THE CHARNLEY LAW DINNER

HUGHES HALL, CAMBRIDGE

14 OCTOBER 2024

I am delighted to have been invited to speak to you this evening after such a splendid dinner hosted by Sir Laurie Bristow and William Charnley. As an alumna of Newnham College, I recognise the shared historic role that Newnham and Hughes Hall have played since the 19th century in the advancement of women's education at this University. That pioneering vision shared by the founders and early Principals of both Newnham and Hughes Hall is still greatly valued today – and still much needed.

Many of you here are just starting out on your legal careers. Perhaps you are wondering how best to use the legal knowledge you are in the process of acquiring by, I am sure, your many hours of arduous and dedicated studying long into the night –perhaps not this particular evening but generally. How best can you use legal expertise for the benefit of society whilst also earning a living?

For you, I realise that my current work on the Supreme Court may seem rather a long way off from where you find yourselves now. When I come back to Cambridge as I often do, I sometimes feel transported back to when I was a student. But I have to recognise that my student days are getting to be rather a long time ago. The kinds of legal issues that I have to tackle in my current role are apparent from the judgments put up on the Supreme Court's website for everyone to see. I thought I would instead give you some insights into some of the legal issues I have tackled at earlier stages of my career, particularly during my years working as a civil servant in the Government Legal Service.

I make no apologies for the subtext here. There is a big wide legal world out there beyond the London law firms or sets of barristers' chambers you will be tempted to join. My own career demonstrates that wherever you decide to go immediately after you graduate, that does not necessarily set you on a rigid path for the rest of your years as a lawyer. I hope in the next few minutes maybe to open up some of the many possibilities there are for an interesting and rewarding career as a lawyer.

The Government Legal Service employs several thousands of lawyers in Central Government. Some of them work in the litigation department, handling the large amount of litigation such as judicial review claims to which a department or Minister is a party. But many of them are working in an advisory capacity, advising on the development of policy and the day-to-day operation of the law as it applies to education, or agriculture, or immigration, or prisons, or foreign policy.

My first post when I joined the GLD was in what is now His Majesty's Treasury. I joined in 1996 and in May 1997 the Labour Government under Tony Blair swept to power with a plan to reorganise the way that financial services, banking, and insurance are regulated. In the course of my work on the Bill which became the Financial Services and Markets Act 2000 I came across lawyers working in lots of different organisations. There were lawyers working in the compliance teams of the banks and insurance companies; lawyers working for the regulatory bodies; and lawyers working for consumer organisations hoping to protect future consumers from being misled or exploited.

We had to tackle many difficult legal issues whilst the Bill was being drafted. They cropped up when we were considering the draft clauses, when we put the draft Bill out to public consultation, and as the Bill made its way through both Houses of Parliament particularly during the Committee stages. Once the Act obtained Royal Assent, I co-led the team drafting all the regulations and orders that were needed to flesh out the terms of the statute.

One issue that was a real sign of things to come arose in the context of the regulation of advertising or promotion of financial services. Under the old regulatory regime, there had been different rules in place for advertisements that were in writing, for example in a brochure or a newspaper advertisement or a mail shot letter, compared to the rules for advertisements which were only spoken, in a phone call or in a tv or radio advert or in a face-to-face meeting. But even back in 2000 when we were thinking about how the new regulations should work, that old distinction between things being in writing and things being oral had started to break down. Suppose you had a TV advert that had subtitles coming up on the screen as the person was speaking. Is that still just an oral promotion or is it now in writing? Suppose you have a presentation made to a group of potential consumers in a conference room where the speaker uses slides shown on a screen during their talk. Are the

slides oral or in writing? If the speaker passed round a printout of those slides at the end of the talk for those attending to take home with them, does that convert an oral promotion into a written one?

This prompted us to try to get to the heart of what was important about the distinction for our purposes. On the one hand, a phone call or a TV advert is ephemeral. It is likely to have less influence on someone than a brochure that the recipient can re-read or keep in a drawer and look at again when they come to choose a bank or financial adviser. Looked at that way you might want stricter regulation for written material than oral. On the other hand, if the promotion is happening in a face-to-face meeting, there is more scope for the company to put pressure on someone in subtle ways than there is when someone is reading a brochure in their own home away from the use of selling techniques. That might point to having stricter controls for oral promotions than written ones.

All these conundrums led to us devising new concepts such as real-time communications and non-real-time communications in an effort to get at where the problems for consumers might arise. Although the original Financial Promotions Order that I drafted in 2001 has been replaced by a later version,[1] I see that much of my original drafting has survived. No doubt many lawyers are puzzling over what it all means in modern times, where the distinction between written and oral communication and between what is ephemeral and what is durable is really elusive.

After a few years in the Treasury, I moved to the Ministry of Defence where I took on the role of Director of Operational and International Humanitarian Law. I joined the MoD at the start of 2002 just as the main hostilities in Afghanistan were coming to an end and it became clear during my first year or so there that there would be another war in the Gulf.

