BACFI

"COMMERCIAL LITIGATION - WHAT IS TOMORROW'S BRAVE NEW WORLD?"

THE 2014 DENNING LECTURE
THE RT HON LADY JUSTICE GLOSTER

INNER TEMPLE, 20 DECEMBER 2014

1. Madam Chairman, Officers of BACFI, Lords, Ladies and Gentleman:

2. When I saw the list of my eminent predecessors who have given the Denning Lecture in past years, I felt honoured to have been invited to give the 2014 Lecture - but (honestly) somewhat apprehensive. I won't say "privileged" because, as many of you know, giving a lecture or an after-dinner speech is never, ever a walk in the park - even if you are given 10 months prior notice. A lecture is, of course, far worse than an after-dinner speech, because in a lecture you have to cut down on the jokes. But at least for a lecture you don't have to sit through a whole evening sipping fizzy water, whilst those around you, quaffing fine wines, become increasingly, and irritatingly, convivial.

3. When I read Lucinda's letter of invitation I was pleased to see that one of my heroes, the late Lord Templeman, who gave the BACFI annual lecture in 1987 (the first year that they were designated

"Denning Lectures") described them as having produced "interesting and provocative contributions". Well I can't guarantee to be "interesting" this evening, but I do hope to deliver "provocative".

4. Sadly Lord Templeman's lecture wasn't available for download on the BACFI website - and I left my researches far too late to obtain a copy from Lucinda. But I bet that his lecture entitled "The State of the Legal Profession" was provocative. He wasn't nick-named "Syd Vicious" for nothing. But provided you knew your stuff, articulated your submissions with clarity, and stood up to him in argument, Templeman treated young junior counsel with great consideration and was sympathetic to their lack of experience. That was certainly not the approach of some of his more crotchety judicial colleagues sitting as judges in the Chancery Division in the 1970s.

5. I have many Templeman anecdotes. But this is my most cherished. I appeared in a company shareholder's dispute in front of Templeman J as he then was. My clients were minority shareholder directors of a small company flogging skateboards. I was also nominally acting for the trustees of their family trusts who also held shares, but in reality had nothing to do with the dispute. The minority directors were trying to get rid of the majority shareholder and director, whom, my minority director clients alleged, was ripping off the company and diluting their shares. We wanted the court to appoint a provisional liquidator pending trial of our allegations on a winding up/unfair prejudice petition. But the wicked majority shareholder said the company urgently needed

more capital, and was prepared to invest more funds thereby diluting my clients' shareholding still further. Needless to say my clients weren't in a financial position to raise further capital and argued - unconvincingly - that the company could continue to trade on credit, on what was clearly a wrongful-trading business model.

6. Templeman J duly refused my application for the appointment of a provisional liquidator. He did so with the classic comment which I as a Commercial practitioner and subsequently a Commercial judge have never forgotten: "Miss Gloster, you have to appreciate that money speaks in this court." But then, in a very active case management way, he directed a speedy trial of our rip-off allegations, all to take place within 6 weeks, and made an order dispensing with pleadings and ordering that the affidavits should stand as each side's position statement.

7. But here is the second point of my story. When we disastrously lost the trial because we couldn't prove that Mr Nasty had ripped off the company, my trustee clients - who had resources, unlike the minority directors - were suddenly faced with a massive claim for costs. That was because I had failed to plead the classic neutral trustee defence in respect of their shareholding:- "The trustees will abide by the Court's decision in the action between the active litigants." A distinguished Chancery QC was bought in by my worried solicitors' insurers to defend the trustees from an adverse order for costs in favour of Mr Nasty. At the costs hearing, the senior silk waffled on and on about the legal obligations of trustees, seemingly making little progress before a stony faced Templeman.

8. Then came the moment when my heart leapt into my mouth. Templeman said: “Actually Mr X, I would rather hear from Miss Gloster as to why she didn’t plead the standard trustees’ defence.” So I rose in trepidation to my trembling feet and falteringly explained that, what with all the hurly burly of preparing for the trial within 6 weeks, I had simply overlooked the fact that, in order to avoid a costs liability, the trustees should have positively asserted that their position was neutral and they simply awaited the outcome of the court’s decision. Templeman could not have been kinder to me; he clearly appreciated that I had given him a straight answer and had not tried to avoid responsibility. He immediately said that he was sure that the whole thing was entirely his fault for having given case management directions which had imposed such a speedy trial timetable and dispensed with pleadings and that was what had led to my oversight. And so he didn’t make an adverse order for costs against my trustees. How generous can you get? That practical and non-technical decision has travelled with me throughout my legal career. It has provided me with a model for a realistic judicial approach to the exigencies of litigation.

