"An Understanding Heart": being a judge in the 21st Century

The 2018 Denning Lecture
Mrs Justice Rose DBE
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It is a great honour to have been invited by BACFI to give this lecture. Your invitation sent me looking along my bookshelves to find Lord Denning's memoire of his life and times *The Family Story*.[1] My copy was given to me by the three other law students in my year at Newnham College, Cambridge for my 21st birthday. Re-reading this charming book it struck me that much has changed in the role of being a judge since Tom Denning was first appointed to the Bench in 1944. But much about the work he describes is still very familiar for a 21st century judge. Some of the views Lord Denning expresses in the book we would politely describe as "of their time", for example his evident regret when he was no longer able as a Judge of Assize to sentence an 18 year old mugger to 25 strokes of the birch. By contrast some of what he says still rings true, for example: "Moral for trial judges: don't be disturbed when you are reversed by the Court of Appeal".

I am sure that Lord Denning would have recognised the source of the quotation in the title of this lecture. When the great Biblical judge King Solomon is asked by God in a dream what he most wants, Solomon replies "Grant me an understanding heart to judge your people, to distinguish between good and evil; for who can judge this vast people of yours?"[2] In that request King Solomon highlights and distinguishes the two key roles of the judge, the process by which judges hear and determine cases, and the function of judging – of how we arrive at and then express our conclusion at the end of the case. An understanding heart was and is a necessary ingredient in both of them.

Let me consider first the process of judging. One major change is that Lord Denning writes that he made it a rule never to read any papers in the case beforehand. He compares his self-restraint with Lord Atkin whose practice was to read the papers in detail in advance of the hearing. The result of this, Lord Denning said, was that litigants thought that the case was prejudged before their counsel was heard; that Lord Atkin had made up his mind before counsel opened their mouths. Today, every significant trial includes in the timetable a day or so for judicial pre-reading. When counsel stand up in the High Court or the Court of Appeal, they expect the judge to know what the case is about. There are two important developments that have been instrumental in this. The first is the introduction of witness statements which stand as the witness's evidence in chief. Written witness statements were introduced by the 1986 Rules of the Supreme Court. They were intended to save costs, eliminate "surprises" and identify the real matters in issue at an early stage before the trial. The reform was thought to encourage a cards on the table approach. In some cases this would promote settlement and if

[1] *The Family Story* by the Rt Hon Lord Denning Master of the Rolls; Butterworths, 1981.
[2] First Kings: 3. 9

the case did not settle it would at least make for a fairer trial. It did not take long, however, before disquiet was expressed that, as one commentator put it, the modern witness statement is not so much "cards on the table" as a manifestation of a "whole kitchen sink" approach. Many judges bemoan the fact that witness statements have ceased to be the authentic account of the lay witness; instead they have become an elaborate, costly branch of legal drafting, incorporating legal argument alongside real evidence and providing a commentary on the documents in the case. The credibility of the evidence of a witness can be undermined if the witness sounds completely different when speaking from the witness box compared to his or her written statement. Concern about the usefulness of witness statements has led to a working party being formed, led by the judges of the Business & Property Courts in the Rolls Building. A group comprising representatives from industry, the judiciary, the arbitration community and the legal professions has devised an online survey of practitioners to complete to express their views. Various suggestions have been made as to how to improve matters. One is to retain witness statements but to require them to start with a statement that they have been written in the witness's own words. Another is that they should include a sentence describing how well the witness now recalls the events set out in the statement and whether they have refreshed their memory by looking at documents or discussing the case with other witnesses. Other more radical suggestions include permitting the opposing party to be present at the interviewing of witnesses or lifting legal privilege from the process of preparing the witness statements. It is interesting that of the total number of responses to the survey so far, 55 per cent have been from barristers and 37 per cent from solicitors, showing perhaps how much concern there is within the profession about the court process. As an aside, the involvement of the Business & Property Courts judges in this group is one example of another way in which the work of the judge has changed since Lord Denning's time. Most High Court and Court of Appeal judges now have a range of "corporate responsibility" roles in addition to their case load. These include acting as Presiding Judges on the Crown Court circuit, or becoming President of one of the chambers of the Upper Tribunal. Others are ad hoc project work such as the Working Party on witness statements, or the Working Party led by Gloster LJ on document disclosure. This has recently led to the introduction of a pilot scheme to modernise the rules to make them more appropriate to the volume of electronic documents disclosed by the parties in many cases. I myself worked with Hamblen LJ for a number of years on establishing the Financial List intended to be the home for high value cases with systemic implications for the financial markets.

