, how to conduct any hearing is a matter of judicial discretion after consultation with the parties and there will be cases where the judge decides that even a procedural hearing should be in person. An example is the case where the parties behave as if the CPR had never come into force more than twenty years ago and fail to cooperate with each other, engaging instead in trench warfare, so that the judge considers an in person hearing, possibly first thing in the morning, is required to instil some common sense.

13. How trials should be conducted is different. Taking an optimistic view that the return to courtrooms continues and more restrictions are not imposed, it is preferable for trials to be conducted in court with witnesses, certainly those whose evidence is in any sense critical giving evidence in person. Nonetheless, as long as the pandemic remains, judges will be sensitive to medical and safety concerns and it may continue to be the case that some trials are heard remotely or some witnesses give evidence remotely.

14. I have heard the view expressed by some judges that enabling witnesses to give evidence remotely from home means that they are more relaxed and at ease giving their evidence, which in turn improves the quality of the evidence. That is all very well, but in a sense, it overlooks that the purpose of live evidence with cross-examination is not to make the witness feel more at ease, but, so far as possible, to arrive at the truth about the particular dispute. It also overlooks that not all witnesses come from homes where they can feel at ease. The predominant view amongst the judges and practitioners to whom I have spoken on the subject is that, at least in relation to critical witnesses or witnesses whose credibility is in issue, it is preferable that they give their evidence in

court. Although in one sense, a witness may find giving evidence in court somewhat daunting, the importance of what Scottish judge Lord Pentland calls the court as place, a neutral location where disputes are resolved, cannot be overemphasised. Provided that we have up to date and robust technology, hybrid hearings may well prove to be a frequent form of hearing in the future with judge and advocates and critical witnesses in court but others such as clients or members of the media participating remotely.

15. One aspect of the pandemic and the need for remote hearings which has concerned me and other judges is the extent to which junior barristers and solicitors' participation is limited to being a tile without picture or sound on a Teams screen. We have been concerned for some time that even in procedural hearings particularly in large cases the parties instruct QCs and the advocacy is done by them, a problem which has been accentuated by the pandemic. Without wanting to take the bread out of silks' mouths, we have been trying, at least informally, to encourage parties to instruct junior counsel and solicitor advocates to do the advocacy at procedural hearings or at least some of it. The various court guides either do reflect or will in future reflect this. As anyone who has been an advocate will say, it is only by doing your own advocacy and making your own mistakes that you learn your trade. In the Chancery Division, the problem has been ameliorated to an extent by the CLIPS scheme which has continued throughout the pandemic to provide the assistance of junior members of the Chancery Bar to litigants in person, particularly in the Applications Court. As I said when I spoke to you last year, this an excellent scheme to be much encouraged. It helps the judges tremendously and gives young members of the Bar advocacy experience.

16. Thank you very much for listening to me and I am happy to answer any questions.