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President, Dean and Professor, and colleagues. “Colleagues” because having retired from my position as Chief Justice, I was made a Chartered Arbitrator of the Chartered Institute, which is a great honour. In addition, I went on a course as a mediator which I passed so, I can say, I am now an accredited mediator for the Centre for Effective Dispute Resolution (“CEDR”), which is one of our main mediation providers and trainers. I am also a consultant to CEDR, helping them, particularly, in regard to international mediation.

For somebody with my background, although I can claim substantial experience as a judge, it is rather intimidating to be among an audience of such obvious experts in the fields of arbitration and mediation. I make no claims to such expertise, but with regard to the suggestion that my speech is keynote, I should explain to those who are non-musicians among the audience that the key note is the lowest note in the key, not as you might have thought the highest note, so things are only going to get better!

I believe I should perhaps start off by congratulating you on being here today. I think it is a great compliment to your enthusiasm for ADR that you should have decided to come to a college of London University where you could be assured that the lecture theatre would have a distinguished history (and indeed this lecture theatre has a distinguished history, reflected in the fact that on my left is a Bunsen Burner which some of you will have remembered from your school days) but where equally you could expect that there would be no air-conditioning. In view of today’s very high temperature you would have been excused if you had felt it was not possible to be here.

What am I going to tell you today that will be of interest to this audience? Well, I have thought about that and I thought it

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might be useful to explain why, on this side of the pond, we are where we are in relation to ADR. So far as that is concerned, I can claim a certain responsibility because precisely ten years ago, I delivered a report, at the request of our government, called "Access to Justice," the recommendations of which have been implemented. The purpose of the report was to deal with a situation where it was manifest that, although what I will call our Rolls Royce system of justice was both with regard to the standards of the profession and the standards of the judiciary still of the highest quality, the one thing the system was not providing was justice to which the majority of the public could obtain access. That was for a number of reasons. Among them was expense, delay, disproportionate procedures, and the complexity of the system.

I heard stories as I travelled around the country taking evidence where people had been let down by the system. There were situations where two neighbours had a boundary dispute and they both ended up selling their homes to pay the costs of the litigation in which they were engaged. In any event, how can you live next door to someone who you have been fighting in the courts? The courts were pushing them further and further apart. Another example was the problems with regard to medical negligence or malpractice. The one thing that nobody could do was say "sorry" in our system. The insurers would not allow the doctors to say sorry when things went wrong, and I met patients who had gone into the hospital to be helped and had come out, unfortunately, damaged, and the one thing they wanted above all was somebody to acknowledge that something had gone wrong and acknowledge that they deserved better treatment than they had received. That was one side of this problem. The other was the doctors who, even though they strongly refuted the allegation that they had done anything wrong, felt that it was impossible because of the attitude of their professional insurers to take the steps they wished of expressing the sympathy they felt for the outcome and discussing what could be done to improve the condition of the patients so that they could, when this was practical, resume their life and not remain with a deep sense of grievance. These are just two examples. There are many others I could quote.

I came to the conclusion that our system, good as it was in certain respects, particularly with heavy commercial disputes,

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just had to change its culture. It had to realise that it was not there only to decide cases, it was there to resolve disputes in the best possible manner for the public.

In order to make a worthwhile report, I had to visit other countries. One of the countries that I visited of course was the United States, and I was hugely impressed by the courts in Washington with revolving doors. I was also very impressed by the Supreme Court of Phoenix's approach to litigation and I thought you were in a different league when it came to addressing the grievances of your citizens. I also travelled to Australia and there again I found that Australia was well ahead of us.

During the visits, as a judge who then had at least fifteen years experience on the bench and before that had a varied practice, I was exposed to and learned about mediation and what the different methods of alternative dispute resolution could offer. Even though I like to think that I was up to date with learning in this country with regard to most aspects of the law, the fact is that our universities were not giving the attention that they should to dispute resolution, and it was no part of a young lawyer's training to be taught about different methods of dispute resolution at that time. I had virtually no experience of mediation.

