arbitration if all the parties consented or:

*"If the cause or matter required prolonged examination of documents or any scientific or local investigation which, in the opinion of the Court, could not conveniently be dealt with by the Court or, if the dispute was wholly or in part matters of account, without the consent of the parties."*

The Commercial Arbitration Act, 1984, which, his Honour said, was designed to return to the original concept of arbitration as a swift, informal and cheap determination, did not repeat Section 15 of the 1902 Act. However, at the same time that it was passed, Section 124 of the Supreme Court Act was amended to give the Rule Committee power to make rules prescribing the cases or questions which may be sent to arbitration. Pursuant to that power, the Rule Committee made Part 72 of the Supreme Court Rules which had now been attacked by some members of the Bar Council. His Honour criticised the suggestion that the power conferred on the Court to appoint of its own motion a court expert was "some great leap into the unknown by adventurous spirits" as failing to take into account recommendations to that effect by the Canadian Federal/Provincial Task Force on Uniform Rules of Evidence (1982) and rule 706 in the US Federal Rules of Evidence, 1975.

He rejected the proposition that Part 72 was ultra vires as being based on the text of different legislation and totally overlooking the history of Section 124(2).

Dealing with the article in *Bar News* which suggested that an order should never be made where neither party desires it, his Honour referred to the decision in *Tylors (Aust.) Limited v. Macgroarty* (1928) St.R.Qd. 170 in which the trial Judge ordered that the dispute be sent to arbitration because he thought the course would save expense to the parties and lead to a more satisfactory determination of all matters in dispute.

The trial judge reviewed the historical evolution of the power to act without the consent of the parties. In 1921 power was conferred on the Supreme Court to make rules empowering a judge either generally or in a particular case to refer any cause or matter to arbitration. The rule made in exercise of this power gave the judge power to refer any case of his own motion. The Full Court affirmed his judgment (ibid, at p.371). His Honour pointed out that more recent single judge decisions which were referred to in the summer issue of *Bar News* failed to refer to *Tylors Case*.

His Honour also pointed out that in *Buckley v. Benell Design and Construction Pty Limited* (1978) 140 CLR 1, