THE BAR GUIDE

A Guide to the Bar of England and Wales

A JOINT PUBLICATION OF INCISIVE MEDIA AND THE BAR COUNCIL OF ENGLAND AND WALES • OCTOBER 2008

THE BAR GUIDE

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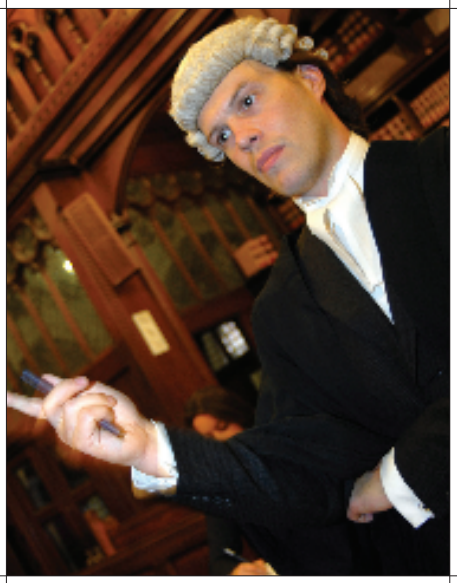

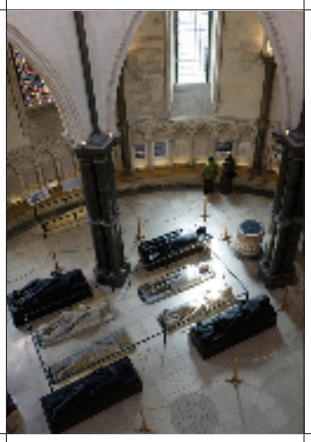

FOREWORD

I am delighted that *American Lawyer* magazine and the Bar of England and Wales are again working together. Earlier editions of this supplement have, I believe, proved its value as a way of explaining what the English Bar has to offer and how we can do business with you. English barristers are used to advising in, and appearing in Courts, Arbitral Tribunals and Mediations in an international context. Barristers are available at the end of the telephone, or via e-mail. Yet many misunderstandings persist about the nature of the Bar's practices and the accessibility of our services, especially in the international field. I hope and believe that we can banish those misunderstandings.

You will see from what follows not only the services which the Bar can offer but also the legal issues of current interest in which the specialists at the Bar are closely concerned. Opportunities for the development of English law in the Middle East and in Europe are explored, where US corporate and legal interests are also prominent and where real possibilities for co-operation are increasing. The effects of the credit crunch, now having such a serious effect on both the US and the UK are also fully explored.

It is in the business of the Commercial Court in London and in the field of international arbitration as well as mediation and of specialist advisory work where the contribution of the English Bar to the provision of international legal services is most prominent, and where we can be of the most obvious assistance. We hope to work more closely with you than ever in the years to come.

For further information, please contact Christian Wisskirchen on CWisskirchen@BarCouncil.org.uk or +44 (0) 207 611 1315 or Michael Brindle QC on Intrelations@BarCouncil.org.uk or +44 (0) 20 7583 3335. ■

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Chairman of the General Council of the Bar of England and Wales

A Guide to the Bar of England and Wales

AN INCISIVE MEDIA PUBLICATION

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INTRODUCING THE BAR OF ENGLAND AND WALES

Welcome to the fifth annual edition of the Bar Guide. Designed to explain the abilities and accessibility of the Bar of England and Wales. This year's issue seeks to inform and update you on the range of work undertaken by the Bar. We look forward to working with you.

Michael Brindle QC,
Chairman of the Bar Council International Committee,
Fountain Court Chambers,
London

Barristers are self-employed specialist advocates. They do not have a monopoly of advocacy rights in the higher courts of England and Wales, but most substantial cases are argued by barristers. Solicitors, including those in the large and well-known law firms, specialise in transactional law, drafting contracts and commercial advice, as well as the collecting of evidence and the organisation of litigation. For nearly twenty years they have had rights of audience in the higher courts, but for the most part serious advocacy has continued to be conducted by the Bar, who also provide legal opinions on difficult and untested points of law.

Barristers tend to be independent-minded, and they are independent in way they work. A set of barristers' chambers can look at first sight much like a partnership, but barristers do not share work or share profits, only expenses. Their overheads are low, allowing their charges to be highly competitive. They are flexible in their working methods, and the availability of direct personal contact with the advocate himself ensures good working relationships. They are not equipped to take on the tasks which solicitors do so well, in particular the day-to-day running of litigation, the process of discovery (or disclosure), the taking of detailed witness statements and the compilation and sorting of large quantities of documentation. For the most part, the roles of barrister and solicitor work well alongside one another.

Much of the work of the Bar these days comes from overseas. This reflects the success of the English courts, especially the Commercial Court, but also other divisions of the High Court, in attracting those who may have little connection with England save for the courts' reputation for high-quality justice. This has gone hand in hand with the reputation of the arbitration services available, particularly in London. The Bar is at the heart of this. Most judges and many of the UK's most sought-after arbitrators have come from the Bar and barristers are prominent in both courts and arbitral tribunals. Barristers have built up a wealth of experience in dealing with international disputes, especially those of a commercial nature.

For an overseas potential client seeking litigation or arbitration services (or certain advisory services) in England it is critical to know where to start. Some will of course have established relationship with firms of solicitors, but many will not, and even those who do may wish an overview of the market in relation to all aspects of a forthcoming dispute. "Think barrister first" could be a useful approach. This is for a number of reasons.

Firstly, the service sought may be one which the barrister can provide himself or herself. It is commonly thought that barristers are inaccessible, and can only be contacted indirectly through a solicitor, but this is not so. Direct access work can be done by barristers for

lawyers overseas, and that includes not only access to the Bar from overseas law firms, such as exist in the USA, but also from in-house counsel in corporate businesses. A phone call or e-mail, whether through information on barristers' web-sites or otherwise, is easy and quick. The barrister can be contacted directly or through his clerk, but the clerk is not a gatekeeper, and need not be used (save to regularise arrangements initially made directly with the barrister). It may be that what is required is a discrete piece of advice, either on English law, or on the merits of a legal argument with which an English barrister can be expected to have relevant experience.

Secondly, if litigation or arbitration in England and Wales is likely, the barrister can recommend an appropriate firm of solicitors to have conduct of the proceedings, or discuss the practicality of the overseas lawyer, whether or not in-house, who might perhaps have a presence in London of conducting the litigation with or without the help of an English solicitors' firm. All of these basic organisational matters are areas where the barrister is well-placed to assist, and clearly would not expect payment for any such assistance. This can then lead to the possibility, but not necessarily the certainty, of that same barrister being selected as advocate for the proceedings. An alternative is that he may recommend another barrister as more suitable. If there is to be an arbitration, the barrister can assist in the choice of suitable arbitrators.