As you have heard, arbitration was well-rooted in my jurisdiction and we all knew that arbitration was there as an alternative to going to court, but arbitration was seen as a rather rarefied speciality for commercial disputes and of no real relevance to the ordinary member of the public. One of the things that I came to a conclusion that we had to focus on was the different methods of resolving disputes and that we should regard litigation as the last resort. That was the thrust of my recommendations and I was indeed fortunate because I found that many of the profession shared my views about the weakness of our system. I found many judges were also of a similar state of mind. So those that are regarded normally as being conservatives with a small "c" were giving support to the idea of changing the system very fundamentally.

The thing that I found most difficult was persuading my fellow lawyers that they could do without Latin. This was, I must confess, merely a flag. It seemed to me that if you were providing justice and dispute resolution for the public, they

should at least be able to understand what was being said. We lawyers, however, found it very difficult to give up “quid pro quo,” “quantum,” and “certiorari” and so I made an attempt to make some inroad on that attitude. If I achieved nothing else, I at least found that thereafter whenever I had advocates appearing before me and they felt compelled to use Latin in my presence, notwithstanding their knowledge of my feelings about it, they always apologised for doing so. This at least showed awareness that they were using a language which was not necessarily entirely appropriate for the administration of justice in public.

What I sought to achieve was a different approach to the whole idea of what the role of the courts was in regard to providing dispute resolution. My attitude to the purpose of the justice system is reflected in the overriding objective which now appears at the beginning of the procedure rules of this jurisdiction. It is set out that it is to achieve a proportionate, expeditious, and fair resolution of disputes. A judge should no longer sit back and allow the parties to conduct the litigation in the way that they chose. Instead, the judges had to become managers—their job was to manage the litigation, or the dispute, which they heard. Right at the beginning was set out a duty on the judge to encourage parties to use ADR if that was appropriate to facilitate the resolution of the dispute. Whatever the criticism to what I was proposing, I never heard a word of difference about the overriding objective, and if any of you are interested in seeing what our system is really about, now you just need to look at Part 1 of our Civil Procedure Rules.

Another innovation that I introduced was the idea that there should be protocols. I think that we were the only jurisdiction at that time who had protocols. The idea of protocols was that those who really knew about the conduct of litigation in the field with which the protocol was to deal would come together with a specialist judge and create a non-binding document, which set out a sensible blueprint for the conduct for that class of litigation. In clinical negligence cases, for example, achieving the disclosure in a consensual, voluntary way prior to the commencement of the litigation was necessary to see whether in fact it was just an unfortunate accident where there was no blame on anybody or whether there was in fact some departure from the proper standards, or at least arguably some departure from the proper standard of treatment.

This focus on resolving disputes did mean that what happened in the courts changed dramatically. We had always settled the majority of our litigation. Well over ninety percent would eventually settle, but when would it settle? It would settle at the last possible moment, just as the litigants were going through the door of the court. That caused the maximum disruption to the parties and the maximum disruption to the courts. We tried to devise a system where that would not happen, and to a great extent we have succeeded.

The drop off in litigation actually reaching the courts here has been quite dramatic. If you go along to the High Court now you can get your case heard as soon as you want it heard. Indeed, the courts are pressing litigants to come and have their cases resolved quickly because the resources they have are now sufficient for that purpose. We re-gearred the procedures so that they were, what some people call, "front loaded." You have to pay out the money at the beginning if you are going to get a resolution of the dispute earlier than would otherwise be the case because people always find excuses as to why mediation should not take place now, or why there should not be a pre-trial evaluation of the dispute, or some other reason why the alternative routes which are available should not be taken. Those alternatives here include of course the use of the Ombudsman process. That is a phenomenon that has been hugely successful, and which I do not think is adopted to the extent that it should be on the other side of the Atlantic.

I have heard no talk about Ombudspersons when I visited the States, as I do regularly to see what is happening there and to discuss issues with my U.S. colleagues. The Ombudsman is a resource that is free of charge. He or she takes over the dispute, does not treat it as an adversarial issue but entirely inquisitorial, and he or she then comes out with a recommendation that is non-binding. If the recommendation is against the public body or the private body, which the Ombudsman regulates, it is almost invariably implemented. In the case of central government, it is inevitably honoured. So, from the litigant's point of view it is a marvellous alternative. It gets a result. It gets compensation if it is thought that it is necessary. Without using a lawyer, without doing anything other than putting the dispute in the hands of the Ombudsman and giving that Ombudsman the

assistance that is needed in order to investigate, a remedy can be obtained.

