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THE NEW DIRECTION FOR MARINE LITIGATION:

HOW CAN THE LITIGATION PROCESS BE IMPROVED?

When I first saw the title that I had been asked to deal with for this Conference, my first reaction was how on earth could I deal with such a topic in 25 minutes or indeed 25 hours! The topic is extremely wide and my job here I think is to try and make it short, relevant, of some interest and also to finish on time. I see that ADR is being dealt with by Matthew Flynn and so I will concentrate on the civil litigation process rather than on ADR even though, in England and Wales, ADR is forming a larger and larger part of civil litigation. I have also interpreted the title to exclude arbitration.

The genesis for this talk came from a discussion I had with one of your members when I was here in Sydney last year in connection with a case which was being heard by Justice Hunter in the New South Wales Supreme Court. The case was set down to last for 4 days and lasted for 7 weeks! I said, at the time, that I thought that there were some aspects of the way in which the case had proceeded that could be improved. I think, therefore, I was asked to come and address this Conference with my suggestions as to how that might happen! It is not for me to suggest improvements in the procedure here in New South Wales so I thought I would deal with this topic by looking, primarily, at England and the Woolf Reforms. I will discuss very briefly the reasons behind their introduction and then whether, 2 years or so on, they seem to be working. Then I will contrast some other jurisdictions, almost picked at random, to highlight how other countries deal with civil litigation. I can then finish with a few thoughts as to how things might be improved.

THE WOOLF REFORMS

I am sure that you have already heard many speeches about the Woolf Reforms which were first talked about in 1995 when Lord Woolf produced an interim report entitled “access to justice”. In that report, he declared

“The key problems facing civil justice today are cost, delay and complexity.”

Few would have disagreed with this diagnosis although it is also important to realise that at the level at which we see civil marine litigation, that is to say the Commercial Court, such problems were not as great as they were in other parts of the country, or in other Courts.

What was really concerning many people in England was litigation in personal injury cases where claims for damages in respect of, sometimes, very serious injuries, could often take 10 years to get to trial. Also the High Court, the Queens Bench Division, where the majority of ordinary civil disputes are heard, was clogged up with many claims which did not involve a great deal of money. In 1994, for example, claims in excess of £50,000 represented only 5% of the Writs issued in the Queens Bench Division. Put another way, only 0.5% of Writs issued in the Queens Bench Division were for claims in excess of £600,000. So far as the Commercial Court is concerned, the amounts involved were normally substantial, although one cannot rule out the odd Greek shipowner who wants to pursue a small claim as a point of principle!

A lot of claims were also being heard in District Registries and Second Tier Courts in cities around the country and it is fair to say that these Courts were very slow indeed. One of the problems was that the standard of administration was (and is) rather poor, so that not only did cases take a long time but frequently documents were lost, hearing dates were not fixed, all of which added to the delay. The Commercial/Admiralty Registry, where most of our business, is really very efficient, and the contrast with the Central London Business List, where claims of under £100,000 are heard is not flattering. It was also felt that a lot of the language used by lawyers was difficult for ordinary people to understand and the Woolf Reforms also tried to deal with that.

The new Civil Procedure Rules came into effect on 26th April 1999 and I certainly do not have time to deal with what they say in any detail. I am sure you have all heard about these changes before in any event. One change which has had quite an

impact is pre-action protocols which seek to explore the issues in the case before an action is started.

The new CPR sought to ensure that only claims of a relatively high value may be started in the High Court. So far as personal injury claims are concerned, claims of £50,000 or more may be heard in the High Court but not otherwise. A system was set up of Fast Tracking cases in the lower Courts which was envisaged as a means of rapidly resolving disputes of relatively low value. The idea here is that a trial date will be set at the outset, 30 weeks ahead, and the trial will not normally last more than 1 day. All the various provisions such as disclosure, witness statements etc. come at fixed times and the idea is that those times are always adhered to. I have to say that our firm does not have many cases, I think, that have gone along these lines!

For more complex cases, the procedure is called multi-track and there are also key milestone dates fixed by the Court which have to be adhered to. The main change here was the introduction of the Case Management Conference; a Listing Questionnaire and a pre-trial review. The Case Management Conference is held by a Judge, it sets the agenda for the case, considers whether or not there should be ADR; tries to narrow the issues; decides on the scope of future work such as disclosure of documents and sets a trial date. The Court will also consider budgets and each side will have to prepare an outline costs estimate of the case and submit it to the Court at the Case Management Conference. You are also required to tell your client how much the case may cost them, which is a useful innovation!

