1. This preface is the text of a lunch-time lecture given on the first day of the lectures by Sir Alan Huggins MA, Vice-president of the Court of Appeal of Hong Kong.

THE ECONOMICS OF JUSTICE, OR WHAT PRICE JUSTICE?

by

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NO DOUBT there are some members of our community who would answer that the question does not arise, because justice is unobtainable in Hong Kong. Even if we disregard this extreme and, I believe, ill-founded view, I fear that there are many who would say that the price is too high—and they have a point, at least in as far as citizens are forces to call upon the courts to resolve their differences.

I make that last reservation because I must in fairness make it clear that I appreciate that by far the larger proportion of all civil disputes—and even some criminal matters—is settled without recourse to the courts. Day in and day out solicitors are consulted by clients and are able either to give those clients advice which enables them to deal with the matter themselves or to enter into correspondence on behalf of the clients and thereby to reach an accommodation with the other side, whether that be another person or some organ of the Government. On top of that there is the non-contentious business. All this is dealt with behind closed doors and, apart from occasional complaints of unnecessary delays, for the most part to the satisfaction of the clients. None of it reaches the ears of the wider public and therefore it tends to be overlooked, but it is a vital part of the service offered by the profession.

However, when a dispute boils over into court the picture is rather different. Even if the courts are, like the Hongkong Hilton, open to all, there are few who can face the financial burden of litigation with equanimity. This is no new phenomenon, but we need to look at it from time to time through the eyes of the

unfortunate litigant, and to that I should add, having regard to the availability of free Legal Aid, "through the eyes of the unfortunate, uninvolved tax-payer". What is it that makes litigation so terrifyingly expensive? Of course it has always been fashionable to blame the fees paid to the lawyers for most of the trouble, but I do not want on this occasion to embark upon any discussion of that thorny subject.

As the basis of any scheme of human justice is the law, I must start with a few words about the law. We all think we can recognise justice when we see it, but a few moments spent in reading the proceedings of any democratic legislature will show that there is *no* general consensus as to what is just. Courts of justice in which each judge was free to decide cases according to his own ideas of justice would reveal comparable inconsistencies. How long is the Chancellor's foot? The broad basis of what the majority considers to be just has to be reduced to rules. There are some rules which are so generally accepted that in England they became established as "the Common Law" and lawyers in the Common Law countries like to think that those rules are a good thing. They are hallowed by time and long experience—apart from the occasional aberrations of H.M. judges which have produced such transient doctrines as that of common employment. It is the more detailed rules sanctified by the votes of legislators which, understandably, tend to drain the pockets of the suffering citizen. These rules are complicated, sometimes too sweeping and often badly expressed. That inevitably produces disputes which can only be resolved by an independent judge who is given authority to declare what is (or ought I to say "should be"?) the law.

There was a time when it was assumed that everyone meant what he said, even if he did not say what he meant. It was a sensible rule, which prevented a lot of unnecessary litigation though perhaps causing a modicum of hardship for the careless. Unhappily a modern breed of lawyers has thrown certainty to the winds in favour of assuming that statutes do not always mean what they say and by refusing to give judges in lower courts credit for having meant what *they* said. The result is an increasing number of contested cases and an increasing number of appeals. As to this all one can hope is that the spectre of the welfare state with its

attendant disease of expecting the Government "to do something" —which has replaced the education of citizens to do things for themselves—will sooner rather than later be exorcised and that the schools will once more encourage children to speak and write grammatically and accurately, so that another generation of Law Lords will not spend its time straining our beautiful language.

The judges' liberal approach to interpretation has unfortunately been reflected in a lack of strictness and incisiveness in other directions. We adjourn too readily and even, sometimes, for no better reason than that we are unable to make a simple decision on the spot. We need to be more conscious of the fact that every day's hearing has to be paid for by somebody and that every unnecessary adjournment delays other (and probably more deserving) litigants, who in these days of high interest rates will almost certainly be out of pocket as a result. At the same time the adage "More haste, less speed" is as applicable to judges as to anyone else, and greater care in a lower court in unravelling the issues or, in a court of first instance, in keeping a record may avoid the necessity of an appeal which, again, has to be paid for by the litigants and not by the judge himself.

Nevertheless, the existence of an appellate court should sometimes encourage a judge to make up his mind without delay and without beating about the bush: if he is respected, his decision may be accepted. The best advice I ever had since I accepted a judicial appointment was "Young man, if you are going to make a mistake on the Bench, make it with both feet".

There are several areas in which the Bench and advocates must both accept blame for costs thrown away. Indeed, I fear that several generations of judges have been responsible for allowing slovenly practices to develop which are now difficult to stop. The dual blame is not surprising when it is remembered that judge and advocate are both ministers of justice engaged in the same general task, and it is important that all those taking part in a trial should be aware not only of their own but of the others' duties, while expecting that those duties will be performed politely but firmly.

Sir Robert Menzies wisely observed that 'a good advocate must be a judge' and although Dr Johnson was right, in the context in which he was speaking, to say that it was not for counsel to decide

the validity of his client's case, it is none the less the duty of an advocate not to take points which he knows to be bad and not to draft grounds of appeal, simply because he is asked to do so, when he knows or ought to know that an appeal is hopeless. Equally it is no part of an advocate's duty to embark upon lengthy cross-examination on matters that are in truth not in issue. Good advocacy always requires that a case be cut down to its essentials and the judges have a duty to prevent a waste of time on non-essentials. Thus it has been said in a criminal case that "a defence which was so confusing that no jury could follow it was just as much an injustice as any other kind of difficulty in a trial".

The name of Bartholomew Cepola may not be known to many of you, but you will find his name still recorded despite the fact that he lived over 500 years ago and that his sole claim to fame—or to infamy—was that he excelled in creating devices to elude the most express law and to perpetuate law suits ad infinitum. His was not an example to follow.

As with adjournments, so with amendments: they occur far too frequently in Hong Kong and are a constant source of unnecessary expense and delay. I believe that the present liberality in the granting of leave to amend at trial, both at first instance and on appeal, produces real injustice and results in an outrageous waste of public money. Of course it is inevitable, on occasion, that a case will take an unexpected turn, but in the ordinary way it should be possible for a pleader, exercising reasonable skill and care, to avoid the necessity for last minute amendments. In my experience the proportion of cases in Hong Kong where amendments are sought at the hearing far exceeds that which ought to be tolerated.

One final word: I know that solicitors are sometimes the target of unfair criticism for things that go wrong. They do so much of the preparatory work that they have many opportunities to slip up, and I should be sorry to appear unsympathetic, especially having regard to the great pressures under which they constantly work. There is, however, one matter which I think requires urgent attention if clients are to be spared quite unnecessary expense. It relates to the sheer mass of paper which is commonly placed before the courts, in particular in the appellate jurisdictions. I have tried cases where the record ran to several hundred pages and yet where

it was obvious that not more than a score could be relevant to the matters still in issue. Then, in spite of adverse judicial comment, affidavits continue to exhibit previous affidavits—with the additional expense that entails. If only documents had still to be copied laboriously by hand they might be more carefully selected—quite apart from being more legible than many of the atrociously bad photostat copies our poor, aging eyes have to contend with.

Litigation has to be paid for and will always be expensive. We all owe it to those who pay for it to ensure that their money is not thrown away to no purpose and that the bill they receive at the end of the day relates only to what was really necessary for justice to be done.