

Remembering DV

Lord Lloyd-Jones JSC is a former Chairman of the Bar European Group and from 2018 its new President. Here he remembers the co-founder of BEG, David Vaughan CBE QC

DAVID Vaughan was a proud Welshman and was devoted to Wales. The name Vaughan is a corruption of *fach* or *fychan* meaning small. Never was a man more inappropriately named. There was nothing small about David. On the contrary, he was larger than life in almost every respect. Everything he touched was imbued with his enormous generosity of spirit.

I first met David shortly after I joined 1 Brick Court (as Brick Court Chambers then was) in 1986. At that time the only practitioners there in the field of EEC law were David and Gerald Barling who shared a single room at the top of Middle Temple Lane which they had christened 'Garden Cottage'. The Bar, unlike the solicitors' side of the profession, had been very slow in taking up the opportunities afforded by the United Kingdom's membership of the EEC and David had been

one of the few who had appreciated its potential. Through study and a pupillage in Paris, he had turned himself into an expert and he became a real pioneer in the field which he was to dominate for the rest of his career at the Bar. At first, Burley, the redoubtable senior clerk at 1 Brick Court, had been sceptical about this new departure, but the scales fell from his eyes when David was instructed to represent ICI in proceedings in Luxembourg concerning an alleged petrochemicals cartel.

David and Gerald were very kind to me and took me under their collective wing. My background in public international law led to a growing interest on my part in European law which David fostered. Following Burley's Damascene conversion, EEC law rapidly became accepted as an important part of the work of chambers. We were soon joined by Nicholas Forwood QC, David Anderson

and Nicholas Green. Many others soon followed, all of us encouraged and inspired by David, with the result that today there are 15 members of Brick Court Chambers specializing in EU law with another 25 practising in competition law.

It was my great good fortune to work closely with David on many cases and to see him in action both in the Royal Courts of Justice and in Luxembourg. He undoubtedly had the ear of the Luxembourg Court, whose members were always attentive to his every word. My first case in Luxembourg was the *PVC Cartel* case before the Court of First Instance. I was led by Nicholas Forwood for the European Commission and David led David Anderson for ICI. The hearings in total occupied a week before the CFI. David was a most skilful and honourable opponent. I well remember how we all arrived exhausted at Luxembourg airport



FRONT COVER. Fleet Street entrance to the Inner Temple. David Vaughan shared a 'reputedly haunted garret' in the C17th half-timbered building above. Prince Henry's Room is over the archway. See 'A eulogy', page 14. (Richard Bryant/Arcaid/Alamy)

CONTENTS

2	Remembering DV <i>Lord Lloyd-Jones JSC</i>	14	A eulogy <i>Mr Justice Barling</i>
4	<i>Editor's note</i>	20	Brexit litigation <i>Jack Williams</i>
6	<i>Factortame</i> <i>Sir David Anderson KBE QC</i>	22	Brexit and justice <i>Evanna Fruithof</i>
9	Democratic deficit? <i>The March Hare</i>	24	Romford II <i>Kieron Beal QC</i>
10	The <i>Kadi</i> case <i>Maya Lester QC</i>	29	Case notes <i>Sarah Ford QC</i>
12	Landmark landlord <i>Marie Demetriou QC</i>		

on our way home on the Friday night and David provided champagne for us all. There was an amusing sequel. The Commission's decision was eventually declared non-existent by the CFI (*BASF AG and others v Commission of the European Communities (Re the PVC Cartel)* [1992] ECR II-315; [1992] 4 CMLR 357) with the result that the Commission had to retake the decision. There then followed years of litigation as to the fairness of the procedure followed by the Commission in doing so, which resulted in many more appearances for us all in Luxembourg (C-238/99 *P Limburgse Vinyl Maatschappij NV (Lvm) and others v Commission (Re the PVC Cartel)*). We all took delight in the sign in the cafeteria at the Court, above the conveyor belt for empty dishes, which read: 'Nous recyclons le PVC.'

David led me in many cases in the CFI and in the Court of Justice concerning the European Coal and Steel Treaty. This litigation, in which we represented British Coal Corporation and, later, the Coal Authority, lasted for many years (for example, Case C-128/92 *HJ Banks & Co Ltd v British Coal Corporation* [1994] 5 CMLR 30; Case C-390/98 *HJ Banks & Co Ltd v Coal Authority and Secretary of State for Trade and Industry* [2001] 3 CMLR 51).