In longer cases, a pre-trial review may also be ordered, normally this will be presided over by the Judge who will hear the case at trial, and this provides an opportunity to monitor progress again, and consider settlement, and, if that is not possible, to give directions for the trial.

All the actions taken by the Court have to be in the light of the general philosophy set out in Part 1 of the Rules, known as the Over-riding Objective. This states that all

cases should be dealt with justly, you will be glad to hear, and that dealing with the case justly includes, so far as is practicable:-

1 ensuring the parties are on an equal footing;

2 saving expense;

3 dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the parties' financial position;

4 ensuring that it is dealt with expeditiously and fairly; and

5 allotting to it an appropriate share of the resources of the Court.

The idea is that every time any Court Official exercises any kind of discretion or management power, he must do so in the light of the Over-riding Objective. So the Courts would, for the first time, take a pro-active role in managing cases to ensure that the Over-riding Objective was complied with. This sounds wonderful, but is quite difficult to do in practice.

The CPR also introduced considerably tighter Court deadlines and procedures. As a consequence, greater investigative and advisory work has been needed in the early stages of a case before an action is commenced; as the timescale for identification of key issues and the general procedural conduct of the case is significantly shorter than was the previous practice. This was recognised as a concern early on since, although the desire of the Woolf Reforms was to cut cost, the "front loading" of costs under the Reforms seemed likely to produce higher costs not lower costs.

I mentioned the question of changes in wording to allow the man in the street to become more au fait with litigation procedure. The plaintiff has become "Claimant"; a

Writ has become a “Claim Form”; pleadings have become “Statements of Case”; Discovery has become “Disclosure” (I am not quite sure why that was necessary); a Mareva Injunction has become a “Freezing Injunction” etc. Even the role of the Taxing Master, steeped in history, has changed as the Taxing Master has now become a Costs Judge! These changes seem to use a sop to political correctness, since I think most people knew what a Writ was. Also there is a question of history involved. However, Claim Form etc. it now is.

One other important change, which was meant to simplify litigation and save costs, was the question of discovery/disclosure. The rules for discovery in England and Wales were broadly the same as they are here in Australia; in that all documents which are or may be relevant to the case have to be disclosed. It is fair to say that this used to result in something of a paper chase and also the introduction of Trial Bundles which were too large. On the other hand, my personal view is that disclosure is an important part of litigation and cases can be won or lost by the disclosure process. In any event, we now have, under the CPR, two forms of disclosure, standard disclosure and specific disclosure. Standard disclosure means that each party has to provide to the other copies of documents on which it relies; which support its own case and those which adversely effect it and is limited to documents which are or have been in the relevant party’s control. It is more limited than the discovery process used to be.

It is possible to apply for specific disclosure. This can be done at the Case Management Conference and the idea is to limit, in the first instance, the width and scope of the former discovery obligation. At the Case Management Conference, the

Court will decide whether or not specific disclosure should be ordered in line with the Over-riding Objective. This has led to some rather inconsistent decisions by the Court, as might be imagined. Some Judges are inclined to take the disclosure rule more seriously and order wide disclosure whilst other Judges are more conservative. One problem, so far as the practitioner is concerned, is that you never know, in advance, which way the Judge is going to go, as it is a matter of discretion.

One other change made by the CPR, was that the many of the documents now served have to be accompanied by a Statement of Truth signed either by the solicitor or by the party to the action. For example, when a Claim Form is served, it needs to be accompanied by a Statement of Truth, often signed by the solicitor, which indicates that you believe the facts set out to be true. The idea here is to prevent entirely frivolous claims being brought forward. When you come to disclosure, there must be a statement confirming the extent of the search that has been made to locate the documents and a certificate, affirming an understanding of the duty of disclosure and that to the best of the signatory's knowledge, that duty has been carried out. The disclosure statement must be signed by the party to the action and cannot be signed by the solicitor, luckily.

The final point I want to make about the Reforms is that there were changes to the way in which expert evidence was given. The Reforms have brought the system in England rather more in line with that in Australia in that the expert has also to sign a declaration indicating that he realises that his duty is to the Court, not to his client. This is a very useful reform, though if has not made much difference in practice to partisan experts.

