QUEENSTOWN LECTURE

Legal Uncertainty in the Financial Markets: How Can the Courts Assist?

1. Modern, sophisticated economies are becoming increasingly vulnerable to market uncertainty, and to financial market uncertainty in particular. No-one living in the UK after the outcome of the BREXIT referendum could be in any doubt about that, and our UK financial markets do not by any means appear to have been the only ones affected. Uncertainties come in various shapes and sizes, political, economic, even meteorological.
2. I want to talk about legal uncertainty. By this I mean two things: (i) doubt about the legal effect of widely used forms of financial instruments, such as the ISDA Master Agreement and (ii) doubt about the legal consequences of a major event, such as the insolvency of a major international financial institution, like Lehman, or the Icelandic banks, or about the legal effect of the steps taken to deal with it.
3. Uncertainties of the first kind affect the financial markets because of the amount of ongoing business being transacted under the contractual provisions in issue. Uncertainties about the legal consequences of past events affect the financial markets, both because of the sheer size of the debts competing for priority for payment out of a finite but insufficient pool of assets, and because a thriving market in the distressed debt may itself be affected by the outcome of the long drawn out battles about who owned what when the music stopped.
4. The concept of legal uncertainty takes concrete form by reference to a particular system of law. My experience is mainly about English law, but England shares with Australia and New Zealand a common law with broadly shared principles, such as the tools for the interpretation of contracts, and equitable principles which still largely regulate fiduciary duties and underpin beneficial ownership of intangible assets, and financial assets in particular. We share a broadly common set of insolvency principles, even though most insolvency law is statutory. So when I speak about the common law, I include both equity and those principles which, although now codified, still take their full meaning from the judge-made law which preceded the codification. And I speak about a common law which our three countries continue to

share, developed by courts which continue to pay the greatest respect to each other's decisions, even though the old appellate bonds have now been broken, and limited divergence of principle in its development is now a fact of legal life. Our courts also continue to take largely the same approach to procedure and precedent, although we may be at different stages of modernisation.

5. It is I think by no means a coincidence that English law (or the similar law of one of our three countries) continues to be the law of choice for many (perhaps most) international financial transactions and instruments. It is in particular one of the two main choices of the law governing ISDA-based derivatives, the other being New York law. This is mainly because, by contrast with civil law systems, our common law and shared procedure offer a basic level of predictability, founded on the respect which our law gives to binding precedent. It is that which serves as the essential foundation of the courts' ability to contribute to alleviating financial market uncertainty. Once a sufficiently senior court has pronounced on a relevant legal issue, that is that (usually at least). By contrast the decisions of the higher courts in civil law countries about, for example, the meaning of a provision in the relevant civil code or standard form contract, generally have no binding force as precedent, and they share their authority as sources of law with academic writings to a much greater extent than they do in legal systems like ours, regulated by precedent.

6. But questions need to be asked about whether that excellent platform of binding precedent is currently used by our courts as well as it might be, for the purpose of assisting with legal certainty in the markets. Do our senior courts actually treat certainty as a desirable policy objective and, if so, do they give it give it sufficient weight? Are our court procedures sufficiently swift and affordable to be able to provide the answer to legal issues causing uncertainty in sufficient time? Do we strike the right balance between dealing with a specific (necessarily historical) case and providing reliable guidance for the future? Are our judges sufficiently expert to navigate the ever-increasingly complicated terms of modern financial structures? Does legislation, or market regulation, assist or get in the way?