The other development that enables judges to pre-read into the case before it starts is the preparation by counsel of substantial opening submissions exchanged by the parties a few days before the trial, setting out the facts and the law in detail. A combination of these two developments has led to the position that in the four week trial that I heard earlier this term, there were no oral opening submissions at all and no examination in chief of the witnesses. When the case was called on, on Day 1 the first substantive thing that happened was the cross-examination of the claimant's first witness.

The introduction of judicial pre-reading has undoubtedly made for shorter trials and more efficient use of court time. It does mean, though, that 21st century judges now have to tread a

fine line to avoid falling into the trap which Lord Denning was so keen to avoid. On the one hand the judge wants to reassure the parties that she has diligently done her pre-reading, she knows who the main people involved in the case are, the broad chronology of events and the main legal issues to be decided. She must, however, avoid any suggestion that she has already made up her mind who is going to win and who is going to lose. The validity of the adversarial process still depends on judges retaining an open mind and in being seen to have retained an open mind before the oral stage of the proceedings. Some guidance on this was given by Lord Neuberger when he was Master of the Rolls in *Frey v Labrouche* [2012].[3] The appeal was from the dismissal of a strike out application in a dispute between members of a family over the operation of a trust set up under the terms of a will. At the start of the hearing of the strike out application, the judge referred to the extensive pre-reading he had done and told counsel for the applicant that he had come to the firm view that it was not a suitable case for striking out. It made more sense for the matter to proceed straight to trial. The judge thought that this would be better for everyone involved as it would shorten the period during which, he said, the family was tearing itself apart over interlocutory battles. Counsel for the applicant asked the judge whether there was any real point in him making his submissions in support of the strike out. The judge frankly said no there was not and dismissed the application. In the Court of Appeal, the appeal was allowed on the basis that the judge had gone too far in allowing the pre-reading to take over the process. Lord Neuberger MR said that where the judge has had the benefit of time to read all the papers he may quite properly be able to dispose of the hearing of the application far more quickly than the parties and their advisers may have expected. It is entirely proper for a judge to express a provisional view at the start of the hearing and then end the hearing if the losing party's submissions fail to persuade him out of his view. But what a judge cannot properly do, however much he believes that he has understood the case before coming into court, is dismiss the application without giving the applicant a fair opportunity to make out his case orally. Lord Neuberger stressed that this is not only a matter of justice being seen to be done. Any judge worthy of his office, he said, will have had the experience of coming into court with a view, sometimes a strongly held view, as to the likely outcome of the hearing, only to find himself of a very different view once he has heard oral argument. This calls to mind the well-known dictum of Megarry J in *John v Rees* [1970].[4] He said "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events".

So we are now at the stage when the judge has done all the pre-reading and the trial starts. How do we discern between good and evil as Solomon put it, or in modern parlance, how can we tell who is telling the truth and who is not telling the truth? The probative value of oral evidence