As I have said there are many other points in the Reforms but all I have tried to do is highlight some of the more important ones. I started off by saying that the purpose of these Reforms was to cut cost, delay and complexity. Has this been achieved? One of the criticisms that is frequently made is that although Lord Woolf acted with the best possible motives, he is a man who has never ever actually litigated a case from the shop floor. Thus he did not really understand the impact that some of his Reforms would have on the solicitors who do prepare and litigate cases. Nevertheless, what is interesting is that when the Rules were introduced, the number of Claim Forms (or Writs as I still call them) issued plunged. Litigation was out of fashion and mediation seemed to be the way ahead. Pre-action protocols were also thought to have had an impact. However now, in 2001, the picture is different. What seems to have happened is that Claim Forms are on the way up again. In 1999, the number of Claim Forms issued in the Commercial Court fell 16% from 1,876 to 1,569. In 2000, the figure fell another 9% to 1,432. In the first 25 weeks of 2001, however, the Commercial Court issued 708 Claim Forms, equivalent to about 1,450 for the full year. The dive appears to have levelled off. Yet, as I know from my own firm, litigation in the last 2 years has in fact been booming, not reducing. How can this be? Interestingly, the number of Claim Forms issued in the Chancery Division, which deals with insolvency, IP, trade and trust disputes etc., has hardly changed.

The answer seems to be that one of the inevitable results of the Woolf Reforms, not I think anticipated by Lord Woolf, was the high front end costs. The work of investigating all the facts, proofing witnesses etc. all used to be done at a fairly leisurely pace as the litigation proceeded. Now, with the CMC coming at an early

stage in the proceedings, all the work has to be done first. What seems to have happened is that the CPR has, ironically, discouraged litigation of small simple cases, but not large complex ones (which are more common, presumably, in the Chancery Division). The combination then of front loading and tighter timetables has actually created a surge of legal activity in larger cases that has more than cancelled out the effect of the decline in claims. This has been good for larger firms with big litigation departments (such as Richards Butler), but not so good for smaller firms. However, clearly this was not the intention behind the Woolf Reforms.

At some point I ought to say something about the question of conditional fees. We do have an ability, now, in England and Wales, to conduct cases on a form of no win no fee basis and I will briefly refer to this later on.

One of the successes, however, of the Reforms is undoubtedly that cases do get heard more quickly. With a moderate amount of co-operation, and a Judge who takes the deadlines seriously, a large commercial case can be ready for trial and begin to be heard after 18 months from the issue of the Claim Form. If a Judge (and the parties) are particularly pro-active that period can perhaps be cut down to 12 months. What this does mean, however, is that you have less time to do the same work and thus you need more people to do the work and thus, arguably, the case is more expensive. The problem is that more time is spent reviewing and re-reviewing lists of issues and case memoranda, preparing for a CMC or a pre-trial review, which largely duplicate the Points of Claim and Points of Defence. All this benefits the Judge but does it benefit the parties? A recent CMC we were involved in lasted 2 days and took the solicitors and Counsel over 2 weeks to prepare for it. Admittedly

the trial itself will be a lengthy one but there does seem to be a disproportionate amount of work involved.

Recently, one of our ex-commercial Judges, Lord Justice Longmore, issued a report on the Commercial Court, just before his appointment to the Court of Appeal. He noted that

> *"There is no doubt that the introduction of CPR has increased the cost at the initial stages of a case for all cases…it is probably true that overall the new Rules have increased the cost of litigation."*

If that is the case then so much for one of the main aims of the Reforms. Lord Justice Longmore went on to say

> *"The countervailing advantage [is] that cases are better prepared and either settle earlier or are better prepared for trial."*

That may be convenient for the Judge but it is not necessarily convenient for the parties who are paying the lawyers' bills.

The Reforms also continue the trend towards documentation being provided in advance in that there are now always orders that witness statements and experts' reports are provided and exchanged well in advance and also that detailed Skeleton Arguments are also exchanged and provided to the Court. This should mean, obviously, that the Judge is very well prepared to hear the case on day 1. However, life is not, unfortunately, always like that. I was talking to a Commercial Court Judge recently who told me that he had finished a long 3 week Commercial Court case at

4.30pm on a particular day. He was considering how much time he would need to draft his Judgment and was then told by his clerk that he had another case starting the following day at 10.30am and was shown a number of boxes containing the trial bundles; pleadings; statements; skeleton arguments etc. With the best will in the world, and even if that Judge had dealt with the case at the CMC, there is no way in which he can absorb that amount of documentation and, indeed, to some extent it means that the whole process has been pretty fruitless since, as before, the first few days will be taken up with the Judge having the case explained to him. Incidentally the Judgment that he was to write in the previous case will also not get done.