Certainty as an Objective

7. It is often said that certainty in commercial transactions is an objective (or a *desideratum*) of English law. This can mean at least four different things. I will call them the certainty principles. First, it can mean that the law should favour an approach to the interpretation of commercial transactions which maximises the likelihood that the parties will know what they are letting themselves in for when they contract. This is said to militate against the recognition as implied terms of provisions which the parties could have, but did not, insert as express terms, and against excessive reference to the matrix of fact for the purpose of undermining the superficially plain meaning of express contractual terms. As Lord Hoffmann once said, sometimes a contract is silent about a particular eventuality because the parties actually decided to make no provision about it. Sometimes nothing really does mean nothing.
8. Secondly, it can mean that the law should favour rules for the ascertainment of the consequences of breach of commercial contracts which minimise uncertainty, e.g. by requiring damages for breach of contract to be assessed as at the breach date, and without regard for what (by the much later time of trial) the court can find out about subsequent relevant events: (see the minority judgments in the *Golden Strait* case [2007] UKHL 12).
9. Thirdly, it can simply mean a senior appellate court not departing from a series of first instance or otherwise non-binding but well known decisions which appear to lay down a consistent principle, even when the appellate court thinks, on balance, that the emerging principle may be wrong.
10. Finally, and of particular recent relevance in cases with financial market consequences, it may mean seeking to restrict the effect of policy-based principles in avoiding the agreed outcome of bargains between commercial parties. Two recent examples in the Supreme Court relate to the anti-deprivation principle and the rule against penalties. In both cases the uncertain application of principles of policy (*pari passu* in insolvency and the avoidance of contractual penalties) gave way to the upholding of a bargain made in good faith for a legitimate commercial purpose.

11. Sometimes these various manifestations of the commercial certainty objective all pull together. But occasionally they pull vigorously in opposite directions. In the *Golden Strait* case a series of earlier decisions of good (but not House of Lords) authority had established a general compensatory principle that the damages payable for the repudiation of a contract, even a commercial contract, should not slavishly be assessed as at the breach date, where subsequent unforeseen events (such as a war triggering an early termination option in a charter-party) showed that the victim of the breach would have suffered a large part of the loss anyway. That is what happened in the *Golden Strait* case itself. A bare majority of the House of Lords upheld that line of authority, applying, you might say, the third of my types of approach upholding certainty. But Lords Bingham and Walker (dissenting 2-3) said that this fundamentally undermined commercial certainty. Lord Bingham said that the view of the majority (and the courts below)-

> "undermines the quality of certainty which is a traditional strength and major selling point of English commercial law".

Lord Walker said that Lord Bingham's view -

> "clearly sets out the principles of law applicable in this area, including the importance of certainty in commercial transactions."

12. But Lord Scott for the majority said:

> "The argued justification for thus offending the compensatory principle is that priority should be given to the so-called principle of certainty. My Lords there is, in my opinion, no such principle. Certainty is a desideratum and a very important one, particularly in commercial contracts. But it is not a principle and must give way to principle. Otherwise incoherence of principle is the likely result. The achievement of certainty in relation to commercial contracts depends, I would suggest, on firm and settled principles of the law of contract rather than on the tailoring of principle in order to frustrate tactics of delay to which many litigants in many areas of litigation are wont to resort."

13. Another case where conflicting certainty principles were at stake, nearer to the financial markets, is one of the Lehman cases, unhelpfully called *Re LBIE,* but

generally known amongst Lehman litigation aficionados as *the Side Letter* case [2012] EWHC 1072 (Ch) and [2013] EWCA Civ 188. Its particular facts don't matter. A long line of first instance and Court of Appeal authorities had established a principle that, for the purposes of the early termination close-out provisions of the 1992 ISDA Master Agreement, the loss to the party in the money should be calculated on the assumption, however commercially unlikely, that the transaction would otherwise have run its full course. This came to be called the "value clean" principle, and applied to both the alternative valuation methods prescribed by the standard 1992 ISDA terms. The *Side Letter* case was the first in England to consider the close-out provisions of the 2002 ISDA Agreement, which most commentators at the time (and the trial judge) assumed simply merged the two 1992 close-out valuation methods into one, without affecting the underlying value clean principle, which continued to apply. No, said the Court of Appeal. The plain language of the 2002 ISDA agreement did not say value clean in terms, and it was not to be implied. So they may be said to have preferred the first over the third of my certainty principles.

