

**Judicial diversity and LawTech: Do we need to change the way we litigate Business and Property Disputes?**

**Speech to Chancery Bar Association Annual Conference**

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**Introduction**

1. May I start by thanking your new Chairman, Eason Rajah QC, for inviting me back this year to the Chancery Bar Association's Annual Conference, despite the mixed reception that I received for last year's speech. You will remember that, on that occasion, I touched a sensitive nerve.
2. What I said remains true today. Some of you will recall the essence of it. I said that "the highest quality barristers practising in the Business and Property Courts need to step up to the plate", and that if they did not do so, they would be "destroying the very infrastructure that has allowed them to prosper", and that "being a judge in our Business and Property Courts across England and Wales is one of the best jobs you can find". I am pleased to say that I am optimistic about the latest High Court competition, and we made some excellent appointments in last year's section 9(4) competition. So, things are, I hope, looking up. But there is no cause to be complacent. I continue to urge you and the most talented solicitors, as I did last year, to "readjust your horizons, and to positively consider the judiciary as a central career aspiration".
3. I want to spend the rest of the time this evening considering another knotty but important, and indeed not wholly unconnected, topic, namely the way we resolve disputes in the Business and Property Courts in England and Wales.

4. To jump ahead, a little, my thesis is that, in the context of the technological developments that are affecting every aspect of what we do, we may need to consider changing our approach to court-based dispute resolution. If we do so, we may be able to kill at least two birds with one stone. We may be able to create a dispute resolution system truly fit for the middle part of the 21<sup>st</sup> century, and we may be able finally to complete the creation of a judiciary and a legal profession that is really representative, in terms of gender and ethnicity, of the society that they serve.
5. This latter has become an important question, because try as we might, we still cannot seem to make the breakthrough to a senior judiciary that is more closely representative of society in terms of both gender and ethnicity. I can assure you that both the Judicial Appointments Commission and the serving judiciary have tried and are trying very hard indeed. We are continuing to take a wide range of active steps to encourage a greater number of the very best women and BAME lawyers from all backgrounds to become judges. There has been great success and a huge upturn in the numbers of women appointed at all levels, but less than we would like at the most senior levels.<sup>1</sup>

### *Judicial diversity*

6. It is pretty obvious that the diversity gap in the senior judiciary is, at least partly, because the pool of solicitors and barristers from which senior judges are selected is itself inadequately diverse. But that is not, in my view anyway, a reason in itself. It is merely a partial explanation of the problem.

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<sup>1</sup> <https://www.theguardian.com/law/2018/jun/08/most-lawyers-recommended-to-be-judges-went-to-state-schools-data-shows>

7. I have wondered for a long time why the pool remains predominantly white and male, despite the intake to the legal profession becoming increasingly diverse and at times entirely gender balanced.
8. As regards gender, I believe that the intake to the legal profession has been about 50% female for approaching 20 years. I think we have assumed for too long that this pool of people simply needed to work its way through the system. The SRA's statistics show that 59% of non-partner solicitors in 2017 were women, but that only 33% of partners were women.<sup>2</sup> The Bar Council's figures show that, whilst there have been equal numbers of men and women called to the Bar since 2000, only about a third of barristers with 15 or more years' practice are women, and only around 15% of QCs are women.<sup>3</sup> But for the Chancery and Commercial Bar, the figure drops to a fifth for those with 15 years or more practice and 11% for QCs.
9. Again, it is not a reason to say that many women are not, despite strenuous efforts, successfully retained in the profession after having children. That is just a further partial explanation of a problem.
10. In my view, the way we actually resolve Business and Property litigation has a lot to answer for. I am speaking specifically about B&PC litigation, because that is my particular area of expertise, but what I am saying may well be said to apply more generally.

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<sup>2</sup> [www.sra.org.uk/sra/equality-diversity/key-findings/law-firms-2017](http://www.sra.org.uk/sra/equality-diversity/key-findings/law-firms-2017)

<sup>3</sup> As at 1 January 2019, there were 16,651 practising barristers, of whom 37.2% were women. There were 10,353 practising barristers with 15+ years' practice, of whom 3,356 (32.42%) were women. The Bar Standards Board's figures up to 2017 at <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/queen-s-counsel-statistics/> show that 15.03% of QCs were women.