[3] *Frey v Labrouche* [2012] EWCA Civ 881
[4] *John v Rees* [1970] Ch 345

elicited during cross-examination has been the subject of much judicial discussion in recent years. This has been prompted particularly by the judgment of Leggatt J in *Gestmin v Credit Suisse* [2013].[5] In an important passage in the judgment, often referred to as the *Gestmin* guidance, Leggatt J said that everyone knows that memory is fallible, but the legal system has not absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. We have a faulty model of memory as a mental record which is fixed at the time of the experience of an event and then fades over time. In fact, research has demonstrated that memories are fluid and malleable. They are constantly rewritten whenever they are retrieved. The process of civil litigation itself subjects the memories of witnesses to powerful biases. Witnesses want to be helpful to the side that is calling them. The lawyer assisting with the drafting of the statement is well aware of the significance for the success of the case of what the witness does or does not say. The effect of this process is that the witness's memory of events is based increasingly on the written material rather than on the original experience of the events. The *Gestmin* guidance has been cited many times in subsequent cases. It is often a way for judges to explain why they have rejected the evidence of a witness even though the judge is satisfied that the witness was an honest witness doing his best to assist the court.

The importance in our judicial system of being able to see and evaluate the witnesses in live evidence is the reason why findings of primary fact based on that oral evidence are very difficult to overturn on appeal. As Lord Hoffmann said in *Biogen v Medeva* [1996],[6] the need for appeal courts to be cautious about reversing the judge's evaluation of the facts is not just based on professional courtesy. It is because the findings of fact set out in the judgment, can only be an incomplete statement of the impression which was made upon the judge by the primary evidence. What is written in the judgment is surrounded by what Lord Hoffmann called a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. Those things cannot be fully expressed in the judgment but they will have played an important part in the judge's overall evaluation. That said, most judges come to believe that they are pretty good at telling when someone is lying, and some judges do a thorough job of calling out any witnesses in the dispute who have given dishonest evidence on oath. One witness was described as someone who regarded truth "as a transitory, flexible concept", which could be moulded to suit his current purposes. He was said to have embroidered and supplemented his witness statements, and to have departed from his own previous oral evidence, sometimes within minutes of having given it.[7] Judges sometimes describe witnesses as making up their evidence as they go along in response to the perceived difficulty in answering the questions in a manner consistent with his case. However, every judge knows that there is a large grey area between a careful and truthful witness on the one hand and an out and out liar on the other. In many cases the judge will conclude that the witness was not being deliberately dishonest, but had deluded himself into believing his own version of events. That has certainly been my own experience of seeing the genuine puzzlement of a witness when confronted during cross-

[5] *Gestmin SGPS S.A.n v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm).
[6] *Biogen Inv v Medeva plc* [1996] UKHL 18
[7] *Berezovsky v Abramovich* [2012] EWHC 2463 (Comm), [100].

examination by a piece of evidence that shows that what he obviously really thinks he remembers cannot in fact have happened. In the first trial I presided over as a High Court Judge, starting two days after my swearing in, I commented that the main witnesses from both sides were combative in the witness box. They frequently supplementing their response to counsel's questions with additional material intended to bang home some point in support of their overall case – the result I suspect of some misguided witness coaching. But I concluded that neither of them was being deliberately untruthful. Rather, their evidence had been coloured to some extent by the feud in which they had been engaged since their business partnership broke up. This caused them to recall what had happened in more black and white terms than is likely to have been true.[8]

Sometimes it is apparent to the judge from the way the witness gives evidence in the box whether he is telling the truth or not, but that is not always the case. A striking example of this was in a trial before Ramsey J in *BskyB v HB Enterprises* [2010].[9] The main factual witness for the Defendant in that case was a Mr Joe Galloway. In his witness statement he said that he had an MBA degree from Concordia College based in St Johns in the US Virgin Islands. He gave detailed evidence about his course of study at Concordia College, the length and frequency of classes he had attended and a project he had worked on mainly at a facility set up on the campus called the Coca Cola building. He described how he had travelled to and from St Johns, flying in and out of the island in a small airplane. It later transpired that according to the Minister of Education of St Johns, there was not and never had been a Concordia College on the Island; there was not, nor ever had been a Coca Cola building on St John; there was not, nor ever had been an airport on St John and it was not possible to fly onto the island. Ramsey J found that Concordia College was in reality a website which sold on-line degrees to anyone who made an application and paid the required fee. The Judge went on to say that the value of Mr Galloway's qualification was effectively and amusingly demonstrated by an application which was made on the website for an MBA degree for a dog "Lulu" belonging to Mark Howard QC, counsel for the Claimant. Without any difficulty Lulu was able to obtain a degree certificate in identical form to that produced by Joe Galloway. In fact the dog actually got better marks than those given to Mr Galloway and received the same glowing testimonial from the President of the College that Mr Galloway produced to the court. The serious point that the Judge made was that Mr Galloway was a man who could lie without any palpable change in his disposition or any outward signs of unease. He demonstrated, the judge said, an astounding ability to be dishonest.

