LITIGATING FINANCIAL DISPUTES IN LONDON AND THE FINANCIAL LIST

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Lord Justice of Appeal

Introduction

1. In July 2014 the then Lord Chief Justice, Lord Thomas, asked Vivien Rose (now Lady Justice Rose) and I to carry forward the initiative he had announced in his Mansion House speech that month in which he had said:

> "There is much that is happening in the international financial markets on which the prosperity of the City and our nation depends. We must be sure that we are providing at the Rolls Building what the markets require by way of fast, efficient and economical dispute resolution. We will be looking closely through joint work between the Chancery Division and the Commercial Court of the Queen's Bench Division at what more we can do to meet the needs of court users in financial cases, seeking views from the institutions, the markets and the professions."

2. The background to this initiative involved recognition of the increasing importance of the international financial markets in an ever more globalised world and London's pivotal role in those markets as a business and legal centre.

3. To take our work forward we assembled a list of targeted consultees with a range of different experiences of financial market business who were invited to small, focused meetings held at the Rolls Building during the autumn of 2014.

4. The main groupings of consultees were (1) Regulatory Bodies; (2) the Treasury and the Ministry of Justice; (3) General counsel and senior-in house litigation counsel; (4) Accountants; (5) City bodies: (6) Market Associations dealing with financial matters; (7) City Solicitors; (8) The Commercial and Chancery Bar Associations.

5. Following those meetings we prepared a report which summarised and commented upon the feedback we had received and set out our recommendations which were for the creation of the Financial List which would include the following features:

(1) More formalised and regular training for Judges in relation to financial markets work;

(2) Early identification of financial cases of substance and/or complexity;

(3) Allocation of a suitable docketed Judge to such a case from either the Chancery Division or the Commercial Court;

(4) The availability of Fast Track/expedited/more flexible procedures for such cases;

(5) The availability of test case procedures.

6. Our report and recommendations led in October 2015 to the creation of the Financial List.

7. Financial List claims are governed by Part 63A of the Civil Procedure Rules. Under CPR 63A.1 a Financial List Claim means any claim which:

> "(a) principally relates to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or

currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement, and is for more than £50 million or equivalent;

(b) requires particular expertise in the financial markets; or

(c) raises issues of general importance to the financial markets.

(3) "Financial markets" for these purposes include the fixed income markets (covering repos, bonds, credit derivatives, debt securities and commercial paper generally), the equity markets, the derivatives markets, the loan markets, the foreign currency markets, and the commodities markets."

8. There are three aspects of the Financial List which I would like to highlight today:
   (1) The knowledge and experience of the judges.
   (2) Procedure.
   (3) Progress so far.
   (4) The potential impact of Brexit.

(1) The knowledge and experience of the judges.

9. Specific expertise in financial cases is important. Financial work is complex and increasingly so. It requires a knowledge and understanding of market context. Financial list judges are specifically chosen from the pool of Chancery Division and Commercial Court judges in the light of their specialist knowledge and skills based on case experience and dedicated and continuous training. In a growing area of law of global importance this gives parties the assurance that financial cases of substance and complexity will be dealt with by an appropriate pool of specialist judges.

10. Chancery Division, Commercial Court and higher court judges already receive education on financial markets issues through seminars arranged by the Financial Markets Law Committee ('FMLC'). As is stated on the FMLC website it:

> "acts as a "bridge to the judiciary", providing a link between commercial judges….and those with relevant financial expertise. It does so primarily by organising seminars on aspects of wholesale financial markets practice. Speakers at these events are usually figures who have played a leading role in the historical development of the industry or market in question."

11. In addition, with the assistance of the FMLC, whole day seminars are arranged for Financial List judges on an annual or bi-annual basis providing an overview of the financial markets, how they work and inter-connect as well as of current issues. The better the understanding of the workings of the markets which the Judges have, the better informed their decisions will be and the greater the resulting respect for such decisions. The last such seminar was held in January of this year.

(2) Procedure

12. One of the key advantages of starting a claim in the Financial List is that you will have a judge docketed to manage the case from start to finish.