14. The outcome of both these cases was that the court found itself able to prefer the result which better reflected the substantial justice of the particular case. Whether they really did much for upholding legal certainty in the markets I will leave others to decide.

15. Occasionally the courts have sought the wisdom and guidance of the market itself, or of a market custodian of the relevant transactional framework. One of the most contentious issues about the meaning of the ISDA Agreement (in both the 1992 and 2002 versions, which were in this respect identically worded), was whether a non-defaulting but out of the money party could simply decline either to perform or terminate an ISDA-based derivative contract when the other party defaulted and, if so, whether default cancelled the non-defaulting party's performance obligation once and for all, or suspended it, and if so for how long. This produced widely differing views from first instance judges in England and one in Australia, and also dragged in the anti-deprivation principle, to which I shall return. In one of the English cases, *Lomas v JFB Firth Rixson Inc* [2012] EWCA Civ 419 ISDA was itself

permitted to intervene. It ran a submission supported by none of the interested parties. The submission failed at first instance but was triumphantly vindicated when repeated (with the support of an interested party from a conjoined case) in the Court of Appeal. This was that the payment obligation of the non-defaulting party was not extinguished, but suspended (without any limitation protection) for as long as the in the money party remained in default, even if the default continued long after the end of the contractual term, as it did in fact, and continues to this day. The result was to recognise an apparent contingent liability on the non-defaulting party of potentially infinite duration. It was a firm application of the first of my certainty principles, since most of the alternative interpretations founded themselves on some form of implied term.

16. The fourth uncertainty principle has sparked off some of the most interesting litigation of all and, I would say, real change in the law in the direction of upholding business bargains to the full, in the face of public policy rules which might otherwise have struck them down. The first series of cases may be described as charting the rise and fall of the anti-deprivation principle. It has always been a fundamental rule of insolvency law (both here and in England) that you cannot contract out of the statutory regime for the *pari passu* distribution of the assets of an insolvent company. Public policy requires creditors of equal priority to be treated equally. This is now understood to mean two things: (i) you cannot provide in a contract for a company to be divested of all or any part of its property at the onset of insolvency, so that the property falls outside the insolvency scheme altogether; and (ii) any contract or arrangement which provides for the distribution of the company's property during insolvency otherwise than as provided for in the statutory code is void.

17. These two rules, simple enough to state and plainly fundamental to the statutory protection of creditors, led over many years to the most complex jurisprudence seeking to identify a dividing line between arrangements which did, and did not, fall foul of them. A description of the twists and turns of the jurisprudence would be difficult to explain clearly even in a lecture devoted solely to that objective. Sometimes the developing rules made fine distinctions between flawed assets

(which curled up and died just before insolvency by virtue of their built-in provisions) and void provisions for deprivation, even though both types had exactly the same commercial effect. Sometimes a provision which might have offended the rule was saved because it was triggered not by the insolvency of the corporate owner of the property, but by the slightly earlier insolvency of an associated company. This was a frequent occurrence in the Lehman crash, as in the *Firth Rixson* case, where the insolvency of the London Lehman company Lehman Brothers International Europe ("LBIE") followed the insolvency of one of its relevant USA based associates by just over one hour. Thus the event of default which triggered the close-out mechanism was not LBIE's own insolvency, but the insolvency of its associate, so that the anti-deprivation principle was not engaged. Sometimes a void scheme for private insolvent distribution was saved by a slight tweak in the drafting, having no real commercial effect but successfully disapplying the anti-deprivation rule: see the *British Eagle* case [1975] 1 WLR 758 (HL) and the *Ansett* litigation in the High Court of Australia. None of this did any good at all to the integrity, let alone the certainty, of our shared financial and commercial law.

18. In the end all the nit-picking was swept away by the Supreme Court in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd and Lehman Brothers Special Financing Inc* [2011] UKSC 38 ('*Belmont*'), and replaced with what at first sight looks like a very simple, easy to apply rule: Was the provision in question inserted for bona fide commercial reasons, without a predominant or main purpose to deprive the company of property on insolvency? If so the anti-deprivation rule does not apply. Their Lordships gave as their express reason for this new formulation the need to uphold party autonomy in commercial transactions.