9. But now I become more provocative. Many of my predecessors began their lectures - not surprisingly - with mini-eulogies of Lord Denning and their experiences of appearing in front of him as counsel. He was of course the most famous of the English judges of the 20th century and undoubtedly made a huge contribution to the English Common Law. But he was not the greatest. That accolade must be reserved for the late Lord Bingham, (or, at the risk of appearing smarmy, for your current President, Lord

Hoffmann, -whom I see sitting right there in front of me.) And some of Lord Denning's judicial and extra-judicial comments would certainly - and rightly in my view - have disqualified him from satisfying the diversity criteria which would have applied if Denning had applied to become a High Court judge today on the basis of his record. But I must be careful here. First - "de mortuis nil nisi bonum." -Translated - "don't say anything but nice things about the dead." Second he was a man of his times - and, of course, they were very different times - and I am a woman of mine.

10. Unlike some of your previous speakers, I only have one Lord Denning experience to recount. Although when I was a pupil I saw him in operation in the Court of Appeal, I myself never appeared in front of him. My only encounter was when I had been at the Bar for about 5 years practising in Chancery Chambers. I was taking a party of about a dozen sixth form girls from my old school, who had been on a educational visit to the Law Courts, to Lincoln's Inn for lunch. Denning was lunching in Hall at High Table. He must have been told about the delegation of schoolgirls because he wandered down from High Table to where we were all sitting and sat down amongst us in a friendly fashion. I told him that I was a practising barrister and that the schoolgirls were thinking about a career in the law. That I was already in practice as a barrister must have completely passed him by, because, after explaining all about being Master of the Rolls and what the Rolls were, he went on to express the view in a charming, but deeply patronising, manner that becoming a barrister wasn't really a suitable career for a girl as it tended to make them aggressive, and strident. But I was in awe and so I said nothing in protest. It is, perhaps triumphalist of me

even to be telling this story. But would Lord Denning ever have imagined the reality of a woman judge in charge of the Commercial Court? I doubt it.

My thesis

11. But let me move on, to the real topic of my lecture tonight. "Commercial litigation - what is tomorrow's Brave new World?"

12. What is my thesis? It is that the legal profession has to identify and meet a number of critical challenges if the UK, and London in particular, is to retain its competitive pre-eminent position as a, if not the, leading centre of excellence for the resolution of commercial disputes. What those challenges are, and how we, barristers, solicitors, arbitration practitioners and members of the judiciary should address them, are particularly pertinent questions as we approach the celebrations for the 800th Anniversary of the sealing of Magna Carta and the Global Legal Summit which is taking place in London in February 2015. According to the Lord Chancellor, the purpose of the summit is to "champion the UK as a global leader in legal services" and to promote and celebrate London as an international centre of excellence for resolving commercial disputes in an increasingly globalised world. By way of an-aside, some criminal practitioners have queried why the Government are spending £1 million on this event in the light of all the legal aid cuts - but that is another story. And I am not going to go there. In my view the Global Legal Summit is clearly A Good Thing.

13. The importance of the rule of law, to the economic well being of the UK is well recognised. Any country that regards itself (as the UK does) as a leading world financial centre, will wish to offer a justice system in which not only its own commercial businessmen have confidence, but in which international businessmen who, for whatever reason, choose to resolve their disputes in this jurisdiction, also have confidence.

14. As Lord Neuberger said in his 2013 Annual Harbour Litigation Funding lecture[1]:

> "Individuals and businesses have to be able to enforce contracts, to protect their intellectual property and to obtain effective redress not merely against other individuals and businesses, but also against the State. To that end, the State has to provide fair and clear laws equally applicable to all, a legal system readily available to all, and an effective and efficient court structure readily accessible to all. It must, in other words, secure the rule of law."

It is not just that commercial dispute resolution is a profitable industry in its own right but rather because the strength of London as a financial centre, and its strength as an international dispute resolution centre, are factors which work in tandem.

