

## Lady Hale Speaks to IPSoc.

On 16 January 2019, the President of the UK Supreme Court, Brenda Hale, Baroness Hale of Richmond (known as Lady Hale) came to speak to [IPSoc](#) the society for junior IP lawyers.



They were treated to an hour long Q&A from Lady Hale where she covered everything from Star Wars to diversity. The questions were expertly asked by [Anna Rawlings](#) (amongst other things, Anna arranged for Lady Hale to attend the talk and is one of the current IPSoc education secretaries).

For those interested in finding out more about Lady Hale's career, check out the latest edition of [British Vogue](#) where she is profiled in a two page spread. This isn't even her first appearance in Vogue; last year she was identified as one of the [25 women shaping 2018](#).

### Which IP case sticks out the most?

Lady Hale identified two IP cases which stuck in the mind because of their real world applicability.

The first was a case about gas burners (*Sabaf v MFI* [\[2004\] UKHL 45](#) covered on the IPKat [here](#)) straightforward subject matter means it sticks in the mind - similar to the crisp packet problem she encountered in the Court of Appeal...



Is it a sculpture?

No - regardless of how it's displayed

The second was *Lucasfilm Ltd & Ors v Ainsworth & Anor* [\[2011\] UKSC 39](#) (the "Star Wars case" covered on the IPKat [here](#)) concerned the question of whether a stormtroopers' helmet met the definition of a sculpture under the Copyright, Designs and Patent Act 1988. Lady Hale particularly enjoyed the different ways in which counsel tried to influence the court's view. Jonathan Sumption QC (as he then was) displayed one of the helmets in a glass case at the front of the court (looking like a sculpture) whilst Alastair Wilson QC brought one of the helmets in a sports bag and handed it round the court - at least one of the Lords tried it on. No prizes for guessing which counsel represented Lucasfilm.

### **What's your advice for junior IP practitioners bringing cases in Supreme Court?**

1. Remember that the Supreme Court is only interested in points of law of general public importance.
2. The hardest part of the Supreme Court as far as IP cases are concerned appears to be agreeing the facts! This is an essential part of the Supreme Court process.
3. Don't give the Supreme Court too much to read and think carefully about whether they are sent in hard copy or electronic. Whilst the court is slowly becoming digital (and obviously Lady Hale can handle a computer!) bear in mind that some of the judges might not be quite so technically proficient.

### **Which judge has been most influential to your career?**

[Lord Bingham](#) - he was clear minded (and essentially another legend). Even now when faced with a difficult decision, Lady Hale asks herself WWLBD (i.e. What Would Lord Bingham Do). [Aldous LJ](#) also got a shout out - he was very influential regarding his understanding patent law - "it's not as simple as it appears at first sight".

### **What's the most difficult case you had to decide?**

The hardest cases of Lady Hale's career were when she was a trial judge deciding whether children should be separated from their parent(s). In many circumstances, she had to make a decision because the law required it but it was not necessarily the best thing for the family.

Inevitably there was some discussion about the implications of *Actavis v Eli Lilly* [\[2017\] UKSC 48](#). As Lady Hale noted, "development of the law" is not done lightly, the implications are considered and the decisions are made in context.

There was a related discussion about jurisdiction in *Lucasfilm*. Lady Hale observed that commerce is global and interconnected so of course there are lots of international issues. In her view, this is why the EU law solution was so neat. If a member state's court didn't know the answer, they could refer the question to Luxembourg & apply it to the case.

### **What's the most difficult situation you face as a judge?**

You're convinced that you're right but no one else agrees!



Cats are always  
sitting in judgment

### **How do you respond to accusations of judge made law?**

This was a reference in particular to the [infamous front page](#) of the Daily Mail which identified the three judges who decided that the government could not trigger Article 50 (and start the Brexit clock) without the consent of Parliament (*R (Miller) v Secretary of State for Exiting the European Union* [\[2017\] UKSC 5](#) AKA *Miller*)

Hale noted that *Miller* is not judge made law by any stretch of imagination. Rather it is the application of principles that were established in 17th Century i.e. that government can make and unmake treaties but only Parliament can make and unmake law.

As Hale observed, inevitably, the question of 'judge made law' is something that the Supreme Court must regularly grapple with. She pointed us in the direction of her 3 or 4 learned articles on the subject but noted that obviously there's a difference between changes to the common law and interpreting legislation.

### **Which Supreme Court case has caused the most debate?**

The amount of discussion varies from case to case. The minimum amount is a brief chat regarding the points in dispute before the hearing. There is then a meeting immediately following the hearing which starts with the most junior justice and goes around the table until they finally get to Lady Hale. This is the practice which began with the Privy Council - it might be nerve wracking for the first speaker but it gives everyone the opportunity to put forth their view.

It also means that by the time it is Lady Hale's turn to speak it is fairly clear both what the outcome will be and who will write the lead judgment. However... sometimes once the writing process begins minds can change and a draft lead judgment can sometimes turn into a dissenting judgment.

Throughout the process there will be lots of emails flying back and forth and potentially a meeting or two.

One case with a great deal of debate concerned Syrian & Iraqi refugees who were rescued by the RAF and landed at sovereign air base in Cyprus. The Supreme Court had to decide: (i) did refugee convention apply (yes) and (ii) did this give a right for the refugees to come to UK (no). Whilst the points of law were easy to determine, what this meant in practice was far less clear to the court. They asked for further submissions on this issue but before the case was heard by the Supreme Court the government settled the case. You can read more [here](#).

## How should you handle advocacy in a Supreme Court appeal?

The key is to keep your submissions simple. It is a difficult but important art to find the best means of capturing the Supreme Court's attention, particularly given that by the time of the hearing, the Supreme Court will have had the benefit of detailed written submissions.



Lady Hale:

'Do. Or not Do. There is no Try'

## How do you handle being a cult icon?

It's not every Supreme Court justice who appears on [Masterchef](#), performs a [guest turn as Yoda](#) in a play or gets a two page spread in Vogue. Lady Hale noted that she didn't set out to become a cult icon (sometimes these things do happen) but she hopes that greater public awareness of the judiciary will help to open up the Supreme Court to new audiences.

## What were the biggest changes the legal profession required at the start of Lady Hale's career compared to today?

When Lady Hale's career began in 1969 the main thing that the legal profession needed was more women. There have been huge improvements in the legal profession in recent years and whilst there is still room for improvement, we now have three women on the Supreme Court. This adds an additional element of diversity in terms of perspective and representation of half the population. As she put it diversity creates a stronger and ultimately better outcome. Clearly diversity is more than just an increasing number of women in the legal profession.

The other big requirement in 1969 was more public funding for legal cases. Sadly, while the situation improved dramatically post 1969 we are now back where we started, thanks to the major cuts to legal aid since austerity was implemented.

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