The Coal Authority decided to reward our efforts by arranging for us to go down Harworth colliery, one of the last working pits in England and one of the deepest. We were accompanied by Sally Brook Shanahan, the solicitor to the Coal Authority and there exists a photographic record of this remarkable event. Fascinating as the visit was, we were very glad to return to the surface after a couple of hours underground.

David's sense of humour was irrepressible and he managed to inject a sense of fun into everything he touched. This was greatly appreciated, in particular by the Judges of the Court of Justice. It was David who, in opening the *Factortame* case (C-213/89 *R v Secretary of State for Transport ex p Factortame Ltd* [1990] 3 CMLR 1), explained to the Court how one of his ancestors had defeated the Spanish Armada. In a similar vein he began his oral submissions in the *Sunday*

Trading case by telling the Court that it was well known that shops sell more when they are open than when they are closed (Case 145/88 *Torfaen Borough Council v B&Q plc* [1990] 2 WLR 1330). In one



David Vaughan CBE QC (1938–2018)

of the ECSC cases Nicholas Green had been arguing that the licensees he represented should be able to acquire the right to extract coal at rates based on its value in 1938 when all rights in unworked coal in the United Kingdom had been placed in a Coal Commission (Case T-57/91 *National Association of Licensed Opencast Operators (Naloo) v Commission of the European Communities (British Coal Corporation intervening)* [1996] ECR II-1019; [1996] 5 CMLR 672). David in response produced a 1938 wine-list from Berry Bros and proceeded to read out the pre-war prices of the finest claret, to the undisguised delight of the Court.

One of the most striking cases in which David led me before the courts of England and Wales concerned the Dover Harbour Board which, under pressure from demonstrators, had banned the export of livestock through the Port of Dover (*R v Coventry City Council ex p Phoenix Aviation* [1995] 3 All ER 37; [1995] CLC 757). It explained that unless it acted to ban this trade, it was likely that demonstrations

would close the entire port. David and I were instructed on behalf of a haulage contractor whose business had been disrupted as a result. Not only was David alert to the implications in EU and domestic law, but he immediately and instinctively appreciated that the dispute raised fundamental issues as to the rule of law. Happily, this was a view with which the Divisional Court agreed.

In 1977 David was one of the founders of the Bar European Group which became the Specialist Bar Association (SBA) for practitioners in the field of European law. As the importance of European law and the numbers of practitioners grew, the BEG flourished. It was strongly supported by the judiciary, in particular Lord Justice Laws, Lord Slynn and Lord Templeman. Its conferences, held each year in a different European state and often involving local practitioners and judges, became a focal point for discussion of current issues of European law and a major social event. David and Leslie Vaughan were for many years an essential part of these annual conferences, welcoming old friends and new members alike.

The last BEG conference which David attended was in Chania, Crete, in May 2017. He was his usual irrepressible self, his interest in European law and the careers of his colleagues quite undiminished.

David was also a founding trustee of the Slynn Foundation. At a time when the EU was about to follow a course of rapid expansion, Gordon Slynn had the vision to realize the importance of promoting the rule of law and educating practitioners and judges in accession states in the principles of EU law. His foundation was an inspiration, in particular for the judiciary in those states which had recently emerged from decades of Soviet control. David was quick to engage the services of his friends and colleagues in the vast programmes of seminars and lectures organized by the Foundation in the accession states.

As a result I have many happy memories of taking part with Gordon and David and many others in seminars, in particular in Poland, the Czech Republic, Lithuania and Malta. Quite apart from

the stimulus of meeting colleagues from very different backgrounds, there was a lot of fun to be had along the way.

I have many happy memories of my travels around Europe with David. Appearances at the Court of Justice in Luxembourg were anything but routine, especially when, as was often the case, we prepared for the hearing by staying at La Petite Auberge in the tiny hamlet of Gaichel. For the duration of our stay the public parts of the *auberge* were turned into an annex of Brick Court Chambers, with the cooperation of the long-suffering staff. I have a vivid memory of a train journey with David from Warsaw to Kraków, which inexplicably included a stroll through a forest clearing while the engine was replaced.

On another occasion, David, Gordon Slynn and I found ourselves one January amid deep snowdrifts in Stráž pod Ralskem, a former uranium-mining town in Bohemia where the Czech Government had established a maximum-security prison and a judicial academy.

