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## An open letter to Ken Clarke, the Lord Chancellor

Seamus Smyth

✓ RECOMMEND? (1)

Congratulations on taking on responsibility for civil litigation.

Ours is, for those who use it, a good system – broadly fair, thorough and conscientious, and untainted by corruption or significant delay.

The cost to users, however, is so great that many – both people and businesses - are excluded completely. For them there is no system at all, which is a disgrace.

Fundamental reform is essential, and that reform will have to be funded. Litigation reform may not be a vote-winner, but the State must provide a dispute-resolution system for all and failure may be a vote-loser.

If not checked, the gulf between cost and access will worsen.

Litigation is subject to constant pressure for improvement. The rules themselves, professional regulation and lawyers' concern about criticism, complaint or claim, cause what was regarded yesterday as "exemplary" to be regarded today as the "required standard".

The leave-no-stone-unturned attitude generates cost (without necessarily providing any commensurate benefit to a client), but is unlikely to diminish. The greater the drive towards faultlessness, the higher the expense of litigation will be and the fewer the users.

The country cannot afford perfection if it is available to only a few. A generally accessible system would be preferable even if less perfect.

Cost has been exacerbated by the info-revolution. Our procedure developed in an era when the material involved in litigation (other than oral evidence) consisted only of documents created or copied by hand, and was very limited.

Time and cost have, in the past 50 years, increased vastly, thanks to mechanical production and copying, the electronic creation, storage, copying and dissemination of documents in the conventional sense, and the creation of non-documentary electronic data –to an extent which is almost limitless. Despite attempts to limit disclosure, litigation is now at risk of being overwhelmed by the quantity of material involved.

Tinkering with the rules is not enough; nor is merely redistributing the cost between parties, lawyers, insurers, third-party funders and the state: the imperative is to reduce the overall cost, and reduction will be achieved only by a change in procedure as radical as the recent revolution in information technology.

How does the State provide a system at acceptable cost (both to the State and to the parties) that does not jettison the valued features of our present procedure? My suggestion is that every dispute involving a defence on the merits is compulsorily subjected to an early determination by the court.

There are circumstances, such as applications for urgent injunctions, summary judgment and security for costs, in which courts today have to examine the merits on a preliminary basis and on a limited amount of material.

In my experience - of cases that have proceeded from such an early examination to a full trial after years of pleadings, disclosure, witness statements, experts' reports and trial involving cross-examination and argument - the outcome after trial is usually no different from the preliminary view.

Where parties are compelled to produce only the essential submissions, essential documents and evidence at an early stage, a judgment based on that limited material will usually be as sound as judgment after a full trial. In such cases all costs after the early hearing achieve nothing. My estimate is that in no more than 20 per cent of cases would the result differ, although reliable measurement of this ratio is impossible.

After provisional determination based on standard claim and defence and limited documents and evidence (written evidence only, other than in very exceptional cases) the party dissatisfied by the provisional determination should be permitted to proceed to trial under our present rules, but only if the "winner" is protected by security for costs and rigorous case-management thereafter.

Under this proposed system, who would be disadvantaged by comparison with the present regime? If my instinct is right it would be 20 per cent, less those who could provide security and carry on, and the 20 per cent would, before being shut out, have had the benefit of a judicial decision, albeit provisional.

I suspect the number shut out at present by the cost-risk of full-scale litigation is greater than 20 per cent, and their exclusion is not based on any evaluation.

The State would have to pay, of course, for the additional judicial and other court staff required, and for additional IT, but this may be no more than was expected for the Woolf reforms in 1999, and there would be a saving if 80 per cent of defended cases ended at the provisional determination.

The overall result would be a great reduction in litigation cost for the State and the parties, at the expense of a modest reduction in the quality of the result.

That price is worth paying for substantially increased access to justice; in the absence of this or some equally profound reform, access to justice will continue to decline, at a greater price for those who should, but do not, have access to the courts.

I wish you well.

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