Thirdly, the barrister can be brought in at an early stage of the dispute, to advise on basic strategy. This may or may not involve Queens Counsel (QC), a form of senior barrister, depending on level of importance of the case. There may be, and often is a jurisdictional issue which requires immediate attention, or a time-bar problem. If the barrister is to be standing up as advocate at the ultimate hearing of the dispute, it makes obvious sense to involve him or her at an early stage. Then the pleading must be planned, and again, although solicitors have improved their experience and expertise in this area, it makes little sense not to involve the barrister closely in this exercise. This is followed by the process of disclosure, which is predominantly a matter for the solicitor, but where points of principle often arise on which the barrister will tend to be consulted. Then the compilation of witness statements, again primarily a matter for the solicitor but one where the barrister will have some involvement. At some stage the client will require advice as to the merits of his case and his prospects of success. The barrister, with extensive knowledge and experience of the judges and arbitrators and their likely reactions to different types of argument, will be ideally placed to give this advice.

Finally, the hearing. Gone are the days when the barrister would insulate himself from his client during the trial. Regular pre- and post-court meetings are now the norm. The roles of barrister and instructing lawyer, usually solicitor, are well-defined and there is no more

WORKING TOGETHER TO ACHIEVE JUSTICE IN GIBRALTAR

David Melville QC, 39 Essex Street, London

It was a case in a million, a lifetime experience, really: dodgy doings in Gibraltar, a fraudulent claim for non-existent losses, and just as it was being struck out for fraud, the realisation that it had been funded by a Californian attorney.

As those attuned to the Civil Procedure Rules and the common law, applicable both in UK and Gibraltar will know, there was a claim against the dishonest funder of the litigation for the costs spent in successfully defending the claim. What would be the chances of bringing the Californian rogue attorney to court in Gibraltar, proving the case against him and then enforcing it in his home state?

This is where my friendship with David Steinberg of Mitchell Silberberg and Knupp of West Olympic Boulevard, Los Angeles, began. (The firm is celebrating its first 100 years in 2008). David was endlessly patient with his teachings on service, jurisdiction, the worldwide effect of bankruptcy proceedings in California, and enforcement issues. He attended the hearing in Gibraltar where the claim for costs was proved and prepared and handled the entry of judgment and debtor's examinations in Los Angeles.

Points to be made? The Californian courts will enforce a claim to costs! It is not all so different as it first appears. But time marches to a different pace in the courts of LA and enforcement proceedings do allow room for the dishonest to wriggle. It has been an experience and the fraternity very special.

duplication than there would be in the US system where a specialist trial attorney complements the team that has been preparing a case for hearing. But modern practice has greatly increased the accessibility of the barrister, not only at trial but at all stages of the litigation or arbitration process.

THE BAR COUNCIL RULES ON INTERNATIONAL DIRECT ACCESS EXPLAINED

Foreign lawyers who wish to instruct barristers directly can do so if the work qualifies as "international work" as defined in the International Practice Rules of the Code of Conduct, namely: (a) where the work relates to matters or proceedings essentially arising, taking place or contemplated outside England and Wales and is to be substantially performed outside England and Wales, or (b) where the lay client carries on business or usually resides outside England and Wales provided that:(i) the instructions emanate from outside England and Wales; and(ii) the work does not involve the barrister in providing advocacy services [in England & Wales].

If either the conditions of (a) or (b) are fulfilled the barristers may receive instructions directly from a foreign lawyer and undertake work which otherwise (in relation to domestic work) has to be left to solicitors.

A detailed explanation of the International Practice Rules can be found at www.barcouncil.org.uk/international and further information can be obtained by contacting International Relations Manager, Christian Wisskirchen at cwisskirchen@barcouncil.org.uk

USING THE ENGLISH BAR IN INTERNATIONAL DISPUTES

English barristers are ideal partners for foreign law firms in search of trial or arbitration-winning advocates. But a question often asked by lawyers from other jurisdictions is how they can identify the right barrister for their case, given the self-employed nature of the profession. Well, here is how:

Like most things in life the best and most effective way of selecting any counsel is past experience. However, if you have no previous experience, there is a lot of readily available information to help you educate yourself on the available options. Barristers operate from sets of chambers which tend to have one or two overall specialisms. The right set and the right barrister can be identified in summary as follows.

Specialist Bar Associations ("SBA"s): These exist for just about every area of law and represent barristers specialising in the particular area. Each SBA has its own website which identifies their members, namely the specialist Chambers and barristers. Details of the various SBAs, their web sites and their contact details, can found at www.barcouncil.org.uk/about/specialistbarassociations/.

The Bar Council of England and Wales, www.barcouncil.org.uk: This organisation represents all barristers practising in England and Wales. The following web page contains a link to the official Bar Directory (http://www.barcouncil.org.uk/about/find-a-barrister/). This allows an Advanced Search for individual barristers and also for Chambers by keywords or areas of specialism. This directory also lists out all of the SBAs.

Commercial directories: Various commercial directories exist which contain appraisals of individuals as lead-

YOU SAY TOMATO....

Tim Lord QC, Brick Court Chambers, London

Despite some transatlantic differences in pronunciation, we understand each other well. The links between Barristers' Chambers in London and major American law firms have never been stronger. Along with a common language, we share a common purpose in providing the best legal advice for clients along with excellent service and value. Now that US law firms can gain direct access to members of the English Bar, we can together deliver litigation excellence in London and worldwide.

I have had the pleasure of being instructed in very large pieces of litigation where the primary contact has been through an American firm, and I have seen how well it can work. Chambers offer a turnkey approach on occasions when lawyers from multiple jurisdictions need to be retained. Our independence and links with many other jurisdictions make us an excellent resource for American clients and corporations and their US legal team looking for legal solutions across the globe.

Leading barristers Chambers have forged links with many of the major international practices and instructions from American law firms have become much more commonplace. As lawyers, we speak the same language.

ers in their respective fields. Examples are: Chambers and Partners, Legal 500 and LexisNexis. Some publish paper directories but most also have website details. For example Chambers and Partners are at www.chambersandpartners.com. You will need to select the United Kingdom guide and thereafter the section on Barristers. This will enable you to search by barristers, Chambers and areas of work. Legal500 is to be found at www.legal500.com. Again you will need to select the United Kingdom and thereafter the section on Barristers. LexisNexis' directory is found at www.lawyerlocator.co.uk . You need to enter the Legal Professional Area. This will allow you to carry out a search for barristers by their names, by their areas of practice and by their Chambers.