15. This point was well made in the 2003 BACFI Denning Lecture "The City and the Law" delivered by the then the Lord Mayor of

[1] David Neuberger, 'From Barretry, Maintenance and Champerty to Litigation Funding', Gray's Inn (8th May 2013), at §52.

London Alderman Gavyn Arthur. What he said is worth repeating as it feeds into later discussion in this paper:

"As Lord Mayor and uniquely as a practising barrister, I can say that the Law has always been absolutely fundamental to workings of the City since it first started as a trading centre during the Roman occupation.

The City rests on no firmer foundation than the unfettered choice of businesses to be here, born of their confidence that London provides a benign commercial environment. The City as we know it will only endure so long as that confidence remains. The importance of the English legal system to business confidence in the City should never be underestimated. Trade and capital are cowardly. They will only go where they feel safe, and their ultimate protector is the domestic law of the place of business. We are fortunate that the English judiciary and common law are magnets for trade. Businesses are confident that our judges, and, in particular the bench of the Commercial Court [I interpose - a nice little plug there!], will resolve their disputes impartially and efficiently. Moreover, the common law is universally regarded as having combined contractual certainty with sufficient flexibility to respond to market change. We should also bear in mind that legal services form a sizeable proportion of City business and make a substantial, if unsung, contribution to the economy. This income is dependent on the continued vitality of the City and the influx of international litigants who choose London as a forum for resolving their disputes…"

16. And earlier he had said:

"The City of London has endured for so long that we might be forgiven for imagining that its status as a financial and trading centre is a rule of nature. History and common sense, however, are on hand to teach us that continued commercial success is not an inevitability. Genoa and Pisa were supplying credit finance when London was a shanty town. The remarkable preservation of these cities attests both to their medieval prosperity and to the sharpness of their decline. We should not deceive ourselves by thinking that the great towers of the City of London could not one day similarly stand in memorial to its past success."

These last words of caution paint a vivid picture of the dangers of complacency. You may not think that, outside some science fiction film director's wildest dreams, the Shard could ever become a leaning Tower of Pisa. The image is a striking, but, let us hope, not a realistic one.

17. You might be forgiven for thinking that the present UK commercial legal scene looks rosy enough. The report published by The CityUK on Legal Services in January 2014 presents some impressive upbeat statistics. According to the report:

- The UK is the world's leading centre for international legal services.
- The UK accounts for around 7% of the global market for legal services. It is the largest market in Europe, accounting for around a fifth of European fee income.

- Over half of the revenue of the largest 100 law firms in the UK is generated by international law firms based in London.

18. The report goes on to say that the value of the legal services sector to the UK economy doubled in the last decade, increasing from £15.8 billion in 2002 to an impressive £20.4 billion in 2012, approximating to 1.5% of GDP, with a positive contribution to the UK's balance of payments nearly doubling in the same period to nearly £3 billion. Gross fees generated by law firms in the UK increased by 5% in the financial year 2012/2013 to £28.5 billion. The report makes the further important point that London's reputation as the leading global centre for the provision of international legal services is underlined by the fact that 40% of governing law in all global corporate arbitration is in English law and that London is viewed as the leading preferred centre of arbitration.

19. And then, of course, close to my heart, there is the new Rolls Building, opened in London in 2011, as the biggest dedicated specialist centre for the resolution of financial business and property disputes in the world. Close to my heart because, as Judge in Charge of the Commercial Court, I was very involved in the business plan for the new building and moving the Commercial Court there. The Rolls Building is around four times bigger than its nearest competitor (whose name, like that of Lord Voldemort, we won't mention) and provides dispute resolution services in almost every commercial field. It houses the judges of the Chancery Division, the Commercial & Admiralty Courts, and the

Technology & Construction Court, and also provides supervising and ancillary jurisdiction for arbitrations.

20. But - if you think that all this sounds unduly complacent - let me turn straight away to identify the very real challenges that the world of Commercial dispute resolution faces, notwithstanding there apparently impressive statistics. These are challenges that are not limited to the high octane world of cases involving millions, if not billions, of dollars or Russian oligarchs. These are concerns which equally apply to small to medium business disputes and indeed more generally across the board to all civil disputes which require resolution through the courts - including publicly funded disputes. My menu of the principal challenges reads as follows:-

(1) the need for modernisation of the courts and the effective and universal use of IT;

(2) perceptions of insufficient judicial diversity;

(3) the need for more streamlined, speedy and cost effective court procedures without front loading of costs;

(4) restrictions on access to justice;

(5) workable systems in place to enable responsible funding of claims.

