Current Matters of Procedure and Advocacy in the Commercial Court

A Lecture
By the Hon Mr Justice Colman,
Judge in Charge of the Commercial List - 23 April 1997

This is not a bid to wrest the COMBAR award for calculated judicial malice from the member of the CA who now holds it, as he has done for several years. The purpose of this talk is to highlight some of the ways of conducting cases in the Commercial Court which prove particularly helpful to the court, your clients and the interests of justice.

Lord Goff of Chieveley in his recent Wilberforce Lecture described the Commercial Court as the foremost commercial litigation tribunal in the world. Several years ago Lord Wilberforce had described it as "the jewel in the crown of the English judicial system" - and his view can be regarded as entirely reliable, not merely because he was a judge of the Chancery Division but because he was born in a tent on the North West Frontier.

However, the purpose of this talk is not, repeat not, to promulgate unattractive ways of saving the time of the judges in order to save the money of the Treasury.

Rather the purpose is to explore with COMBAR ways of improving the service which the Commercial Court and those who practise in it can provide to their clients.

So far as those who practise as advocates in the court are concerned, that involves promoting as far as possible the case of the clients but at the same time assisting the court, as far as consistent with the interest of one's client, in achieving an accurate resolution of the questions in issue.

At the present stage of its development the English procedural system as in the Commercial Court has moved to a half-way stage between one based entirely on oral advocacy and one based on written advocacy. Experience in other countries suggests that this is (i) irreversible and (ii) likely to lead to an even greater emphasis on written advocacy. For example, in many civil law jurisdictions, such as Italy, there is now virtually no oral advocacy and witnesses are hardly cross-examined at all. The court simply works on written submissions and written statements, often in the course of a series of hearings, lasting perhaps an hour at the most and normally less and in some jurisdictions, such as the Netherlands, resolving issues - even issues of fact - piecemeal.

Now I am a very strong believer in the fact that the great strength and reputation of the

Commercial Court lies above all in the technique of oral dialogue between the court on the one hand and those who appear in it on the other. Let me explain this.

Much of what has to be determined by the Commercial Court involves matters of considerable complexity; whether one is concerned to construe a charter party, or a North Sea oil and gas field contract, or to investigate the methods of chemical analysis of liquid cargoes, or the reserving techniques required for long-tail liability insurance. Counsel appearing in such cases will have spent hours sitting poring over the contractual documents, perhaps with their clients' assistance or sitting with their expert witnesses, going through every line of very complex reports about a discipline which may be totally novel to counsel and the court. The end of all this is likely to be more or less elaborate skeleton arguments and experts reports which have probably taken days to prepare.

It is terribly important not to lose sight of one of the main purposes of this exercise - namely to inform the court of the key matters in issue. But the judge comes to these issues cold. He does not have the benefit of getting an expert to explain the points again and again until he understands them. He relies completely upon Counsel as the primary expositor of (i) the discipline and (ii) the nature of the issue. It is against this background that the question of the function of oral advocacy has to be understood.

The judge finishes his Friday list in the Commercial Court having had to determine one very marginal application to set aside service of a writ outside the jurisdiction, two applications for leave to appeal against arbitration awards, one application for specific discovery of eighteen different categories of documents and a contested application for further and better particulars of a 35-page Points of Defence. Thus stimulated, he gets back to his room at 4.30pm if he is lucky, to discover a pile of 15 lever-arch files and the plaintiffs' counsel's 69 page skeleton which on first glance, seems to be devoted largely to the physics of natural gas extraction, except for those parts (i.e. about 15 pages) which deal with estoppel by convention. He then finds a fax from defence counsel's clerk to say his skeleton has been delayed. (How is it that no more than 50% of counsel at the Commercial Bar succeed in getting their skeleton arguments to the Court by 2.30 pm the day before the trial?). Remembering that he is determined to finish a difficult and overdue reserved judgment in another case over the weekend, the judge's eyes search hopefully for the key to this substantial trial - the pleadings bundle. What does he find? - A file marked "A" which can be raised from its box only by means of powerful lifting gear, which on closer inspection contains 650 pages of pleadings so tightly stowed that the metal clip on the rings can't be fastened, the pages can't be opened and the rings have been assaulted with a sledge hammer so that the ends don't engage and the pages could not be turned even if there were only half

the number.