Chambers' websites: Most chambers have websites which provide detailed information about the individual barristers practising from that set of Chambers, examples of past cases and areas of work. Increasingly the website will also contain CVs of the individual barristers. The website addresses for barristers' Chambers are listed under the Chambers' entries in the Bar Directory or in the SBA websites or the various directories.

Legal Search Engines: A useful approach is to run a Lexis search to identify relevant English law or European law cases on a particular point. The reports always name the counsel involved, and specialists in a particular area can be identified relatively easily.

Having identified a likely candidate, the next step is to telephone or email the barrister or his or her clerk. The details will be readily available from the Chambers' website or any of the above. The clerks at the chambers listed will be able to provide a detailed curriculum vitae of anyone in the set and will answer any questions you may have about his experience. Barristers will usually be available outside court time to meet and/or discuss any prospective engagement.

As an overseas lawyer, in-house counsel or lay client you can instruct a barrister directly or via a firm of English solicitors. The starting point will be to speak to the barrister's clerk. He will answer any questions you have, provide further details of experience and availability, explain the terms on which the proposed barrister will advise or act, and proposals for payment, for example the applicable hourly rates for the case or a lump-sum price (the fee system in England & Wales is very liberally regulated, one of the few prohibitions being contingency fee arrangements). The rates will depend upon seniority and the standing of the barrister, and the nature of the work required. This should be discussed in detail, although it may be best to pay for an introductory conference to discuss with the barrister the outline of the case, what needs to be done and by whom.

Generally it is best to involve a barrister at the earliest possible stage of a dispute, in order to have his or her tactical input as the dispute crystallises, and in order to obtain early identification of the likely legal issues and the evidence which it will be necessary to collect.

Generally it is best to involve a barrister at the earliest possible stage of a dispute, in order to have his or her tactical input as the dispute crystallises, and in order to obtain early identification of the likely legal issues and the evidence which it will be necessary to collect. It will often be the case that much of the evidence gathering for a case, especially for arbitration, can be done by an instructing overseas lawyer. However, if the barrister considers that some of the necessary preparatory work would best be undertaken by a solicitor, he will be able to recommend from personal experience of the market a suitable person or team within a specialist litigation firm. Alternatively if you appoint a barrister through a firm of solicitors, they will generally deal with the terms of engagement although there is nothing to stop you making contact with the barrister's clerk. ■

ARBITRATION IN THE MIDDLE EAST

Dr Mark Hoyle,
Tanfield Chambers, London

The Arabian Gulf has always held a fascination for travellers and entrepreneurs. Acting as a trading centre of unrivalled substance for many centuries between the Indian sub-continent, East Africa and the Levant and Mediterranean, its successful rulers have been outward looking. By the 1960s and 1970s trade had given way to oil and gas exploration and exploitation as the mainstay of the economies of the many states in the area. With increased oil revenues, and an eye to the future, diversification on a grand scale has taken place. Alongside oil and gas, huge infrastructure projects have been designed and built, more are on the way, and flourishing financial markets have been established. Significantly, to furnish staff and labour for the booming economies, expatriate immigration (from other Arab countries, the Far East, the Indian sub-continent, and Europe) has led to many of the smaller states having a minority of their own citizens as residents. Tourism is also now a major economic driver in the UAE and Oman, and other states are developing this leisure industry.

Inward financial investment is at an all time high, and the financial markets (especially in Bahrain) are at the forefront of Islamic banking.

Inward financial investment is at an all time high, and the financial markets (especially in Bahrain) are at the forefront of Islamic banking. In parallel with the increase in interest in the region, many of its rulers have started projects to restructure and reformat their laws. Mostly based recently on the laws and practices of Egypt (but with Bahrain, Dubai, and Oman having had in the past relevant Common Law rules and regulations), there is a mood for change in many states to bring the laws, especially those that touch upon commerce, trade and finance, to a point where they provide a sound framework for business and dispute resolution. These plans are well advanced, and encompass both substantive and procedural laws. The long experience of the English Common Law has been widely praised, and the new models have taken freely from the best of English law and practice; more changes are planned.

Below, David Simpson provides a snapshot of the present position in Qatar, a state with close links with Bahrain, and which is now a major player on the international market with its domestic construction plans, its heritage funding, and its purchases and investments overseas through sovereign funds. Richard Harding highlights construction in the UAE, and the new Dubai International Financial Centre, and Chantal-Aimee Doerries QC shows the practical way in which the English Bar has participated in dispute resolution in the area.

There are many opportunities for lawyers in the region, especially Barristers with experience of overseas work, multinational cases, and international dispute resolution. In partnership with local and locally based firms, there are many opportunities for those prepared to invest time and energy in the area. The Gulf has a long history, and is very much part of the wider Arab and Moslem world. An understanding and appreciation of its culture and traditions is essential.

THE BAR AND TECHNOLOGY AND CONSTRUCTION DISPUTES IN THE GULF STATES

Chantal Aimeé-Doerries QC,
Vice-Chairman Technology and Construction Bar Association,
Atkin Chambers

The boom in construction, infrastructure and power projects in the Gulf States has inevitably led to a large number of disputes between the various parties involved in such projects be they governments, employers, contractors or professionals. The resolution of such disputes has frequently involved, and continues to involve, barristers from England and Wales acting as advocates, arbitrators and mediators. They are appointed by a range of parties, UK and foreign lawyers, professionals and clients direct. Barristers are well suited as the projects, and any subsequent commercial arbitrations in the Gulf are generally conducted in English. Further, as many of the arbitrators appointed in such arbitrations are English, whether based in the Gulf region or the UK, clients are frequently interested in advocates from a similar background. The below cases are typical examples of instances where barristers have been involved.

Case 1
A Gulf State engaged regional contractors to construct a highway through mountainous and desert regions. Substantial disputes in excess of £20 million arose between the parties as to the contractor's entitlement to payment for the works and variations and for delay and disruption. The parties agreed to arbitrate. The seat was in the particular Gulf State with the applicable law being the law of the said State. Three English arbitrators were appointed one of whom was a retired judge and former Queen's Counsel. Both parties appointed a team of barristers to represent them during the arbitration.

Case 2
An American engineering construction company was engaged in relation to the construction of a combined power and desalination plant in Abu Dhabi giving rise to disputes of some US $80 million which the parties agreed to mediate. The engineering company engaged an English barrister to advise in relation to the mediation.