So how do other countries deal with civil litigation?

Denmark

First of all I looked at Denmark. In Denmark, the Court does not play a very pro-active role. The parties normally serve a Claim Form followed by a defence, followed by one further pleading each. Apparently the Court does not interfere in this and it is very much for the parties to decide whether the case is ready for hearing. The pleadings are meant to be as short as possible. The pleading must set out the legal grounds on which each party bases his case and also must attach any documents on which the party relies. There is no discovery under Danish law. Thus any documents which need to be brought to the attention of the Court must be attached to the pleadings. Pleadings must also include the names of the persons whom the party wishes to call as witnesses. Each side has to provide a short, key, statement of their case, which the Judge can use as the basis of his Judgment.

There is no specific time limit for the preparation of the case and I understand that some cases can be under preparation for up to 7 years. However, normally the preparation would take about 9 to 12 months and only when the parties agree the case is ready for hearing do they ask the Court to set a time. Apparently in Denmark there have been very substantial problems with waiting times and it is common to wait for 12 to 18 months for a Judge to hear the case. There is no specialist Commercial Court. A recent Reform was trying to bring down this waiting time to about 6 months but it is quite common for this period to be doubled.

Witnesses do give oral evidence, in the usual way, but if for some reason beyond their control they cannot attend then the Court hearing is often cancelled and reinstated. When the case gets to Court it is dealt with much more swiftly than in England. In small cases half a day is sufficient and an average commercial case only lasts one day. Only very major cases with more than 5 or 10 witnesses would be given more than 4 days in Court. When the hearing starts, each party reads out their statement of case and then an agreed statement is read of the facts of the case. Then witnesses give evidence and it is very rare for a witness to be cross-examined for more than one hour. Then there are closing speeches which do not normally last for more than half a day altogether. Costs are awarded against the losing party. This is very different from the Anglo Saxon system.

France

I looked at the procedure adopted in the Tribunal de Commerce. This is the most common jurisdiction for commercial matters and the vast majority of commercial

cases are heard here. Interestingly, the Judges are lay Magistrates who serve on a voluntary basis and who are assisted by a legally qualified Court clerk. This may be thought as somewhat unreliable when hearing large commercial matters.

There is no formal procedure or timetable for the exchange of pleadings and the number of rounds of pleadings is variable and depends on the number of parties and the complexity of the case. The documents are not attached to the pleadings but documents on which a party seeks to rely have to be disclosed to the other party. The exchange of pleadings can last for 6 months or sometimes up to 2 years or more.

As in Denmark, a party is obliged to disclose documents on which they intend to rely but do not have to disclose any documents that are harmful to their case. France relies fairly heavily on the appointment of a Court expert in appropriate cases. He (normally not 'she') is appointed by the Court as an independent person who will examine the case. I think we are all familiar with the appointment of a Master Mariner in shipping cases in France. That expert can request disclosure of any documents that he requires from either party but that party is not required to comply if he feels the documents may be damaging. Failure to comply, however, does allow the expert to draw an adverse inference.

Apparently, it can take between 1 to 3 years to obtain a trial date from the commencement of proceedings, which is perhaps more similar to Denmark. At the hearing, a written file containing a copy of all the pleadings, the relevant documents and an explanation of the case is submitted to the Judge in advance of the hearing.

The Judge is likely to base his Judgment on those files. There is an oral hearing but this is unlikely to last more than 1 or 2 hours even in a large case. The Judge then considers the matter and renders a Judgment anywhere between 1 week and 1 year after the hearing.

Interestingly, there is usually no oral or written testimony at all. The Judges generally do not place much weight on the testimony of witnesses in the case as it is naturally assumed that they are biased! This is why if it is necessary to investigate the facts other than through the documents, a Court expert will be appointed and his report will be given considerable weight. Costs are awarded against the losing party but they are unlikely to be very significant in a large case as Costs Orders rarely exceed FF30,000 or US$5,000.

