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ACCESS TO JUSTICE

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Introduction

1. It is a great privilege today, after thirteen and a half years sitting as a judge, when I am about to resume private practice as an arbitrator and begin practice as a mediator, consultant and legal expert, to be invited to give this lecture today. My particular interest has always been in access to civil justice and in how the hurdles to it may be surmounted. I have given in the past a number of lectures on this topic. Some overlap with them is inevitable. I shall concentrate on four topics. First and foremost I wish to speak on the crucial importance in the case of an adversary system such as ours for legal representation of parties if justice is to be done. Second I shall say a word about the progressive elimination of public funding and its consequences. Third I shall say a word about the "Conditional Fee Agreement". Fourthly I wish to underline the critical importance of the availability in all cases of mediation.

The Adversary System

2. The common law adversary system of litigation practised in England today is a modernised version of trial by battle. When the dispute between the parties was resolved by trial by battle, the outcome turned on the quality of champion which each party could afford to retain. So today the rules of law practice and of procedure are such that a party is at a very serious disadvantage in litigation unless legally advised before and during and legally represented during such battle and the quality of the representation can and does determine the outcome. The law, the rules of practice and the procedures at trial are not such as to be readily obvious to the layman litigant and he cannot on his own be expected to be able to meet his legally represented opponent on equal terms. If he does litigate without legal representation, there is more than a very serious risk that he will fight the "wrong" fight against the wrong opponent on the wrong basis, will fail to call the right evidence and will be unable by cross-examination or otherwise to meet the case made against him. That is why able litigators (like the champions before them) are so highly paid. It is because their skills both

before and at the trial are calculated to affect the outcome of the trial – and frequently do so, in particular when not matched by a champion of equal class on the other side.

3. The judge under the adversary system has very limited scope to play a part in adjusting the balance in representation of the parties. As under the rules governing trial by battle, his function is to ensure that the rules of battle are complied with by all parties and to decide the winner and loser in accordance with the rules. He can not on his own equalise the balance in terms of representation by himself charging into battle or by intervening, calling witnesses or giving directions or making the case for the disadvantaged – in other words he must take no action which might reasonably be seen as compromising his neutrality, however much he may be tempted to do so.

4. The dilemma facing the unrepresented party whether to bring or defend proceedings, is accordingly acute. He does not know what are his prospects of success. He does know or at least should know that without legal representation they will be less than they otherwise would be. The dilemma is made more acute by the enormous increase in legal costs over the last ten years. These costs are not merely an insuperable hurdle to his own legal representation, but so far as they are incurred by his opponent he faces the threat of an order for his payment of his opponent's costs if he fails in the action. A party's economy in respect of his own costs affords no break on his successful opponent's more generous expenditure which is recoverable from him.

5. In summary, under the adversary system of litigation as a general rule you obtain the quality of justice which you can afford to buy – the better the representation relative to your opponent's the higher your prospect of success.

6. A judge sees this day in and day out in the courts, and a judge has so often the depressing experience of seeing the ill-advised choice and under performance of legal representatives and (on summary assessment of costs) the disproportionate fees charged, and how ill-informed the solicitors and their clients must be in this regard. I recall when I taught at an Oxford College and interviewed applicants for places at the College. I often found it clear that a small number of applicants should definitely be given places and a small number definitely should not: but determining the choice between the other applicants in respect of the remaining places I found the task fraught with anxiety and difficulty. On an occasion I recounted to a very senior colleague in another discipline the difficulties I experienced in making the choice. He was dismissive of my difficulties. He said: "I never have any doubt choosing between candidates. I know who to choose within moments of seeing them". Soon thereafter I met another member of the college in his discipline and I recounted our conversation. He laughed and said ¨He never had any doubts – he always unhesitatingly makes the wrong choice." That is sometimes how I feel seeing the choices made by solicitors and clients.

