



MASTER OF
THE ROLLS

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Introductory

1. It is, I must confess, a great pleasure, as well as an honour, to have been invited to give the keynote speech at your conference today. The honour is self-evident. The pleasure is partly due to the fact that I can see a number of old friends, whom I remember from earlier conferences, arbitrations, consultations, and court cases while I was at the Bar. But it is also a pleasure, even a relief, to be talking about a subject where I feel at home. Having been a member of Falcon Chambers for twenty years until 1996, with my background in property valuation, the law relating to land and buildings, and landlord and tenant law, I have often wondered what qualifications and experience I have to pontificate on intellectual property, insolvency, or the law of trusts and estates, and, more recently, human rights, personal injury, administrative law, and even matrimonial and criminal law.
2. When a judge really knows about a subject, he is able to concentrate on the argument, rather than spend his time learning about the basic principles, and he is much better able to see and appreciate the wider ramifications and problems raised by the competing

arguments. But, as so often, there is a contrary view. It may be that a judge is most at risk of going wrong when he thinks he understands and knows about the topic at issue. He is more likely to have preconceived ideas; he is perhaps less likely to listen; he is more at risk of accepting outmoded notions.

3. Be that as it may, dilapidations used to be a very familiar topic for me during those twenty years at the Bar, and I found both the legal aspect and the more fundamental surveying aspect of great interest, and often of great difficulty. Having said that, I have not had a great deal to do with the topic since I became a judge, although it was very much part of my staple diet for twenty years. So I know about dilapidations – or at least I did.
4. As many of you will know, there has for some years been a strong wish from the legal and surveying professions to have a pre-action protocol specifically devoted to dilapidations. As President of the Property Litigation Association, I have been well aware of this wish, and I have supported it. When I became Master of the Rolls two years ago, I also became head of civil justice and therefore found myself in a position to try and do something about it. And I did, but there are many factors to be considered when drafting a protocol, such as consistency of language and principles with the CPR and drafting practices, as well as consultations with various entities, so even now we are not quite there. As this is the first talk I have given on dilapidations since becoming MR, it seemed to me that I should spend some of my allotted time on the issue of protocols and the dilapidations protocol in particular. I also thought that a few words on some other procedural issues and on the expert's duties to the court might be appropriate.

Pre-action Protocols generally

5. The protocols were an inherent part of the Woolf reforms of civil litigation which have been undertaken over the past ten years, and they have effectively been incorporated in

the CPR and Practice Directions. These protocols set out mechanisms whereby parties to prospective litigation inform each other of the essential features of their respective cases very early on – before proceedings have even started. The protocols represent an attempt principally to do two things – (a) to ensure that litigation is conducted by both sides from the “off” on a fair, cards on the table, basis, and (b) to encourage and facilitate early settlement where it is feasible.

6. The Civil Justice Council, which I chair, has recently initiated a review of the protocols, now that we have had several years’ experience of them. There is no doubt that the protocols have had some success, and there is also no doubt that the success has been greater in some areas than in others. As I see it, the three principal disadvantages, which are in some ways connected, are (a) the protocols have tended to be too detailed and prescriptive, (b) they have often had the effect of increasing and front-loading the costs of litigation, and (c) any failure by one side to comply with their requirements is used as a stick by the other side to beat the first side with.
7. Like any aspect of civil procedure, the protocols should be applied with the overriding objective in mind. They are intended to facilitate settlement, and if settlement is impossible, to ensure that the ensuing proceedings are as focussed, as efficient, and as fair as possible. It would be unfortunate if protocols were treated as a sort of binding and immutable micro-management scheme for every case. Of course, it is important that all those involved in litigation covered by a protocol are aware of the terms of the relevant protocol, and conscientiously follow them unless there is good reason for not doing so. And the court should make sure that unjustified disregard for a protocol is not overlooked.
8. However, a protocol cannot cater for every aspect of every case, as so many disputes have unique features. So the terms of a protocol should not be seen as being writ in stone.