Case 3
A high value ICC arbitration arose between an international joint venture and a Gulf State company concerning the design and construction of a petro-chemical plant in Jordan. Both parties engaged a team of barristers to represent them. All three arbitrators were Queen's Counsel from London. Similarly, the mediator was a London Queen's Counsel.

Case 4
An international joint venture agreed to procure, engineer, construct and refurbish a Gulf State power generation and seawater desalination plant. It subcontracted certain of the works to a European engineering contractor. The contractor went into liquidation and the contract was terminated. Claims in excess of 100 million were referred to an ICC arbitration. Two of the three arbitrators were specialist Queen's Counsel from London. Both parties engaged a team of barristers to advise and carry out the written and oral advocacy.

> The advocacy skills of barristers from England and Wales are well respected by clients in international arbitration, including in the Gulf region.

The advocacy skills of barristers from England and Wales are well respected by clients in international arbitration, including in the Gulf region. This combined with the familiarity with the relevant standard forms which underpin many of the underlying projects in addition to the reputation of the Bar as independent practitioners, are the reasons the specialist practitioners at the Bar of England and Wales are attractive to international clients.

DUBAI LEADS THE WAY

Richard Harding
Keating Chambers, London

Just a few years ago, the United Arab Emirates was a little-know backwater in the Arabian Gulf. But today there will be few who have not heard about the region's economic boom, and the emirate of Dubai. A combination of record oil prices and property law reform, have lead to unprecedented investment in Dubai's construction sector. It has been reported that there are plans for a further US$300 billion to be spent over the next decade. Rarely a week goes by without another mega-project being announced: off-shore developments in the shape of palm trees, the world's tallest building, or a waterfront development twice the size of Hong Kong.

Dubai has attracted not only the bulk of the region's investment, but also the majority of the expatriate professionals. This has resulted in Dubai becoming the centre for the region's legal business, and hence the leading location for arbitration expertise, particularly in relation to the construction sector.

Since most building contracts involve a local, UAE party, the applicable law is usually that of the UAE, and the seat of arbitration is also generally the UAE. The use of institutional arbitration is well established in Dubai. This used to be the Dubai Chamber of Commerce and Industry, but more recently a specialist arbitration centre has been opened, called the Dubai International Arbitration Centre (DIAC). Its arbitration rules have been modernized, and will be recognizable to those familiar with other regional institutions.

One of Dubai's more radical legal innovations is a free-zone for international financial institutions, known as the Dubai International Financial Centre (DIFC), which has its own commercial jurisdiction, separate from the rest of the UAE. The judges of the DIFC court have been recruited from around the world. They conduct proceedings in English, and apply laws which have

been specially written for the DIFC. Judgments of this court are then enforceable in the UAE courts without further review.

The DIFC has recently announced a joint venture with the London Court of International Arbitration (LCIA), pursuant to which parties can chose the LCIA, with its long experience of appointing arbitrators and administering arbitration proceedings, as the arbitral institution. New laws are also expected shortly to allow parties to choose the DIFC as the seat of arbitration, and also to reform the current federal arbitration laws in line with the UNCITRAL model law.

The largest and wealthiest of the emirates which make up the UAE, is Abu Dhabi. But it has lagged behind Dubai in terms of legal developments. However, the emirate currently has ambitious plans to overhaul both its laws and legal institutions, and to keep the UAE at the forefront of commercial dispute resolution in the Gulf.

AND QATAR FOLLOWS...

David Simpson
3 Verulam Buildings, London

In the tiny Gulf state of Qatar, lightning speed economic expansion fuelled by colossal reserves of liquid natural gas, has called into question the ability of the local court system to meet the needs of the commercial sector. Local lawyers are increasingly seeing a role for arbitration in the resolution of commercial disputes.

The Emir of Qatar has been supportive: permitting foreign investors to settle disputes with third parties through local or international arbitration (Law 13 of 2000) and decreeing Qatar's accession to the New York Convention on Foreign Arbitral Awards in 2003. More recently the Qatar Chamber of Commerce and Industry launched the Qatar International Centre for Conciliation and Arbitration. The QCCI Declaration establishing the Centre describes it as a "problem-solving mechanism to remedy conflicts among local institutes and between the local and foreign institutes". The QIAC has now signed thirteen memoranda of understanding with other international arbitration centres and hosted, in January 2008, a conference in Doha on International Arbitration. Problems remain though, with some local lawyers highlighting difficulties with the procedural laws governing arbitration in the state. State law, for example, does not recognise the independence of arbitration clauses in otherwise void agreements.

The government of Qatar now proposes that local banks, insurance companies, brokerages and asset management companies will come within the QFC's perimeter.

All this may be about to change, however, with the proposed roll-out into the state of the 2005-estabished Qatar Financial Centre. The QFC was originally conceived as a state-within-a-state where international financial services companies could operate in an environment of English law, underpinned by a commercial court headed by the retired Lord Chief Justice of England and Wales, Lord Woolf. The government of Qatar now proposes that local banks, insurance companies, brokerages and asset management companies will come within the QFC's perimeter. This will mark a fundamental change in the legal landscape of the country with almost all financial activity in the country becoming subject to English law and the jurisdiction of a court modelled on London's Commercial Court. At the same time one can expect significant interest in the QFC's own arbitration system, whose legal framework already exists but which has not yet been put into action. The QFC also has powers to establish an ombudsman-style arbitral system to handle disputes arising from financial services activities at the retail level.

Time will tell how the QCCI's and the QFC's arbitral offerings compare. One way or another, however, alternative dispute resolution is likely to have a big role to play in this small but economically powerful country. ■

THE ENGLISH BAR AS A GATEWAY TO EUROPE

COMPETITION LAW IN EUROPE

Nicholas Green QC
Brick Court Chambers, London

A leading American text book[1] states as the first sentence of Chapter 1: "The United States pioneered anti-trust law in the late 19th Century." The authors then go to cite the enactment by Congress in 1890 of the Sherman Act as the progenitor of this pioneering spirit. In actual fact whilst Americans, and in particular American lawyers, became enthusiastic enforcers of anti-trust throughout much of the 20th Century, the origins of anti-trust law lie in sophisticated legislation emanating from Europe in Roman and pre-Roman times.

Legislation which is recognisable even to modern eyes prohibiting cartels and monopolistic practices was introduced by Julius Caesar to control the supply of corn in Rome in the the period shortly before he left to conquer Gaul in circa 59BC. Complex price regulation measures were introduced by successive Emperors in the 3rd and 4th Centuries AD. Throughout Europe (in particular following the dark ages) legislation was introduced by a plethora of European princes and monarchs to curb monopolistic practices and in particular conspiracies to raise prices.