To a certain extent many of these points are related. It is not too grandiose to characterise them as possible threats to the Rule of Law. Sadly for you - or perhaps happily - time does not permit me to share my sometimes controversial views on all these topics with you without seriously cutting into your Christmas drinks party time. So I shall concentrate on topics (1) and (2).

The need for modernisation of the Courts and the effective and universal use of IT.

21. Information technology has radically changed all aspects of our lives and economic activity. As Professor Richard Susskind said in his excellent book "Tomorrow's Lawyers" it is simply inconceivable that somehow the way in which we lawyers and judges conduct litigation or dispute resolution will be exempt from any change. But the infrastructure supporting the administration of the courts and tribunals is in desperate need of reform. The IT in courts is archaic. The way in which technology in the courts and tribunals operates is inefficient and disjointed based on a technology that is now decades old. It costs the taxpayer well over half a billion pounds a year to run. The service provided is currently based on outdated assumptions about how people expect to access services. Very few are available on-line and only a limited number of case types can be started and progressed through digital channels. HMCTS relies on systems that are out-dated and do not facilitate automated processes. They have limited integration with the wider justice service systems and drive continued need for inefficient, paper-based processes. Reform is therefore urgently needed to reduce delays, improve services and consistency to the public, reduce costs and support growth in the UK's legal sector. There has been an increasing sense of frustration in the profession that steps have not been taken before now to bring about reform. There has been little investment in the system to support the integration of the estate or the modernisation of IT in a properly strategic way.

22. The depressing history of years of failure by government to implement successive recommendations made by the judiciary to drag the courts' administrative systems into the digital age has been cogently summarised by the Lord Chief Justice, the Rt Hon Lord Thomas of Cwmgiedd, in his recent lecture in May 2014 given to the Society for Computers and Law[2]. I recommend it as bed-side reading. We are lucky to have a Lord Chief Justice who is so committed to the modernisation of the administrative infrastructure of the Courts and the Tribunal Service and who is prepared to use his political clout to achieve this result.

23. Probably as a result of the Lord Chief Justice flexing his muscles, the picture in the last few months has changed dramatically. On 28 March 2014 the MOJ announced[3] that "The Treasury had agreed a one-off package of investment averaging up to £75m per annum over the five years from 2015/16 which will be used to deliver more efficient and effective courts and tribunals administration for all users and deliver significant savings." Those savings are said to be in excess of £100 million per year by 2019/2020.

24. HMCTS states that its reform programme is intended simultaneously to:

- deliver modern and integrated technology to introduce greater digital working, speed up processes and, by updating

[2] IT for the Courts: creating a digital future 20 May 2014, Society for Computers and Law Annual Lecture.
[3] Ministry of Justice Press Release published 28 March 2014 - reform of the courts and tribunals.

our technology, provide users with choice on how they access our services by offering online and telephone options. That, it is said, will mean the public will only need to go to court or tribunal building when it is absolutely necessary;

- improve court and tribunal buildings, by making make better use of buildings while reducing the cost of maintenance; to improve the utilisation of hearing rooms to reduce waiting times and provide modern, accessible and fit for purpose facilities for all who access our services.

- introduce streamlined efficient processing. To enable the delivery of an efficient and high performing courts and tribunals service that will meet the needs and expectations of 21st century court users".

Moreover the HM CTS reform programme has already begun the work of looking at the entire position of civil and family courts and tribunals, investigating and implementing the changes that are needed to ensure the provision of an effective digital service. The monies are available and a project board has been set up. So the work has started.

25. It all sounds fine and dandy. But seeing is believing. It depends on the honouring of the commitment to provide funds. And in his recent press conference on 12 November 2014, the Lord Chief Justice made it absolutely clear, when answering a question about the possibility of substantial cuts to the budget in a new Government that we "had for the first time in probably a hundred

years the opportunity for significant investment in IT and in the Court estate"… but that if the "very substantial investment which we had secured were not to go ahead for any reason," then in his view "the justice system would face a severe crisis." And he rightly referred to the current IT system - both back office and court user facing - as "wholly antiquated."