In view of the fact that it is going to be extremely difficult to penetrate this sizeable chunk of the world's rain forests, the judge turns back to the skeleton argument to help him extract the essence of what the case is about and what he ought to be reading in the 2 and 3 spare hours he is likely to have over the weekend. And this is the acid test. The big switch-off is the skeleton which starts in this way:

(i) In order to obtain an overview of the issues the Court is invited to read

- Bundle A (pleadings),
- the core bundle, files B, C, D, E and F,
- the witness statements of Dr Schadenfreud,
- Sir Charles Fortescue Peppiatt and Kevin Nurd (see Bundle G)

or (ii) The real issue in this case is **conveniently** (note the word) to be found in the further and better particulars of the Re-Amended Points of Reply Requests 17 to 43 and in paragraphs 9 to 24 of the subsequently Re-Re-Re-Amended Points of Defence.
All the references are of course in Bundle A.

I want to make it unmistakably clear that no skeleton argument or outline submissions should ever start without two features:

(i) A broad-brush description of the facts in the action;
(ii) A list of the issues of fact and law.

That is just as important for a summons for further and better particulars, further discovery or for a contested application for leave to amend the pleadings, as for a trial. It is also particularly important in applications to set aside service outside the jurisdiction and for applications for summary judgment under Order 14.

Put yourself, for example, in the position of the judge who is taking the general list on Friday and finds together with the 20 other bundles of cases delivered to his room on a Thursday afternoon your application for leave to make a substantial re-amendment to the Re-Re-Amended Points of Reply - just 6 weeks before trial. Your solicitors have sworn a 50 page affidavit explaining exactly why you want to add 6 new paragraphs to the pleadings. They have succumbed to an irresistible urge - no doubt aided and abetted by counsel - to

exhibit 2 lever-arch files full of documents. There are dozens of pages of pleadings. The judge reaches for the skeleton argument. And what does he find in paragraph 1:

> "This application is designed formally to put in issue a question which has long been known to both parties - namely - whether the statement by the Owners' P & I Club in its letter of 14 July 1982 that the Germanischer Lloyd Surveyor had indicated that the No.3 centre tank plating had been satisfactorily ultrasonically tested, when taken with cargo insurers' statement in their letter of 12 August 1982 that their surveyor had approved the previous year's ultrasonic test results of the No.7, 8 and 9 port tanks on the owners' sister ship Flora, gives rise to an estoppel by convention precluding the defendants' reliance on the matters pleaded in paragraphs 17 to 41 of the Re-Re-Amended Points of Defence".

I cannot emphasise too strongly that for the judge to be given an overview of the facts and issues in the case overall is absolutely vital to his ability to dispose of the application or to prepare for the trial effectively and efficiently.

If a skeleton argument in future omits that kind of opening the judges may exclude the cost of its preparation, i.e. a proportion of the brief fee, from qualification as part of the inter partes costs.

I have referred to applications for specific discovery and for further and better particulars. Although many summonses are issued, sometimes applying for a substantial list of specific categories of documents, it is frequently the case that by the day and the hour of the hearing a thorough discussion between counsel can eliminate practically all issues as to relevance and necessity for disclosure. Similarly with requests for Further and Better Particulars. But that does not always happen. The result can be a serious and wholly avoidable impact on the court's limited time. Let me take a very recent example:

One of the functions of the Judge in charge of the Court is to monitor the amount of time estimated for the hearing of commercial summonses. If more than the limited periods of time specified in the Commercial Court Guide are requested, the Judge in charge must approve the reservation with the court, but will do so only if the extra period is certified as necessary by counsel. The Court recently received a request for the fixture of a summons for further and better particulars. There were 52 paragraphs of request and the time estimate was 4 hours. Now, every experienced junior counsel should know enough about pleading to appreciate when an allegation is open to a justifiable request for particulars. It is not

difficult to distinguish between the minimum pleading necessary to identify the case being pleaded and evidence in support of that minimum. It ought always to be a simple thing to distinguish between a pleading deficiency and, by contrast, questions which are really only within the sphere of interrogatories or a notice to admit facts. I made the following direction:

> "It is directed that this matter shall not be listed unless and until there has been a meeting between counsel for the purpose of resolving all issues, but particularly those relating to Further and Better Particulars. If there are 52 disputed answers to the Request, one or both counsel are failing in their duty as officers of the court. Any attempt to persist in unjustifiable requests, particularly attempting to interrogate, as distinct from requesting particulars, and to persist in inadequate replies to proper requests will attract indemnity costs orders or even wasted costs orders against counsel."

