21st CENTURY BAR CONFERENCE

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"THE COMMERCIAL COURT"

THE HON LORD ERICHT

I am delighted to have been asked to come along today and share with you – in-house lawyers and others - some thoughts and impressions of my experiences since becoming a Commercial Judge some six months ago.

When I started as a Commercial Judge this summer the 2017 Practice Note on Commercial Actions had been in force for about a year so I thought it might be interesting to look at that Note and how it was working in practice.

The 2017 Practice Note replaced and updated the Practice Note which had been put in place when the Commercial Court was created back in 2004. The new Note builds on the practice which had developed in the Commercial Court over the years. More than that, it reinforces the ethos of the court.

The court has an ethos of service. The court is here to serve the business community. It is here to provide a method of dispute resolution which serves your commercial needs: quicker, less formal and more focussed than traditional litigation. It is here to bring judicial resolution to disputes that cannot be resolved in any other way. As the practice note says:

> "The commercial action procedure is intended for cases in which there is a real dispute between parties which requires to be resolved by judicial decision rather than by other means".

These last words emphasis something else about the ethos of the court: "Requires to be resolved by judicial decision rather than by other means".

Note that it doesn't say "requires to be resolved by court action rather than other means". It says "judicial decision rather than by other means". Of course "other means" can mean ADR in appropriate circumstances, and I remind you of what the Practice Note says must be done at the pre-litigation stage:

> "Both parties should consider carefully and discuss whether all or some of the dispute may be amenable to some sort of alternative dispute resolution"

But even where there is a court action there can be resolution by means other than a judicial decision.

So the Commercial Court aims to provide an ecosystem which encourages and enables resolution by the parties, even once a commercial case is up and running.

The court uses its case management powers to order meetings to take place between the parties. It also orders meetings of the experts. I have found this power to be very effective in facilitating resolution without judicial decision.

Let me give some examples.

In one case, parties came back to me after their meeting with each other and told me that if one of the issues in dispute could be resolved by me then they needn't trouble the court with the other issues in the case as they would be able to sort these out amongst themselves.

Another case settled shortly after a joint meeting of experts. If that meeting had not taken place, then the experts would not have engaged with each other until during the proof and the same result would have been achieved but months later and at great expense.

In one case I ordered that the meeting of experts be facilitated by an independent counsel who chaired the meeting then drafted a detailed report of the meeting analysing where and why the experts disagreed. This was very successful in narrowing the issues before the court.

Another key part of the ecosystem is the emphasis on getting to the nub of the dispute, rather than being waylaid by what lay people often see as lawyers' games about procedures and technicalities.

Pleadings in traditional form are not normally required in a commercial action. The overall requirement is fair notice: the purpose of the pleadings is to give notice of the essential elements of the case to the court and the other parties. This requirement can be satisfied without one counsel laboriously turning documents or expert reports into averments which another counsel then laboriously goes through admitting or denying one by one.

Pleading is not one size fits all. If the parties seek a decision only on construction of a contract, there is no need for articles of condescendence or pleas in law. If they seek a decision only on a point of law, the summons can consist of their legal argument. Expert reports and schedules such as Scott schedules and calculations of the damages due can just be lodged with the court and briefly referred to in the pleadings. Witness statements are exchanged in advance so there is fair notice of the evidence to be tested at proof. Where a party's position is not clear then that is remedied in the case management stage by practical orders designed to get them to clarify the issue. The court is not interested in squabbles about "objection no record" or "plead facts not law" or "averments lacking in specification: dismiss the case". All of this emphasis on the nub of the dispute in pleadings should mean that it is easier for your clients to understand what is going on, and for your clients to appreciate the efforts you are making on their behalf and to be more accepting about what it is all costing them.

That emphasis on getting to the nub of the dispute extends to the proof itself. No need to spend hours in examination in chief setting out a witnesses' position or narrating background: the judge has read the witness statements and the productions and so that is all taken as read and we can proceed rapidly to an exploration of the contentious areas in cross. And increasingly we are getting to the nub of conflicting expert evidence by hot-tubbing: all the experts go into the witness box at once and the judge facilitates a discussion between them on where and why they disagree with each other. The court service is proud to be able to provide a variety of sizes of tubs for this purpose, from a cosy two-person witness box to a more commodious jury box accommodating up to 12 experts in comfort.