13. The continuity and case familiarity provided by case docketing is greatly beneficial. It saves considerable time and cost in interlocutory proceedings and at trial. There is no need to explain the case and issues more than once. Greater consistency and predictability results. It also leads to closer, better informed and more robust case and costs management.

14. Other procedural advantages are that Financial List claims are potentially particularly well placed to take advantage of the Shorter and Flexible Trial procedures.

15. The Shorter Trial Procedure offers dispute resolution on a commercial timescale. Cases are case managed by docketed Judges with the aim of reaching trial within

approximately 10 months of the issue of proceedings, and judgment within six weeks thereafter. The procedure is intended for cases which can be fairly tried on the basis of limited disclosure and oral evidence. The maximum length of trial is four days, including reading time.

16. The Flexible Trial procedure involves the adoption of more flexible case management and trial procedures where the parties so agree, as, for example, by limiting disclosure and oral evidence. This enables the parties to have a more simplified, expedited and cost-effective procedure than the full trial procedure currently provided for under the CPR.

17. In addition, the Financial List has the unique advantage of the Financial Markets Test Case procedure. This enables market issues to be determined even if there is no dispute between parties. It applies to claims which raise issues of general importance in relation to which immediately relevant authoritative English law guidance is needed. It enables a person who is or was actively in business in the relevant market, by mutual agreement, to issue proceedings against another person who is or was actively in business in the relevant market provided that other person has opposing interests as to how the law raised by the claim should be resolved. In appropriate cases a relevant trade, professional or regulatory body or association, or a third party affected by the determination of the issues, may, with the permission of the court, be joined as a party or otherwise allowed to be represented.

18. The claim is determined on the basis of agreed facts and the general rule is that there will be no order for costs. In a case of particular importance or urgency the trial may, at the court's discretion, be heard by a court consisting of two Financial List judges, or a Financial List judge and a Lord or Lady Justice of Appeal.

(3) Progress so far

19. To date there has been a total of 64 cases in the Financial List since its inception in October 2015 – 34 through Chancery, 30 through the Commercial Court.

20. There have been four appeals or groups of appeal with permission from the court below and six appeals or groups of appeals with permission from the Court of Appeal. There have been five applications for permission to appeal refused by the Court of Appeal.

21. The Court of Appeal has determined the permission to appeal applications between 3 weeks and 3 months from the date the matter was filed, with most applications being determined in less than 2 months.

22. The appeals have had hearing dates between 4 months and 12 months from the date the matter was filed, the latter being listed to the parties' requested date.

23. Financial List work has been dealt with by both the court below and the Court of Appeal expeditiously.

24. A good example of this is provided by the case of *National Bank of Kazakhstan (NBK) v The Bank of New York Mellon (BNYM)* [2017] EWHC 3512 (Comm); [2018] EWCA Civ 1390.

25. The case concerned a claim for declaratory relief as to the effect of orders made by the Dutch and Belgian courts on their banking relationship with the respondent, and whether it required BNYM to freeze all assets which it held under a Global Custody Agreement with NBK.

26. The Part 8 claim for a declaration was issued on 22 November 2017.

27. The hearing of the claim was expedited and was heard by Popplewell J on 19 and 20 December 2017. Judgment was given orally on 21 December 2017, the last day of the Michaelmas Term.

28. Permission to appeal was given by Longmore LJ on 30 January 2018.

29. The appeal was heard by the Court of Appeal on 22 May 2018. I gave the leading judgment and it was handed down on 19 June 2018.

30. The case and its appeal were accordingly dealt with in less than 7 months from the date of issue of the proceedings.

(4) The potential impact of Brexit

31. In my view, the likely legal impact of Brexit on English law and the UK's role in international dispute resolution, including in the financial services sector, has been exaggerated.

Choice of law

32. In relation to choice of English law, for the vast majority of international commercial agreements, Brexit is unlikely to make any difference to the substantive law applicable or as to whether parties should continue to choose English law as the governing law.

33. This is borne out when one considers the well recognised reasons why international business parties often choose English law to govern their contracts. These include:

(1) Party autonomy

34. English law has always recognised the importance of the parties' freedom of contract and will strive to uphold the bargain they make. Provided you contract in objectively reasonably clear terms, what you agree is what you get. The parties are their own contractual masters.