Six weeks later the parties to that direction have not been so bold as to apply for a date for hearing.

Discovery Reverting to discovery, there are two areas of principle which give rise to untold dispute: firstly, relevance of particular categories of document, and secondly, evidence that the party against whom the order is sought has the documents in his possession, power or control.

May I first deal with relevance and with the vexed question of the meaning and effect of the decision in *Peruvian Guano*. I considered that case and how it should be applied in *O v M* [1996] 2 Lloyd's Rep. 347.

> "Although at that end of the spectrum of potential evidential significance it may be said that such documents fall within the letter of Brett LJ's formulation of relevance for discovery purposes, in as much as such classes of documents might, if disclosed, fairly lead the plaintiffs to a train of inquiry which might have the consequence that the plaintiffs were enabled to advance their own case or damage the shipowners' defence, that is not what the formulation means or how it ought to be applied. The principle was never intended to justify demands for disclosure of documents at the far end of the spectrum of materiality which on the face of it were unrelated to the pleaded case of the plaintiff or defendant and which were required for purely speculative investigation. The excessively wide application of Brett LJ's

formulation of relevance has probably contributed more to the increase of the costs of English civil and commercial litigation in recent years than any factor other than the development of the photo-copying machine. That formulation must not, in my judgment, be understood as justifying discovery demands which would involve parties to civil litigation being required to turn out the contents of their filing systems as if under criminal investigation merely on the off-chance that something might show up from which some relatively weak inference prejudicial to the case of the disclosing party might be drawn. On the contrary, the document or class of documents must be shown by the applicant to offer a real probability of evidential materiality in the sense that it must be a document or class of documents which in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it in the broad sense which I have explained. If the document or class cannot be demonstrated to be clearly connected to issues which have already been raised on the pleadings or which would in the ordinary way be expected to be raised in the course of the proceedings, if sufficient information were available, the application should be dismissed."

It cannot be too strongly emphasised that the absence of discovery in cases which are ordinary commercial actions not involving fraud is a real danger to the perception abroad of the English Commercial Litigation system as an efficient and high-quality piece of machinery.

What about the party who asserts through his solicitor's affidavit that the documents are no longer in his possession? How far ought this to be a blanket defence to a discovery application? Of course that party can always be required to confirm its list on affidavit. But that is only likely to be of very limited value if the party is overseas and unfamiliar with the English concept of relevance. I should therefore like to say something about the approach which the Court takes to evidence of possession.

(1) There are some documents which because of their very nature are likely to be in the possession of one party - e.g. a shipowner is likely to have in his possession the general arrangement plan or the pump and pipeline layout.

If it is a damage to cargo claim, and those documents have not been disclosed, there will be a strong inference that the shipowners' list is deficient. An order for discovery by affidavit is likely to be made.

(2) It is however in the realm of one-off documents that problems arise - e.g. internal memoranda relating to the substitute trading of an oil tanker which has been prematurely redelivered in breach of a time charter. In that kind of case the court will not be impressed by a bold assertion by your solicitor that he is informed by the clients that no such documents exist. In such a case, particularly when there is an overseas client, there is no substitute for the solicitor going to the clients' offices and personally looking through the files. He will probably have to go there in any event in order to finalise witness statements. No doubt there may be cases where the filing system is difficult to understand or chaotic, but in most cases a reasonably competent solicitor ought to be able to unearth the relevant documents if they were there - subject always to language problems.

The court is therefore extremely unlikely ever to go behind a solicitor's statement that he has visited the offices, inspected the files and found nothing or only the disclosed documents. Unless fraud is alleged, this is not normally necessary with an English client provided that the solicitor has educated the client in the principles of relevance and informs the court that he has done so. I would most strongly encourage advising solicitors of the need to be prepared to go to the filing systems of foreign clients, rather than relying on the clients' own understanding of relevance and his own ability accurately to search for documents.