7. As a corollary of the general rule that you obtain the quality of justice you can afford to pay for, litigants in person by litigating often sow the seeds of their own destruction. There is no distinction to be drawn by the court in the orders it makes (and in particular the orders for costs) between represented and unrepresented parties, and as ill-advised applications can result in orders for costs which render the whole litigation an unproductive exercise the litigant and ill-advised pursuit of the action can and does result in total ruination – bankruptcy and loss of home and possessions. The litigants of whom Charles Dickens wrote so feelingly in Bleak House haunting the Court of Chancery haunt the courts today complaining not of delay of hearings and undue complication of the law and legal process as was the complaint in the old Court of Chancery, but that at hearings the merits of their cases were not appreciated – and indeed on occasion because of lack of legal representation their merits were indeed not given due weight.

Public Funding

8. It is against this framework that we must consider the effect of the progressive withdrawal of public funding in civil cases. Public funding offered the underprivileged two essential forms of protection. The first was the provision of public funds to pay for legal advice for and legal representation in court of those whose lack of means was such as to require such support. The second was a statutory rule prohibiting enforcement of any order for costs made against a publicly funded litigant unless and until the court was satisfied that he had the means of discharging it without e.g. losing his home. Public funding placed the publicly funded litigants on close to equal terms with those who did not require such funding. They had the disadvantage that public funding might not be available to attract the quality of representation available to the publicly funded litigant. Many high priced (if not high principled) advocates declined to accept instructions from publicly funded litigants. On the other hand the publicly funded litigant enjoyed the benefit not available to the privately funded litigant that they were protected against enforcement of adverse orders for costs.

9. To save public funds, the Government has however now for practical purposes eliminated the availability of public funding in ordinary civil litigation. It was all very well for the Government to say, when it introduced the Human Rights Act, that it was “bringing rights home”, meaning enabling human rights to be protected and enforced in all English courts without the need to establish them in proceedings before the European Court of Human Rights. But it was a hollow boast when those in most need of recourse to the law were at the same time being deprived of the necessary funding to protect and enforce them. It is remarkable and depressing to see that this topic has not found a place in political or judicial agendas, and certainly not the place that it deserves. This may be because the provision of public funding is perceived to be mainly or principally a matter of interest (or primary interest) to lawyers concerned about their livelihoods. But that is to mask reality. The public interest to be protected is not the livelihood of lawyers but the protection of the under-privileged. It is only as a necessary corollary of recognition of the need to provide that protection that lawyers must be paid to provide that protection.

10. The challenge facing Society today arises from the division in society between those who feel they have a stake in it and those who feel that they do not and in particular between those for whom the law is a form of protection and those for whom the law is an irrelevancy or at worst as an instrument of oppression. The Rule of Law can and should be a cohesive force, but it can also be a divisive force, in society. Which it is must depend on how far access to its protection is open to all. When its protection is withheld for any reason, this is a recipe for a well founded sense of alienation. Rights are only meaningful so far as they can be protected and enforced in the courts.

11. It must surely be a short sighted economy for us to withdraw the availability of public funding from the under-privileged. It promotes the sense that the protection of the law is for the "haves" and not the have-nots". The price to be paid for this in terms of respect for the law and social cohesion should not be underestimated.

12. I turn now to examine how this shortfall in the provision of legal advice and representation for the underprivileged is to be made up.

The Conditional Fee Agreement

13. The Government's proffered as the alternative to public funding the Conditional Fee Agreement ("the CFA") and the After the Event Insurance Policy ("the Policy"), legalised CFAs and altered the rules of court regarding recovery of costs. So far as litigants are concerned these are Greek gifts offering the palest shadow of public funding. Under the CFA the client agrees with his solicitors to pay his legal representative (1) a base fee which is lower than that which would be his ordinary fee and (2) on top of the base fee a success fee not exceeding 100% of the base fee. Under the Policy the insurance company in return for a premium agrees to meet any liability for costs of the opposing party if the client failed in the action. The rule changes provide that if a party suing under AN Agreement is successful and is awarded costs such costs may include the success fee and the premium paid by the successful party under the Policy. The scheme however had as many holes as a colander – for example:

i) Since the success fee could not exceed 100% of the base fee, the solicitor could not expect to recover his normal fee unless the client agrees to pay at least one half of that fee in any event. This is likely to be beyond the means of many (if not most) needy clients;

ii) If the success fee plus the base fee together exceed what would otherwise be together the lawyer's normal fee, why should the other party be required to pay that excess, at any rate if not responsible for the successful party's impecuniosity? And why should he also have to pay the costs of the insurance premium?