As Commercial Judges we are always looking for ways to improve the service we provide to the business community. We are greatly assisted in this by the Consultative Committee on Commercial Actions. The committee meets three times a year. Its members include the commercial judges and clerks, representatives of the legal profession and representatives from commerce and industry. It is important that the committee contains as wide a range of users as possible, particularly in-house lawyers as the committee benefits greatly from their close connection with and understanding of particular industries. If you – or any of your in-house colleagues not here today – would be interested in joining the committee, we would be very interested to hear from you. Just drop an email to the commercial clerks email address which is on the Scottish Courts website (commercial@scotcourts.gov.uk)

I would like to take the opportunity to update you on a couple of the things that the Consultative Committee has been working on.

The committee has been looking at ways in which the court's procedures can be relaxed in appropriate circumstances. If you want to roll up to the Commercial Court in a mini we won't always insist you pimp it up into a Rolls Royce. We will adapt the procedures to suit the case. The standard orders set out a timetable for witness statements, notes of argument, lodging of electronic joint bundles etc. Maybe your case does not need witness statements, or doesn't need a note of argument or whatever. Let us know at the preliminary hearing and we can disapply the normal procedures and save you unnecessary expense.

That's particularly true with electronic joint bundles. We recognise that the preparation of these – and in particular the hyperlinking of documents such as cross-references between statements and productions can be time-consuming and expensive and there can sometimes be technical problems. Electronic joint bundles are meant to be an aid not a hindrance, and although in most cases they are of great aid to the efficient and cost-effective functioning of the litigation, if that's not the situation in your particular case tell us at the preliminary hearing and we can do something about it.

Another area the committee has been looking at is disclosure. In England discovery is an extensive, time-consuming at extremely expensive process at the start of the litigation. Traditionally in Scotland we have adopted a far more restrictive – and far cheaper - approach focussing on voluntary production of documents backed up by the courts powers to order production of particular documents under specification and diligence, or under Commercial Court orders during the case-management stage. Some of you may have attended the very useful and instructive Commercial Court Conference which looked in detail at this topic earlier this year. We want to encourage a cooperative, constructive and sensible approach. Discussions between parties on recovery should start as early as possible, in conjunction with the pre-action protocol. Particular issues which may arise in relation to recovery of electronic documentation – data sampling, search words and the like – can also be discussed at this stage. It is hoped that this will mean that agreement on disclosure has been reached by the time the case calls for a preliminary hearing, but if not the court can address any outstanding issues then. The overall aim of the court is to ensure that the recovery of documents is reasonable and proportionate and that unnecessary or disproportionate expense is avoided.

Paris, Frankfurt, Amsterdam Brussels. What these cities have in common is that since the Brexit vote they have set up commercial courts designed to take on the types of cases which are currently litigated in UK commercial courts. The language of these new courts is English. The new courts apply UK law. The new courts adopt features of UK litigation which previously were not permitted in their country such as cross-examination and oral legal submissions. To take the French court as an example, cases are conducted in English,

English or Scots law is applied, there is judicial case-management, there is oral evidence – including cross-examination – and oral submissions, all of course in English, and a right of appeal to an English speaking court of appeal.

The key to the success or failure of these new courts will be Brexit. At the moment, orders by the Scottish or English commercial courts can be easily enforced throughout the EU. If this changes as a result of Brexit, then there may be attractions in taking a Scottish or English dispute to an English speaking court whose judgment can be enforced throughout the EU.

I leave you with one final thought. Sometimes it is good for to get a view about what we do from an outsider with a fresh pair of eyes. Esther Roberton is not a lawyer. She has held various important positions in Scottish public life including various roles with the Scottish Council for Development and Industry and is currently the chair of NHS 24. She has recently produced a report for the Scottish Government on Legal Services Regulation. In it she says (p49):

> "I had, perhaps foolishly, assumed that in the commercial sector Scottish lawyers and advocates would have significant business in the oil and gas sector for example but quickly learned that this work tends to go to London as contracts are invariably drawn up under English law."

The Commercial Court can only provide a service to the Scottish business community if that community uses it. I would encourage those of you who are in-house lawyers to ensure that your organisations' contracts provide for Scots law and the jurisdiction of the Scottish courts. With that plea I come to the end of my talk and I thank you all of you for your attention and wish you well for the rest of your conference.