The present regime is encapsulated in Articles 81 and 82 EC. These prohibit, respectively, agreements and concerted practices which restrict, distort or prevent competition, and, the abuse of a dominant position. In the last two decades there has been an interesting reversal of the enthusiasm on the part of trans-Atlantic regulators for intervention. Since the Presidency of Ronald Regan US government agencies have increasingly adopted a lighter touch in determining in which cases they will intervene. On the contrary, in the EC the European Commission and the National Competition Authorities have a positive duty to enforce Articles 81 and 82 throughout Europe and the European Court has proven itself dirigiste in its approach to intervention.

The present Commissioner for Competition has, in a number of public statements, declared that the European Commission is today the world's leading enforcement agency. As is well known, in many parts of the world legislation modelled to a greater or lesser extent upon Articles 81 and 82 EC has been introduced or is in the course of being introduced. This is particularly the case in Asia. China has in 2008 adopted competition law based in large measure upon the European

model. Models of antitrust enforcement which take as their starting point EC law can be found for example in Singapore, South Korea and even in Papua New Guinea. A consequence of this is that internationally the jurisprudence and administrative practices which are applied in Europe are viewed as precedents to guide the way forward for other regulators. It is no coincidence that a significant number of the most prominent cases presently being pursued by the European Commission are against US Corporations whose activities entail them selling and engaging in commercial activity in Europe.

The English Bar has for many years been engaged in advocacy and litigation involving anti-trust law. Once again this is not a new phenomenon. Reported cases illustrate that over the course of very many centuries the English Bar has been arguing about doctrines such as restraint of trade, misuse of monopoly power, creation of disincentives to trade, etc. One of the most famous of these was Darcy v Allin in 1602 where the Court was required to rule upon whether the grant of monopolies were illegal and void upon the basis that they led to the increase of prices, the deterioration of the quality of goods and services, and "the tendency to reduce artificers to idleness and beggary."

In Europe anti-trust litigation is not done with the assistance of a jury. It is performed before and the outcome decided by a judge. Increasingly, Member States in Europe have appointed specialist anti-trust judges to preside over trials and hearings. In the United Kingdom a specialist court known as the Competition Appeals Tribunal presided over by a High Court judge sits hearing anti-trust cases in conjunction with specialist economists and other lay assessors, such as accountants or senior members of the business community. Across Europe anti-trust litigation is on the increase. Practitioners are rapidly learning lessons of US practice in relation to the bringing of civil claims for damages. There is no such thing as a treble damages case in Europe, but interest is payable upon sums awarded by way of compensation and this, in practical terms, often serves materially to increase the size of any award. In Europe it is not just the EC Commission which is responsible for enforcing competition law. Every member state must, under the terms of Regulation 1/2003, appoint regulatory authorities to enforce the competition laws within their own the territories. National courts are under a duty to provide full and effective remedies for infringement of competition law and it is recognised that this is a serious duty which judges must pay regard to. The consequence of this is that there is a steadily increasing amount of anti-trust litigation. The Bar is actively engaged in this and it frequently works very closely with economists. Judges are becoming more familiar with economic literature and techniques.

Competition law occurs not just, however, in the courts. It also takes place before the regulatory authorities and in international arbitrations. Indeed, an increasing phenomenon is international arbitrations based upon competition law. These may take place anywhere in the world and may involve companies who have little connection with the EC. However, if the conduct of the companies in question touches upon the European Community, then it is often argued by one of the parties that EC anti-trust law is engaged.

In short European anti-trust law is rapidly expanding. It is a subject that is being increasingly litigated in a variety of different fora. The English Bar with literally centuries of experience of arguing such cases is very well placed to represent clients in such cases.

1 Fox, Sullivan and Perritz, Case and Materials on US Anti-trust and Global Context (2nd Edition), page 1.

WORKING WITH THE ENGLISH BAR ON EC LAW

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The remit of EC law is of course much wider than competition law and, despite a perception of lack of political enthusiasm on the part of UK Governments for participation in Europe, the English Bar has built up formidable expertise in EC law in London. Indeed the presence of English barristers arguing cases in the European Court of Justice and subsequently becoming judges in the European Court has been widely acknowledged as contributing to a stronger emphasis in the Court on caselaw and more extensive judicial reasoning than would be common in civil law systems. Procedures have some similarities with those applicable in the District Courts of Appeal in the United States.

As regards substantive EC law, the foundation of the Community is in the free movement of goods and the freedom to establish companies in order to carry on business without being subject to restrictions imposed by national law. Freedom of establishment is of particular interest for US corporations expanding their business around Europe. Once they have their first EU establishment in the form of a company formed in accordance with the law of a Member State and with a registered office, central administration or principal place of business within the Community, Article 48 EC requires them to be treated in the same way as natural persons who are nationals of Member States. The concept of what is a "restriction" is far-reaching.

For example German courts were not allowed to refuse to recognise the capacity of a company formed under the law of the Netherlands to be a party to legal proceedings where the company had moved its actual centre of administration to Germany but without dissolving the Dutch company and reincorporating under German law. Possible justifications based on the protection of creditors and minority shareholders were acknowledged by the Court as possible grounds to justify restrictions but could not result in the outright negation of the freedom of establishment. A Spanish bank was held entitled to export its business model of paying interest on current accounts to France, a practice which the French authorities had prohibited on grounds of the relevant French legislation. The European Court relied in particular on the competitive edge which the payment of interest would give the Spanish entrant to the French market, thereby potentially counteracting the formidable entry barrier posed by the lack of a developed branch network. The Court declined to accept the alleged justification of protection of consumers, pointing out that a less restrictive rule was capable of achieving similar ends.

These examples are only the tip of the iceberg of how EC rules are capable of assisting business in its day to day to dealings throughout Europe. The dilemma is how to manage the differing regulatory environments with which a corporation active in several EU Member States is confronted. In most cases, the relevant US corporation will have local lawyers who have helped to

form the relevant subsidiary or advised on how to obtain the relevant operating licence etc. Such transactional lawyers are well able to identify the regulatory hurdles and hindrances. There can be a regular review of which rules have a truly dampening effect on the ability of the corporation to compete. To this end an excellent model is to engage an English barrister specialist in EC law to work in a team with the US attorney or general counsel and local legal expertise. Potential issues to challenge can be identified and the strongest possible pre-litigation strategy proposed. Submissions will be presented before the local courts but issues of interpretation of EC law can also be referred to the European Court. Specialist legal expertise can thereby become a tool in the corporate armoury.

