Some reflections on Practice at the English Bar

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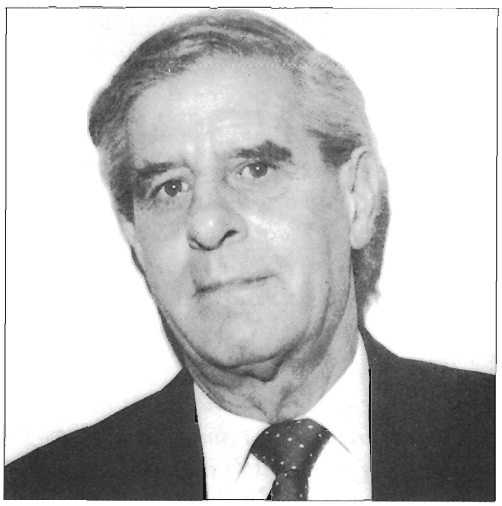

I have returned to the Johannesburg Bar following a sabbatical year in London during which I practised at the Bar. Given the historical background against which our legal system has developed, I was naturally not surprised at the many similarities in the two systems. What I found more interesting, refreshing and stimulating were the differences. In what follows I will firstly set out some impressions of life at the Bar and then deal with aspects of practice in the courts.

The four Inns of Court contain specialist sets of chambers in fields such as commercial law, common law, crime, tax, intellectual property, building, shipping, libel, company law, administrative law, and family law. Most sets handle a mix of these specialist fields. It follows that the work a barrister is likely to get will depend initially on the chambers he joins.

A set of chambers is an institution in itself with a reputation and goodwill created in the past and nurtured by its present members. Work comes to a set because solicitors have used and been well served by that set or because it or some of its members have a particular reputation in one or other field. A member of chambers can expect to receive a share in the work that comes to chambers.

Clerk's role

The protection and promotion of the goodwill of chambers is naturally in the hands of its members, guided by the clerk who plays an important and vital role. It is the clerk who handles all briefs that come to chambers. He deals with the solicitor's initial inquiry as to the availability of a member of chambers, negotiates the fee and handles solicitors' queries and complaints. If the member sought to be briefed is not available the solicitor can of course go elsewhere. However, the invariable practice is that the clerk attempts to keep the brief in chambers by recommending someone else in chambers who is available. For this purpose a Chambers Diary is kept in which is recorded members' trial, consultation and other commitments. If a brief is accepted and counsel becomes unavailable because, say, a matter has run longer than anticipated, the clerk will try to arrange with the other side and the court for the matter to stand down until counsel is available. If this fails he will, with the concurrence of the solicitor, find another member of chambers to take the brief. It is often said that a good clerk is one who does not allow a brief to leave chambers.

Goodwill

Members of chambers protect and enhance their reputations and the goodwill of chambers by the quality of their work. Sub-standard performance comes to the notice of solicitor and clerk and the consequences can be disastrous. A barrister who, for any reason, falls out with the clerk would be well advised to look for other chambers. For the services he renders, and they are many and diverse, the clerk, who as a rule has no legal training, used to be paid the shilling in the guinea of counsel's fee (ie 5%). With the advent of decimalisation some clerks are paid 10% of the fee, 6% is not uncommon. Some sets have changed to paying the clerk a salary and a bonus based on chambers turnover. A justification for the retention of the percentage system is that it acts as an incentive to the clerk to obtain and keep work in chambers for the benefit of all concerned. A possible reason for the change is the growing tendency of solicitors to brief counsel of their choice. The role of the clerk could also be undermined by a recent amendment to rules of practice, which now provide that certain recognised institutions (eg the Institute of Architects) and its members can brief counsel direct.

A practice that assists a busy barrister and provides a source of income for a junior barrister, is that the former can ask the latter to do work for him or her provided that the latter is paid a proper fee for the work. The advantage to the busy barrister is that he or she can accept more work than would otherwise be the case. The advantage for the junior is the experience gained and the fee earned. The benefit to chambers and the clerk is obvious.

Interdependence

A set of chambers is not a partnership. However, for reasons already stated, members are dependent on each other to an extent unknown at the South African Bar. It is this interdependence that results in a set of chambers scrutinising very closely any application to join chambers.

Following a recent change to the rules of professional conduct, barristers are now allowed to advertise. The discreet handing out of cards is a common practice. More important is the publication and distribution of a *Chambers Brochure* listing the names, qualifications and services that members of chambers offer. With written permission, the brochure can mention the name of any professional or lay client for whom members have acted. Some chambers even publish their rates.