19. Remarkably similar in spirit was the clarification of the law about penalties by the Supreme Court in the two conjoined cases known as *Cavendish Square Holding BV v Makdessi* and *Parking Eye Ltd v Beavis* [2015] UKSC 67. The first was about a clause in a business sale agreement which treated the outstanding purchase price as irrecoverable if the vendor committed a breach of a restraint of trade covenant designed to preserve the goodwill of the business for the purchaser. The second was a provision in a car parking contract which imposed a large payment if the owner

parked his car longer than a specified free period. The general rule, drummed into us as law students all round the common law world, was that a contractual provision which imposes as a deterrent for a breach of contract an obligation on the contract breaker out of all proportion to the loss caused by the breach is void as a penalty. But this is now only so if the provision cannot be treated as having been inserted to serve the legitimate commercial interest of the innocent party, even if the relevant interest is served by imposing a deterrent for breach. Both the allegedly penal clauses were upheld.

20. This carefully reasoned case is worth a lecture in itself, but the gist of the court's thinking may be found in this passage from the joint judgment of Lords Neuberger and Sumption:

> "A damages clause may properly be justified by some other consideration than the desire to recover compensation for a breach. This must depend on whether the innocent party has a legitimate interest in performance extending beyond the prospect of pecuniary compensation flowing directly from the breach in question."

21. The judgments in the *Cavendish* case contain what many may regard as rather sharp criticism of the reasoning of the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205. More recently the High Court has politely rejected those criticisms, in *Paciocco v Australia and New Zealand Banking Corp* (2016) HCA 28. That was a case about a late payment fee in an ordinary credit card contract. But for present purposes the really telling comparison between the two leading decisions about our shared common law is that they proceed upon exactly the same lines, in the interests of contractual autonomy, in defining the essence of the penalty doctrine, and restricting its ambit, where the alleged penalty is triggered by a breach of contract.

22. All these cases (*Belmont, Cavendish and Paciocco)* substitute for previous unsatisfactory rules a protean test in which the public policy limits on party autonomy (i.e. freedom of contract) are defined by reference to the legitimate

commercial interests of the party relying on the provision in question, coupled in the case of penalties with the requirement that the burden of the provision on the wrongdoer should not be extravagant, unconscionable or, in modern language, disproportionate to the interest protected by it.

23. Legitimate interest and proportionality are fine-sounding modern phrases which make the rules which they replace look old-fashioned, fusty and overly technical. But they may in time be found to introduce new uncertainties of their own. What is the touchstone for the legitimacy of a commercial interest or objective? Do we all share the same notions about commercial morality, or even proportionality for that matter? Only time will tell.

Procedural Snakes and Ladders

24. The English chancery and commercial courts have long prided themselves on being able to provide a speedy resolution to legal issues causing commercial uncertainty. For example, if there is no real dispute of fact necessitating a trial, the court will decide questions of law or construction summarily, or as a preliminary issue on an expedited basis, without putting the parties through the long drawn out procedures of pleadings, disclosure and the exchange of witness statements. This is no recent occurrence. I can remember while a junior barrister being in a case about the construction of a North Sea oil participation agreement which was fast-tracked to trial in the Commercial Court in 6 weeks, and to the Court of Appeal in another 6 weeks, in the early 1990s. Disputes about whether the title to land was marketable under a contract for sale could be brought to a speedy decision in time for completion, by a (now defunct) process known as the Vendor and Purchaser summons in the Chancery Division.