FOCUS ON INTELLECTUAL PROPERTY LAW IN EUROPE

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The European Patent Office opened on June 1st, 1978 – just over 30 years ago. It has proved enormously popular with industry. A single application to the EPO can provide patent protection in up to 38 different European countries, including all the Member States of the EC and many non-members too (e.g. Switzerland, Norway and Turkey). Although situated in Munich, Germany, the EPO operates in three languages: English, German and French. But English is the language of choice. In 2007, US applicants filed over 35,000 applications in the EPO – another record and over 40% more than any other country in the World.

Oral hearings are common in the EPO and members of the English Bar experienced in patent law are frequently instructed to appear and argue cases at such hearings using their specialist advocacy skills. An oral hearing may take place at the examination stage. Or it may occur as a result of an opposition by a third party. Oppositions may be filed at any time in the 9-month period after grant. There are also oral hearings before the EPO's Board of Appeal. Patent Attorneys and Patent Agents can instruct the Bar direct for any of these hearings.

In trade marks, since 1996 it has been possible to obtain a European Community registered trade mark by application to the Office for Harmonization in the Internal Market ("OHIM") in Alicante, Spain. Like the European Patent, the Community Trade Mark has proved extremely popular. A CTM is valid in all 27 Member States of the EU. As well as processing applications for registration, OHIM also administers oppositions to such applications and applications for revocation of trade marks after their registration. An appeal lies from any decision to OHIM's Boards of Appeal. Oral hearings may be held by OHIM if it considers it expedient. Members of the English Bar specialising in trade mark law are instructed to appear at such hearings and to use their special experience to advance their clients' case. Being part of the EU legal order, there is also a further appeal from OHIM's Boards of Appeal to the Court of First Instance ("CFI") and the European Court of Justice ("ECJ"). Members of the English Bar have considerable experience in appearing before the CFI and ECJ and that experience can be deployed to advantage in any appeal from OHIM.

In designs, there exists both a registered and an unregistered Community Design. OHIM also administers the Registered Community Design and since 2003 more than 300,000 designs have been registered. There is no opposition procedure in respect of RCDs but otherwise the opportunities for oral hearings at first instance and on appeal are similar to those for trade marks. Members of the English Bar may appear at all of such hearings.

Looking to the future, the European Commission is presently working to create a Community patent and a European Union Patents Court. It is proposed that the Court will have an international jurisdiction to enforce European and Community patents on a pan-European basis. These goals have long been the wish of industry but their achievement has proved elusive. The draft Agreement affords a right of audience before the new Court to members of the English Bar and, should the current proposals come to fruition, it can be expected that barristers will play a full role in the proceedings of the new Court and in ensuring that the highest standards of professional representation and advocacy are established and maintained. ■

THE CREDIT CRUNCH

THE CREDIT CRUNCH BITES

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Before the run on the Northern Rock bank (formerly a building society) the UK had no special legislation to deal with failing banks. In that it was alone among the G7 countries. The UK Government rushed through the Banking (Special Provisions) Act 2008, which enabled the Tripartite Authorities (The Treasury, the Bank of England and the Financial Services Authority) to acquire shares in, or securities issued by, a financial institution or to compel the transfer of those shares or securities to another body corporate. That Act also contains the power to compel the transfer of all or part of the property, rights and liabilities of a financial institution to another body corporate. The power is cast very broadly, permitting contracts to be avoided and redrafted. Importantly, it deprives parties of their contractual termination rights.

The 2008 Act is valid for only 12 months. The Treasury has been involved in a process of consultation with interested parties on a permanent regime, which has become known as a "special resolutions regime" ("SRR"). The broad idea is to make permanent the matters introduced in the 2008 Act, but real issues arise as to scope of the proposed SRR. Because the UK has no history of such regimes, there is much caution as to how far it should go, in particular where the rights of contracting parties are to be interfered with, without the familiar insolvency law guaranteeing precedence of secured creditors and equal treatment of unsecured creditors.

The Treasury is much influenced by the experience in the USA. Not, one hopes, the experience of the Sarbanes-Oxley Act, passed in the wake of the Enron crisis, which relates to corporate governance and is thought by some to have been a rushed reaction to those problems. Rather, the US experience of dealing with failed banks. Historically, the US has had much more experience of such problems, largely because of the very different way in which banks have grown up and operated there, as compared to the UK. There are many more small banks, and much more experience of failure.

The UK perception is that the legislation in the US, permitting intervention in circumstances similar to those contained in the 2008 Act and envisaged in the SRR consultation, has been on the whole successful. It does not seem that major problems have occurred which are not worthwhile in the overall interests of protecting depositors of failed banks, even at the risk of prejudice to other creditors. Understandably, therefore, the Treasury asks why the UK should not follow the US lead. This has already been done through the 2008 Act, albeit that Act will expire after 12 months. Whilst the experience of the two countries is different, there is force in this approach.

The first key point is whether the SRR should permit whole business transfers only, or also the transfer of a part of the business of a failed bank. There is reluctance to allow the latter, which conflicts starkly with standard insolvency solutions, and permits a cherry-picking of the best parts of a business, leaving non-depositor creditors with only the rump of the failed institution. The US position is not limited to whole business transfers, but there are safeguards which are of importance. There is a "whole relationship" safeguard, such that there cannot be cherry-picking of transactions from the same counterparty. Thus a financial market master agreement must be transferred as a whole or not at all, so as to avoid counterparties having to deal with two different banks.

The second point is the extent to which contracting parties' termination rights should be interfered with. It is understandable that parties should not be permitted to terminate by virtue of the passing of the special res-

olution itself, since that would risk defeating the whole purpose of the special resolution regime. But this will usually occur before the institution becomes formally insolvent. It is important that contracting parties should not be deprived of the power to terminate in pursuance of a contractual right to terminate for default upon insolvency. It is important that the Tripartite Authorities should make it clear that the power to vary contractual terms under an SRR does not extend to interference with rights of this nature. It is also important that the power to vary contractual provisions should be used for clearly defined purposes only, limited to the minimum interference necessary, and not to provide for a wholly different contractual performance form that envisaged by the contract.

LITIGATION ISSUES ARISING FROM THE CREDIT CRUNCH

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Recent years have seen a prodigious growth in securitisation techniques. The development of structured investment products has allowed risk to be spread across national boundaries and financial markets. In the good times, these products boosted liquidity and profit, but they are now doing the opposite. Moreover, they separated the processes of underwriting, distribution and investment, which made the need for transparency about the nature and extent of the risks involved more acute. Unfortunately, the number, length, and complexity of the transaction documents for such products tended to obscure, rather than clarify, those risks. As it turns out, many of the investors who piled money into structured investments did not have a full appreciation of what they were doing.