11. To achieve real success in a litigation practice, we seem to require our lawyers at all levels to dedicate so much of their time to their professional activities, that there is inadequate time for a proper life. Many people are simply not willing to countenance the levels of commitment required to sustain a successful practice. I am talking about the sheer number of hours worked, and the requirement often to be available 24/7 and at week-ends. In addition, the demands of sometimes very lengthy oral hearings place huge strains on advocates and instructing lawyers alike. It is often necessary for those involved in synchronous court hearings to stay up much of the night to prepare cross-examinations and speeches for the court. All these pressures take their toll on those with family and other commitments that are entitled to some priority in themselves.
12. Admittedly, aspiring QCs are no longer asked to supply 3 years' gross earnings in support of their application for silk – as they were, I may say, in my day. But we still require them to demonstrate achievements that can only be attained by working absurdly long hours.
13. As a result, a significant proportion of talented female lawyers (and indeed some male lawyers too) are deterred from wanting to undertake this kind of work at the highest level. This is a real reason why those who come through a gruelling career in Business and Property litigation tend to create a pool for judicial appointment composed disproportionately and predominantly of males. We are missing out on a whole cohort of talented women, and some men too, with caring responsibilities, or who cannot or do not wish to devote all their time to their work.
14. There are similar but subtly different reasons why the pressures of a litigation practice act as a disincentive to BAME lawyers. It is true that the SRA's statistics show that, in 2017, 21% of solicitors were BAME, and 20% of partners were from those backgrounds. The Bar Council's figures show that 13% of all barristers are BAME, but only 8% of QCs are BAME. And these figures look to be improving so that the senior ranks of the Bar will be

ethnically representative of society within a short time. But even so, the most talented BAME candidates are still not sufficiently coming through to the pool that presents itself for senior judicial office.<sup>4</sup>

15. This, in my view, is caused at least in part by cultural and social factors. The higher echelons of the Chancery and Commercial Bars are still predominantly male and also socially, even culturally, homogeneous. The Bar is not unique in this; and it is not intentional, but it still requires attention. Until we can make further progress on social mobility, I believe that the pool of candidates for senior judicial office will not be more representative of the BAME sections of our society. I should say that great progress is being made in this direction in relation to judicial offices below the High Court, but less so in the High Court and above.<sup>5</sup>
16. Social mobility as many of you will know is close to my heart, as a previous Chairman of the Social Mobility Foundation. Ever since Lord Neuberger's report on Entry to the Bar in November 2007, it has been apparent that there are barriers to entry that prevent people from less privileged backgrounds obtaining pupillages and tenancies. What is less well documented is the barriers that prevent that cohort from progressing to the highest levels of the Bar, particularly in the most prized specialisms. This may be too big a topic for this lecture, but it is something that I regard as a critically important piece in the jigsaw. Even if we cannot say precisely why, it is clear that talented junior lawyers from

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<sup>4</sup> Of the 16,651 practising barristers as at 1 January 2019, 13% are BAME. Of the 10,353 practising barristers with 15+ years' practice, 1,289 are BAME (12.45%). 7.11% of QCs are BAME.

<sup>5</sup> <https://www.theguardian.com/law/2018/jun/08/most-lawyers-recommended-to-be-judges-went-to-state-schools-data-shows>

less privileged backgrounds do not find it as easy as their more privileged peers to end up in the pool that presents itself for admission to the senior judiciary.

17. Let me move on then to examine one possible solution to some of these problems.

### *The relevance of new technologies*

18. So, what is the relevance to this of the new technologies? As some of you may know, I am a member of the UK's LawTech Delivery Panel, which aims, amongst other things, to support global innovation in the justice sector, to encourage the widespread development and use of LawTech in the UK, and, I think particularly importantly, to promote the use of English law and UK jurisdiction as a foundation for legal technologies.
19. You do not need to have been at the Chancery Bar for all that long to realise that things are changing at speed. Few of us now actually use physical books for legal research as opposed to wall and shelf decoration. Nearly all big cases are tried using digital trial management systems that allow the lawyers and the judge to do everything electronically. We are well-advanced in introducing online dispute resolution for small money claims, divorce and social security claims. It will not be long before the scope of these initiatives is expanded into areas more familiar to most of you.
20. In the context of these changes, even leaving aside the rapidly advancing use of smart contracts and digital ledger technology, it would be surprising if we did not need to have a long hard look at the way we actually resolve court-based Business and Property claims. I am not talking about the increased use of telephone, video or online hearings, controversial as such things seem to be. I am talking about a complete rethink of the way we resolve major business disputes.