iii) The reasonableness or otherwise of the success fee must turn on the clients prospects of success. How can solicitors and clients sensibly negotiate this figure in view of the solicitors conflict of interest and how can the taxing judge sensible and objectively decide this question on the assessment of costs?

iv) The success fee is expected to reflect the risk undertaken by the solicitor or counsel that the case will not succeed. This means that the client is justified in agreeing to pay a higher success fee the greater the risk of his failing. But this likewise means that his opponent is at risk of liability to reimburse a higher success fee payable by his opponent if the greater his own prospects of success in the action. To any rational person this is pure "Alice I n Wonderland".

v) The solicitor or barrister is only likely to agree to a CFA if the prospects of success are very high indeed. Experience suggests that what is required is a close to 90% prospect. A CFA is accordingly a means of securing representation in a very limited range of cases.

In a word the CFA does not fill the lacuna left by the withdrawal of public funding save in a very limited number of short and relatively simple cases.

Mediation

14. I turn to the only available alternative namely mediation. Under the CPR mediation is intended to be the first and litigation the final resort. But in the absence of financial or other backing or the availability of a CFA, and unless the party is prepared to act in person in any proceedings it is the only resort. That does mean that the opposing party if he knows of the absence of any available alternative can refuse mediation or abuse its procedures with practical impunity. There is no duty owed to the opposing litigant to proceed to and with mediation in good faith – and certainly no duty that can give rise to a claim in damages. But in practice if a court orders mediation or the parties agree to proceed to mediation, the parties do give mediation a chance, and once mediation has begun (most particularly when the mediation is in the hands of a skilled mediator) the process itself and the search for a solution to the problem acceptable to all parties can gather the support of all parties and there is a real prospect of an agreement, though the agreement may reflect the perceived respective abilities of the parties to proceed with litigation in default of agreement.

15. Two things are in my view essential if mediation is to play its full part in our system of dispute resolution. The first is that the court possesses and exercises a discretionary jurisdiction to order the parties before it to proceed to mediation irrespective of their wishes, though their wishes will be a relevant consideration in the exercise of the discretion. There may be reluctance on the part of the parties to take or be seen to take the initiative in inviting or even agreeing to mediation e.g. out of fear that it may be taken as a sign of weakness. It is of course not a sign of weakness, but a sign of

strength, a sign of willingness to ventilate the full circumstance of the dispute and to participate in a process directed at finding a means of resolution of the dispute. The second is that evidential burden should lie on the party refusing to participate in mediation to justify his refusal and accordingly avoid the established sanctions for such unreasonable refusal.

16. In a recent speech at S J Berwin I gave my reasons for discounting the negative observations in both these regards of the Court of Appeal in Halsey. I seem to have made some progress in my endeavour to set the record straight in this regard, for at a recent conference on mediation I heard a retired Lord Justice express doubt as to what the Court of Appeal had decided and indeed whether it had decided anything. That is a constructive (if totally unrealistic) approach. Whatever may have been the position previously (and this may found a let-out for the Court of Appeal) the very recent European Union Directive on Mediation makes plain that the court can and should have the free standing and independent power to order mediation. There is however a need for an authoritative pronouncement to this effect, for whilst judges in London can decide for themselves what (if any) weight should be given to the observations in Halsey, in practice district judges in the country are naturally and understandably treating them as law, refusing to order mediation in the absence of such consent. It is likewise important that the burden should be widely seen as resting on the party refusing to proceed to mediation to prove that his refusal is unreasonable if he is to avoid the exercise of the court's sanction as to costs or otherwise in respect of such refusal. The party who refuses has alone the first hand knowledge of the reasons for his refusal. Surely it is not unreasonable that he should be called upon to share this knowledge with the court and to justify his frustration of the scheme laid down in the Rules for alternative dispute resolution by mediation.

17. In concluding my observations on mediation I would refer to one as yet unrecognised by-product of the growth of mediation. It affords a form of rehabilitation and gainful occupation for those retired judges who can after training manage role reversal from judge to mediator. Speaking generally if success is to be measured by the achievement of peace with justice (and I can think of no better measure of success) I have little doubt that mediators are more successful than the judges – and should receive the recognition due to them for this achievement.