If it is difficult for judges to decide on the basis of the oral evidence what actually was said at a meeting or what factors did influence the company's board to take a particular decision, that raises the question: if we cannot rely on oral evidence, how are we supposed to go about discerning between good and evil? The answer nowadays is that there is much more documentary evidence in every case than there ever was in Lord Denning's day. Even in a case entirely in the domestic sphere, the family members will often communicate by email.

[8] *Smithton Ltd (formerly Hobart Capital Markets v Naggar* [2013] EWHC 1961 (Ch) [39] – [40].
[9] *BSkyB Ltd v HB Enterprises Services UK Ltd* [2010] EWHC 86 (TCC).

And as one of the characters says to Mark Zuckerberg in *The Social Network*, the film about the birth of Facebook, "the internet's not written in pencil, it's written in ink". Judges are frequently astonished at how unguarded people are in their email communications. People still write as if it is an ephemeral means of communication which it clearly is not. I have seen many witnesses squirming in the witness box when faced with some casual, snide remark they have made about a colleague or a client. The remark probably seemed quite funny and clever at the time but feels much less so when you are being asked about it by a bewigged and begowned QC with the person who was the butt of your comment sitting facing you across the court.

That reminds me of another aspect of judicial conduct. Lord Denning says in *The Family Story* "One thing a judge must never do. He must never lose his temper. However sorely tried. Nor must he be sarcastic to counsel or to witness. Never discourteous." Most of us, I hope, manage to stick to that most, if not all the time. Certainly I remember when I was filling in the application form for my first fee-paid judicial appointment as a Chairman on the Competition Appeal Tribunal, one of the competencies I was required to demonstrate was "the ability to listen patiently and courteously". There have been many times since then that I have had to bite my tongue and think to myself: "Now is a good time to demonstrate that I do indeed have that competence." For the 21st century judge it is not just a matter of being polite. It is essential that the judge is able to speak to everyone who comes to court in an appropriate and respectful manner. It is essential too that judges are aware of cultural differences or the way that a person's conduct in court may be affected by any mental or physical impairment they may have. An important resource for the modern judge is the Equal Treatment Bench Book. For example, it is useful to know that there are culturally different ways of structuring answers to questions. Native speakers of English expect to make their most relevant point in reply to a question first, giving any needed background detail afterwards. However, speakers of South Asian languages would be accustomed to providing the background detail first as context, then coming on to make their most relevant point of reply at the end. If the judge is not aware of that, there is a risk that he will fail to grasp what a witness is saying, or wrongly consider a witness to be evasive, or allow counsel to cut off a witness' answer prematurely. The meaning and appropriateness of eye contact varies from culture to culture. Lack of eye contact can appear evasive, bored or disrespectful in some cultures, but is indicative of respect by others. For people from particular cultural backgrounds it is not helpful for the judge to ask, after explaining something: "Do you understand?" The person may say 'yes' even if they have not understood. To say 'no' means not only a loss of face for themselves but may, they believe, lead to loss of face for the judge by suggesting that he or she has not explained something properly. Many judges need guidance about the terminology to use when referring to minority ethnic identity or to transgender people. The English language is constantly evolving, and what was acceptable in the past, for example referring to people as 'coloured' rather than 'black' is now the opposite way round. In contrast, the word 'queer' has to some extent been reclaimed by young people but is still regarded as derogatory by some people in the LGBT communities. This is not about so called 'political correctness'; rather it is part of society's response to the need to recognise and respect diversity and equality. There is a description in the Bench Book of the difficulties that someone on the autism spectrum is likely to encounter in the court process and the adjustments that should be made to proceedings to accommodate them. An

