PRESIDENT'S LUNCHEON

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ADDRESS BY LORD JUSTICE STAUGHTON

It is a major task of anyone who is head of a business to plan ahead, to forecast future trends and take measures to cope with them. No doubt this is particularly the case in the insurance industry. But the principle also applies in the business of running law courts. In 1956, when the Suez Canal was closed, there was suddenly a major demand for the services of the Commercial Court. The same happened, to a much greater extent, in 1973 when President Nixon prohibited the export of soya beans from the United States. More recently, when it was my turn to be judge in charge of the court, the judges received an invitation to visit the new building at Lloyds. We welcomed the opportunity to see the conditions in which underwriters and brokers work: the underwriters in their boxes looking suspiciously at the slip presented by the first broker in the queue, and energetic young brokers scurrying up and down escalators to complete their cover. But one of our group was observed taking a long hard look at the casualty book near the Lutine bell. That was David Bird, our listing officer. He was calculating the cases which we would be required to try in three years time.

There was, as I noticed at the time, a cloud on the horizon no larger than a man's hand. The judge in charge has a heap of papers on his desk every morning relating to actions which have just been started. A surprising number of them in 1987 were reinsurance disputes, often involving many parties, most of them from overseas. Perhaps I should have taken more energetic steps than I did to persuade the authorities that an explosion of this type of litigation was to be expected, and that more resources would be needed. In the result, last week three of the six judges allocated to the Commerical Court were trying insurance cases - that, you may think, is 50 per cent; and two of those cases appear to be internal disputes of the insurance industry. I believe that it is not long before the Court of Appeal will also be involved.

I shall return in a moment to the topic of reinsurance disputes; for the moment I say only that it must be a matter of regret for all that internal disputes in the insurance industry are now so common. First I ask you to consider whether all court proceedings have come to last far too long and are far too expensive, and what can be done about that. One solution would be for lawyers to be paid less, but that might be controversial. Judges, I would observe in passing, are relatively cheap. In 1957 Mr Justice Devlin observed that the fee for hiring a courtroom and a judge was two guineas a day; the fee for a courtroom without a judge was five guineas a day. No doubt the figures have changed since.

One problem that is plain to all is that there is far too much copying of documents. Not even the simplest case can be tried without two or three hundred pages for each participant, and in commercial cases there are thousands of pages or more. That is because it is cheaper, quicker and easier to copy everything than to exercise brain-power in deciding what is relevant and necessary. Usually the documents are beautifully prepared, but the expense must be large. The judges, and others, have to guess which documents are worth reading. Somebody has to carry them all round from place to place; and when one is taking papers home in the evening or at a weekend, one either needs a pantechnicon or has to guess what will be needed. One solution is to abolish the photocopier. This never used to happen when documents for use in court had to be copied by typewriter and carbon paper. Or there could be some sanction in costs if, as frequently happens, several volumes of documents are copied for use in court but in the event are never even glanced at. A third, more radical, solution would be to abolish the process called discovery of documents. Why should it be an essential requirement of justice that each party should produce, not only the documents that he intends to rely on, but also all other documents that might conceivably be relevant? Do other countries have this requirement? Would the skies fall if it were abolished, except in special cases where one party is inherently unable to prove his case without the other's help? There would certainly be a major saving in the cost of litigation, and in the delay involved.

Another cause of lengthy trials and expense is the modern proliferation of expert evidence. Time and again the parties to a dispute wish to call two or three expert witnesses each, when it is hard to see that any expert evidence is necessary. In personal injury cases they will wish to call an accountant, whose only function will be to do some calculations which could just as easily be done by the parties, or their lawyers, or even the judge. In commercial cases I was often told that an expert witness was required as to the practice of the trade, whether it was insurance or reinsurance, or banking, or commodity dealing. In a high proportion of cases such evidence is, I regret to say, useless or even irrelevant.

It is not the function of witnesses to tell the court what the intention of the parties was, or what was the meaning of the contract which they made. That is just as well, as when such evidence is inadvertently admitted, almost invariably the witness for one side says that the contract means one thing, and the witness for the other side says that it means the other. The intention of the parties is to be determined by the ordinary English meaning of the words which they used, judged in the light of surrounding circumstances which were known or could be expected to be known to both of them. The fashion nowadays is to speak of the factual matrix. In some cases evidence may establish a custom or usage which affects the meaning of the contract, but those are very rare.

There are, of course, technical terms used in many commercial contracts, and the court may need evidence to understand them. It is here that reinsurance is a particularly difficult topic, for the parties often do not themselves seem sure of the meaning of the words which they use, or at any rate find difficulty in explaining them to obtuse lawyers.

Beyond the meaning of technical terms, it is sometimes helpful, and indeed necessary, to have evidence as to how a particular industry operates. For example in an insurance dispute a judge might need to be told, if he did not know already, what a slip is, and how, by whom and in what order it is completed. In the *Libyan Arab Foreign Bank* case I heard massive expert evidence as to how a sum of three hundred million dollars could be transferred from one bank account in London to another. But such evidence does not go directly to the meaning of the contract which the parties have made. At most it forms part of the background, surrounding circumstances or matrix.

The need to restrain unnecessary use of expert evidence is not helped by the Rules of Court; indeed in my view it may be positively hindered. The parties are required on the summons for directions to apply for leave to call expert witnesses. That may well have the effect of making their advisers think that some expert evidence is necessary, which otherwise would not have occurred to them. When they then ask for one, two or three experts, the judge can and sometimes does ask what they are needed for. But provided application has been made in due time and that any conditions as to the exchange of reports are observed, the judge has no power to refuse leave. This too should be looked at, if the costs of litigation are to be contained.

I have spoken for so long that there is not time to consider other causes of expense and delay, such as the long-windedness of counsel and the ignorance or idleness of judges. At least for those of you who prefer arbitration, there is your president. Recently in the Financial Times law report it was said that his competence as an arbitrator was not in dispute, that he was a non-practising barrister, co-author of one of the standard works on re-insurance law, president of another prestigious insurance association and had worked for Mercantile & General for 29 years. So alternative dispute resolution is ready to hand.