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Keynote Speech:
"Advocacy in the Commercial Court"

Introduction

Let me start with the unexpected – thank you. I am a great fan of the commercial advocacy which I see in the Commercial Court. Over the last two years I have been in the Commercial Court full time and I have almost always been impressed with the standard of advocacy. In truth the occasions when I have been unimpressed have been thin on the ground. The commercial bar recruits incredibly talented people – and it shows. That doesn't mean there isn't room for improvement; even the best advocates I see are stronger in some areas than others. Those of you at or near the start of your careers will obviously be building the skills to become as good as it gets.

Let me also reassure you this is not purely my subjective - and possibly eccentric - views. I recently spoke on this topic in company with Lord Hamblen and the Chancellor and I have fed in some of their views. My own views have also to some extent been formed by great thinkers on the subject of previous generations. There are famous talks by Colman J and Sumption QC and more recently by Vos LJ and Teare J (*see Resources at the end of the speech*). You can still find those talks today and I recommend you do so. I will break no new ground, but rather aim to draw the themes together and give it my own polish.

I have two themes, the first from Lord Hamblen, which is entitled "Help the Judges"; and the second from taken from the vital work of the much missed Edmund King KC: "How to lose a case". Everyone who has read it has a favourite bit. My own, which I will use as my second theme, is that every single case is only ever won on the facts, even the ones that supposedly aren't.

How I propose to proceed is in three sections:

- Structure and Clarity – mostly addressed to written advocacy
- Oral submissions, particularly the law
- Witnesses.

Written advocacy

So, for the first part, let's think about the purpose of advocacy. It is really easy to forget that it is not about telling the judge what the clients want you to say (something of which we see even more now the client is more often joining remotely) or even about the bits you feel passionately about. Its about what the judge sees in their head. To me the answer to a case

has always been like a kaleidoscope pattern. You turn the facts and the law around and they form a pattern. Suddenly you make a small move, and you find a uniquely harmonious pattern. You as advocates are therefore looking to make the view appear to present a harmonious, simply right picture.

It is also like you want to direct the judge to a particular view from a hill. You look in one direction and see a particular view, your opponent goes by a different route and stands in a different place and see things differently. Your aim is to guide the judge from the foothills to exactly the point you are at, so the judge sees your view. I am not alone in thinking in these terms - I have heard Lord Hamblen speak of the importance of giving the judge a road map. Each of you gives the judge a set of instructions, the judge then decides which to follow. Chances are it will be the clearer set of instructions. As Edmund says, written advocacy is the "guide through the mess". To do that you need to focus on the broad legal canvas, not the snapshot. If you shout about the picturesque tree which is part of what you can see, that does not necessarily help the judge to find the right path to see it themselves. It is really important to accept that you know far more about the detail than the judge ever can. Don't drown them in detail as it'll just confuse them.

A really important point which I have already mentioned and which I see running through previous talks is the imbalance of familiarity in which Colman J said:

> *"..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…"*

(It is worth finding this talk and reading on, for a vignette of the Commercial Court as I had forgotten it was in 1997 – faxes and all).

Think about the recent NPG mosaic portrait of the late Queen – a portrait composed of individual pictures of her. It is as if you know all about all the detail in each of the pictures. But the judge wants the portrait, not the single tile.

Bear in mind too that the broad canvas is different for each hearing and your written submissions need to do different things. Always start by identifying the broad canvas for that hearing.

As for brevity, Lord Hamblen's view was "try shortening your argument and then try again". I don't actually subscribe to the view that shorter is <u>always</u> better – but I do agree that thinking about how brief you can make it is essential.

So, looking at different occasions for written advocacy:

- *Interlocutory hearings:* It should be the judgment you want delivered, plus the extra bits that will help to grab the judge's interest.

- *CMC:* This needs to be in or close to bullet points: What is in issue? What are the points the judge needs to look at? What is likely to go by consent? Summarise the tedious bits (eg the live differences on costs management) in a table. Being functional is key, and prized.
- *Trial*: The most difficult because it does the most. It may well need to have all of the following: introduction from scratch, the assistance the judge will need to write the judgment and "go back and read this once we are into the case" sections.

In general terms any of these may well need to cover a number of things:

- A summary of why you say you are right, that the judge can use as a summary of your case in writing the judgment, and a useful summary of the facts and the issues which the judge will need to decide.
- Your road map in getting to your world view.
- You then need to cover those points - factual and legal - in more detail, by building conclusions with supporting reasons which are complementary and cumulative. The aim is (per Lord Hamblen) building "what should seem like inescapable logic".
- Fourthly, and again from Lord Hamblen; "address the main argument advanced by the other side". You'll need to think about what the other side will say and ensure you have flagged to the judge that you do have answers to their best points. It is astonishing from this side of the bench how noticeable it is if one side goes long on a point and the other side ignores it. The dog which doesn't bark is famously suggestive…

The Sales Pitch

When I started at the Bar a very neutral approach to written advocacy was considered best practice. I rapidly learnt that complete neutrality is a good way to lose a case.