Universal litigation by numbers is not realistically possible. Professionals involved in projected litigation should not use the protocols as justifying turning off their brains. Further, even where your opponent wrongly fails to comply with a protocol, you should not treat it as a weapon to gain an advantage, although I can well see that the mentality of litigation makes the temptation hard to resist. Normally, you should simply ensure that the failure is pointed out to your opposite number promptly and, if appropriate, your opposite number should then promptly remedy the failure.

The dilapidations protocol

9. Currently, the idea being developed by the Civil Justice Council is that all the existing protocols are to be made shorter and simpler. That is on-going work. Because the dilapidations protocol has come up for consideration at a time when the whole approach to the drafting of protocols is being considered, there was a strong body of opinion to the effect that it should await the outcome of the review of existing protocols. Although there was force in that view, I am glad to say that it has not prevailed. The acceptance of the need for a dilapidations protocol militated against, and eventually prevailed over, the case for a delay. And there is obvious attraction in the notion that a new protocol could actually provide a template, or at least an idea, as to how future and redrafted protocols might look. In other words, as has happened before in the legal world, property law shows the way.

10. A group of solicitors and surveyors, led by Jacqui Joyce, produced an excellent first draft of the protocol, and there have subsequently been negotiations and discussions between various interested groups and responsible people. It would be of little, if any, interest to any of you to hear of the detailed comings and goings of those discussions. Suffice to say that they have been fruitful. Having been presented with the first draft, I asked John Sorabji, my redoubtable Legal Secretary, to take over the negotiating and finalising of the drafting of the protocol, and, after much discussion in which I have had some

involvement, he has come up with a version which is, acceptable to Jacqui and her solicitors group, and to the RICS, primarily represented by John Rowling has also taken on board some last minute proposals from the Ministry of Justice, whose support for any protocol is essential as the Lord Chancellor has to approve it.

11. The final draft of the dilapidations protocol will go before the Civil Procedure Rule Committee in the next few weeks, and I hope that it will prove acceptable. Subject to any last minute improvements, it should then be signed off by me, hopefully by the end of this year.
12. What effect will it have? I hope it will have the intended effect of all protocols, namely enabling each side to know the other's case early on, promoting early settlement, and if no settlement is achieved, the consequence of efficient and fair proceedings.
13. In very brief summary form, the protocol works as follows. The landlord's surveyor has to start the process by sending an honest costed schedule of dilapidations, which need not raise a section 18 valuation, but must state what, if anything, the surveyor knows of the landlord's intention with regard to the premises. The tenant's surveyor must reply in kind, but if the tenant wishes to raise a diminution in value argument, his schedule must include a section 18 valuation. I will not say more about it as I see that it is the subject of the next talk.

Other procedural issues

14. The MoJ has recently published proposals for improving the resolution of disputes in the County Court. Because so many property-related cases are heard in the County Courts those proposals could have a real effect on your world. However, many dilapidation cases are in the High Court, and in any event dilapidations cases are not typical County Court fodder. Accordingly, the effect of any such proposals which are eventually implemented

may be limited. The proposals include what may be characterised as an extension of the pre-action protocols in that it would involve the parties to projected litigation preparing almost all the way for trial before troubling the court. That appears to me to be a doubtful policy, as it is difficult to believe that parties could satisfactorily prepare for a trial without the court's supervisory and disciplinary and sanctioning powers being exercisable on the way. However, there may be aspects of this proposal which would be workable, judging from what I have heard about the Australian experience.

15. The Government is also committed to ADR, a commitment which, within limits, I support. At least in general, if a costly and time-consuming trial can be avoided by an early mediation, the outcome is to be applauded. However, mediation does not always succeed, and, if it does not, it results in the very things which it is intended to avoid – increased costs, increased delay and increased bad feeling. Even where it succeeds, it is sometimes because one party is too exhausted, battered or too short of funds as a result of the mediation not to settle. Further, because of the mind-set of many of those involved in litigation, there is a danger that mediation is merely used as another tool in the tactical armoury. I emphasise that this is not a coded attack on mediation, merely an attempt to warn that it is not the answer to litigation, but a valuable tool which must not be misused: to overplay its value will in the long run undermine its benefits. The difficulty for judges is to identify which cases are good, and which are bad, candidates for mediation.