26. Of course ultimately it is a decision for Parliament, which controls expenditure, what funds it decides to provide. But if Government fails to honour its stated commitment, there is no doubt that the profession will be up in arms, and, I venture to suggest, that the UK's presentation of itself as the gold standard location for dispute resolution will be indelibly undermined.

27. But there is of course a felicitous exception to all this - The Rolls Building. It is not susceptible to cuts. The Commercial Court has had an electronic diary and case management and filing system for some years, but the Chancery Division had not, and the TCC's was fairly basic. On 6 May 2014 HMCTS announced that after an integrated extensive procurement exercise it had appointed Thomson Reuters to deliver a new IT system for the three jurisdictions in the Rolls Building, based on the Thomson Reuters C-Track application. The new system is expected to be delivered in a phased approach by late 2015 for a total cost of approximately £5 million. As somebody who has been involved on the Project Board involved in the long process which has led to the signing of the contract, I can tell you we all breathed a sigh of relief.

28. The new IT will place the Rolls Building at the forefront of modern court technology, consistent with the high standard and international reputation of London as a business dispute resolution centre. The new system has already developed an electronic listing and case management capability, and by the end of 2015 will provide for an online filing of claims 24 hours a day, 7 days a week, from anywhere in the world. And luckily MOJ is contractually committed - so at least technically the project is insulated from possible future cuts.

29. But of course this in turn has led to complaints from those practising in the wider civil fields that too many IT initiatives have been focussed on the Commercial Courts, the Chancery Division and the TCC and not sufficient on the lower courts orother divisions of the QB. To which I would say - yes, we were lucky, but it was right to prioritise what is relatively a small investment in financial terms so as to promote the Rolls Building's flagship status. And now, as I have said, there does appear to be the real will and commitment on the part of the Government to spend funds on bringing the wider civil and family courts and tribunal systems into the digital world.

30. That is of course all great news. But it is not sufficient simply to have new technologies in place. We, the litigators, the solicitors, the barristers, and particularly the judges, have to be prepared to adapt our working practices to utilise the new technologies. But in my view neither the judges nor counsel are getting the point. This

is what - I said earlier this year. my Harbour Litigation Funding 2nd Annual Lecture[4]

31. In the *Berezovsky v Abramovich* case[5], I conducted - at least so far as I was concerned - a virtually paperless trial. The only documents which I also had in hard copy were the (approximately) 3000 pages of written submissions - no doubt so that I could scribble my acerbic comments on them… The remainder of the galaxy of documents, case materials and pleadings were stored in easily accessible and well-organised electronic files on an internet cloud, to which the daily electronic transcripts were effortlessly hyperlinked. But, and this is the point I am making, counsel - at least the more senior ones - appeared unable - at least when it came to cross-examination to relinquish the comfort blanket of hard copy files and the ubiquitous yellow sticker. Vast quantities of ring binders were stacked up like the giants' gold outside Valhalla in Wagner's Das Rheingold in seried ranks in the court room, and were trundled back and forth from chambers everyday.

32. And in the Court of Appeal we would hardly know that the digital revolution had begun. Whilst routinely we receive skeleton arguments electronically (at least, if we ask for them) and many judges make their notes on computers, I have never been offered before a case starts access to a digital version of the files. The same old hard copy files, in rainbow hued ring binders, arrive in their battalions before the case starts and pile up in our room; puffing

[4] 14 May 2014 Commercial litigation - the far horizons: paragraphs 21-24.
[5] [2012] EWHC 2463; see paragraphs 34-36, and 1250.

junior clerks continue to wheel overloaded trolleys into court. And we never have all the documents because of mis-filing. And do you know what the astonishing thing is? When, as I often do, in a commercial or tax case, ask whether it would be possible to be provided with the case documents in electronic format (but without parties going to any additional cost) I am almost always provided with the facility within a day or two - by which time of course the appeal is over and I have marked up my hard copy documents. The solicitors in a commercial case almost invariably already have the documents scanned and stored in electronic form - and usually have them in an easily accessible, well-organised set of electronic files that reflects the hard copy bundles. I have little doubt that in many commercial trials at first instance the position is the same. It is not - or should not be - a cost consideration. There are many packages available on the market at different prices to suit every budget and every size of case. Given that disclosure frequently has taken place electronically, the additional costs of electronic presentation of documents for the trial or other hearing, should not be more expensive than hard copy presentation or so I am told. The cost savings in not having to handle and update hard copy files would of course be immense - not just in administrative time, but also in judicial and lawyer time.