(2) A body of precedent

35. English law has been determining cases involving international financial disputes for many years, which has enabled it to build up a formidable body of precedent to assist parties and their advisers to know where they stand and to be able to predict the outcome of any disputes when they arise.

(3) Certainty and predictability

36. English law has long recognised the importance of certainty for commercial parties. Judges are commercially minded, they seek to prioritise and promote certainty and consistency, and to avoid hard cases making bad law. The developed state of English law enables clear legal advice to be given and costly disputes thereby avoided.

(4) Flexibility and adaptability

37. English common law is not bound by any code or prescriptive rules. It is able to and does adjust to the rapidly changing commercial world and seeks to keep up to date with modern developments and needs. It has a wide range of remedies, both legal and equitable, which assists it to do so.

38. Brexit will have no effect on any of these or other recognised strengths of English law. The key reasons which exist for choosing English law as the governing law will be unaffected.

<u>Choice of jurisdiction</u>

39. In relation to choice of jurisdiction, the reasons for choosing English law are also good reasons for choosing English jurisdiction since, for obvious reasons, English judges are regarded as best placed to decide issues of English law which may arise, particularly issues of difficulty.

40. Other well recognised reasons for choosing English jurisdiction include the following:

(1) The quality, independence, impartiality and integrity of the English judiciary

41. This reflects a reputation built up over a long period of time and a proven track record. High Court judges are chosen from the foremost legal practitioners and already have extensive legal experience and expertise, This is exemplified by the specialist and trained judges who sit in the Financial List.

(2) Specialist courts

42. Under the umbrella of the Business and Property Courts based in the Rolls Building, there are number of specialist courts able to deal with business disputes of differing kinds, and for financial services work there is now the Financial List.

(3) Modern courts and flexible court procedures

43. The Rolls Building is the largest business court centre in the world. It is a modern building with all the facilities required for 21st century litigation.

44. Court procedures are kept under constant review in order to meet the needs of users, as reflected in the procedural innovations I have discussed with regard to the Financial List.

(4) The availability of high quality legal advice and dispute resolution services

45. London is home to many of the world's leading international law firms. More than 200 overseas law firms from 40 jurisdictions practise in London, including over 100 US law firms. It has a strong independent Bar. It also has a large pool of court experts and providers of other court services such as translators, interpreters, stenographers, transcribers, IT services and electronic trial assistance. Mediation is established and encouraged and there are many experienced mediators.

46. Brexit will have no effect on any of these or other recognised reasons for choosing English jurisdiction.

47. One area on which Brexit will have a potential effect is the recognition of jurisdiction and of judgments within the EU. The UK government's stated position is that it will seek to agree a framework of civil judicial co-operation with the EU which would "mirror closely the current EU system". In the context of civil jurisdiction that means the Brussels Recast Regulation. Even if that is not achieved, the government has made it clear that it would apply to sign up in its own right to the Lugano II Convention, under which jurisdiction agreements and judgments are required to be recognised and enforced within the EU. In any event, it will sign up to the 2005 Hague Convention on Choice of Court Agreements under which exclusive jurisdiction clauses are required to be recognised and enforced,

including by the EU. Potential difficulties of enforcement should not therefore be exaggerated.

Conclusion

48. The Financial List is flourishing and its work should not be substantially affected by Brexit. *The National Bank of Kazakhstan v The Bank of New York Mellon* case provides an excellent example of the benefits that the Financial List can bring, highlighting good use of the knowledge and experience of the judges and of the available procedures. It is a model of the "fast, efficient and economical dispute resolution" which the Lord Chief Justice called for in his Mansion House speech, and which the Financial List was set up to provide.

49. When announcing the introduction of the Financial List in July 2015, Lord Thomas stressed the following advantages of the List: first, promoting access to the courts and the expertise of trial judges, for market actors in an area that is of significant importance to the development of both the domestic economy, and to open markets internationally; secondly, helping to avoid costly and time consuming litigation through providing a mechanism for authoritative guidance; and thirdly, promoting the rule of law nationally and internationally. Three and a half years after its introduction, the Financial List is well on the way to meeting those goals and becoming the international benchmark that was envisaged.

Sir Nicholas Hamblen
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