One reason is that judges are human and they tend to come to a case with a sense of what common sense suggests the answer is. But their view of what is common sense can be affected by how you sell your case. While I join in deprecating the use of adjectives and adverbs, there are ways and ways. Sumption is in favour of what one might term "the opening zinger": the first paragraph of your skeleton should grab the judge with an interesting legal principle or interesting facts. There are cases for this, but it probably works better on appeal, where he was famously brilliant. Or you can trail your structure - your headlines of "why I am right". Or trail the absurdity or unattractiveness of the other side's position via a telling analogy.

I have said that I do not subscribe to the "brevity at all costs" approach, but there is one area where I fall in with the other judges. Whittling down your points is very important: what your submissions do not need to do and should not do is take every point. If there is a predominant fault in modern commercial advocacy it is this. Your ingenuity sees many points; you have second and third lines of answers to many of the other side's points. But in the end you do need to decide what the right analysis is and pursue or flag that. At the risk of sounding like the Emperor Joseph in Amadeus, "too many points" can turn your audience off.

Quite aside from the risk – a real one - of a costs penalty (both Foxton J and I have imposed costs penalties for this approach recently), there is an even more existential risk. If we see

four separate points being taken to defend against an argument of the other side, we begin to suspect you don't think much of your first line of defence, or your second. As Vos LJ has said "bad points drive out good points". That is very true. Amidst the forest, how do we know which is the best tree? A key part of a good route map is the clear path.

The Judge's Time

As judges we have to read a lot of skeletons. Please think about our timeline. You can see each judge who has written about this feels this passionately. What you think of as our prep time is often eaten into by paper applications or urgents. On Fridays we may have 4 applications to prepare after a full Monday to Thursday in Court.

The extras

We don't ask for jokes (they generally fall flat) but I agree with Sumption that beyond logical and coherent presentation, a degree of fairy dust is nice. He says to use unusual turns of phrase and to add historical or social context to make what you say more interesting. I concur entirely, though it is a matter of taste and personal style how one adds that extra dimension.

How do you do all this? You think like a judge, put yourself in our shoes. Try being a Judicial Assistant or an arbitrator. You may well also find that as your leaders move on the bench it becomes easier, because you know what they will want.

Oral submissions and authorities

In a 2014 talk Vos LJ said that this is the area where advocates make the most mistakes. With this proposition I agree. He also said that "courts are always reluctant actually to look at the authorities". With this proposition I profoundly disagree.

Two further points with which I agree:

- First, tell the court what proposition you are using a case for (it may not be controversial). If you don't get a blank cheque you then need to be able to explain why it is authority for that proposition.
- Be sparing with authority for general propositions: textbook references are fine. Only go to authorities that are truly in point.

Remember always that the unconsidered reference is a hostage to fortune. I have decided a case against someone on an authority stuck in a footnote which they had not thought about, but upon which the other side seized with unholy glee as being "the most helpful authority".

Do take enough time to ensure that the court understands the facts of the case and the point that you are trying to get out of it. A good advocate can tell the story of the case in three lines in a memorable way and can find ways in the facts to make almost any case cited against them distinguishable. Again: all cases are about the facts. This explains why you need to limit your authorities as there is only time for a very few. An authority properly explained is likely to take 10-15 minutes.

Having said that I like authorities, there are two views about that, and we all agree with Vos LJ that "my bête noire is huge bundles of authorities that are never looked at". We have tried to give a solid steer on that in the new Commercial Court Guide at sections F12 and Appendix 5.

Other points I should mention about oral advocacy are:

- Don't just read out your script, think what needs to be elucidated orally
- When you are doing that, DO link to the skeleton so we can annotate.
- You must also be flexible and be ready to talk.
- You may think the judge or arbitrator is stupid or ignorant and doesn't know about something, but you may well be wrong; and even if you are right, no-one likes being patronised - it is not likely to incline a judge to your case. There is an art to explaining a point with which the judge or arbitrator is not familiar in a way which is not patronising, and which does not irritate. As the old saying goes: honey catches more flies than vinegar…
- The second one: "Grandstanding". In modern litigation there is a great deal of playing to the gallery to impress the client or a focus group or the public but it rarely impresses the court. All three of Vos, Hamblen and Flaux have made this point, so please take note! You can be sure of this: If you are making a jury speech for the benefit of your client or your solicitors then you are bound to irritate the court.