33. So where lies the problem? It lies, I fear, with the judges and the advocates. It is not that judges and advocates are luddites - they are just more comfortable with what they know. But we are all going to have to learn new tricks. Parties should in my view be much more aggressive in seeking case management directions that

require parties to operate in an electronic court environment, and judges should be much more pro-active in making such orders. Practice directions or new rules may have to be introduced to achieve this end.

34. Of course I am not suggesting that it should be made unlawful to bring paper into a courtroom. Nor am I suggesting that proposals for virtual courts, or on-line dispute resolution, will rule out, in the commercial case, the need for live presentation of evidence by witnesses or, most importantly, the need for oral argument, which is often outcome determinative (even in these days of written arguments). But we, by which I mean you, the litigators, and we the judges, are going to have to change to work efficiently in the new digital world.

35. I turn now to what I regard as the second challenge.

Perceptions of insufficient judicial diversity.

36. You may wonder what on earth this has to do with Commercial litigation and why the topic could be regarded as a challenge or a threat to the status of London as a centre for commercial dispute resolution.

37. Can I say first of all, that unlike some of the sisterhood, I rarely speak on public occasions such as this about judicial gender

diversity. As Lord Sumption said in his excellent Bar Council Law reform Lecture "Home Truths about Judicial Diversity"[6]

> "In modern Britain the fastest way to make enemies is to deliver a public lecture about judicial diversity. Unless you confine yourselves to worthy platitudes, you are almost bound to cause offence to someone." Another lecture I recommend for bedside reading."

38. In my experience as a barrister at the Commercial Bar no professional or lay client apparently cared whether you were a woman or a man or what your ethnic background was. They hired you because you could deliver the service the client wanted - you knew more about derivatives than anyone else because you had been there at the start of the market drafting the contracts, or you were a wicked cross-examiner who could destroy the enemy with the maximum efficiency. You certainly were not being hired because you satisfied some sort of corporate tick box criterion that all external service providers should be drawn equally from the male and female sex.

39. But now we have what I would describe as a faintly hysterical media coming up with alarmist headlines such as "UK Judiciary in the dock over its lack of female judges - only Azerbaijan has fewer women presiding over cases says a Council of Europe report."[7]

40. We also have repeated press coverage about the continuing lack of women in the Supreme Court and the recent publication of a report commissioned by the Labour Shadow Chancellor entitled "Judicial Diversity: Accelerating Change" by Sir Geoffrey Bindman QC and

[6] 15 November 2012.
[7] See The Independent, 10 October 2014

Karon Monagham QC. The report makes a number of points and recommendations. I pick out only 3 or 4 for mention:

- it asserts that there is a "culture of exclusivity" which stereotypes the judges as a white male barrister educated at public school and Oxbridge;
- it recommends that a quota system should be introduced to the judicial selection process so as to achieve as quickly as possible a balance between men and women, and ethnic minority and white judges in the senior judiciary including the Supreme Court (for the gender quota it suggests at least one third of each sex in each court…);
- it recommends that there should be greater progress towards the concept of a career judiciary and that the tie break provision contained in the Equality Act in relation to gender and ethnicity should be applied at the sift/ short listing stage of the selection process.

41. Similar sort of statements are contained in a report entitled "Innovation in the Law", which is to be launched by solicitors Hodge Allen tomorrow. It is said to be based on interviews conducted by IPSOS Mori with 508 "legal professionals" I am not sure about the statistical basis but I give you a flavour of the report:

"74% of legal professionals agreed with the statement that "senior positions throughout the legal profession are still seen to be dominated by white public school educated men."

"And so far as the judiciary is concerned 70% of legal professionals believe women, the state-educated, ethnic minorities and those with disabilities are under represented". And

"There was near unanimity in the belief that women were under-represented in the judiciary". The report also contained the classic comment

"Only 12% agreed with the statement that it is easy to combine being a mother and developing a career in the legal profession". But please - it is not easy to combine any full-time job with bringing up young children - whether as a mother or a father.