Pupilage

The English pupilage system differs materially from its South African counterpart. A person wishing to practise as a barrister must before or after call to the Bar serve a twelve month pupilage. The chambers in which the aspirant barrister seeks pupilage will depend on the field of law in which the person intends to practise. There are rules prohibiting chambers from discriminating against applicants for pupilage on the grounds of race, sex or religion.

Pupilage is divided into a six month non-practising period followed by a six month practising period during which the pupil is allowed to accept briefs. Either of these periods can be extended by a further six months. Pupilage can be served in one set of chambers. It is quite common to split the periods between two sets.

Within chambers the pupil is assigned to a pupil master who is a barrister of at least five years standing. During pupilage the pupil is farmed out to other members of chambers and in some instances to other chambers. Serving pupilage in a set of chambers is no guarantee of a place in chambers. There is a perennial shortage of places in chambers that can result in a barrister being unable to practise at the Bar. During pupilage the pupil knows that he or she is under constant assessment as a possible member of chambers. Chambers are in turn anxious to ensure that any vacancy is given to a pupil who not only gets on with members but who has, during pupilage, displayed a potential to do well in practice. What this ensures is that the pupil works hard and gives of his or her best.

One of the most important recent changes in the pupilage system is the introduction of paid pupilage. This change resulted from the justified criticism that recruitment to the Bar was limited to an elite that could, for twelve months, afford to live and work without pay. Valid as the criticism was in England, it is of far greater relevance in South Africa where many people must be kept out of the profession because they cannot afford pupilage. For this year chambers will have to offer at least one paid pupilage. The suggested minimum for a twelve month pupilage is 6 000 pounds a year. Some sets of chambers are offering as much as 18 000 pounds. Payment is not based on means and a system is being worked out to subsidise chambers that cannot afford to pay the suggested minimum rate.

In the first six months of pupilage the pupil is dependent on what chambers pay. In the practising period earnings are supplemented by briefs received and remuneration for work done for other members of chambers. In the first few years of practice this income is often an important source of a junior barrister's earnings.

Racialism

The racialism that exists in England has permeated the English Bar. Over the years, people of colour, or as they are termed, "members of ethnic minorities", have found difficulty in getting a tenancy in established chambers. The result is a number of ethnic minority sets of chambers having in the main poor facilities. In an attempt to deal with the problem the Bar Council, in addition to prohibiting all forms of racial discrimination, has established a *Race Relations Committee*. It recently announced a twinning arrangement that will twin an "established set of chambers" with an ethnic minority set. The latter will, it is hoped, benefit from constructive advice on chambers administration, fee collecting, access to text books and law reports, practical advice on professional problems and the secondment of pupils and possibly barristers between sets. Well intentioned as this move is, it will not solve the problem. Sadly, one has to acknowledge that even where legislation and rules prohibit racial discrimination, racialism remains endemic in most societies. What is hopeful and helpful is that the English Bar recognises the problem, debates it publicly, and is attempting to find solutions.

Green and White Papers

The Green and White Papers, the debates that followed and the legislation being introduced this year,

have swept away many cobwebs of the past. What is now recognised and accepted by all is that for the foreseeable future the development of the English legal system requires a well organised and independent Bar that can and will adapt to the changing needs of society. The impetus for change did not come from within the Bar but from public pressures. The positive response of the English Bar to these pressures has secured its future and has also resulted in the public understanding its role in the legal system. A Bar that ignores the changing needs of the society it serves will not survive. The future of the South African Bar is in the hands of its members; survival depends on an immediate and positive response to the challenges of change.

Turning to practising in the civil courts, it would be presumptuous for me to claim a mastery of English practice. What I will deal with are areas of practice I have come across that may be of interest to the Bar, Side-Bar and helpful to those responsible for making and changing our rules of practice.

Rules of practice

The rules regulating practice in the High Court are contained in two volumes of what is known as the White Book. It is an essential tool of practice. Its 3 000 plus pages contain not only the rules and court form but most importantly a detailed commentary including numerous case references. A new edition is published every three years. Between editions the book is kept up to date by the publication of a bi-annual cumulative supplement. As claimed by the authors the merit of the publication is that it is able "to capture both the permanent and the passing features of the judicial process, to reflect the fundamental continuity as well as to embody the continual and often radical change being made in practice and procedure." What I found refreshingly different in England is the flexibility in practice and the ease with which the system adapts to change. This is because the rules of practice in the four main divisions of the Court – Queens Bench, Chancery, Commercial and Family – are under constant review by standing committees made up of judges, barristers and soliciters. All changes (and they are frequent) are published in *Practice Directions* – examples can be the All England and Weekly Law Reports.