It is particularly good for the citizen because if it does not work out and they do not like what the Ombudsman has recommended, they can go off to the courts or do whatever else they want. They can mediate. They can arbitrate. But the fact is that that is available. Now, I do not think we, in this jurisdiction, use the Ombudsman sufficiently. Ironically, one result of the European Convention of Human Rights becoming part of our law is that the Ombudsman is regarded as some form of inferior type of dispute resolution mechanism; so if that is the only remedy that they could get, they can complain to the European court or to our courts and say there has been a contravention of Article 6. Article 6's language is a reflection of what fifty years ago (when the convention was drafted) was thought to be the methods that should be used to resolve a dispute. But that aside, the Ombudsman system is working very well, although it has not, in fact, been integrated into our dispute resolution system or linked with the courts to the extent that I would like to see happen. I would like the courts to be able to refer cases to the Ombudsman, and I would like the courts to have cases referred to them by the Ombudsman if there are difficult points of law to be resolved. I believe that will happen one day but it has not happened yet.

The critical difference between most other jurisdictions and our jurisdiction is the cost-shifting rule that we have here. A relatively limited costs jurisdiction exists in the States, but here when appropriate the courts can, and do, regularly make an order for costs in favour of the successful party in litigation. This means that about two-thirds of the costs are ordered to be paid by the unsuccessful party. In special circumstances, an even larger proportion of the costs can be ordered to be paid. That means that the courts have a most valuable tool available to sanction those who do not act reasonably. I draw attention to this because on my travels I was told again, principally in the States and in Australia, that if you want mediation or early evaluation to take off, you have to make it compulsory. They pointed out that in fact when it is compulsory, the results are extremely positive.

I formed the impression, particularly in California, that it was compulsory because of the state of the dockets in the various

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courts. The state courts were hugely overburdened, and the fact was that if you wanted a case heard within a reasonable time, you had to use some form of alternative dispute resolution because you would not get an early hearing in normal circumstances from the courts. Indeed there was an engine at work pushing people away from the courts because of this situation. Of course the fact that there are difficulties in dealing with the volume of cases in a particular area is a valid consideration to take into account, but my view was that when we were not in that position in this jurisdiction we should not make it compulsory for people to go to mediation. The courts must always be open to everyone who wishes to use them.

This does not mean, however, that two things could not happen. One is that judges should encourage people to mediate: I am glad to say that happens now regularly in the courts, and it is the case that many disputes in all different areas now go to mediation as the result of a judge encouraging the parties to do so. Equally, it did not mean that the courts could not take into account the failure of a party to respond to the requirement to mediate and mediate in good faith when it came to assessing costs. There have been cases before courts where it has been challenged that the appropriate order for costs should be the usual one, namely that the winner takes all, because the winner did not do what would have been sensible and agree to mediation.

This is part of the new culture, but I have to recognise that the ability of the courts to exercise that power has its difficulties. This is because certainly here, and as far as I know from the mediations I have attended in the States, what happens during the course of the mediation is confidential unless both parties agree that it should not be. It seems to me absolutely critical to the well-being of mediation that it should continue to be confidential. Yet, how can a court assess whether a party has been mediating in the way that they should, unless they write a very silly letter, if what happens during the mediation cannot be inquired into?

So, there are limited powers but the courts have given us guidance. Two or three years ago, the court did give guidance in a well-known case in this jurisdiction called *Halsey*.¹ They pointed out the difficulties of making special orders for costs, but

¹ *Halsey v. Milton Keynes Hospital Trust* [2004]EWCA Civ.576.

recognised that the ability existed within the court to take into account a failure to go to mediation when it is the course that obviously should have been adopted but was not. Indeed, I have myself, when sitting as an appellate judge, taken that factor into account and influenced the order for costs in consequence of it. These matters are now precedents and help to change the culture. There is still here, as in most other parts of the world, a reluctance on the part of many members of the profession to go to mediation. They regard it as somehow interfering with the proper process of litigation. Often this is because they are not sufficiently familiar with the mediation process and they have not had personal experience of what it can do and how valuable an instrument it can be.