Witness Statements I would like to begin what I have to say about witness statements by paying tribute to the guidance for members of the Bar in relation to Preparing Witness Statements for Use in Civil Proceedings written by a working group of the Bar Council's Professional Standards Committee under the Chairmanship of Jonathan Hirst QC. It is an excellent exposition of the duties of counsel when asked to settle a witness statement. No junior counsel at the Commercial Bar should fail to read it.

Some counsel seem to assume that judges have not the faintest idea how a witness statement is taken. Let me give an exaggerated example:

Counsel: "At paragraph 15 of your witness statement you say that you climbed down into the No.4 Deep Tank and observed that the 21st, 22nd and 23rd web frames were in fair condition without excessive corrosion.

Now, that can't be right, can it, because you could never have seen them well enough in the dim conditions with light only coming through the inspection port?"

Witness: "I could see very clearly because I had a high powered torch."

Counsel: "There is nothing about that in your witness statement."

Witness: "But I was obviously using one. I always do."

Council: "I suggest you did not mention it because it is completely untrue."

The court will be unimpressed by this type of questioning. And it will be unimpressed because the judges know - particularly with a foreign witness - that a solicitor takes a witness statement in the following way.

He flies out to some foreign city or port with his cassette recorder and the documents from the case. In the course of the flight and/or in his hotel room on arrival he jots down a long list of things he has to ask the witness about. He meets the witness and asks him a whole series of questions about the details of the case. He records the conversation - questions and answers. This may be extremely difficult work, particularly if the witness's English is poor and disjointed or his recollection is blurred.

The solicitor then returns to England and, working from cassettes, he writes out a first draft of the evidence. Not surprisingly he writes it in good English, for nothing would be more absurd than to attempt to reproduce the semi-coherent answers to his questions or the syntactical morass presented by those answers. Paragraph 14.3 of the Guide states that a witness statement "should, save for formal matters, be expressed in the witness's own words and not those of the lawyer". I have to say that this is a most impracticable requirement with witnesses who, like so many, speak comprehensible broken English. The reproduction of their disjointed and more or less incoherent answers would not be helpful. That will happen in cross-examination anyhow. What the court needs is as accurate a reproduction of the **substance** of what the witness told the solicitor as possible and preferably written in comprehensible English. It makes no sense whatever, if the witness can only speak broken English, for his statement to be written in broken English or to be translated into his own language and then altered by him and translated back again into English.

The next stage is for the solicitor to send to the witness a first draft of the witness statement for approval or comment. The witness then corrects the draft and a further draft is produced. Alternatively a further interview may take place before the final draft.

In all this exercise, if the solicitor never asks the question, "how could you see the web

frames in the deep tanks?" or "did you have a torch with you?" the torch is never mentioned in the statement.

I have to say that wherever a witness is cross-examined on omission of details I always make a point of intervening to ask how his witness statement was prepared. More often than not, the answer to that question explains the omissions.

That said, omissions must not be allowed to distort the truth. This is a point very strongly underlined in the Bar Council Guideline document and it is one which must be constantly watched.

Security for Costs I should like to say a brief word about these applications. There are many of them before the court, and they are happily now free of the major vice that had begun to develop a few years ago of one party or the other inviting the court to investigate the merits of the claim and defence for the purpose of showing that the claim was relatively weak. In this connection I want to make it very clear that unless a plaintiff can show that his claim is of the kind of strength that on an Order 14 application would justify at least an order for payment into court by the defendant of the whole or most of the claim, the strength of the claim is irrelevant and any attempt to go into the merits on applications for security for costs will be very strongly resisted as a waste of the court's time.

I would like to mention a new development in the Commercial Court's practice on such applications for security for costs. It has been found in many cases that where the plaintiff has relatively small assets and has to put up a substantial amount of security, the impact on its ability to trade could be very serious. For example security by way of bank guarantee might be available only against a back-to-back deposit. That could very substantially deprive the plaintiff of trading capital. In many cases the effect could be even more damaging than that inflicted by a Mareva injunction. Yet a successful plaintiff who is not in the end ordered to pay the defendant's costs has no means of recovering such loss or expense under English Law as it now stands. He cannot even recover the expenses of security as legal costs. This is most unfair where no order for costs is ever made in the defendant's favour.