To the best of my knowledge the Transvaal Provincial and Witwatersrand Local Divisions are the only divisions in South Africa in recent times to lay down local practice directions. The fundamental weaknesses in what is irreverently called "Oom Gert vertel" is that it lacked input from the Bar and Side-Bar, was designed to meet the needs of the Court, and that it was created in a vacuum in the sense that there was no infrastructure to cater for continuing change. In South Africa an acknowledgement that practice must keep pace with changing needs coupled with a closer relationship between Bench, Bar and Side-Bar would help solve the problem.

Attitude of Judges

An overriding impression that practice in the High Court has made on me is that judges and masters (of whom more later) get on with the work of the court with as little waste of time as possible. Judges come into court on time. There is no morning adjournment, which in South Africa and with the exception of the Appellate Division often lasts much longer than the stated fifteen minutes. "Convenient" adjournments are not sought ten or fifteen minutes before the court day ends. If there is a possibility of finishing, judges as a rule do not object to sitting late. All of this is important, particularly in courts of first instance that carry an enormous work load. Technical objections that merely serve to delay a hearing are frowned on, matters are not struck off or postponed for an irregularity in the index or pagination; late discovery is not met by a postponement but where possible by standing the matter down to give the aggrieved party an opportunity to examine the documents, the judge using the time to read the record. If a skeleton argument is not prepared and exchanged counsel is obliged to furnish opposing counsel and the court with a list of authorities. The judge has these before him so that he can more easily follow the argument.

Motion proceedings

As in South Africa, motion proceedings account for much of the High Court's work load. To expedite the handling of work there are in each division of the court a number of permanent "masters" who are qualified barristers or solicitors. Subject to a number of exclusions a master has jurisdiction to deal with motion matters that would otherwise be dealt with by a judge. Examples of matters excluded from a master's jurisdiction are criminal proceedings, matters affecting the liberty of the subject and injunctions (interdicts). Included in the jurisdiction is the right to hear an application for summary judgments, setting aside of a judgment, striking out and any number of applications for interlocutory and final relief. A master can hear evidence and determine a claim for a statement of account as well as damages where the merits have been decided by a judgment of the court. He can, with the written consent of the parties, hear a trial. There is a right of appeal to a judge from all orders of a master. A hearing before a master and a judge in chambers is informal in the sense that the judge, master and counsel do not robe. The public is exluded from the hearing, but should circumstances require, the proceedings are adjourned to open court. Solicitors have the right of audience before a master. A hearing before a master is by way of an appointment. To ensure the efficient working of the system, and to meet the convenience of practitioners, a party, when applying for an appointment, is required to give a realistic estimate of the duration of the matter. Thereafter notice of the date and time of the hearing is given to the parties. A similar practice applies to hearings before a judge. The volume of work done by the six Queens Bench and five Chancery Masters naturally free judges in these divisions for other work.

The efficiency of a busy division such as the Witwatersrand Local Division would be enhanced if a similar system was introduced. In the absence of suitably qualified persons for permanent appointment, the system could operate by appointing silks, senior juniors, or suitably qualified attorneys to act as masters for say a month at a time. The experience gained would no doubt also help to decide if the person concerned is temperamentally and otherwise a suitable candidate for the Bench.

Because an interlocutary application for say an interim injunction is not designed to decide the merits of the dispute and as they frequently arise in circumstances of urgency the

English Rules allow hearsay affidavit evidence provided its source is disclosed. What results is a more practical and expeditious determination of such applications. A sensible and salutary restraint on those seeking an interim injunction that should be introduced in South Africa is the requirement that the plaintiff must give a cross undertaking in damages. This is an undertaking to the court that in the event that the court at the hearing determines that the plaintiff is not entitled to the injunction, he will pay such damages as the defendant may have suffered by reason of the granting of the order. In appropriate cases the rule is relaxed, in others the rule is fortified by requiring the plaintiff to pay an amount to a stakeholder. Because the court is ultimately concerned with the justice of the case relief will not be refused to an impecunious plaintiff otherwise entitled to relief simply on the ground that his cross undertaking is of limited value. Militating against the inconvenience caused to a party affected by an interim injunction is the power given to a judge to order a speedy trial. This can result in the trial being heard within months of the grant of the interim injunction.