Witnesses

I am not going to give you the basics, you know them and Vos LJ has set them out beautifully. I am going to talk about the witnesses as part of advocacy where these themes are evident in a more sophisticated way.

The archetype, the dream: Destruction:
"What is the co-efficient of the expansion of brass?" That question, posed to the expert witness in the murder case of Rouse destroyed the expert's credibility and played a significant part in hanging Rouse who had murdered a man to fake his own death – it appears to escape from the complications of his having acquired four wives bigamously and not a few affiliation orders. It is destruction of the bravest sort because it starts with the classic "question to which one doesn't know the answer". The question has to be carefully calibrated so if you do get a correct answer you don't end up looking a complete fool. That is one form of destruction.

Or there is the destruction by diligent research and preparation of which the classic must be Mark Howard KC's takedown of a certain Mr G. We have a telecoms dispute. The witness, Mr G, is the Managing Director of the defendant company. His credibility is in issue. Ideally one would want a platform to suggest he had faked an email. Mr G had said that he held an MBA from Concordia College, St Johns, in the US Virgin Islands. He gave details and said that he had attended Concordia College for approximately a year. He produced to the Court a degree certificate and transcripts of his marks. Mr Howard put it to him that Concordia College was a sham, but Mr G maintained that he had duly attended the institution and obtained his degree. He gave detailed – very confident -evidence about his time there. Mr Howard then produced to the Court another degree certificate from Concordia College. It certified the attainment of an MBA…by his dog "Lulu". He also had a transcript – in which the examination marks achieved by the dog rather exceeded those of Mr G.

These destructions are the dream. But they actually encapsulate aspects of the way in which cross examination does more than pit two people against each other. The Mr G example is about the discipline, the preparation, the thinking about how to get to the objective – how to help the judge decide the key question and pursuing every avenue in preparation.
Interestingly it was cited to me recently by a US lawyer as an example of why the continental model of judge led questioning is inferior to our adversarial approach.

But there are other ways.

The impossible question
In a libel trial brought by Cadburys against the Evening Standard about an article contrasting the Cadbury reputation for philanthropy with their financial support of a cocoa production system which depended on slavery, this was the final question in cross-examination: “Have you formed any estimate of the number of slaves who lost their lives in preparing your cocoa from 1901 to 1908?” Either answer would be fatal.
Or there is the classic question from the Seddon trial. Rufus Isaacs asked: “Miss Barrow lived with you from July 26, 1910, to September 14, 1911?” Seddon: “Yes.” Isaacs: “Did you like her?” What was Seddon supposed to say?
You may say that these are jury skills. I would disagree. I have seen (very occasionally) such questions asked successfully in a commercial trial. They are not for every case. They are not for every witness and they have to be grounded in some serious empathetic thinking as well as analysis. But such a thrill when they work!

But what about the other skills with witnesses? Mostly you don’t need to destroy or to find an impossible question to win. Paul Stanley KC, in his work on Witness Handling, notes cross examination as having “not a single aim”. He points out that "Sometimes you may be seeking to “undermine” or “discredit” the evidence that has been given. But showing that a witness is a liar is not the same thing as showing that he or she is mistaken, or uncertain, or delusional."

Impression: making the judge like/distrust the witness
Kolarele Sonaike has said that every advocate recognises the moment that a judge’s mind is made up: " very often the view that a judge takes of a particular witness quickly becomes clear and any answers are then assessed through the filter of that impression". How do you guide that impression? How do you convey the impression you want the judge to record in the judgement? Again, this is all about preparation. You need to know where you are going. Can you portray the witness as sloppy and prone to mis-recollection from other documents? Or maybe aggressive and prone to not conceding obvious points?

How can you ensure the impression stays in the judge's mind? Quite common in commercial trials is the timed punch: you don’t just work out your solid punch, you work out how to time it for maximum impact - preferably the killer question just before a break, so the judge takes it away without the impression being overwritten. Like the Cadbury case where it was the last question in cross examination. Some advocates regard it as showy– but it has been known to work! It involves having a solid punch to land and knowing how long it will take so you can move to the subject x minutes out from the break. So again it is all about preparation.

There is also the “less is more” aspect. Sometimes the magic is in not cross examining at all – do you need to give the witness the platform? Sometimes not speaking or stopping short is the best advocacy. As the Chancellor said in a recent speech "once witnesses start to speak, anything can happen!".

PD57AC

As Paul Stanley KC notes, in cross examination sometimes your objective is to establish additional facts, possibly even for telling the story. There is a tension here with the current answer in the Business and Property Courts: PD57AC. This PD restores what we would say was always the correct practice in the light of science on witness recollection and best evidence.