42. Let me return to the question "Why does the issue of judicial diversity matter so far as the maintenance of the UK's position as a preferred commercial dispute resolution centre matter." My answer is to remind you of the importance which the Lord Mayor in his Denning Lecture attributed to the qualities of the English judiciary and the confidence that international and domestic businessmen have that their disputes will be resolved impartially and efficiently here. My view is that if there is a perception that the English judicial selection process operating in our multi-cultural society is not targeting and appointing the brightest and best candidates for senior and other judicial posts, whatever their gender or ethnicity, but restricting its appointments to some limited pool based on historic gender or ethnic stereotypes, that will inevitably have the effect that the business confidence of which the Lord Mayor spoke will over time be eroded.

43. But that leads inevitably to the next three questions:

- what is the current position in relation to judicial diversity?
- what positive actions are currently being taken to improve diversity?

- should further, more radical artificial, measures be taken to improve diversity?

This brings us of course to the controversial issues of getting rid of the statutory merit selection criteria, mandatory quotas and a career judiciary.

The current position - the reality.

44. As Lord Sumption explained in his lecture there are many reasons both social and economic why historically there have been so few women and members of ethnic minorities in the judiciary. But the picture has, despite what you read in the press, changed dramatically in my professional lifetime and even since 2012.

- The number of female judges in the Court of Appeal has doubled since 2012. As at 9th Ocotber 2014, eight (21%) of the 38 judges in the Court of Appeal are women.
- There are now 21 (19%) female judges in the High Court of a total of 108, whereas in 2012 there were 17 (out of 110). (When I was at the Bar you could count female High Court judges and Lady Justices of Appeal on the fingers of one hand)
- The percentage of women sitting in courts and tribunals (excluding magistrates and non-legal members) has increased from 30% to 32% - and women make up 45% of the Tribunals judiciary.
- Nearly one in 10 of all courts and tribunals office holders (9.4%) is from an ethnic minority background.

- There are more women sitting as magistrates than men - over 25% out of a total of 21,626. and just under 9% of all magistrates are from an ethnic minority background.

45. And may I try and dispel the myth that the predominant profile of the senior judiciary is white, male, public school educated Oxbridge barristers. Of course, lots of them are, but lots and lots of them aren't, and even those who prima facie fall within the category are often the products of social mobility of their parents or themselves in earlier years. Somewhat egotistically I refer to myself as an example. Were I a male, I would apparently fit the traditional stereotype: educated at a famous girl's public school and Girton College, Cambridge; then a career at the Bar. But scratch the surface and the real story is very different. I was an adopted child of parents neither of whom went to university. My adopted father had been sent back as a boy to Germany as an enemy alien at the start of the 1st World War; he subsequently came back to England after that war; although originally of Jewish extraction, he was imprisoned without trial in a London prison under the notorious Defence Regulation 18B at the beginning of the 2nd World War. But he was a hard working businessman and managed to make enough money for me to have the education which he had never had. And he was incredibly proud when he finally obtained British nationality in his 50s.

46. I share that personal anecdote with you because I suspect that many of my colleagues who might superficially be claimed as satisfying some sort of "stereotypical" model would have similar social mobility tales to tell. The Bar and the Bench naturally attracts those

who want to achieve intellectually and professionally - it is not surprising that they may have gone to the more prestigious universities in the UK, whether Oxbridge or elsewhere. But the notion that there is a culture of exclusivity is misguided. Perceptions of course are a different thing - and they should be dispelled.

47. What steps should be taken to improve judicial diversity? My view is that it would be wrong to change the statutory selection criterion which is wholly based on merit. It is also unnecessary to do so. What matters and what will improve diversity is that the most able candidates put themselves forward, no matter what their background, gender or ethnic categorisation. What matters is that the JAC identify these people and encourages them to move forward as candidates.

48. The JAC is bound by statute to select candidates on merit. It has a statutory duty to have regard to the need to encourage diversity in the range of persons available for selection, but only subject to the first duty. The JAC's view - which I share - is that any change in the statutory requirements, for example by the application of mandatory quotas would give rise to real concerns about the quality of appointments and would lead to a lessening of public and international confidence in the judiciary. A fundamental principle for the Commission is that appointments should be made on merit from the widest range of candidates. To apply any other factor such as a quota, could result in the appointment of people who were not qualified to fill a particular role.