The Mareva Injunction

Anton Piller relief was introduced to England in 1976. The baptism of fire through which it went as it sought recognition in South Africa is fully documented in our law reports. Anton Piller was preceded in 1975 by an equally radical innovation in the form of what is now known as the Mareva Injunction, named for the case in which it was first granted. In its original form the relief was only available against foreign defendants. By a 1981 Act of Parliament it was made available against all defendants. What inspired the remedy was the inconvenience suffered by plaintiffs with claims against foreign shipping companies who "might well incur liabilities for repairs or stores in England and have assets here such as a Bank account or an admitted right to be paid insurance money. It was very annoying to creditors to find their assets spirited away before they could obtain judgment and execute against them." (White Book Vol 1.479.)

What the Mareva Injunction authorises is the attachment by a plaintiff of sufficient of the defendant's assets so that they may be preserved and be available for execution in the event of the plaintiff succeeding. The attachment does not give the plaintiff a real right in the assets attached or a preference over other creditors who are at liberty to execute against the attached assets. The order can be granted against assets anywhere in the world and enforcement is possible in jurisdictions having a similar form of relief. Although a breach of the order is only a contempt of the court, when served on a bank it creates a right that is in effect a real right. To make the order more effective the defendant is invariably required to file an affidavit disclosing the full nature and whereabouts of all of his assets. He can also be required to make discovery. For obvious reasons a Mareva will always be sought *ex parte*. For this reason and also because of its immediate and draconian effect on the defendant's right to deal with his estate, the rule requiring full disclosure of all material facts is rigidly enforced. It will only be granted if the plaintiff can advance some grounds for believing that the defendant will remove or dispose of his assets before judgment is satisfied or that there are grounds to believe that any dealing with assets may defeat the ends of justice. In granting the order the court has regard to the reasonable needs and requirements of the defendant. The plaintiff must of course give a cross undertaking in damages. The extent and limits of Mareva Relief is still being refined by the English Courts.

In a country that is a world centre for foreign trade, that is unencumbered by exchange controls, and in an age where computer and telegraphic transfer of funds is the rule rather than the exception, and where delay between summons and judgment can last years, the Mareva Injunction is an important and potent weapon in the plaintiff's armoury. The grant of the injunction often results in a speedy settlement of a dispute that could otherwise drag on for years.

In South Africa, an attachment to found or confirm jurisdiction can provide limited protection and security to plaintiffs with a claim against a foreign defendant. Plaintiffs with claims against resident defendants have no protection. If a remedy cannot be found in our common law legislation could bring about change that would prevent all defendants subverting the ends of justice.

As delay in the hearing of applications and particularly interlocutory injunctions, is inevitable, one of the primary concerns of the court in England is to ensure that when the matter is heard the facts as they then exist are before the Court. There is accordingly no limit to the number of affidavits that can be filed. In appeals against interlocutary orders it is not unusual for the parties to file further affidavits setting out new or changed facts or circumstances that have occurred from the date of the judgment appealed against. This flexibility in practice helps to ensure that justice is done.

Pre-Trial Conference

As in South Africa, pleadings in England are confined to a statement of claim, defence and, where necessary, a reply. Before or after filing the plea the defendant can serve a request for further and better particulars. This does not affect the close of pleadings. A similar right is afforded to the plaintiff when the plea is filed. Discovery follows the close of pleadings whereafter (with the exception of the Commercial Court) the plaintiff is required to serve a Summons for Directions returnable before a master fourteen days thereafter. The closest South African counterpart to this procedure is the Pre-Trial Conference. The essential difference in the two systems is that in England the court retains control of the procedure, thereby ensuring that before a matter comes to trial the parties have done everything they can with a view to shortening the length of the trial and saving costs generally. In England a matter will as a rule only be placed on the trial role when there has been compliance by the parties with all the directions given at the hearing of a Summons for Directions. The weakness in South African practice is that a trial date can be applied for after service of a notice to attend a Pre-Trial Conference. The invariable practice which defeats the spirit and purpose of the rule, is that a Pre-Trial Conference is only held after notice of a trial date is received and frequently such conferences are delayed until a few weeks or days before the trial. This in turn often

results in a postponement. Time and money would be saved and the interests of justice better served by adapting the English procedure to our requirements.