autistic person may have difficulty answering hypothetical questions because they may be unable project themselves forward to envisage how they would feel in two different posited scenarios. Sometimes an autistic person will prefer to sit close to the door of the court, or to have fans and anything making a buzzing or humming noise switched off. The most recent addition to the Book on 22 November 2018 drew our attention to a decision by an Upper Tribunal Judge to allow a party to make an unofficial recording of the hearing because of his dyslexia and other cognitive impairments.[10] One point that judges need to be aware of is that one should not assume that a religious individual who chooses to affirm in the witness box rather than swear on a Holy Book has done so because he or she does not intend to tell the truth. Some orthodox religious believers may choose to affirm because their religion states that they should not swear an oath as a matter of principle, or because they believe that swearing an oath on a religious book is not an appropriate procedure to be undertaken in a non-religious context such as court proceedings. These points about the need for cultural sensitivity arise in the Business & Property Courts as well as in the Queen's Bench Division. For example, in June 2016 I presided over a long trial of a claim brought by the Libyan Investment Authority against Goldman Sachs.[11] The trial coincided with Ramadan and for several of the Libyan witnesses the first question they were asked before they were invited to confirm their witness statement was when they last had anything to eat or drink. The answer was usually at 2 am that morning.

Let me now move from process to outcome. How do 21st century judges decide cases and write their judgments? In Lord Denning's day judgments were almost always given *ex tempore* immediately after the close of oral submissions. Occasionally, he says in his memoire, if the case is difficult, judgment is reserved for two or three weeks and put into writing. How things have changed. The fact that almost every judgment is now reserved – certainly if the hearing lasts longer than a day – is the result of a number of changes. As I mentioned earlier, the volume of material before the court is much greater, even in a small case, than it used to be. Judges feel that they need to show in the judgment that they have read and digested many of the contemporaneous documents and to refer to some of the many authorities cited. The number of cases cited has also expanded enormously given the availability of on line databases. In a high value trial there will usually be a verbatim transcript of the evidence produced by stenographers at the close of each day. Most judges want to review the evidence, at least of the most important witnesses and include some quotes in the judgment to show that they have taken the time to read it through.

Secondly, in Lord Denning's day, the great majority of judgments were really only ever read by the parties in the case. It was only rarely a judgment delivered by a first instance judge would be considered important enough to be included in the law reports. Now, every reserved judgment and very many ex tempore judgments are published on BAILII and Lawtel almost as soon as the words have left the judge's mouth. The immediate wider audience makes judges more anxious about how polished the final article needs to be. Thirdly, technology has I suspect

[10] *CH v SSWP (JSA) (No.2)* [2018] UKUT 320 (AAC).
[11] *The Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch).

led to much longer and more complicated judgments. Now most judges type their own judgments rather than write them out long hand as Lord Denning did. The new suite of programmes which judges have on their work computers includes the latest version of Dragon voice recognition software. This enables judges to dictate their judgments directly onto the computer screen. This is a great time saving device but like any new technology it has its own pitfalls. The 21st century judge has to be attuned to spotting a different kind of typo when proof reading. One example that I did fortunately spot before the judgment went out to the parties was this: what I *said* was "In my judgment there is some force in Mr X's submission". What the Dragon software *transcribed* was "In my judgment there is some foreskin Mr X's submission".