Singapore

I thought I would include Singapore since they have developed a version of the Woolf Reforms, so to speak, rather more than we have. As most of you will know, the Reforms in Singapore brought in by the present Chief Justice were very draconian and were designed to ensure that all cases were held promptly. I remember being in Singapore when these Reforms first came in a few years ago and most of the lawyers there were in a real state. All cases must be heard within 12 months of the case being started. The Court fixes a hearing date irrespective of the wishes of the advocate and there are very draconian rules as to the service of pleadings etc.

The rules on pleadings and disclosure are similar to England and Wales but in view of the extreme pressure on time, I am told that it is often very difficult to properly deal

with disclosure. The hearing, again, is more similar to a hearing in England in the sense that witnesses are heard and cross-examined and the case can last a reasonably long time.

It is not really part of this talk but I was told that the Court of Appeal have adopted a particularly stringent timetable for hearing appeals. There is only one appellant Court in Singapore, which hears all the cases. They sit on one day a week and hear 7 cases in the day. Each case gets one hour. This certainly moves cases along but you will no doubt have your own view as to whether this is a satisfactory way of discharging the appellate function.

The United States of America

The comments here really are based on proceedings in the Southern District Court of New York, the legal system in America being so complex it is difficult to generalise about proceedings in that country. There is a huge difference between the procedure in State Courts and Federal Courts and I have chosen the Federal Courts as being more uniform across the USA.

The timetable for cases going to trial is usually fairly swift, about 1 year. Pleadings will be a Complaint and a Response followed by Discovery. As you all know, Discovery is a very lengthy process in the United States and falls into 2 distinct parts. The first is documentary discovery which can be very wide ranging indeed and second is depositions. Depositions can be both of witnesses and of experts and the idea is to find out facts and evidence that will be given at trial well before the trial takes place. The depositions can be very extensive and expensive as they are often

taken abroad. I know of a recent case, in which my firm was involved, where the American attorneys taking depositions took up one entire floor of a hotel in Southern Italy! It is felt by a number of people that the discovery process in the United States, though extensive and costly, is beneficial in the sense that it achieves a very high percentage of settlement. In other words the parties are made aware at a reasonably early stage of the defects in their case.

There are always pre-trial reviews, at least one if not more, and there is an assigned Judge when the case is first started. That Judge deals with all the interlocutory matters including any Motions that might be made before the case comes to trial. However, there is no specialist Commercial Court and the Judge may have no shipping experience at all. So far as the trial is concerned, it is generally shorter than in England although most witnesses will testify in person and be cross-examined. Although statements can be taken as evidence in chief, this is at the discretion of the Judge who may direct that the evidence be led and then subsequently the witnesses are cross-examined. It is unusual for them to be cross-examined for the same length of time as in England.

Submissions are made both orally and in writing, Briefs are submitted, both before and after the hearing, again at the discretion of the Judge. The main difference between procedure in England and the United States is that no costs are awarded to the losing party.

Australia

I ought to say a few words about the Supreme Court of New South Wales, having seen it in action last year. As one or two of you here will know, I was somewhat taken aback by the procedure adopted by the Court. I found the system of having a Tender Bundle rather different as well as having to introduce all the other evidence by Affidavit. I was also struck by the very rigid application of the evidence rules both before and during when witnesses were giving evidence. When one witness was giving evidence I noted that objections took up 15 minutes of 1 hour of evidence.

Although England has been criticised (rightly) for many things in relation to its trial procedures, the rules of evidence are applied much more sympathetically. It is very rare, in England, for a witness to be prevented from giving evidence on any technical ground. If a Barrister does try and take a point of evidential procedure, the Judge normally overrules him and tells the witness to get on with it. I also noticed, in Sydney, that it is possible for applications to be made to amend pleadings throughout the course of the trial. This is despite the fact that there appears to be a rule against this. I was told that the Judges normally allow these amendments, with a penalty as to costs. My own view about this is that it should be prevented if at all possible since, obviously, it can change the way in which the case is argued and inevitably leads to lengthening the trial. You maybe interested to hear that in the case that I have been talking about here in Sydney, after the 7 weeks of trial, including 1,000 pages of closing submissions and 2½ days of oral closing submissions, Counsel for the First Defendant then made an application to amend the defence!