As you can imagine, there were many difficult legal issues raised at that time, and we had to work closely with other Government departments including the Foreign Office and the Attorney General to analyse them.

The main legal issue that kept coming up then was whether the European Convention on Human Rights applied to the conduct of the British forces in Iraq either during the armed conflict or in the period when British troops

[1] See the Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (SI 2001/1335) reg 7 replaced by the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (SI 2005/1529) reg 7.

occupied Southern Iraq from mid-2003 onwards. The effect of the Convention applying was not so much directly in the way that the troops behaved, because many of the norms set out in the ECHR are mirrored by other international law Conventions that clearly applied.

The context in which the issue came to be litigated was in relation to what is known as the investigative or procedural duty under Article 2 of the Human Rights Convention. Article 2 protects the right to life, and this has long been interpreted as including an obligation on the State to investigate thoroughly the circumstances of the death of someone killed by an agent of the state such as a soldier. The question was whether that duty under Article 2 to investigate deaths arose where a British soldier shot and killed someone on the streets of Basra in Southern Iraq during the course of the occupation. The soldiers said that they had been acting in self-defence and that may well have been right. The issue was how extensive an investigation had to be carried out and how independent did the people conducting that investigation have to be from the military.

Previous case law of the Human Rights Court in Strasbourg seemed to say that in order for people in a particular geographic area to be protected by rights conferred by the Convention, the State had to have sufficient control over that area to be able to confer **all** the rights provided for in the Convention – the Convention could not be partially applied with only some but not all of the rights conferred on the citizens in that territory. Our case first went through the English courts using the Human Rights Act 1998, which had come into force in October 2000. All the English Courts held, relying on that earlier Strasbourg case law, that the Convention did not apply except in the case of a prisoner who had been killed whilst being held in custody by the British Army. However, when the case got to the Strasbourg Court they revised their earlier view and held that the Convention did apply in Iraq. The British forces had exercised sufficient control over Southern Iraq to come under a duty to protect Convention rights there.[2]

By the time the case was concluded in Strasbourg, I had long since moved on to a different job in the GLD. My next and final post was as a legal adviser in the House of Commons. The work of the House of Commons throws up all sorts of legal issues. Some of them are the same issues that

[2] *Al-Skeini and others v United Kingdom* (Appn 55721/07) judgment of 7 July 2011, discussing the domestic stages of the litigation.

arise in any large organisation: contract disputes over building work, claims by employees about injuries at work or about their pay and pensions. At the other end of the scale are the issues that are unique to the House, such as the protection of Parliamentary privilege under Article 9 of the Bill of Rights 1689. In between are the issues which arise for any public body. In that last category are issues arising from the Freedom of Information Act 2000.

Some of my work in my three years in the House of Commons legal team concerned how much detail the public were entitled to know about what expenses MPs had claimed reimbursement for from the House. Some of you may remember this controversy which raged for a while after the making of the first FOI request to the House authorities in January 2005, just days after the FOIA came into force. The House of Commons published information about the total sums claimed annually by the MPs who were the subject of the FOI request but refused to give a detailed breakdown about what it had been spent on.

That led to an interesting battle between the lawyers acting for the House (including me) and those working for the Information Commissioner about the boundary between the public's right to know, and the MPs' right to protection of their personal data under section 40 of the Act. MPs like any other citizen are entitled to some privacy for what goes on in their homes and there are security issues as well raised for them and their families– even back then when social media were in their infancy.

The Information Tribunal held that the information should be disclosed because the public interest overrode the MP's expectations of privacy. The Divisional Court, sitting unusually with three judges, agreed.[3] They said that the case was not concerned with idle gossip or public curiosity about trivialities. The controversy was brought to an end – so far as the lawyers were concerned at any rate - by the leaking of all the information to the Daily Telegraph starting on 8 May 2009. Whether the Court of Appeal's view that this was not about idle gossip was borne out by the media coverage following the leaking of the information, is for others to judge.

After three happy years with the House of Commons legal team I left the civil service to start my judicial career, first as a tribunal judge, then as a High Court judge … the rest, as they say, is history.

[3] *Corporate Officer of the House of Commons v Information Commissioner* [2008] EWHC 1084 (Admin).

I hope that my reflections on my earlier legal work may inspire some of you to think about a career or at least part of your career in the Government Legal Service. I know that some of the brightest and the best young lawyers from here do decide to make their careers here. Last year my judicial assistant was a Government lawyer who took a year out to come and work for me at the Court helping me with research and as a sounding board for my thoughts about the cases I was sitting on. The High Court, the Court of Appeal and the Supreme Court all have good programmes for lawyers of the highest calibre to work closely alongside a judge either for a term or a year. I know that many JAs find the experience gives them an excellent insight into how law is made and also a good opportunity to think about how they want their careers to progress.

I wish you every success in your careers wherever they take you – the best I can wish for you is that you have as rewarding and fascinating a career as it has been my privilege to have.