Many Court of Appeal judges complain that judgments are now much too long. To which the trial judge's riposte is, "But I'm not writing it for you". A judgment has many different audiences. One of them is the Court of Appeal and one of them is certainly other lawyers, text book writers and students working out how the law is changing. When I was a law student reading a case, I would flick through all the facts set out in the law report until I got to the discussion of the legal principles. For the parties in the case, for whose benefit the whole process has been devised, the opposite is usually true. Every judge must bear in mind when structuring a judgment that the parties to the case and the individuals who have participated in the trial are generally not interested in the legal principles discussed. They want to see what the judge thought about them and whose version of events the judge decided to accept. It is the factual narrative parts of the judgment that they want to read.

When it comes to a discussion of deciding cases, the first point to make is that the judicial function is to make a decision, however difficult it might be to choose between the parties. In *Stephens v Cannon* [2005][12] the Court of Appeal was considering the decision of a Chancery Master who had been faced with two experts giving their rival opinions on the valuation of a property in dispute. In his judgment, the Master had described how persuasive both experts had been and how far apart the valuation figures they came up with were. He said that he was unable to decide that he preferred one view over the other. In those circumstances the case fell to be decided on the basis of the burden proof. Since the burden of proof was on the claimant and had not been satisfied, he adopted the valuation put forward by the defendant. The claimant appealed on the grounds that this had been an abdication of judicial responsibility in failing to reach a conclusion, somehow, on which expert was better. The Court of Appeal agreed. The circumstances in which a judge should resort to the burden of proof to decide a case are very rare. Wilson J's judgment in the Court of Appeal stressed the importance of the parties being able to see that the judge has really tried to come to a decision on the evidence. The parties must, he said, be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost.

Lord Denning says in *The Family Story* that his root belief was that the proper role of a judge is to do justice between the parties before him. If there is a rule of law which impairs the doing

[12] *Stephens v Cannon* [2005] EWCA Civ 222

of justice then, he believed, it is the province of the judge to do all he legitimately can to avoid that rule – or even to change it – so as to do justice in the instant case before him. That is all very well but it begs the question which the judge must address: if justice does not correspond to the result of the application of the existing law, how is a judge to know what is the just outcome? I suspect that most judges are less confident that their own gut feeling about a case is necessarily a surer guide than the decisions of previous judges. Lack of that kind of confidence never seems to have troubled Lord Denning.

At least in the commercial sphere in which members of this Association work, many cases could, it must be said, be decided either way. Usually the witnesses for both the claimant and defendant are giving their honest recollection and usually there are respectable legal arguments both ways. The question for the judge often boils down to this: "Should I rescue this claimant from the tangle he has got himself into and if I feel I should, can I do so without risking making a mess of the law for the future in ways that I cannot now foresee?" Often the answer to this is finely balanced and judges can legitimately arrive at different conclusions on the same set of facts. Let me give some examples. One issue of justice and fairness that the courts have recently had to grapple with is how to respond to the growing number of litigants in person and the extent to which they should be treated differently when they fail to comply with the rules of court. In *Barton v Wright Hassall* [2018][13] the Supreme Court was considering the case of a litigant in person who purported to serve the claim form in the proceedings on the defendant's solicitors by email, without being told that the solicitors were prepared to accept service by that means. It was common ground that this was not good service. As a result, the claim form expired unserved on the following day and the claim was then statute barred. The question at issue on the appeal was whether the Court should exercise its power retrospectively to validate service. In the leading judgment for the majority, Lord Sumption JSC noted that now that the availability of legal aid and conditional fee agreements has been restricted, many litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances when making case management decisions and when conducting hearings. It will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The rules do not distinguish between represented and unrepresented parties but provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent since any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side. This may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step he is about to take. The dissenting justices would have allowed the appeal. Lord Briggs JSC, dissenting stressed that he was not holding that being a litigant in person constituted a free-standing good reason why Mr Barton's botched attempt at service should be validated. But the balance of factors in favour of and against validation of the service of the claim form came down in a different way for him and for Baroness Hale, DPSC.