So having, as briefly as possible, explained what has been going on in England and Wales and looked at one or two other jurisdictions, I have to conclude by some views as to how the litigation process could be improved. Obviously I am going to look at this from an English perspective since I can only really make sensible comments on the English process.

First of all it seems to me that the Woolf Reforms are clearly a sensible move. I do think that litigation, particularly of the nature found in the Commercial Court, needs to have a more streamlined procedure and stricter time limits.

ASSIGNED JUDGE

I would like to see the introduction of a system where, at least in complex cases, a Judge is assigned to the case and then hears all the interlocutory applications as well as taking charge of the trial. This would mirror the system in America. This does happen in some complex cases and I think it should be expanded.

TIME LIMITS

The next point is that I would like to see Judges being tougher on parties in relation to time limits. The Woolf Reforms have encouraged a somewhat tougher attitude but even now Judges are too ready to allow amendments, to allow extensions of time which are not really necessary and which merely add to the delay in having a case heard.

TRIAL DATES

I would continue the process started by the Woolf Reforms of setting a trial date at the CMC and I would like to see trial dates set with a particular time limit, i.e. not less than 12 months after the CMC, for example. These trial dates should be fixed without reference to the convenience of Counsel, and indeed the Woolf Reforms do say this. Nevertheless in a recent case in which we are involved a trial was adjourned, purely because one of the Barristers had subsequently become unavailable, which is in direct contradiction of the Woolf Reforms. This is merely the same point as I made above and I think the Judges should be consistent in the application of the rules. If the rules are there, they should be applied.

DISCOVERY/DISCLOSURE

Personally, I am in favour of the discovery process being far reaching. I appreciate this leads to additional cost and expense but, certainly in complex cases, I think it is also likely to produce the best chance of a "fair" result. This is not a particularly fashionable view. When I went to my first lecture at Oxford, the lecturer said that as we were all new to the law we probably thought that law and justice had something to do with one another and he would like to inform us that they had nothing whatever to do with one another! Nevertheless, I do think one of the purposes of litigation should be to get the right result, not just a result. I feel that the disclosure process can contribute to getting the right result.

I think the civil law system of having no disclosure does not necessarily get the right result. I think it unsatisfactory that French Judges assume that witnesses for each

side are automatically lying! I am speaking here as a lawyer, not necessarily as a client. Obviously a client who has damaging documentation which he would not like to disclose is not interested in a fair result at all, he merely wants the right result for him. Having said that, it is often said that disclosure in American proceedings has gone too far and this is, I think, correct. I am told that a new direction has now been introduced in Federal Court that depositions should not exceed 7 hours, which is a sensible step. It is trying to find a balance between proper investigative disclosure and fishing expeditions that is so difficult.

TRIAL BUNDLES

I have already referred to the fact that I think the English system of having all the documents in one trial bundle is sensible. The disadvantage of this is that the bundle can be too large. I would like to see a system whereby the Judge in charge of a case is able to have some impact on the size of the trial bundle. At the moment, everybody puts all the documents in just in case, and often half of them are never looked at. Some judicial control of this would be sensible.

SKELETON ARGUMENTS

We are moving, slowly, towards the system of having more arguments in writing. Skeleton Arguments have made a big difference to litigation in England and Wales over the last few years and I would like this to continue. However they are not much good unless they are prepared properly in advance. At the moment the tendency is to produce them very much at the last minute, say 24 hours before the beginning of the trial which, when the trial is complex, it is not much help to anybody. I would like

to see a rule whereby the Skeleton Arguments are produced well before the beginning of the trial, say 14 days, so that both sides can see exactly what is going to be said. It also gives the Judge a chance to look properly at the issues in the case. If all the Trial Bundles were lodged at the same time, then the Judge would have a chance of being well prepared.

AMENDMENTS

I have already said that I think that one of the difficulties in trials is amendments being asked for and acceded to during the course of a trial. I would like to a system whereby no amendments are allowed, save in exceptional circumstances. Of course that is, at least to some extent, the current rule, but Judges are inclined, no doubt because they wish to be fair, to allow amendments. The whole purpose of having a Case Management Conference and judicial intervention during the course of the preparation of the case for trial is that there should be no need for any further amendments once the trial has started.