Expert reports

For many years it has been a requirement of the English rules that expert reports be exchanged and not as in South Africa summaries prepared in many instances for the purpose of disclosing as little as possible. The most revolutionary recent change in English trial procedure which now applies in all divisions is a rule requiring parties to exchange statements of the oral evidence a party intends to lead at the trial. As stated in the White Book (595) "the rule makes an enormous and notable advance toward the open system of Pre Trial procedure". As summarised in the White Book the rule is *inter alia* designed to achieve –

- ☐ the fair and expeditious disposal of proceedings with a corresponding saving of court time, the cost of preparing for and running a trial;
- ☐ the elimination of the element of surprise at the trial;
- ☐ the creation of an atmosphere in which the parties can reach a fair and reasonable settlement;
- ☐ the identification of the real issues and the elimination of unnecessary issues;
- ☐ the encouragement it gives to parties to make admissions of fact which they are often reluctant to do;
- ☐ a framework within which routine evidence in chief can be given in summary form;
- ☐ the improvement of the process of cross-examination.

The court directs how and when statements of witnesses are to be exchanged. They can be amended before trial to correct errors. With the court's leave statements can be supplemented to deal with statements made by other witnesses. At the trial the witness may not, save with leave, add to or give evidence in chief on any matter not referred to in the statement. Practice requires the use of the language of the witness and not the solicitor's formal draft. When called and after being sworn the witness confirms his statement and is then cross-examined. A party or the court may require the witness to give all or part of his evidence orally. If the witness is not called his statement is not evidence.

Accessibility of Courts of Appeal

Of enormous benefit to parties and the image of justice is the accessibility of the Court of Appeal. At the commencement of a recent non-jury libel trial involving an American art expert and a newspaper, the trial judge ruled that an important part of the newspaper article was not defamatory. The plaintiff wanted to appeal against this ruling. Within a week the Court of Appeal heard and upheld the appeal. A few days later the trial was restarted before a different judge and ran its course. In the result justice was not delayed. In South Africa what would have happened is that the trial would have been postponed. At least a year would go by before an appeal court could decide the matter. A further delay of at least another year would follow before the matter would come up for trial.

Facilitating the quick hearing of appeals, and this is also relevant to the bulk of the record in all appeals, is that the solicitors prepare agreed bundles that form the record on appeal. In so doing they eliminate irrelevant parts of the record. What is avoided is the lengthy delay and wasted costs occasioned in South Africa by being required to use a private contractor with no knowledge of the issues who not only includes irrelevant documents in a record but who also slavishly retypes and then copies all printed documents. What I found easy to get used to in England was reading both sides of a piece of paper. This practice reduces by half the bulk of most records and halves the cost of the paper used. I do not know why this practice cannot be introduced in South Africa. After all, our law report text books and for that matter every other book we read is printed on both sides of a page.

Where merits and damages are in issue the court, as in South Africa, will in an appropriate case separate the issues. Unlike his South African counterpart, the English defendant has an immediate right of appeal against a judgment on the merits. Such appeals can be disposed of quickly. In personal injury cases where the merits are conceded, judgment can be given for damages to be assessed by a master. These procedures result in the quicker finalisation of damages claims. Provision is also made for interim awards that serve to alleviate the financial and other hardships suffered by an injured plaintiff, the full extent of whose damages may take a long time to formulate and establish.

Changing needs

A legal system develops and evolves within the dynamic of the society of which it is a part. Part of this dynamic is an awareness of the changing needs of society. This applies not only to the substantive law but to professional practice and court procedure. In England, as I have endeavoured to show, awareness and a willingness to respond is reflected in the recent radical changes in the practices of the Bar and the ongoing and sometimes equally radical changes in practice and procedure. An important stimulant for the development of a legal system is an understanding and appreciation of the strengths and weaknesses of other legal systems. In this respect the English system benefits from its contract with Commonwealth countries, the European Community, the USA and the East.

I believe that South Africa's isolation from the international community has had an adverse effect on the development of our substantive law, practice in our civil courts, and practice at the Bar. Apart from impersonal access, through overseas law reports, journals and text books, we have very little if any meaningful contact with foreign judges and practitioners and little if any knowledge or understanding of the legal systems and practices in other countries. Isolated our system will atrophy. Any failure to respond to the changing needs and requirements of society will result in our legal system becoming a scorned and useless adjunct to our society.

It is trusted that the appropriate authorities and the legal profession will take note of this article. There is no doubt that South Africa, in the areas indicated by the author, failed to adapt to changing views and needs. South Africa's isolation in recent times does not in our view afford a sound excuse for this state of affairs. – Editor