EXPERT WITNESS INSTITUTE

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KEYNOTE SPEECH by LADY ROSE

1. I am very pleased to have been invited to speak at this year's conference and to share a few reflections on the vital role that experts play across all aspects of litigation and dispute resolution. It is, I think, one of the more fascinating aspects of a lawyer's life to learn from expert witnesses about such a variety of topics really across every aspect of the human experience, given that every aspect of the human experience can, it seems, give rise to a legal dispute. From examining whether the music of *Chariots of Fire* bore too close a resemblance to an earlier work,[1] to blood spatter forensics in murder trials, experts can assist the court across the full spectrum of legal topics. In the Supreme Court and Privy Council alone, over the last few years we have seen expert evidence adduced on DNA obtained from gun casings, and the biomechanics of hip replacement joints.[2]

2. Some of my own experience with expert evidence comes from my time in the Chancery Division of the High Court. It in fact formed a key part of perhaps my favourite case so far in my judicial work. That is the great case of *Thwaytes v Sotheby's* which I heard over the course of 17 days in Autumn 2014.[3] That was a case about a painting which was clearly a copy of a well-known painting by Caravaggio called "The Cardsharps". The question was whether this copy was or might have been also painted by Caravaggio. It was agreed that it had been painted about the same time as the accepted original in the late 16th century. It had been sold by Sotheby's in their Late Masters' auction for £44,000 and labelled by them just as a copy. The person who bought it at auction later claimed that it was indeed by Caravaggio himself, making Mr Thwaytes who had consigned it to Sotheby's more than a little peeved. The question was not exactly whether it was actually it was actually the work of the master but whether it should have been sold as having Caravaggio potential.

3. The case gave me a fascinating insight into the world of art valuation and dealing. What emerged also was a contest between two different approaches to the expert appraisal of the authenticity of a work of art – on the one hand the use of the "connoisseurs' eye" which involves bringing to bear years of experience looking at works of art by various artists and on the other hand the use of scientific methods of analysis. There were many memorable moments in the trial, some of which are recounted in a book written after by one of the expert witnesses, Prof Richard Spear

[1] *EMI Music v. Papathanasiou* [1993] E.M.L.R. 306 (EWHC (Ch)) (Eng.)
[2] *Washington v R* [2024] UKPC 34; *Hastings v Finsbury Orthopaedics* [2022] UKSC 19.
[3] *Thwaytes v Sotheby's* [2015] EWHC 36 (Ch).

who describes the trial in detail.[4] I heard not only from experts on the authenticity of the painting but also from experts on auction house practice. They gave evidence about whether Sotheby's should have taken the painting out of the frame in order to examine it more closely, – or should have tried to clean it up before selling it, or should have brought in a more specialist expert help to appraise the value of the painting.

4. An entirely different case I presided over involving experts was the claim by the Libyan Investment Authority against the investment bankers, Goldman Sachs. The Libyan sovereign wealth fund sued the bank because Goldman for selling them £1.9 billion of derivatives shortly before the stock market crash in 2008. The LIA lost all their money. One of their many complaints was that Goldman had made excessive profits on the trades. That involved hearing evidence in which each experts on both sides carried out their own calculation of the level of profits earned by Goldman Sachs and expressed their opinion about whether the profit was excessive or not.[5]

5. But much of my experience of dealing with expert evidence comes from my time sitting as a judge in the Competition Appeal Tribunal (or "CAT" for short). During my time on that Tribunal, we were starting to see two general trends that have since increased and may well have an effect on how expert testimony is prepared and given in the future and hence on the kinds of work you will be asked to do.

6. The first trend is the growing importance of collective actions, that is where a single individual claimant brings an action in court on behalf of many other claimants who have suffered the same injury at the hands of the same defendant. In the CAT the typical case is brought by customers of companies that have engaged in illegal cartel arrangements which are alleged to have increased the price at which all their customers bought goods from them over many years. The collective process makes it feasible for a large number of people who have all suffered a small financial loss to bring a claim. But it makes it very difficult to adduce individualised evidence from each claimant's purchase department or each defendant's sales department. If you have hundreds of claimants and perhaps tens of thousands of individual transactions, you cannot simply put the head of sales or the head of purchasing for each of those hundred companies into the witness box and ask for their evidence in the usual way. This is not just a procedural issue that arises in the CAT, it arises wherever collective actions are considered appropriate.

7. So what we find instead is the parties increasingly relying on experts – particularly economists and accountants - to produce an econometric model into which they can

[4] *Caravaggio's Cardsharps on Trial: Thwayes v Sotheby's* Prof Richard Spear, Paul Holberton Publishing 1st edn (2020)
[5] *The Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch), paras 372 onwards.

feed vast numbers of data points gathered largely from the companies. Their computer databases record every price that they have charged on every transaction to every customer over the relevant period – and that time period can last over a decade. The economists then look at trends in the pricing, see if the ups and downs can be accounted for by other events happening in the market. The aim is to isolate price movements which can then be treated as having been caused by the secret cartel activity. That of course is oversimplifying what they do but it is enough to illustrate a couple of points.