There is however a but! Paul Downes KC for example would say that live witness testimony is not always about directly resolving factual disputes, it fulfils other important roles such as giving context and meeting the witnesses which are more not less important in heavily document commercial disputes. I agree and I disagree. There are cases where it is true; relatively simple issues may be rooted in a wider story and where securing losing party acceptance of the result might be facilitated by demonstrating an understanding of that story. But there are too many cases where the parties' subjective passionate views and desire to be known and understood does not help, but hinders.

I do however agree that there is an important advocacy point about telling a story that makes sense. This is not shut out – and in a sense this is in part what lies behind PD57AC. One aspect which is flagged by the new PD is the possibility of examination in chief - precisely to enable a witness to tell their story. That was a point flagged by Popplewell LJ as something lost in current prevailing practice – it is not always desirable for good witnesses’ first impressions to a judge being of them "on the back foot”, as they are in cross-examination. We need to think about opening the door to evidence in chief in appropriate cases.

So please believe that we know, and we appreciate, that it takes hours of prep to do 5 minutes of good cross examination. But it is worth it – and it is worth going to the extra mile to get better results. That extra dimension and the thought which goes into it, the constructive and empathetic thinking about what does the judge need, what will make the story make sense for the judge.

Edmund King KC's take on the best cross examination is that it is usually done by charm and by thinking in preparation as to what must have happened as a matter of natural human behaviour, picked up from clues as to what was going on from the documents. This empathic side to cross examination is echoed by Paul Stanley KC, who speaks of the importance of getting the witness to like you. This is true - indeed I once saw Ken Rokison KC get the right answer out of a witness simply by being nice.

Perhaps the most famous example of disarming is F. E. Smith, appearing for a defendant insurance company in a case where the claimant was a man who wanted damages for an injured arm. After asking the claimant a series of mundane questions about the injury, Smith inquired: “How high could you raise your arm before the accident?” The man obligingly demonstrated from the witness box – and of course lost. This is all about empath skills –

Smith had got the witness to put aside his guard, and he had bored him. This demonstrates charm and psychology in tandem.

I know that some of you will be thinking that these kinds of refinements are not really possible. I completely accept that some of them are not refinements you can hope to pull off in the early stages of your career. And I completely agree that in many cases opportunities to shine like this don't come at all. Many cases consist of doggedly putting your case to a witness who knows his party line and sticks to it. But they are the skills that will come with persistence in the basic skills and preparation, they are something to aspire to - and facets of them are achievable in many cases. For example, using immersion in the facts, deduction, empathetic understanding to construct the questions which tell the bits of the story the judge will want to have filled in. Or to lull a witness into a false sense of security – the FE Smith example is actually from his early career.

It's easy to think of this section as being about you and the witness, but again it is actually once again about helping the judge. These passages of cross examination turn cases – the Mr G example is a classic. There the judge needed to decide if Mr G was a liar. Did Mr Howard KC help the judge make up his mind, do you think?

Conclusion

Finally let me say this, and I am confident I can speak for all these luminaries of the Commercial Court bench as well as myself.

We appreciate it is not easy – trial advocacy is the difficult end of the equation, as there are lots of skills to juggle. Many of you will struggle to get enough oral advocacy to feel very comfortable at an early stage. If you can get witness advocacy that is great, but if you can't, don't worry too much because there are so many skills that no-one has them all to perfection and you can get there by other routes.

All of the skills dovetail. You'll learn to produce the written documents which aids the judge and you are at the same time building the skills which translate into effective oral advocacy. Thinking about how judges think will in turn make it easier to work out how the witness thinks and how best to "help" us in making sure the witness gives the impression you want the witness to give.

While I know the commercial bar is not the easiest place to get advocacy practice, let me come back to the start – the advocacy we see is already highly skilled – both from leaders and juniors. I hope this talk will have helped you edge that bit closer to perfection.

Just remember: we judges need - and very much appreciate - your help.

Resources:

Mr Justice Colman: "Current Matters of Procedure and Advocacy in the Commercial Court" (1997)
https://static1.squarespace.com/static/5ba510e3c46f6d304aaada90/t/633af5ef57c5a8023d2dabbb/1664808444290/Advocacy+In+The+Commercial+Court.pdf

Jonathan Sumption QC Masters of Advocacy Lecture: Appellate Advocacy (2009) reported here http://southeastcircuit.org.uk/education/jonathan-sumption-qc-on-appellate-advocacy
Mr Justice Teare "Advocacy in the Commercial Court" (2012) https://www.judiciary.uk/wp-content/uploads/2014/09/teare-talk.pdf
Lord Justice Vos "Advocacy: What works and What Doesn't" in The Commercial Bar Association (COMBAR) 1989-2014 (Bloomsbury 2014)