25. The High Court (and the Chancery Division in particular) was especially alert to assist trustees and other fiduciaries with prompt guidance on legal issues affecting the discharge by them of their duties. This manifested itself most effectively in favour of Insolvency office holders in the Lehman litigation, following the 2008 financial crash. A whole series of cases about the consequences of the Lehman failure were

prepared, argued and decided (with virtually no live evidence at all) using the procedural vehicle of an application by the office holder (usually the joint administrators of LBIE) to the Chancery Division of the High Court for directions. The application described the questions which the office holders wanted answered, in one case (*Lehman Client Money)* running to over 70. Parties were joined to represent all the conflicting interests in the outcomes (often 6 or more parties per case). Sometimes the office holders were neutral. More often they argued a particular corner with full adversarial vigour.

26. Three procedural techniques, used in combination, made it possible to identify and decide the many issues in these cases with reasonable speed and coherence. The first is the list of issues. This is an organic document, developed by co-operation between the parties (but with the office holder having the last word) and changing right through the preparation and even hearing of the case, as old issues were agreed and new ones presented themselves.

27. The second is the position statement. This took the form of a series of successive documents by which each party developed and refined its outline case on the issues as they emerged, in place of formal pleadings, and for the purpose of informing each other of their cases. By the time of trial they had been replaced with fairly full oral submissions, masquerading as skeleton arguments.

28. The third is the statement of assumed facts. The concept of 'assumed' facts needs some explanation. Normally the court decides disputes about historical events, where the facts may be as much in issue as the law, or interpretation. But in cases about complex standard form structures used in the financial markets, disputes about primary fact are seldom decisive. These statements are again organic documents, added to and altered as the parties' researches shed new light on the underlying business and transactional structures.

29. There is an important distinction, at least at the conceptual level, between agreed and assumed facts, although in practice they perform the same role at trial. Statements of agreed facts are a familiar enough concept. They serve the vital purpose of concentrating the forensic part of the trial on the usually small residue of

facts which cannot be agreed. In most of the Lehman cases, that residue was thereby reduced to zero.

30. Statements of assumed facts are an unusual animal, and the special creature of this type of application. When office holders apply for directions, they frequently want help on questions of principle, or on matters of widespread application in relation to the forensic tasks which they have yet to perform. Frequently, at the level of finer detail, office holders have to be their own *prima facie* judges of fact (subject to court control), for example in the acceptance, rejection and valuation of proofs. Armed with directions on assumed facts, which they calculate to be sufficiently proximate, though not necessarily identical, to the true facts as they later emerge, they can proceed, correctly armed as to the law to be applied, once the infinitely variable detail has been hammered out. Settlement is greatly facilitated once the relevant principles have been clarified.

31. The advantage of agreed statements of assumed facts, as to the precise content of which the office holder's judgment usually has to prevail, is that the case avoids becoming bogged down in a minute investigation of detailed factual issues which may be disproportionate to their impact on the issues of principle to be decided. Bucket-loads of time are saved, and swearing matches avoided. From the judge's perspective, he is saved the time-consuming task of setting out the non-contentious but relevant facts, often the longest part of the preparation of a judgment. The judge can just press a button on his computer and, hey presto, the agreed statement is incorporated, lock stock and barrel, into the judgment. The other advantage of assumed facts is that parties can agree them purely for the purpose of the instant proceedings, while remaining free, should it matter on points of detail, to contest them in the future without being issue estopped. This greatly contributes to a collaborative and constructive hearing, where the presentation of helpful argument is not hindered by worries on the part of the legal teams that they have left some forensic stone unturned in their preparation, or unwittingly given hostages to fortune.

32. I have thus far described the procedural ladders which help the parties and the court to deal with issues of legal uncertainty affecting enormous sums. How about the

snakes? The first, and most obvious, is that certainty is by no means achieved at first instance, before the trial judge. Nor even in the Court of Appeal. Our shared common law is united in treating questions of interpretation as purely legal issues, and in regarding every legal issue as having a right and a wrong answer, rather than a permissible range of answers, within which the trial judge has a margin of appreciation provided he/she acts rationally, as in the exercise of a discretion. Nor (as in relation to factual questions addressed by live witnesses), is the trial judge any better equipped than the appellate courts to decide a question of law, apart from usually having longer to ponder. The result is that the trial judge's determination is just the first stab at the problem, with the final decisive answer emerging, often several years later, from a bare majority decision of the Supreme Court.