8. First it makes the disclosure of data to be crunched by the experts hugely important and burdensome both for the parties who have to gather and disclose it and for the other side who have to analyse it. With disclosure being so voluminous judges sometimes need to front-load decision-making. A judge may be reluctant to accept that two completely different methodologies should be prepared right up to trial with the experts then fighting it out at trial and the judge at the end of the day deciding which method is best. This is particularly true if that means doubling the work for everyone at the end of the day, with the result that one whole tranche of disclosure and expert analysis will be jettisoned as having been entirely unnecessary because the judge accepts the other side's methodology.

9. There are alternative ways of getting around this dilemma. One of these is a method known affectionately (and a little misleadingly) as "hot tubbing". This shares perhaps symbolic rather than physical similarities to a jacuzzi - the idea is to get experts in a room together with the tribunal judges, answering questions sequentially or at the same time. It pares back the adversarial tone. This can be a positive thing if removing the experts from the combative arena of competing counsel can lead to two previously entrenched experts to reach a useful level of agreement. At the least it often helps to narrow the debate.

10. The process may be worthwhile in the long run even if it involves a much greater degree of involvement in the case proceedings by the tribunal themselves and at a much earlier stage than would usually be the case from more traditional adversarial proceedings.

11. The other trend which has become apparent is the growing technical nature of much expert evidence – not only in the medical sphere but also in the telecoms and computer sector. This presents challenges first for the expert in explaining it to the barristers in the case, then for the barristers to explain it to the judge and then for the judge to explain it clearly in the judgment. For a good example of this, see the recent judgment of Mr Justice Mellor on the vexed question of whether Dr Craig Wright is the real Satoshi Nakamoto who invented Bitcoin. Judge Mellor says that based on his experience as a patent judge, he did not find the technology behind Bitcoin all that

difficult. All I can say is that I guess the first para on the section about how Bitcoin works would be baffling to most ordinary mortals.[6]

12. So what are my top tips from the other side of the bench, as someone who has seen the best and not-so-best of what expert evidence has to offer?

13. First and foremost, remember that your duty is to the court, not to the party instructing you. Needless to say, it is the judge's trust and respect that ultimately will prove the most important factor in your evidence being accepted by the court. So focus on that rather than worrying about getting the better of the barrister cross examining you. Those who come across as more partisan, with the hope of being hired in future cases by the same parties, will likely find that method backfiring. There is a cautionary tale in the *Bitcoin* case where, after he had been instructed, the expert witness had blogged about the case and how important it was for him to win it.[7]

14. What you want to avoid is being in the position which arose recently in the CAT in *Royal Mail and BT v DAF Trucks*. The CAT concluded that the expert evidence had been "clearly influenced in favour of the commercial interests of [the] respective clients".[8] When the case went on appeal, the Court of Appeal observed that it is important experts understand, and respect, what is entailed in their duty assist the tribunal, in particular by giving full and frank disclosure, including prior relations with a client, impacting upon the objectivity and independence of their opinion. As the Court noted:

> "The CAT is also entitled to expect experts to adjust their opinions, even to the detriment of their clients, in the light of evidence as it emerges. An expert whose heels remain firmly dug in, might find such obduracy taken into account, adversely, by the CAT in the final account".[9]

15. My second point is a plea for clarity and concision. The courts now routinely receive expert reports that rival the length of Tolstoy's *War and Peace*. Quantity, however, does not guarantee quality. Sometimes the sheer weight of analysis obscures the real point at issue. In an age where some cases have more pages of documents than there are people on earth, there is no point in overwhelming judges with information. It is increasingly common for judgments to make reference to the amount of expert evidence being presented before them, particularly over tightly fought high-value

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[6] *Crypto Open Patent Alliance v Craig Wright* [2024] EWHC 1198 (Ch) paras 307 onwards. Para 312 reads "The most used hash function today is SHA256, and this is what Bitcoin uses. SHA256 hashes are usually encoded and expressed as a string containing 64 alphanumeric characters, such as the string 2cf24dba5fb0a30e26e83b2ac5b9e29e1b161e5c1fa7425e73043362938b9824 (the hex encoding of the SHA256 hash of "hello")."

[7] See above paras 281 onwards.

[8] *Royal Mail and BT v DAF Trucks* [2023] CAT 6, [480].

[9] *Royal Mail and BT v DAF Trucks* [2024] EWCA Civ 181, [177].

claims, as being “huge” and “excessive”.[10] This often results in a disproportionate amount of time and money being spent on complicated analyses.

16. Thirdly, do not underestimate the tribunal’s expertise. Increasingly, specialist tribunals include subject specialists, a medical doctor, an economist, or even a military expert, who will bring informed scrutiny to your evidence. So you may find that your most searching questions come not from opposing counsel but from the bench.

17. Above all, I hope you approach your work as expert witnesses with a sense of shared endeavour. The aim of every court is the same: to reach a fair and informed decision. That doesn’t mean lawyers being needlessly aggressive, or standing up shouting in the middle of the room shouting “I object” at the expert’s first utterance. Judges don’t want to trip you up or catch you out. We want you to help us understand what for many will be unfamiliar territory. And if you do that with honesty and clarity, you will find yourselves indispensable to the process.

18. Thank you, and I wish you a successful and interesting conference and all the best in your work ahead.

[10] *Royal Mail and BT v DAF Trucks* [2024] EWCA Civ 181