Because of the number and value of structured investment products across the world, and the high levels of leverage often used, the US housing market slump had an unprecedented effect on global financial markets. Prices have crashed, it has become almost impossible to value some asset backed securities and many structured investment vehicles (SIVs) are now in a state of distress. Investors have found themselves holding expensive investments with an uncertain value which they cannot realise. This is spawning litigation in the two great global centres of modern commercial law, the United States and England. The United States is ahead of England in the number and range of claims that have been brought, but England is beginning to catch up.

In England, we are seeing many claims for the determination of the sort of questions that arise when portfolios of assets cease to perform. In structured investments, the transaction documents have not always well drafted, particularly in relation to the consequences of enforcement and/or insolvency events. Disputes are arising as to the rights of particular noteholders to control assets, give directions and receive payments. There has been a spate of cases in which security trustees and receivers have sought the directions of the court as to what they should do.

The English courts have long experience of complex contractual and trust cases of this sort. England is fortunate in having a sophisticated system of financial, corporate and insolvency law and well developed procedures to deal with such cases, on a cross border basis where appropriate. The English courts also have close links with the offshore jurisdictions in which most funds and SIVs tend to be based (Cayman, Jersey etc,). The law applied by these jurisdictions is invariably based on English law, the lawyers working there are often English lawyers and they are used to working with members of the English Bar. This makes it much easier to handle and resolve transnational issues involving different instruments governed by different systems of law.

In England, the Chancery Division, the Companies Court and the Commercial Court pride themselves on their ability to handle complex cases of this sort flexibly and with the minimum of delay. In *Re Whistlejacket Capital Limited,* for example, the receivers of a SIV applied for directions as to the priority of payments between various noteholders following an insolvency acceleration event. That event occurred on 15 February 2008, meaning that payments were due to be made to the noteholders 30 days thereafter. Receivers had been appointed under the security trust deed and these receivers applied to Etherton J (a judge of the Chancery

Division) on 28 February. As the matter was urgent, he agreed to hear the application on 3 and 4 March and he handed down judgment on 5 March. He also allowed two representative noteholders to argue for rival constructions of the security trust deed on conditions of anonymity. Anonymity is becoming a common feature of such applications.

These cases are just the beginning. A host of further claims are in the pipeline, including advisory claims, misselling/misrepresentation claims, claims alleging improper conflicts of interest, valuation/pricing claims, credit swap/financial guarantee claims and statutory/regulatory claims. This is likely to dwarf the surge in litigation that was seen following the Russian bond crisis of 1998.

In England, particular care needs to be taken with advisory/misselling claims. The facts need to be rigorously analysed to establish whether there is a claim at all and, if there is, it needs to be carefully formulated. Under English law, there is no general duty on a bank to advise a sophisticated investor, nor any general duty of good faith or fair dealing. In addition, the English courts are slow to find that banks owe fiduciary duties. What the courts look for is an assumption of responsibility to advise or, failing that, an express or implied misrepresentation. Moreover, they are reluctant to make findings of fraud, particularly against financial institutions.

It is an oversimplification to say that England is a favourable jurisdiction for banks and intermediaries who promote and/or market investment products and an unfavourable jurisdiction for investors. What can be said is that taking early advice from a suitably experienced barrister will pay dividends in the long run.

THE CREDIT CRUNCH AND THE IMPACT ON MARKET OFFENCES IN THE UK

Amanda Pinto QC
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The credit crunch is feared to be fuelling a rise in general crime, surveys amongst the public in the UK have revealed. According to BDO Stoy Hayward accountants, in their FraudWatch report released at the end of June 2008, fraud cost UK businesses more than £705m in the previous six months, a 74% increase over the same period last year, and the highest since their records began[1]. What are the UK government agencies doing to cope with the situation?

Whereas in the USA, Cioffi and Tannin, the hedge fund managers associated with Bear Stearns, were indicted in June 2008 with offences relating to the collapse of the investment bank, in the UK no arrests have yet been made of anyone involved in the devastating slide in HBOS[2] share value, following the impact of short selling on the price. Shares have lost over 75% of their value over a 9 month period, the inference being that the price was driven down by rumours spread by those involved in short selling the stock. Indeed, very recently, after HBOS sought rescue funding and set about a very substantial rights issue, it seems the FSA investigation is

still seeking to identify sufficient evidence of market abuse offences, following a further decline below the subscription price. In the last few weeks – arguably after the horse had bolted – the FSA introduced rules requiring investors who short sell more than 0.25% of a company's shares during a rights issues, to issue an announcement to the Stock Exchange.

Market offences

The Financial Services and Markets Act 2000 is intended to protect the integrity of the financial markets and to prevent financial crime. It creates investigative powers for the FSA and the Secretary of State, and regulatory, enforcement and criminal offence regimes. Market rigging is a criminal offence under the Act[3]. It covers a person who makes (deliberately or recklessly) a false statement, promise or forecast which he knows to be misleading, false or materially deceptive; or who dishonestly conceals material facts in order to induce another to act in relation to a relevant agreement or investment. 'Misleading conduct' targets conduct done to induce another to act in a particular way in relation to investments, and, significantly, does not require the prosecution to prove an element of dishonesty. Another offence arising from those involved in the manipulation of the share price is insider dealing: dealing in price-affected securities and using information gained as an insider, in the acquisition, or disposal of them.

The difficulty in the current circumstances is proving that a person has had such an influence on the market. Whereas the evidence in the Bear Stearns case apparently supports the suggestion that the hedge fund managers were reassuring clients of the strength of the investment they were pushing, whilst not only was the market obviously going the other way, but they themselves were taped expressing concern at the stock and divesting themselves of their own positions, in the HBOS debacle it is not clear that such evidence will be available.

Regulatory v criminal proceedings

Most FSA investigations result not in criminal but in regulatory proceedings. Market manipulation, for example, is a regulatory offence which cannot be brought before a criminal court. The FSA must have regard to the seriousness of the offence, when deciding whether a criminal prosecution is in the public interest or whether civil intervention or enforcement would be more appropriate. The latter may be cheaper and arguably speedier, but are such proceedings having the desired effect on public confidence or providing the deterrence the market requires[4]? Consider the recent regulatory proceedings which resulted in fines totaling £900,000 of the Thinc Group, a large IFA group. In the relevant period the firm acted as broker in the sale of sub prime mortgage contracts; 775 of these, which were the subject matter of the fine, represented total consumer borrowings of £76.9 million; these sales generated revenue for the firm of approximately £0.7 million. In addition, the fines related to 18,015 regulated mortgage contracts, representing total consumer borrowings of £2,706 million, which generated revenue for the group of almost £36 million. By agreeing to settle at an early stage the firm qualified for a 30% discount- without the discount the fine would have been £1,285,000.The incentive to risk falling foul of the regulations is obvious, and in monetary terms, substantial; regulatory infringements are serious, but they do not have the status or the obloquy of criminal trials and convictions. They attract far less publicity and the stigma attached to what may be significant failings, involving dishonesty and the taking of improper advantage in the market, is inevitably reduced.