33. The result of this long snake is, of course, delay and continued market uncertainty. Some of the cases arising from the 2008 crash have taken 4 years to get all the way to a Supreme Court decision. Now that LBIE has turned out, after all, to be solvent (i.e. to have a surplus after paying all unsecured debt in full) there is a whole series of further cases wending their leisurely way to the Supreme Court, appropriately called the 'Waterfalls' cases, to decide who gets the surplus, and in what shares. The first was decided at first instance in 2013, in the Court of Appeal in 2015, and is still to reach the Supreme Court where every part of it (even where the lower courts were unanimous) will be fully argued for a third time.

34. Very occasionally this three stage snake is reduced to two stages by the leapfrog procedure (by-passing the Court of Appeal). This is being considered for the first of the big legal issues raised by Brexit, namely whether Parliament must approve the issue of a notice to quit the EU by the UK. All too infrequently the higher courts are lined up to hear the appeals in quick succession, but this has hardly ever happened for cases about the financial markets. Life and limb (such as cases about assisted suicide, or turning off life-support), more often get that treatment, but (wrongly in my view) issues about the financial markets have yet to be recognized as affecting the nation's health, and deserving expedition on that ground. There are simply no joined-up rocket dockets to take the case from inception to final determination in the highest court.

35. In England the delay problem has been exacerbated by years of grave overload in the work of the Court of Appeal, leading to a non-expedited case now taking up to 20 months after trial to get heard there. Reforms are in the pipeline (including removing the right to an oral hearing of an application for permission to appeal), coming into effect in October this year, but it will take years before the backlog is cleared.

36. The second problem arises from the sheer complexity of modern financial structures. Few of our commercial and chancery judges (and even fewer in the higher appellate courts) have had any real familiarity with those structures, let alone the jargon by which they are described by market participants, in advance of being asked to decide the most complex and technical issues about them. Getting astride the complexities, and gaining a sufficient understanding of the commercial background to be able to interpret them in context, has been a demanding challenge for advocates and judges. If I may give a personal example, a week before I tried the *Firth Rickson* case, I wouldn't have known whether ISDA was a name for a widely-used derivative contract, or for a lawn-mower. The problem is made no easier to solve by the fact that, in London, the High Court judges who decide these cases are evenly divided between the Commercial Court (a part of the Queen's Bench Division) and the Chancery Division, along an ancient boundary going back well over a century, and with no discernable modern rationale, however deep the tribal loyalties.

37. A more serious and (until now) intractable problem is that the settled practice of the common law courts has been to confine themselves to dealing with formulated disputes about historical events, rather than deciding issues of principle up front, before the uncertainty leads to dispute, damage and disaster. Traditionally, the court will not pronounce on merely hypothetical issues. Put shortly, the court usually practices remedial, not preventative, medicine.

Attempts at reform

38. I have already described how the certainty principles have slowly been gaining ground, with both the intention and I think probably the effect of reinforcing commercial autonomy as the basis for the adjudication of issues affecting market structures. I must now turn to procedural developments.
39. First and foremost, the cohabitation of the Chancery and Commercial judges in the new Rolls Building annex to the London Law Courts (by far the largest business and property court centre in the world) coupled with apprehension of increasing competition from commercial courts elsewhere (e.g. in Singapore and Dubai) has I think led to a new focus upon the need for a joined-up approach to the determination of financial market issues. This has manifested itself in four recent developments.
40. The first is the new Financial List. (in England a 'List' is a sort of virtual court or judicial grouping for the hearing of a particular specialist stream of cases). The Financial List is presided over by a team of 8 High Court judges, drawn equally from the Chancery and Commercial judiciary, and is designed to hear cases of only the very highest value and importance affecting the financial markets. By using a small judicial team, the object is to concentrate the requisite experience and skill to maximise the quality of the decision making. Cases will generally be docketed, i.e. managed and tried by the same judge.
41. Secondly, there is now established a process of regular judicial seminars on financial market matters, both for the Financial List judges and for those in the higher courts likely to hear the inevitable appeals. The most distinguished lecturers are drawn from around the financial world, and the programme is organised by the Financial Markets Law Committee based at the Bank of England. By this means it is intended that judges do not (always at least) come cold to a complex financial market issue. The devil lies in the detail: spotting a market problem coming down the line before anyone has issued proceedings about it.
42. Thirdly, the Rolls Building courts have together promoted a new Flexible Trial process, to be used if the parties agree or the court decides that it is appropriate to