CROSS-EXAMINATION

Again I am in favour of detailed cross-examination, since this can win or lose cases. It is always said that the most difficult time of your case is when your own witnesses are giving evidence and this is certainly correct. I have had cases where cross-examination has resulted in the case being lost when I thought the case should have been won. However, I think, on balance, cross-examination is a useful weapon. Nevertheless, we need to try and put some limits on the time for cross-examination. I think the time in Denmark is too little (though more than France!) but allowing the

witness to be cross-examined for weeks in a large complex case does not seem to me to be necessarily very sensible. I think there should be more judicial intervention here to make sure the cross-examination is restricted much more to the evidence being given by the witness and to the issues in the case rather than a far reaching and irrelevant cross-examination in the hope that something will turn up.

JUDICIAL TIME

One thing I would also like to see is Judges having more time to deal with the administration of cases. By this I mean that Judges should, when a case finishes, have a certain period before the next starts, both to draft a Judgment in the preceding case and to consider documentation for the next case. The example I gave before about a Judge being faced with one trial immediately after another is perhaps uncommon, but I do not believe Judges have enough time, at the moment, to deal with the case load they have. If they had more time, assuming that it could be policed properly, you would get Judgments rather more quickly, and perhaps more accurately, as well as the Judge being more up to speed for the beginning of another complex case.

SOLICITOR ADVOCATES

England is one of the last bastions of the solicitor and barrister system. The idea of having a specialist advocate who wears funny clothes and a wig is something that we successfully exported to our colonies, but which exists nowhere else. I understand that in Australia, the situation differs from state to state although the system in the

Federal Court of New South Wales seems very similar to London. Apart that is from the "morning tea adjournment"!

One of the things that Mrs Thatcher was determined to do when she was Prime Minister some 15 years ago, apart from take on the Trade Unions, was to abolish the distinction between solicitors and barristers. As you may know she was herself a barrister but she under-estimated the immense conservatism of the legal profession, strangely enough more of the Bar than of solicitors. Accordingly, nothing much actually happened to change the situation. In order to appear before the High Court, you still need to be either a barrister or else a solicitor advocate. Ironically, the body in charge of giving certificates to solicitors to become a solicitor advocate is the Bar and the Bar has shown itself very unwilling to grant very many such certificates. Accordingly, although there are now more solicitor advocates than there were 10 years ago, there has not yet been any significant impact on the way in which cases are prepared and fought.

Most of our foreign clients cannot understand why we need to split the profession in this way. They point out litigation gets on quite happily in their own country without a split profession. Indeed in the most litigious country in the world, the United States, there is no such division. It is fair to say, however, that in the firms that I know in the United States, they do tend to specialise either in becoming trial lawyers, i.e. doing the advocacy, or else fulfilling the role that is more similar to that of a solicitor. In any event would a greater use of solicitor advocates or a fused profession be a way forward for civil litigation?

This is a question which I find quite difficult to answer. The way in which litigation is run in England, even despite the Woolf Reforms, lends itself to there being a split profession since no barristers wish to deal with the somewhat menial task of preparing the case for trial, dealing with administration, disclosure etc. Most solicitors do not have the necessary training or indeed desire to argue a case in Court. I myself have only argued one arbitration myself and I must say I found it a very taxing experience. If you want to bring about a change you would need to grant the right of audience before the Higher Courts to all solicitors, on qualification, in the same way as the right of audience is given to barristers. This might then produce a significant change and once, for example, the large litigation firms started trying to buy up barristers then the whole situation might alter.

I do not see that as being very likely to happen and my own view is that the future of civil litigation does not so much depend on a change in this system. It can actually be exploited for the benefit of the client. It is frequently cheaper to have opinions and pleadings done by junior Counsel who are experienced at this work. Counsel do not like getting involved in the discovery process which is done by the solicitor. The only time where you get significant extra costs is at trial, where it is not always necessary to have a QC; a junior and 2 solicitors sitting in Court. However, having said that, if you look at a substantial case in the United States, it is not uncommon to see a team of 6 or 7 attorneys which actually produces just the same result. Overall, therefore, I do not see the abolition of the division between solicitors and barristers necessary for the progress of civil litigation.

