LONDON INTERNATIONAL DISPUTES WEEK: SESSION ON 9th MAY 2019
DISCLOSURE AND EVIDENCE IN COMMERCIAL LITIGATION

KEYNOTE SPEECH BY SIR RUPERT JACKSON: "*SLAYING THE HYDRA*"

1. THE POST-BEECHING AGE

1.1 The assize system and its demise. Henry II established the assize system in 1166. For eight centuries HM judges travelled around their circuits, holding assizes in each town where they stopped to clear the trial lists. This practice continued for much of the twentieth century, although by then their lordships travelled by car, rather than on horseback.[1] In the 1960s a Royal Commission chaired by Lord Beeching declared that the justice system must move with the times. Assizes and Quarter Sessions must be axed. Instead, Crown Courts should take over all the work of those ancient tribunals. A new breed of 'circuit judges' would be created. They would sit in both the Crown Courts and the County Courts. This reform was duly adopted.

1.2 The post-Beeching age. The post-Beeching age is the period since the Beeching Report, roughly the last fifty years. During that period social change, technological change, new ways of doing business, large scale migration and cultural shifts have made huge demands upon both the criminal and civil justice systems.

1.3 The traditional common law methods of ascertaining facts collided with the realities of the post-Beeching age. Scientific evidence became more challenging for lawyers. In criminal cases DNA profiling replaced fingerprints. In civil litigation, the digital revolution led to an explosion of data and metadata. Documents became impossible to lose. This posed a serious challenge to all common law jurisdictions, for obvious reasons. Less of a challenge for civil law jurisdictions, again for obvious reasons. There was a growing realisation that the only way to control litigation was for the lawyers and the judge to get a grip on the case and the real issues at the outset.

1.4 Lengthening trials – so cut out evidence-in-chief. The practice of treating written witness statements as evidence-in-chief began in arbitration and spread to the courts. This saved the time which counsel would otherwise spend in laboriously taking each witness through their proof and teasing out their account of events. The downside was, of course, massively long witness statements carefully edited by lawyers to gloss over embarrassing matters and circumnavigate obstacles. Opposing lawyers would then spend much (expensive) time poring over the statements and devising avenues of attack. Thus, a well-intentioned reform has had the effect of driving up costs.

1.5 Expert evidence. Expert disciplines multiplied. Expert reports grew ever longer and more expensive. Partisan experts who saw themselves as quasi-advocates for the client added to the problems.

2. THE REFORM MOVEMENT

2.1 Across the common law world civil justice reformers struggled against the excesses of modern civil litigation. Examples include:
Woolf reforms in England and Wales (1999)

[1] See *On Circuit: 1924-1937* by Sir Frank MacKinnon, Cambridge University Press, 1941.

Civil Justice reforms in Hong Kong (2009)
Cashman reforms in Victoria (2010)
Osborne reforms in Ontario (2010)
Jackson reforms in England and Wales (2013)

2.2 All common law jurisdictions have faced broadly similar problems and have come up with broadly similar answers. Discovery must be limited to documents which really matter. Parties must focus their evidence, both factual and expert, on the real issues in dispute. Both the conduct of litigation and the expenditure of costs must be proportionate.

3. THE HYDRA FIGHTS BACK

3.1 As Hercules discovered, the Hydra has a nasty habit of sprouting new heads and biting anyone who attacks it. Hercules eventually killed the Hydra by cutting off all its heads and burning the necks. In the field of civil justice reform, two new heads which always spring up are 'front loading' and 'increased complexity'.

3.2 Those who oppose reform always say:
(i) 'Most cases settle early. Don't do detailed work on the case until it is clear that it will fight. It is far cheaper to disclose everything, than to set about defining the real issues and limiting discovery to those. Likewise, it is much easier and cheaper to serve lengthy evidence covering everything than to focus your evidence on a few key points. Costs control in advance is impossible, because we don't know how the case will develop.'
(ii) They then add for good measure: 'The rule book is already too long. Don't add yet further complexity'.

3.3 The working group who prepared the new disclosure pilot (and who are going to address you this afternoon) will face an onslaught on both counts. In my view, the new disclosure rules are excellent. But the cry will go up "Far too much frontloading". Opponents will also point to the length of Practice Direction 51U (15 pages of White Book) and all its new concepts: initial disclosure, extended disclosure, list of issues for disclosure, disclosure review document, disclosure models A, B, C, D and E. Campaigners will say: "Too much complexity". So, both heads of the Hydra are going to bite the reformers viciously over the next two years. I advise the working group to stand their ground, although no doubt they will need to tweak the detailed rules in the light of experience during the pilot.[2]

3.4 The tentacles of the Hydra spread into many law offices and chambers. Sometimes these tentacles can strangle well intentioned reforms. Let me give two examples taken from the 2013 reforms:[3]
(i) New rule 31.5, the so-called 'menu option'. This rule provided a range of disclosure orders which the court may make, ranging from very limited disclosure to extensive disclosure.
(ii) New rule 32.2 (3):[4]
"The court may give directions-
(a) identifying or limiting the issues to which factual evidence may be directed;
(b) identifying the witnesses who may be called or whose evidence may be read; or
(c) limiting the length or format of witness statements."

[2] Several of the Jackson reforms were piloted between 2010 and 2013. In each case lessons learned during the pilots necessitated amending or at least tweaking the draft rules.
[3] Most of the 2013 reforms have worked well, but these two did not. See *The Reform of Civil Justice* (Sweet & Maxwell, 2018) by Stephen Clark and Rupert Jackson.
[4] My *Review of Litigation Costs Final Report* (January 2010) said that we must control the length of witness statements. I subsequently drafted rule 32.2 (3) and presented it to the Rule Committee as a way of implementing that recommendation.

Neither of these rules achieved the desired culture change because, by and large, neither practitioners nor judges took much notice of them. Standard disclosure was agreed or ordered in virtually every case. Judges seldom used their powers under the new rule 32.2 (3).

3.5 Each generation of law reformers does battle with the Hydra. New working groups are currently tackling both disclosure and witness statements. This afternoon they will tell you about their work. May they succeed, as Hercules eventually did in his second labour.

Sir Rupert Jackson 9th May 2019