[13] *Barton v Wright Hassall LLP* [2018] UKSC 12

Lord Sumption in *Barton* referred to the fact that Mr Barton's problem arose in large part because he had not allowed himself time to rectify any mishap. He issued his claim form at the very end of the limitation period and opted not to have it served by the court. He then made no attempt to serve it himself until the very end of its period of validity. Lord Sumption said that "A person who courts disaster in this way can have only a very limited claim on the court's indulgence." A similar courting of disaster occurred in *Union Eagle v Golden Achievement* [1997].[14] There the Privy Council was considering a claim for specific performance by a company that had entered into a contract for the purchase of a flat on Hong Kong island. The contract stipulated that if full payment was not made by 5 pm on 30 September 1991, the seller had a right to rescind the contract and the deposit of HK$420,000 would be forfeit. Payment was tendered at 5:10 but was rejected by the seller who rescinded the contract and kept the deposit. The question facing the Privy Council was whether the court had any power to absolve the purchaser from the consequences of being 10 minutes late. Lord Hoffmann rejected the notion that the court has an unfettered jurisdiction to grant a party relief from the consequences of the contract, describing it as "a beguiling heresy". He went on "It is worth pausing to notice why it continues to beguile and why it is a heresy. It has the obvious merit of allowing the court to impose what it considers to be a fair solution in the individual case. The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth." The reasons why the courts have rejected such generalisations are founded upon practical considerations of business. In many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be "unconscionable" is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. Judges must recognise that the realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case. In that case the Privy Council was unanimous in not stepping in to help the claimant out of the tangle he had created by being 10 minutes late.

That said, there have been many legal doctrines developed by the courts that do enable them to step in. In Lord Denning's day the focus was on the enforceability of exclusion clauses leading to the invention of the ill-fated doctrine of fundamental breach of contract. That doctrine served briefly to sweep away exclusion clauses and then was swept away itself in *Photo Productions v Securicor Transport* [1980].[15] Longer lasting has been the doctrine of undue influence to which Lord Denning also made a notable contribution in *Lloyds Bank v Bundy* [1975].[16] There the Court of Appeal did rescue the elderly Mr Bundy from the improvident charge he had allowed the bank to impose on his home to secure his feckless son's loan. Applying that case law in the case I have already mentioned, I decided not to rescue the Libyan Investment

[14] *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514.
[15] *Photo Productions v Securicor Transport* [1980] 2 WLR 283
[16] *Lloyds Bank v Bundy* [1975] QC 326

Authority from the $1.2 billion worth of derivative contracts it had entered into with Goldman Sachs shortly before the stock market crash of September 2008. The balance between the wish to step in and arrive at a fair result as against the commercial dangers of the courts taking on that role, could be said to be behind the Supreme Court's frequent revisiting of the principles of construing commercial contracts and other instruments: see most recently the discussion in Lord Hodge's judgment in *Barnardo's v Buckinghamshire*[17] handed down on 7 November 2018. That could be the subject of a whole different lecture.

These decisions show that what Lord Denning called the "justice of the case" is a lot more complicated than feeling sorry for one side or the other and then letting that guide the result. Many cases arise from the ordinary mishaps and frailties of human nature. People sign up to interest rate swaps or derivative instruments without reading the small print and without thinking through the effect on their finances if the market moves against them; lawyers stay up all night drafting contract clauses which in the cold light of day do not make sense and no one can remember what they were supposed to achieve; business men set up partnerships and start up companies together and then fall out terribly after a few years. The doing of justice means having a wider appreciation of the effect of the principled, case by case development of the law on business and on society as a whole. It is that wider perspective that distinguishes the task of the judge from the task of the advocate.

At the end of the case there is usually one side which is very happy and one side which is very disappointed. I hope that if judges continue to approach the role of being a judge with an understanding heart, people will continue to entrust their disputes to the courts to resolve and we will continue to judge this vast people of ours.

[17] *Barnardo's v Buckinghamshire and others* [2018] UKSC 55