We have heard today that mediation is only part of the canopy of alternative dispute resolution mechanisms and that arbitration is important. It is not without significance that at the same time that I was doing my investigation as to the way the courts worked, Lord Saville was in the process of doing a similar exercise with respect to arbitration. Also ten years ago, in 1996, there was a new Arbitration Act. Section 1 of that Act is the equivalent of Part 1 of the Civil Procedure Rules. It says, in stark terms, "The object of arbitration is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay or expense." It goes on to make it clear that, subject to the public interest, parties should be free to agree on how their disputes are resolved. It sets out that the court should not intervene except in the limited circumstances for which there is provision in the Act. This is the right approach. Arbitration is a process so similar to that in the courts, that it should be regarded in a similar way. It needs to be managed in the same way.

No one, in this jurisdiction at any rate, has set out in the form of binding legislation how the mediation process should be conducted and again, I think that is right. I think the strength of mediation is its flexibility and its ability to resolve disputes in a wholly different way from what happens in the course of either litigation in the courts or arbitration. It is my belief that mediation has as important a role to play with respect to arbitration as it has in regard to litigation in the courts. That is something which is often lost sight of and needs to be heeded by those who specialise in arbitration.

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Can I close in this way? There have been recently in this jurisdiction one or two examples of cases still taking extraordinary amounts of time and involving extraordinary costs. There are two cases in particular; one involving an insurance company, the Equitable Life Insurance Company, and the other involving the Bank of England. They demonstrate that you are never at the end of the process of tailoring the litigation system so that it meets the needs of the public. The Bank of England litigation involved the collapse of a bank and the litigation costs came to £100 million. The governor of the Bank of England made a speech at the Mansion House just recently where he talked, not surprisingly, in the most critical terms about a process that could produce such a result, albeit that the Bank of England was exonerated completely in the process and albeit that the Bank of England felt it could not mediate. It considered that this was a case where the integrity of both the bank and its senior officials were at stake and therefore the case must be fought.

I accept that it is the prerogative of any litigant to take that view, if there is good reason for doing so. I would not criticise the Bank for coming to that conclusion, but what I do criticise is the fact that it was not appreciated, even though the litigation could not be avoided, that there could still be a role for a mediator. The mediator could assist the parties as to how to simplify the litigation. To ensure that matters which were not really in dispute did not lengthen the litigation unnecessarily. As to how to help the parties to produce timetables that were of reasonable length for making submissions and hearing the evidence of witnesses.

The trouble with having negotiations between parties with no neutral present is the parties both see the case from their side's point of view. An objective neutral can help in most situations even if the help is limited to avoiding the parties from conducting the litigation in a disproportionate manner or to assist to achieve some order. If a mediator cannot help them to achieve this, then there is a strong obligation of the court to ensure that litigation does not cost the amount, and does not last as long as it did in these cases. I am not criticising either the judge who tried cases or the professionals or the members of the profession who conducted the cases. My knowledge of what happened is too limited to justify this. The cases, however, illustrate that, whereas we have made great progress in this

jurisdiction over the ten years since I made my report, we still have a lot to learn.

Let me illustrate why I say we have a need for a mediator. When I started off as a young man on the Oxford Circuit, being happy to do any case I could, sometimes I was instructed in personal injury cases. I sometimes had to give advice as to what I thought was a reasonable figure at which to settle the cases. Two solicitors, who I am glad to say were in the habit of instructing me, met and they said, "Look, we should be able to settle this." One said, "I went to my counsel and he advised X thousand pounds" and the other said, "Well, I went to my counsel and he advised X plus £10,000." Very sensibly they said that they would exchange the opinions of counsel in view of the difference of view that had been taken. It happened that both of the opinions were signed by me! I do not blush about that except that I recognised that my record keeping was not such as it should be. What I do think this illustrates is that I was acting on the story I heard from each side and if you heard the story from one side as to the extent of the injuries it was very different from the story you heard from the other side. I was not in a position to hear both sides normally before I gave an opinion and certainly these opinions were given months apart, so I had not remembered the case when I had come to give the second opinion. But if there had been a neutral who could have heard both sides and said, "With respect, Mr Woolf, that view of the seriousness of the injuries is really contradicted quite clearly and convincingly by the view of the doctor on the other side," would I have been guilty of making two different evaluations? I do not think I would. I think that is just one tiny illustration of what can be achieved by a more sensible form of litigation and the more constructively managed dispute resolution process that should be the hallmark of a contemporary justice system.