49. Particularly relevant for my theme this evening would the wider implications for London and the UK as a financial centre and as a centre for resolution of commercial disputes if artificial measures were taken to increase judicial diversity. The notion that appointments to the UK judiciary were no longer based on merit and relevant commercial expertise but on a quota or some other artificial system could significantly dent the confidence which domestic and international businessmen have traditionally enjoyed in the UK judiciary's ability to decide cases impartially and efficiently. That factor could clearly be deployed by the UK's competitors to its commercial disadvantage. So could the introduction of a career judiciary - judges who had been judges all their lives with no experience of the real commercial world. Let me quote again from the Lord Mayor's 2003 Denning lecture on the proposal for a career judiciary:-

> "So may I touch upon the possible introduction of a new class of professional life-long judge along the lines of the civilian systems of many European countries? The City considers it to be one of the strengths and attractions of our system that High Court judges are recruited solely from the ranks of senior practitioners, whether barristers or solicitors. Commercial law, indeed all law, is nothing if not an intensely practical discipline. No amount of study of the workings of trade or finance, or fluency in the theoretical law can compare to the imaginative and instinctive approach that results from a career in practice and the dialogue with businessmen and women that that entails. This issue also touches upon the esteem of the court. Litigants are aware that the appointments system ensures that the expertise of the judiciary is a stable quality. They are aware that the lawyers, who argue on their behalf with energy and creativity, and with fair play, will one day be judges of similar distinction to those already on the bench, who in their turn once proved their merit in the arena of the court.

> Would the fact that Mr Justice Smith was placed fourth in the judicial exams at the age of 25 instil a comparable degree of confidence? I, for one, have my doubts."

50. And last but not least what would the effect be on applicants for judicial posts? It might well put off the more able applicant from applying at all if she thought that some gender quota was to be applied against her in a particular competition. But perhaps most importantly, those of us who have got where we have got in our professional lives on merit - or at least are arrogant enough to think we have got there for that reason - don't want to be patronised by being told that we have only squeezed in as the result of some positive discrimination initiative.

No Need

51. Finally there is in my view absolutely no need for artificial steps to be taken to improve judicial diversity. Loads of positive action is already being taken by the Lord Chief Justice who together with the Lord Chancellor has a statutory duty to encourage judicial diversity. In December 2013 the Lord Chief Justice published the Judicial Diversity Statement and announced the creation of a Diversity Committee to support him in fulfilling this statutory duty. The Committee is responsible for formulating a strategy for encouraging judicial diversity, approving an annual delivery plan and monitoring and evaluating progress and success. The Committee approved its plan in April 2014 and is now working with the Judicial Office on its delivery. The Committee has introduced all kinds of initiatives. For example: a Judicial Role Model Scheme has been introduced; and a new Mentoring Scheme

is going to be launched in January 2015. The scheme will seek to support women and BAME lawyers and lawyers from non-traditional backgrounds to apply for their first judicial appointment and judges (both fee-paid and salaried) to progress to higher office. It will be targeted at women and BAME lawyers and lawyers from non-traditional backgrounds (to improve social mobility). There have been a number of Outreach Events and more are planed.

52. These include targeting Government lawyers as potential candidates for the bench. At the Senior Civil Service level 50% are women and about 10% are BAME. Likewise as the Lord Chief Justice said at his recent press conference, attempts will be made to target a hitherto unutilised resource - women partners in solicitors' law firms who habitually retire in the early 50s - just at the time when the JAC recruits for the High Court Bench. Whereas in the past, traditionally one had to have been a recorder to become a judge (which frequently put off women solicitors who hadn't been able to take off 4 weeks a year to sit as a recorder) in the New Year, the Lord Chief Justice/JAC will be running a competition for people who have never been recorders to enable them to sit as Deputy High Court Judges - a preliminary step to becoming a High Court Judge. This is a real step forward.

53. So can I please exhort, cajole, tempt any of you BACFI members who might be interested to give serious thought to a judicial career at whatever level. You undoubtedly have real and useful experience of the business world. You would make a real contribution to the judiciary and you would help improve our diversity figures and dispel the myths. Being a judge is the best job

in the world. If you want to come and discuss it with me, please feel free to do so - now or whenever you like.

Endnote

54. Your 2012 Denning speaker ended up by quoting his motto on his coat of arms in Lincoln's Inn. Needless to say I don't have a motto or coat of arms whether in Lincoln's Inn or anywhere else. And anyway I am not sure that it would be the best way to round off a lecture that has spent so much time on judicial diversity.

Thank you very much.

Elizabeth Gloster