do so, whereby the established procedures for pleadings, disclosure and witness statements are replaced by a bespoke set of directions to suit the particular case, designed to focus attention on the key issues and the steps needed to prepare for their determination, cutting out expense, waste and delay and leading to a speedier, shorter trial. This is really a development of the procedural advances deployed for example in the Lehman cases which I have already described, but for use on a much wider scale than just in the insolvency office-holder application context in which they originated.

43. Finally, the Financial List is to accommodate market test cases. By that I mean the determination of looming financial market issues, but in the absence of (and hopefully before the emergence of) a formulated dispute between particular parties. The idea is that a market custodian (such as ISDA itself, or a market regulator) could bring the issue to the court for prompt determination on assumed facts, joining as parties representatives of sections of the market with an interest in a particular outcome. Thus far there have been no takers, and there are reservations about its value in academic circles, but the facility is there, so that the markets themselves have a remedy for the traditional problem of having to wait for a dispute actually to emerge, if only they can gear themselves up to use it.

44. Alongside these specific developments I must mention the Court Service's Reform Programme, which began in 2015 and has been funded by a £730 million promised Government investment with effect from April 2016. One of its two main aims is to digitise all our court processes, so that cases are issued online, files are all stored electronically, and trials prepared and conducted on a paperless basis. The Rolls Building courts already offer online issue, filing and storage. Our criminal courts are already now equipped for paperless trials, and it is only a matter of time before the civil (including commercial and chancery) courts follow them. One day digitisation will even reach the Court of Appeal. It has already arrived in the Supreme Court.

45. Freedom from the tyranny of paper offers big advantages in the flexibility, speed, efficiency and cost effectiveness of our courts. As probably the heaviest documented of all, the financial cases can only benefit from these reforms, when they soon (as I hope and expect) come to pass.

Conclusion

46. What answers does this mini-review provide to the questions I posed at the beginning of this address? As a judge I am meant to be part of the solution, and therefore singularly (and unusually) ill-equipped to provide impartial answers. But let me try, before throwing the questions open to your judgment and debate.
47. Do our senior courts actually treat certainty as a desirable policy objective and, if so, give it sufficient weight? I think that recent cases show that this happens now more than previously, but the certainty principles don't always pull in the same direction in any particular case.
48. Are our court procedures sufficiently swift and affordable to be able to provide the answer to legal issues causing uncertainty in sufficient time? Our procedures are certainly heading in the right direction, save for the absence of any joined-up management and expedition of the appellate stages, which are still too slow. They are affordable when the stakes run to tens of millions of pounds, but notoriously expensive below that very high level of value at risk.
49. Do we strike the right balance between dealing with a specific (necessarily historical) case and providing reliable guidance for the future? Not yet, but the procedural basis for doing so is now in place, in the form of the market test case procedure, even though yet to be used.
50. Are our judges sufficiently expert to navigate the ever-increasingly complicated terms of modern financial structures? They are well on the way, and both the concentration of expertise and the training are now in place.
51. Does legislation, or market regulation, assist or get in the way? I just don't know. In speaking about the *Lehman* experience in 2012, I said that the regulatory regime for the segregation of client money and its protection from the collapse of the market participant had utterly failed. But much has been done since, both in new regulation and in revised provision for stress testing. We will I think just have to wait and see

what, if anything, we have learned from past failures. I wonder if we will have long to wait.

MB

28th August 2016