Many of the regulatory 'triumphs' of the FSA are, on analysis, overwhelming cases of dishonesty, which, in any other sphere would have resulted in criminal proceedings and almost inevitable prison sentences. The apparent reluctance of the government to prosecute those in the business sector continues despite the impact of the credit crunch on public confidence. Or perhaps it is an accolade to those specialists at the Bar who successfully limit the damage to, and protect the reputation of, their clients, when facing an allegation of white collar crime. ■

NOTES

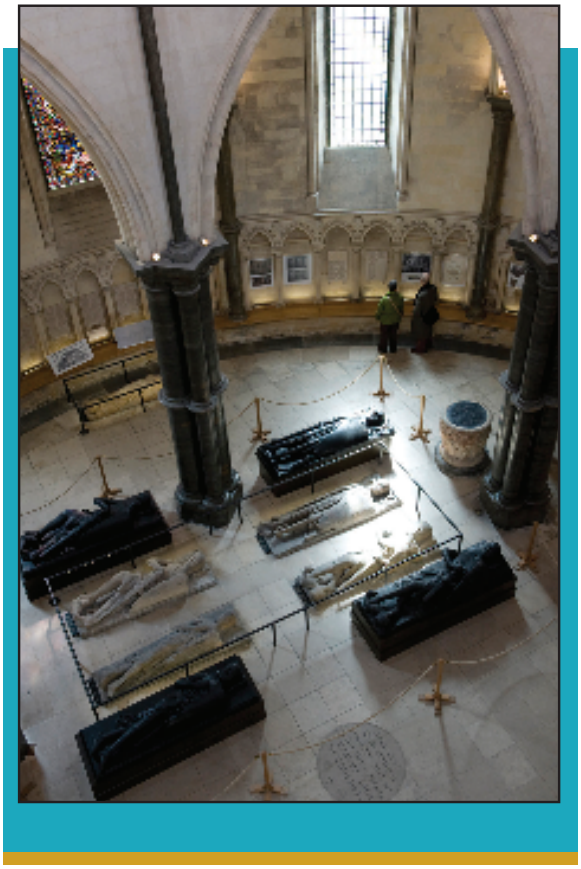
1 FraudTrack is prepared by BDO Stoy Hayward and is based on all reported fraud cases of over £50,000.
2 The largest mortgage lender in the UK.
3 S397 FSMA 2000.
4 The FSA has four objectives under the Financial Services and Markets Act 2000: maintaining market confidence; promoting public understanding of the financial system; securing the appropriate degree of protection for consumers; and fighting financial crime.

THE TEMPLE CHURCH 1185 – 2008: HISTORY, ARCHITECTURE AND EFFIGIES

Robin Griffith-Jones, FSA, Master of the Temple, www.templechurch.com

BESIDES lawyers, Legal London has a lot more to offer. The Temple Church is an outstanding example, being one of the most historic and lovely of London's churches.

'To the tomb of Christ!' So Pope Urban II, preaching the First Crusade in 1095, had called upon the people of Europe. The Order of 'the poor fellow-soldiers of Jesus Christ' was founded in 1118-9; its knights took vows of poverty, chastity and obedience, and dedicated themselves to the protection of pilgrims. The Latin King of Jerusalem gave them space for accommodation near his own palace on the Temple Mount, site of the long-destroyed Jewish Temple; so the Order was soon known as the Knights Templar.



The most sacred place in the most sacred city of Jerusalem was the Church of the Holy Sepulchre. It was the goal of every pilgrim. Christ's (supposed) cave-tomb had been rediscovered in 325; the Emperor Constantine built over the cave a shrine, a courtyard and basilica to the east, and finally a colossal round church encircling the shrine itself. In their round churches the Templars recreated the sanctity of this holy place.

In London, the Templars moved to the 'New Temple' by the River Thames in the 1160s. The Round Church and its small Chancel were consecrated by Heraclius, Patriarch of Jerusalem on 10 February 1185. In the coming years William Marshal, 1st Earl of Pembroke and his sons William and Gilbert were all buried near the high altar. In 1235 Henry III declared that he would be buried in the Temple Church; the Templars demolished their Chancel and built in its place – and presumably in preparation for the King's body – the hall-church which still stands today. The new Chancel was consecrated in 1240 in the presence of the King himself.

In 1608 King James I granted the Temple to the two Inns of Court, Inner and Middle Temple. The Inns must, in return, maintain the Church and its clergyman, the Reverend and Valiant Master of the Temple. They must provide the Master with a mansion (which they do) and with a stipend of £17 6s 8d or 52 marks per annum (which, with a welcome allowance for four centuries' inflation, they do too). After the Great Fire of 1666 the Inns decided to remodel the Church in the most fashionable classical manner. Christopher Wren had been married in the Church, and was asked for advice. Under his supervision the Church was whitewashed, panelled and wainscoted; box pews and a grand organ were installed.

In the 1840s the whole Church was restored and

decorated in the grandest gothic style. To match the new character of the Church the Inns established a choir of choirmen and choristers which has become one of the most celebrated choirs in England. The Church's Victorian splendour survived for just 100 years. In the night of 10 May 1941 an incendiary landed on the Chancel's roof. The fire sadly caught hold and spread. The heat split the Chancel's columns, but the vault held up; the wooden roof of the Round caved in on the knights' effigies below. . It took fifteen years for the Church to be repaired, to its present – far more spare – appearance.

Perhaps I should admit that the Church is now famous for more than just its history and its music. The Church is the setting for a scene in The Da Vinci Code. Thousands of visitors have been drawn to it by the novel. The first flood of Dan Brown pilgrims, arriving from America before we had even heard of the novel, simply bemused us. 'Have you read the book?' they asked the verger as they came in. The verger has continued to insist, ever since, that these visitors must surely be asking about the Bible.

The Temple Church is among the most historic and lovely of London's churches.

In 2008 the Temple is celebrating the 400th Anniversary of the Letters Patent that granted the whole Temple to the lawyers' societies of Inner and Middle Temple. An exhibition in the Temple Church forms part of the Temple 2008 Festival. For the full programme of events please go to http://www.temple2008.org/ ■

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