In these circumstances there is a developing practice of requiring defendants who apply for security for costs to be asked to give to the court an undertaking to pay to the plaintiff all losses and expenses caused to the plaintiff by having to put up security for costs, should no order for costs ultimately be made in the defendant's favour. Since the remedy of security is discretionary, failure to give the undertaking may result in refusal of the application.

It follows that all counsel instructed to appear on applications for security for costs should obtain instructions as to the tendering of that undertaking or at least sufficient instructions to enable them to respond to the court when the undertaking is considered.

Expert Evidence at Trials It is rarely satisfactory to treat expert evidence in the same way as evidence from factual witnesses.

It should happen that in most cases there will have been a meeting of experts aimed at isolating matters in issue between them. By that time their reports will have been exchanged - even supplementary reports - and they will have been read by the judge. He will therefore have before him a mass of detailed technical material which he may only partially understand. It makes no sense for the experts to be confined to confirming their reports and then be subject to cross-examination. It is almost always much more useful to the court for the experts first to give oral evidence in chief explaining their position on the matters in issue between them. This need not take up a lot of time. All the technical background will already have been read. It does, however, give the judge a chance to evaluate each expert's position on the points in issue **before** cross-examination and to relate the expert issues to the technical background and vice versa.

There has been a great deal of criticism recently of the amount of time taken up in court by expert evidence. In the ordinary way, with good sense on the part of all concerned, it should be quite unnecessary for guillotines to be imposed in the Commercial Court. If, however, there is a danger of over-playing expert evidence, most of the judges will now discuss with counsel beforehand how long expert witnesses are likely to take and those discussions should produce adequate constraints. I have never found it necessary to guillotine expert evidence although I have used prior discussions with counsel to cut back what seems to be unduly extravagant use of court time.

Reserved Judgments Archive The law reports and in particular Lloyd's Reports have never been able to keep up with the flow of judgments on matters of law or procedure which are produced by Commercial Judges. The position is deteriorating so badly that it must now be regarded as impairing the administration of justice. Most judgments are not reported for over a year and many are never reported at all.

The Admiralty Registrar, Master Miller, keeps copies of all open court judgments given in the Commercial and Admiralty courts which are reserved and handed down. There are currently 373 judgments in the archive delivered during the last 3 years. The vast majority are unreported. The output is about 150-170 per year.

These judgments are presently kept in chronological order but not indexed. In other words unless you know the name of the case and the date you cannot use the archive. Furthermore, all you can do with the judgment is read it in the registry. If you want a copy you must pay the shorthand writers. As it happens, the shorthand writers have had nothing to do with these judgments which if reserved are produced by the judges and their clerks. Further, the judges have the copyright. What happens in practice is that if counsel asks a judge for a copy of one of his unreported judgments, it is usually provided free.

In order to make use of this archive a judicial assistant is being appointed to prepare a subject matter index. This will not be as detailed and informative as the index to a major legal text book, but it will be a sufficiently comprehensive search facility to help the profession to find the latest decisions on all main topics covered by the judgments. This index probably will not go back to the beginning of the three years for we shall concentrate on the period of the 18 months immediately before the work is done. This is due to funding constraints. After we have indexed most of the back-log of judgments we shall disseminate the index to the profession, and it will be kept up to date by the deletion of cases as and when reported and by removing decisions when judgments are reversed by the Court of Appeal or House of Lords.

In the early stages dissemination may involve only the circulation of discs to professional bodies, such as COMBAR and the Law Society. Alternatively, we are looking at the feasibility of transferring to individual chambers discs of the contents of the index. In the not too distant future it may be that we can put the index on the Internet. Once that happens, it seems likely that it will be widely used. However, there still remain quite complex negotiations afoot aimed at setting up a world-wide web site for the Commercial Court. This would be an extremely useful facility not only for the dissemination of the index but also for disseminating other Commercial Court information, such as listing dates and times and practice directions.

I anticipate that the index will be available in about 6 weeks time.