After three days we were driven back to Prague where we enjoyed a particularly memorable dinner before adjourning to the Rudolfinum to hear Vladimir Ashkenazy conduct the Czech Philharmonic Orchestra. The latter was just one of many musical highlights of our travels together around Europe which included many nights at the opera: *Tosca* in Vilnius, *Un ballo in maschera* in Kraków, *Così fan tutte* in Prague and, yes, *The Marriage of Figaro* in Vienna. These were times to treasure.

David's practice in the field of European law coincided almost exactly with the duration of the United Kingdom's membership of what became the European Union. He readily appreciated the central role which law plays in our relationship with the rest of Europe and he made a most distinguished contribution to the development of EU law as a new legal system.

His other lasting legacy can be seen in that long line of young lawyers whose careers he nurtured and inspired, all of whom remain devoted to him. They, in turn, have made a significant mark in the practice of European law. It can be said of David Vaughan, without any exaggeration, as was said of Sir Christopher Wren, *Lector, si monumentum requiris, circumspice* ('Reader, if you seek a monument, look around you.') □

Editor's note

MUCH OF THIS issue is devoted to remembering David Vaughan CBE QC, the first Chairman of the Bar European Group (1978–80) and BEG life Vice-President, who died earlier this year.

David Vaughan and Stephen O'Malley, who were both on the International Practice Committee of the Bar Council at the time, co-founded BEG in 1977, with the assistance of a working group consisting of Jonathan Mance, John Thomas, Peter Goldsmith, Francis Jacobs and Clare Tritton amongst others. David was to become the first BEG Chairman in 1978 and thereafter remained active within the group for the next 40 years.

His life and achievements were recalled in speeches at the funeral service held in Brecon Cathedral and the memorial service in the Temple Church, both venues of great importance to David, as both a proud Welshman and Bencher of Inner Temple. An edited extract from Mr Justice Barling's Brecon eulogy is at *page 14*.

On *page 2*, Lord Lloyd-Jones JSC recalls the David he knew. Other colleagues have contributed articles with recollections of being led by David Vaughan in some of his landmark EU law cases: Maya Lester QC on *Kadi* (*page 10*); outgoing BEG Chairman Marie Demetriou QC on *Crehan* (*page 12*); and Sir David Anderson KBE QC on perhaps the best-known of them all, *Factortame* (*page 6*).

One aspect of David Vaughan's life and work which is much commented upon was his enthusiasm for promoting promising young EU lawyers, many of whom went on to work either with David or otherwise to make their way in EU law. Most of the QCs, High Court judges and even members of the Supreme Court featured in these pages fall into that category. It is a category that also includes the editor of this magazine, who first met David when he came, with Sir Gordon Slynn, to speak in Cambridge in the 1980s—David immediately suggesting a mini-pupillage in his Chambers.

With David's passing a significant piece of BEG history has passed too. The words read by Mr Justice Green at the Temple memorial service from John Donne's *Meditation 17* were thus especially apt:

'No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less...'. However, the BEG will carry on David's legacy and in particular his enthusiasm for exchanges with other European lawyers and making transcontinental connections.

Another founding member of BEG who recently passed away is Clare Tritton QC, BEG Chairman 1982–84. Formerly head of European Law Chambers, she had retired from the Bar and, as Clare McLaren-Throckmorton, became the tenant of Coughton Court as well as devoting her time to managing the Throckmorton estates.

Our special thanks and congratulations go to Sir John Laws on his retirement as BEG President after 24 years and to his successor, Lord Lloyd-Jones (BEG Chairman 2004–05) as BEG's third President, after Sir John and Lord Templeman. An event to mark Sir John's long and successful presidency is planned later this year. Congratulations also to David Anderson QC on having been awarded a knighthood as well as the news that he is shortly to be made a working peer, both of which were announced on the same day.

On matters not directly related to BEG members, and yet of concern to all, readers will also find in this issue articles by Jack Williams on possible Brexit-related judicial review challenges (*page 20*) and by Evanna Fruithof on the Bar Council's push for a discrete justice track in the UK's negotiations with the EU (*page 22*). Finally, there is the second and final part in Kieron Beal QC's series on applicable law, this one dealing with tort and continuing the conceit from part one that after Brexit the UK will replace Rome II with Romford II (*page 24*). □

Philip Moser QC
pmoser@monckton.com

The Saloon at Coughton Court, Warwickshire, home of the Throckmorton family.
(Einsiedel/National Trust/Alamy)