16. I should also mention the proposals made by my colleague, Lord Justice Jackson, in his report, produced in December 2009 which contained a remarkably impressively wide-ranging, speedily produced, coherent, and carefully considered set of recommendations. The press and media coverage has concentrated on his proposals regarding recoverability of success fees and ATE premium, and referral fees, the regrettable results of the last Government's ill thought out amendments to Legal Aid in 1999. I am glad to say that, in

that connection, most of the Jackson recommendations have been adopted by the present Government, and are currently being incorporated in a Bill before Parliament.

17. However, there are other proposals of which you should be aware. Greater judicial case management, judicial costs management, and the mysteriously named hot tubbing are three proposals I should mention. They are all proposals which are currently being piloted in one or two courts. I am a very strong believer in testing any idea before rolling it out, wherever that is possible. Some ideas sound good on paper but do not work. Even ideas which work very well will have problems to be ironed out or improvements which can be made. So, where one can test a proposal on the ground in one or two courts before rolling it out throughout the courts of England and Wales, I have no doubt but that it is sensible to do so.

18. Case management involves proactive judges, and, from the judicial perspective, that requires aptitude, training and time to read in. The Judicial College, whose function is to educate judges, is very much committed to facing up to this challenge as it also is on costs management, which is an essential aspect of case management to which the CPR did not extend. In a sense it is case management plus. It involves both parties providing an early assessment of the likely level of costs if the case proceeds to trial, and the Judge deciding what limits to impose on costs, bearing in mind the nature of the case, the amount involved - in a word, proportionality.

19. Hot tubbing is an informal description of concurrent witness evidence, which is intended to be a less confrontational and more constructive way of experts giving evidence in court. The traditional system involves each side calling its expert or experts in turn, and the expert or experts then being cross-examined by the other side: it can be confrontational, slow, and unwieldy. Hot tubbing involves all the experts sitting down together with the advocates and the judge, and essentially having a discussion meeting

under the chairmanship of the judge – more of a seminar aimed at getting the right result in a calm, rational way. It has been developed successfully in Australia, particularly New South Wales, and it is now being piloted in Manchester Civil Justice Centre, so far with some success. As with case management and costs management, it puts extra pressure on the judges: it can be said to involve an increasingly proactive, inquisitorial role for the judiciary when compared with the detached umpire role which the common law system has traditionally envisaged.

The surveyor as an expert witness

20. The role of the expert is very much under the microscope. In a recent decision, *Jones v Kaney* [2011] UKSC 13, [2011] 2 WLR 825, the Supreme Court has notoriously held that an expert witness may be sued for negligence by his client. Although my initial reaction to this decision was one of surprise, further consideration led me to the conclusion that it was a natural development of the way in which the law had been going. As recently as the late 1960s, in *Rondel v Worsley* [1969] 1 AC 191, the House of Lords held that a barrister could not be sued for alleged negligence of his conduct of a case in court; then, less than 35 years later, the House changed its view and held that a barrister enjoyed no such immunity – see *Hall v Simons* [2000] UKHL 38, [2002] 1 AC 615. It is, at least in my view, hard to see why, if a barrister owes an enforceable duty of care to his client in litigation, an expert witness in the same litigation should have no such duty. It seems to me that the arguments that there should be no such duty are the same, and, if the barrister has such a duty, so should the expert.

21. Whether in the case of an advocate or an expert witness, I have no doubt that judges will be careful to ensure that they adopt a realistic attitude to that duty. The pressures on a professional person are frequently very great, and the existence of those pressures must be taken into account when deciding that an error or oversight was more than a mistake, and amounted to negligence. And where the circumstances are particularly difficult, for

instance when the professional was giving evidence in court, any judge faced with a contention that an expert was negligent will bear in mind those particular pressures. Nonetheless, where a judge is satisfied that, despite taking into account those pressures, the evidence given by the professional was simply unacceptable, i.e. what no competent professional could have given in the circumstances, why should the professional not be liable to his client if his client has suffered a significant loss as a result? And the recent Supreme Court decision does not cast doubt on an earlier Court of Appeal decision that an expert witness owes no duty to the other side.