21. As I have often said, it does not, in this technological era, make much sense to require all the parties, the lawyers and the witnesses in a case to travel sometimes thousands of miles to be in one place with the judge and the other side to the litigation for every hearing; and in some cases for some quite lengthy hearings. There simply must be a better way in terms of cost and efficiency. I am not suggesting that we can design that better way on the hoof. But I am sure that the new technological revolution offers the opportunity for a complete rethink of the way that business litigation is undertaken.
22. There are many possible ideas: for example, greater use of staged dispute resolution, greater online interaction between the judge and the lawyers or the parties; hearings that are asynchronous, rather than synchronous;<sup>6</sup> fewer formal hearings requiring everyone to be in one room at one time; and cutting down the times for responses in an era when everyone checks their mobile phones dozens of times a day.
23. I should be clear about one thing. I am not advocating the abolition of traditional hearings, but I would expect, in a reformed system, to find them to be necessary less often than they are now. As things stand, we have live hearings with many people present even when factual issues are not being determined. I understand that legal arguments are often made clearer by oral exposition, but there are certainly some occasions on which an oral hearing adds nothing to the written materials either for the parties or the court.
24. Finally in this connection, I fully understand the importance of open justice and of justice being seen to be done. Certainly, in devising an efficient more technological dispute resolution system, we will need to have full regard for these and other requirements of fair and transparent court-based dispute resolution. None of that should, however, deter us

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<sup>6</sup> Meaning trials that are not conducted with everyone in the same courtroom at the same time, but rather online with the judge making enquiries of different parties that can be answered speedily but without continuous attendance at court.

from re-examining the way we decide cases to take account of the massive technological advances since our system evolved in the 19<sup>th</sup> and 20<sup>th</sup> centuries.

*What would be the effect of reforming the way we do dispute resolution*

25. So let us imagine for a moment, a time in the not so distant future where we have reformed the way in which we decide Business and Property disputes to allow them to be resolved, maybe partially or wholly online, with far less delay and far less cost to the parties.
26. In designing a new system for a new era, we need to consider not only the essential requirements of justice, but also the consequence of any changes that are proposed. It is here that I think we may be able to hope for a “win-win” solution. As I said a few minutes ago, a significant proportion of talented female lawyers (and some talented male lawyers) are deterred from wanting to aspire to undertake the kind of work that would most obviously qualify them for high judicial office. Moreover, the way we litigate could be said to make it more difficult for lawyers from socially less-privileged backgrounds to transition from young lawyers to senior litigators or advocates ready to apply for the senior ranks of the judiciary.
27. What if we were able to devise a litigation system that did not make so many of the demands that the present system imposes on its lawyer participants? I can imagine a system where, with much of the preparation taking place asynchronously, lawyers can log on and work at times of day that suit them; and where the judge would make orders online, and the lawyers and parties would fulfil their obligations to the same, perhaps shorter, strict deadlines, but outside the confines of a formal hearing.
28. There would be, in that situation, I think, a real likelihood that the composition of the pool from which judges are chosen would come closer to its natural and representative



diversity. These technologically empowered dispute resolution approaches would allow lawyers to fulfil their family commitments and also litigate at the highest level. They would be potentially less dependent on the social environment of the courtroom, which might make it easier for the talented less-privileged entrant to the legal profession to get to the top.

29. As I was fond of saying when I was Chairman of the Social Mobility Foundation, there is only one fact that needs to be accepted if we are to understand why much needs to be done to improve social mobility. That fact is that there is an equal proportion of highly talented people from all ethnic and social backgrounds. Wealth, ethnicity and background are not indicators of talent. There are then a range of factors that make the large number of talented people from less privileged backgrounds inadequately represented in the higher echelons of our national professional life.
30. Once we accept that an equal proportion of highly talented individuals emanate from all backgrounds, genders, and ethnicities, it is obvious that we need to make changes to the demands we make on our professionals, if we are, as a society, to achieve the advantages of a representative and socially mobile judiciary. Those advantages are, it may be noted, to solve problems by considering them from all angles rather than, as white males and people from similar backgrounds tend to do, from one particular end of the telescope.
31. I have little doubt that, if we were to reform the way we litigate Business and Property disputes, we would have a good chance of attracting and retaining a more diverse cross-section of talented young people to the legal profession in general, and to become specialist barristers in particular. This would then impact on the pool for senior judicial office, making it in turn gender balanced and more reflective of the BAME members of our society.