COURT EXPERTS

This is a system used extensively in some civil law countries as I have already said. I would be in favour of introducing a similar system to England. As you may know, under the new Arbitration Act, 1996, arbitrators now have power to appoint an expert to assist the Tribunal if they feel this is useful. I do feel that one of the problems with litigation in England is something of an over reliance on experts who, whatever they may say in relation to independence, nearly always vigorously support the side that is paying their bills. There would be additional expense if both side continue to employ their own expert as well as the Court appointing an expert. One of the other difficulties is that you have to have a good panel of experts on whom the Court could rely and whom the parties would regard as sufficiently experienced. However if the matter involved a question of forensic accounting, either party could hardly complain if the Court appointed one of the big accountancy firms. Similarly, in shipping cases, all the large marine surveying firms, naval architects etc. are well known and there should be no difficulty in the Court appointing an appropriate expert. Indeed the parties could be asked to agree on an expert although this might be as difficult as asking them to agree on an arbitrator!

What this would tend to bring about, I think, is an unbiased view, in the sense that the Judge will be hearing from an expert who has no loyalty to either party. That expert could still get the matter wrong but the Judge, not being a fool, would also be able to take his own view as to whether the expert had entirely come to the right conclusion. I recall a case we had in arbitration where a very well known firm of experts came to a particular conclusion about the boilers on board a newbuilding. The conclusion

was based on computer print outs and was very damning to our clients case. Our expert did not understand the way in which the conclusions had been produced and was therefore no use. One of the arbitrators, who had some background in this matter, refused to accept that the conclusion being put forward was correct and over the course of a few days, and I believe with the advantage of discussions with another expert, managed to point out that the conclusions come to were in fact entirely erroneous. I think this subject is a difficult one but the fact that an independent expert has been thought to be sensible so far as arbitration is concerned, and the new Arbitration Act was very widely discussed before the Act was drafted, shows that there could well be some support with this particular idea.

CONDITIONAL FEES

Is this system part of the way forward? As you probably know, there is now a system in England and Wales whereby you can act on behalf of a Claimant on a conditional fee basis. This means that if you lose the case, your client pays you nothing, but if you win the case you are able to charge more than your usual fee, up to 100% on top of your usual hourly rate. This is very much a compromise, nothing like the contingency fees charged, particularly in America.

One of the main differences, also, between England and America is that you are obliged to pay the costs of the Defendant if you lose the case. It would, quite obviously, be something of a burden on the solicitor were he to guarantee to pay the other side's costs. Accordingly what happens is that insurance policies have been developed which can be taken out by the Claimant which will ensure payment of the

costs of the Defendant if the claim is unsuccessful. If the claim is successful then the cost of that insurance policy is recoverable by way of costs from the Defendant.

My firm does not do very much conditional fee work, perhaps for obvious reasons. It requires a considerable investment in terms of cashflow and is not normally appropriate for large commercial cases. Also, it is very difficult to make such a system work when you are acting for the Defendant. However the system has been useful in cases that I have mentioned, such as personal injury work. We also took on one case ourselves, a case of unfair dismissal, where the Claimant was unable to obtain Legal Aid, which, with the introduction of conditional fees is to be abolished in civil cases, and we were relatively certain that the Claimant had a successful case. Indeed we were successful and from that point of view everything worked well. It seems to be the aim of the Government to replace Legal Aid with conditional fees, which, in my view, is a retrograde step.

The downside of conditional fees, obviously, is that lawyers will only tend to take on cases where they are relatively certain that there will be a successful result. We do seem to be moving more and more into what has been called a compensation culture and I think that conditional fees to some extent will encourage this. There is a view that if something has gone wrong then “someone ought to be to blame”. I think we will just have to wait to see how this develops. The fact that the Defendant, if successful, is able to recover their costs, is still a deterrent against the type of claim that seems quite common in America. In America, a Defendant will often settle a nuisance claim in order merely to save his own costs. I do not see that as the way forward for litigation in England. I do not believe it is desirable. With conditional

fees, even of the limited type available in England, another factor is introduced into the litigation process, a purely commercial one, which is not necessarily in the interests of the clients or justice. The legal adviser is considering his own interests as well as that of the client. Indeed we are now seeing the growth of commercial companies which advertise heavily and 'sell' their expertise in this area. I realise that this may bring redress to some people who would otherwise be left without any remedy, but I find it all slightly distasteful.

SPECIALIST COMMERCIAL COURT

As you will have gathered from the earlier parts of this talk, I am strongly in favour of a Specialist Commercial Court. We are lucky in that we have the throughput of work to keep a Court with 8 or 9 Judges busy and also that the standard is high. I hope this will continue.