22. It is clear that any expert witness must be completely honest in his evidence: his primary duty is to the court. That does not mean that he has no duty to his client, any more than a barrister or solicitor can avoid having a duty to his client simply because he has an overriding duty to the court. The overriding duty of the expert witness to tell the truth in his evidence to the court does, in my view, make the expert's position very difficult. He may have to sell his client, who is paying him and whose business he may well want in the future, down the river. However, that is no doubt something about which any sensible professional warns his client at an early stage. Because of the difficulty in which the current rules place an expert, I have in the past half-jokingly suggested that, rather than requiring an expert to tell the truth, the rules of court should give him a free rein to say whatever he wants. That has not been adopted, or even seriously considered, and there is now no doubt about the duty of an expert: like any other witness, he owes a duty to the court to tell the truth.

23. The fact that an expert witness owes a duty under the CPR to the court to tell the truth in his evidence, i.e. to give his honest view, does not, in my opinion, at least as at present advised, prevent him from being on a contingency fee, although it may affect the judge's view of the expert's credibility. Indeed the Court of Appeal has said that it should "only be a very rare case" that the court would accept evidence from an expert who is on a

contingency fee and that were an expert to act on such a basis the court should be informed of that at the earliest case management stage in order for it to determine whether such evidence was permissible – *Factortame (No 8)* [2003] QB 381 at [73]¹. The rarity of such an event is, of course, increased by the prohibition on experts acting on a contingency fee set out in the Civil Justice Council’s *Protocol for the Instruction of Experts*².

24. However, I wonder whether the new post –Jackson landscape will change the Court’s perception and require the Civil Justice Council to revisit the *Protocol*, which was last issued in 2005 and may well now be said to be in line for review. Recoverable success fees already mean that lawyers can have a strong interest in the outcome. And it might be thought that Lord Justice Jackson’s support for contingency fees for lawyers, which the Government has accepted (and renamed Damages-based agreements), suggests that (a) either lawyers are treated as exempt from temptations which might seduce surveyors or (b) contingency fees for surveyors should become more acceptable.

25. Turning to another topic, I also consider that there is nothing in the CPR, either expressly or in its spirit, which imposes on an expert an obligation to be honest in any negotiations into which he enters with the other side. Of course, if he lies and this results in a settlement which the other party would not otherwise have agreed, the other party could apply to the court for rescission of the agreement or for damages. Or the expert may find that he is liable to his professional body for misconduct or disciplinary procedures. But the CPR cannot, either in terms of principle or in terms of realism, be

¹ “To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement. Accordingly, we consider that it will be in a very rare case indeed that the court will be prepared to consent to an expert being instructed under a contingency fee agreement.”

² White Book 2011, annex to CPR 35, *Protocol* at 7.6, ‘Payments contingent upon the nature of the expert evidence in legal proceedings, or upon the outcome of a case, must not be offered or accepted. To do so would contravene experts’ overriding duty to the court and compromise their duty of independence.’

expected to apply to a professional's conduct of negotiations on behalf of one party, simply because he is, or is due to be, an expert witness for that party in actual or forthcoming litigation. The CPR duty is to the court in the context of the proceedings, not to the other party to the litigation outside the actual proceedings. Of course, once the professional has provided a proof of evidence in the litigation, which must comply with his duty to the court, his room for negotiations will be pretty prescribed.

Substantive law

26. Going through the Estates Gazette Law Reports for the past five years, it is interesting to see that many of the problems which were troubling the courts when I was at the Bar are still popping up - whether any work of repair needs to be done, who it should be done by, to what standard the work needs to be done, whether work is repair or improvement, the actual cost of the work, the landlord's intentions with regard to the premises, the diminution in the value of the reversion, and whether the tenant's exercise of the break clause is vitiated by breaches of the repairing covenant. It is instructive to see how, just when the lawyers think there is nothing more to be said about a topic or a principle, a new and unanticipated set of facts arises, and the principles have to be reconsidered.

27. Looking at those cases and reading other property law cases brought back happy memories for me, and suggested a happy future for you.

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