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THE FUTURE OF CIVIL JUSTICE

AN ADDRESS TO THE CIVIL COURT USERS ASSOCIATION

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I started to practise at the Bar in 1964. I will end my time as a judge in six months' time. I will start by giving you a snapshot of the civil courts then and now.

Then a county court judge's financial jurisdiction was limited to £400, and a registrar's to about £50. Civil legal aid was available for about 80% of us. We might have to pay a contribution, but if we lost, our liability for the other side's costs was limited to a sum equivalent to our contribution. In those days, the civil courts were financed by a partnership between the taxpayer and the litigants. The taxpayer paid for the court buildings and the judges, and the litigants paid for the rest out of court fees, which were quite low. Nearly every other comparable country adopts the same approach as we did. Defended business in the county court was partly paid for by the profit made on the fees charged for undefended debt business. Defended business in the High Court on the other hand had always been supported by the profit made on non-contentious probate business, where the fees were charged as a percentage of the deceased's estate and not on the work that the court had to do.

In those days solicitors had a conveyancing monopoly and they could charge a fixed percentage of the value of the property they conveyed, even if the work involved was quite small. These profits subsidised the work of the litigation department, so that litigation costs were quite low. For plaintiffs litigation was a middle-class pursuit, except for personal injury claims and divorce work. There were over 30 solicitors' firms around Lincoln's Inn Fields, and three in the London Borough of Tower Hamlets. When I used to go down to a legal advice centre in East London, people sought advice on tripping accidents on pavements, on problems with their family or their landlord, and how to change their name. The idea of using the law for other purposes hardly entered their minds.

I have one more memory from those days. There were two ways of enforcing payment of a judgment debt: the sheriff in the High Court and the bailiff in the county court. Many creditors with bulk claims preferred the High Court. Most of their claims would be transferred to the county court if a defence was filed. Every High Court writ against a personal defendant had to be served personally. I used to do a lot of work for solicitors who were instructed by Dun & Bradstreet whenever it was necessary to use litigation to enforce a debt. Mr Manktelow was one of their managing clerks, and he told me that before the war, when he really was an office boy in an attorney's firm, he used to bicycle round London serving the writs. Once he served a writ on a butcher in his shop in Penge High Street, and the butcher was so angry that he chased young Manktelow all the way down Penge Hill brandishing his chopping knife. He had never cycled so fast in his life. Things are less exciting now.

I jump 42 years to the present day. The county court now has unlimited financial jurisdiction for most claims. The courts are financed differently. The partnership between

litigants and the taxpayer was scrapped in 1992. Litigants now have to pay for everything, including the court buildings and the judges, unless they are on income support. There is also supposed to be a scheme for fee remissions, but it doesn't really work. Because of the Treasury's full cost recovery policy, court fees have gone up and up, and the Courts Service still don't recover all the costs. The old way of financing business in the High Court has gone, because fees for non-contentious probate fees are now limited to what the work costs. Our civil justice system would be on its knees but for the profit made on the fees charged for undefended debt business. Much of this is now transacted by computer and never goes near a judge, and the marginal costs of transacting this business are quite low.

A "full cost recovery" system of financing civil litigation has always been a nonsense. It lives in the land of make believe. We have now suffered it for 14 years. If the criminal courts are included, there was a £160 million backlog of essential maintenance work for our court buildings a year or two back. And we cannot finance the IT investment which might help to get us out of the mess we are in if it has to be financed by court fees alone.

As to legal fees, the solicitor's conveyancing monopoly with its old fee structure was scrapped in the late 1960s. A solicitor's litigation department now has to show a profit like everyone else. Litigation costs, charged by the hour, have soared. And because expenditure on criminal legal aid has got out of control, spending on civil legal aid has been scraped to the bone. It is now available only in a limited range of cases for those on income support. A conditional fee agreement is a possible option for everyone else. These may be suitable for the bulk business for which they were designed, like road traffic accident claims, but they have never been suitable for much of the business that used to come to court. Litigants without a CFA either have to pay their own way, or have to cave in because they cannot afford justice.

It was not supposed to be like this when the Woolf reforms were introduced. But the Woolf reforms were not supposed to be introduced without the IT support they needed. Today the county courts are submerged under a sea of paper, and the courts face great problems in some areas of recruiting and training staff of the quality they need for transacting defended business. At the Central London County Court there is a turnover of 30% of staff each year. Judges spend up to a third of their time sorting out the papers.

In May 2002 the Deputy Head of Civil Justice, Lord Justice May, spoke of his fear that if in five years' time the Court Service were not to have proper and sufficient IT in support of civil litigation, it would be in danger of disintegrating. He said that the quality of service the administration was then achieving depended on the good will of a number of overworked staff. Their morale was supported by an expectation that proper IT was around the corner, and expectation could not sustain morale indefinitely.

