The obtaining, regulation and the use of Evidence in the Pre Trial and Trial stages of the resolution of disputes in the English Common Law Jurisdiction.

Thank you for inviting me and my colleagues from the Common Law jurisdictions to this Meetings of Minds.

In England we have undergone two radical revolutions in the past 15 years in our endeavours to provide a just resolution of civil disputes.

Once the parties have commenced litigation, our approach is now two fold :

A. The judicial management of the Pre Trial stage.
B. The traditional adversarial Common Law Trial.

A. The Pre Trial stage

1. The issue and defence of an action seeking its determination by the Court is a matter for the parties.
2. The judge and the parties must seek to implement the Overriding Objective of the Rules, the first time that our procedural approach to the resolution of civil disputes has had a philosophical basis. The Overriding Objective is to deal with all cases justly and since the reforms of 2009 it is now of paramount importance that this should be achieved at a proportionate cost and in compliance by the parties with the rules, directions and orders of the court. Upon a defence being served, the court takes charge and the judge assumes a judicial management function.
3. At the initial management hearing, which may be by video conference or telephone, the parties must *inter alia* assist the court to identify the issues, consider mediation, decide which issues require full investigation and which may be disposed of summarily, fix timetables to control and speed the progress of the case, deal with as many aspects of the case at one time as possible, avoid attendance by the parties at court, use technology and since 2013 the parties must provide the Court with a detailed budget of the likely cost of the litigation which the Court may cap as appropriate.

4. In most instances the parties may be able to agree these directions in advance and submit them them to the judge for his approval - usually by e-mail. The judge may vary these directions subject to the parties having the right to address him.
5. These directions will determine the extent and form of the witness evidence that may be adduced, the extent of the disclosure of documents and directions for the provision of expert evidence.
6. The parties must respond promptly to any enquiries as to the progress and compliance with the management directions of the court.
7. The judge will give the parties a Trial Window namely a bracket of dates within which the trial will take place. Depending on the complexity and estimated duration of the Trial, this may be a week or a number of weeks.
8. The managerial judge in the High Court is unlikely to be the trial judge due to the commitment of the High Court judges to be out of London on Circuit for half the year trying mainly criminal cases.

The collation of Evidence - the building blocks of a judgment.

1. It is the task of the parties initially to decide on the material required to support their case and / or to oppose the other side's case.
2. There are basically three forms of evidence
3. **Witness statements** including the statements of the parties.
4. **Documentary evidence.**
5. **The opinions expressed by experts** called by the parties.

Witness Statements and their use at Trial

1. It is the task of the parties to select the witnesses upon whom they seek to rely and to prepare their statements which must contain a statement of truth.
2. The management judge will decide the issues to be decided, which witnesses may have their statements read to the court and which witnesses must attend to give their evidence in chief and to to be questioned by the other party (cross examination).
3. The management judge will decide on the length and format of the witness statements.
4. Normally when a witness is called to the witness box, he will be sworn to tell the truth and shown his statement and asked it it is

true. The statement will then stand as his evidence in chief and the other party will be invited to ask to question the witness (cross examination). Following re-examination by the party calling the witness, the judge will be invited to ask any questions which he may need to elucidate the evidence given by the witness.

5. It is not the practice in Common Law courts for the judge to conduct the questioning of witnesses. To do so would be regarded as "*descending into the arena".*

Documentary evidence.

1. In the original Rules of 1998 each party to give disclosure of those documents upon which they relied, those intheir possession which might support the other side's case and those which were adverse to him. This was known as *"Standard Disclosure.* This proved too demanding and expensive.
2. The parties since April 2013 may now adopt a number of forms of disclosure ranging from none at all to very extensive disclosure but must produce an estimate of how it compares in cost with standard disclosure. The judge will then rule on the form of disclosure to be adopted in the instant case.

The Evidence / Opinions of Experts

1. It is for the parties to decide whether to seek the opinion of an expert and to instruct the same. The choice is that of the parties. The Common Law does not recognise "court appointed experts".

2. Parties seeking to rely on the evidence of experts must obtain permission from the judge, identify the issues to be addressed, and the cost of using an expert.

3. Where permission is granted by the judge, the parties' experts having seen each other's reports, must "meet" to narrow any differences they may have. Such meetings may be by telephone or video.

4. Although the evidence of experts is normally given sequentially, it is now possible for the experts to give their evidence "at the same time" with the judge leading the discussion - it is an Australian practice known as "hot tubbing". I have my reservations but only time till tell if it is likely to be successful.

5. Irrespective of by whom an expert receives his instructions or by whom he will be paid, all experts have a primary duty to assist the court.
6. The opinion of academic lawyers is not sought - the judge is expected to know the Law but he may be referred to textbooks and articles written by such lawyers

B. The Trial

1. The parties or usually their counsel submit in advance their skeleton arguments to the judge outlining the case, their submission on the facts and the law which the judge will read before the Trial.
2. However once the trial stage is commenced, the judge must in a sense become the traditional neutral judicial observer. He must of course control the proceedings but in practice this never needs more than a proverbial "*raised eyebrow"* and a quiet rebuke of counsel. No English judge has a gavel nor would dream of using one!
3. The case is opened by the claimant's counsel, the jwitness statements of those not attending the hearing will be read to the court, the claimant's other witnesses are tendered to the court and are cross-examined and re-examined and such documents as are relevant are produced and read to the Court. The claimant's experts are called and will express their opinions on the issues which they have been directed to address.
4. The defendant and his counsel follow the same course.
5. Each counsel addresses the judge as to the evidence which each party claims has been proved and the law which supports their respective cases.
6. The judge will determine on the balance of probabilities the facts which have been proved and the finding in law which he has determined. He is expected in most cases to give an *"ex tempore"* judgment. If he decides to reserve his decision and give a written judgment he should give an estimate of the date when he will deliver the judgment.
7. Should a party wish to appeal the decision, permission must initially be sought from the trial judge and if refused, a written application may be sought from a single judge of the appellate court and if that is refused, permission must be sought from a full three member appellate court. Appeals are generally discouraged.

The English Rule of 2015.

Hence the **Pre Trial** stage is conducted by judicial case management to ensure that if there is to be a trial, an amicable settlement not having been reached, the same shall lead to a just resolution of the issues between the parties and achieved at a proportionate cost.

The **Trial** remains adversarial throughout. The parties present their cases and call their witnesses, cross examine their opponents witnesses, produce the documents they rely on and place their experts before the Court. The duty the Judge is to determine on the balance of probabilities the facts and the issues he finds to have been proved to which he must apply the Law and to give his decision in the form of a reasoned judgment preferably "*ex tempore".* He will decide whether to give permission to appeal though applications to do so are rare.

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