*Other advantages of a new way of litigating*

32. I should return then to the other potential advantages of looking again at the way we litigate Business and Property disputes.
33. First, we should not underestimate the importance of our Business and Property litigation to UK PLC and to global dispute resolution. There are some 18,000 cases started each year in the Business and Property Courts at the Rolls Building not including the 7 Business and Property regional centres. Moreover, what goes on in our courts is often mirrored to a greater or lesser extent in many national and international arbitrations and mediations governed by English law and other common law systems.
34. Secondly, the Business and Property Courts lead the way in litigation reform as has recently been exemplified by the disclosure and cost capping pilots that started in our courts at the start of this year.
35. Thirdly, if we do not quite soon re-think the way we resolve disputes, taking account of the technological changes that have occurred and are occurring rapidly in financial services and almost every other conceivable business field, we will risk allowing our court-based dispute resolution to become dated and irrelevant. You may rest assured that business people nationally and internationally only use the services of our Business and Property Courts because they produce a state-of-the-art dispute resolution service. There are competitor courts and arbitration centres springing up all over the world, as none of you needs reminding. Many of those courts are investing heavily in technological solutions that will make litigation less costly, quicker and more efficient. We should make sure we are not left behind.

*Conclusions*

36. I can draw these thoughts to a close by drawing attention to what I see as a virtuous circle that is available for us to grasp

if we embrace the future with careful consideration and enthusiasm.

37. The judiciary and the Judicial Appointments Commission have made monumental efforts to square the circle of appointing only the very best candidates and trying to achieve a fully diverse judiciary for the benefit of the society it serves. The time has now come, I think, to consider somewhat more adventurous solutions in addition to those already adopted.
38. If we were able to take advantage of the new technologies to expedite and reduce the cost of Business and Property litigation, without reducing the openness and transparency of justice, we would, incidentally perhaps, stand a chance of solving a number of problems that have hitherto looked the most intractable.
39. First, by using the internet and technology more intelligently and effectively, we would undoubtedly increase access to justice – as the money claims online pilot has already demonstrated.
40. Secondly, we would, as I have said, stand a real chance of changing the working methods that seem historically to have worked against gender balance and social mobility amongst the higher echelons of the legal profession. Lawyers would be able to work when they wanted, and when it suited their family commitments, rather than having to be tied to all-night or anti-social working hours to suit the timing of synchronous court hearings in every case.
41. The prize for success will be a more balanced and highly talented pool available for judicial office to which we have aspired for many years now.

#### *Fintech, Regtech and LawTech*

42. Let me finish by saying something briefly about FinTech, RegTech and LawTech. I know that these days you will

hear a vast number of people talking on these subjects. In many cases, if they are of my sort of age, it sounds as if they are trying to explain the concepts of digital ledger technology and smart contracts to themselves, rather than providing any real insight.

43. It seems to me, however, that the Bar and the Chancery Bar in particular has a golden opportunity in relation to these technologies. This is an opportunity for now, not for tomorrow. We have English law, and English law will remain as certain and predictable after we leave the European Union as it was before. We have well-respected courts and a cadre of some of the highest quality judges available anywhere.
44. We can establish English law as the most effective basis for smart contracts, DLT, and Fintech generally if, but only if, we make sure that our lawyers quickly become experts in the field. This is very much something for you to move ahead with as rapidly as possible.
45. I hope you will get some help. I hope that the UK's LawTech Delivery Panel will move fast to produce a guidance note that will enable English law to provide much needed predictability in these areas. It is imperative that we know the answers to some key legal questions, such as what precisely and technically is a cryptoasset, whether it is a chose in action, a chose in possession or something else; to what extent existing legal principles as to the holding, transfer and priority of property apply to cryptotassets; and how existing regulatory regimes will apply to cryptoassets and smart contracts.
46. These are urgent questions to which we will all need to know the answers before very long.
47. Many thanks for your attention.