I quoted this in a lecture I gave in November 2004. I explained that a basic IT infrastructure was now being rolled out to as many civil and family court centres as possible. This was good for morale, but it did not and could not help staff and judges with the paper mountain. Even if courts received documents by email, they did not have the document management systems they thought they had been promised. Efforts were being made to adapt office systems to court use, but there was a limit to what courts could achieve with office systems.

But it was not all doom and gloom. A great success in the last 15 years has been the computerised claims production centre at Northampton which issues claim forms and default judgments for major creditors. Another huge success story has been Money Claim Online. Anyone can now start a debt claim for up to £100,000 against up to two defendants at any time of the day or night. All you need is a PC, a modem and a credit card. The Courts Service hope that more and more people will issue claims in this way. In a rational world they would cut the fee by 40%, as Ken Livingstone has done with Oystercards, instead of allowing a £10 discount on a £120 fee for a debt between £1,000 and £5,000. But they cannot do this so long as they have to subsidise the defended business of the courts from the profits derived from this income flow.

These IT developments take a huge amount of undefended debt business out of the courts completely, and over 10% of defendants now file their defences by email. After that the case has to be handled on paper at the local county court office.

I also have high hopes of Possession Claims Online. This should be available this year and will provide a similar service for straightforward possession claims based on rent and mortgage arrears.

I ended that lecture in 2004 on a gloomy note. I had spoken of the vision we had five years ago, before the Treasury gave a "thumbs down" to our plans to modernise the civil courts. Four years ago I really thought we were on the way to creating new arrangements for civil and family justice of which we could be proud, but two years later I said I did not see any light on the horizon at all. I did not even see any evidence that the scale of the problem was being properly addressed because there were so many other initiatives being pursued, distracting the attention of our policy-makers.

Today I do see a flicker of light. It comes from the Courts Service's new Business Strategy paper, published last month. It says that when people come to court the Courts Service will provide services that suit them. It says that tackling the courts' estate and improving the IT infrastructure will pay a key part in delivering the new strategy. It acknowledges that there are some key areas where they can administer the courts more efficiently. In this context they mention the removal of high volume bulk work from the courts, the centralization of back office administration, and the improved electronic management of documents and the case file. This repeats everything we said five years ago. The staff and the judges in our court houses should be able to concentrate on defended court business and have proper IT systems to help them.

In this new paper they say that in accordance with the new judicial concordat they will ensure that the courts have sufficient skilled and well-trained staff. They aim to increase the proportion of civil cases that are started electronically to at least 75% by 2010. By 2008 they aim to use Money Claims Online for 250,000 claims every year. They say that the cost of administering those claims will be reduced by 40% if they do. By 2008 they also aim to use Possessions Claim Online for 100,000 claims. They say that a single civil jurisdiction, merging the county court into the High Court, is being considered. All of this is excellent.

But how is all this to be paid for? After all, the whole of the cost has to be met from litigants' fee income just when other Government policies are aimed at reducing the number of debt claims that come to court. The volume of civil claims has gone down by 20% since the Woolf reforms came in. Although the number of debt claims went up last year, they say that current initiatives are expected to reduce the workload by up to 10% more. This will cause huge difficulties on the income side of the equation.

And it is here that policy departs from reality. In 2004 the Department promised the Treasury that they would achieve full cost recovery for the civil courts within the three year time span of their new spending allocation. We are told that a Civil Fee Programme has been established to deliver a long term strategy that will both meet full cost recovery and protect access to justice. They speak of a Fee Structures Project that will shift from front-loading fees on commencement to fee-charging points in the litigation process that more closely match the cost stages. They speak of "delivering cost recovery" through the fee increases that will be needed in order to achieve this by April next year.

What do all these words mean in practice? The glory of our civil justice system always used to be that it provided a place where the weak could meet the strong on a level playing field. This is what Lord Diplock meant when he said this 25 years ago in the Bremer Vulkan case: "Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access."

For over a hundred years the taxpayer provided a subsidy by paying for the court buildings and the judges. For 40 years he also provided a cushion for those of moderate means so that they could afford to access justice without fear of bankruptcy. All that has ended because of the criminal legal aid overspend and the Treasury's insistence that the Department must itself fund the overspend.

The policies mentioned in the Courts Service paper mean that as litigation goes on, the financially weaker claimant is going to have to put money in the meter to keep the litigation

going at all, and the litigation will be held up if the money isn't paid. If the financially stronger defendant insists on going to trial a lot more money will be needed. Their last proposals spoke of a hearing fee of £200 an hour or £1,000 per day for High Court trials. They overlooked the fact that many High Court battles occur at the pre-trial stage. As the differences between the High Court and the county courts are now going, policies limited to the High Court won't work. But is an hourly charging policy acceptable in the county court? Will people stand for it? Does the Treasury really understand what it is doing to our civil justice system?

In other words, I believe that the strategy for the future of civil justice is back on the rails. The arrangements for funding it are not. As someone on the brink of retirement, I am happy to close my speech by saying that that will be your problem, not mine.
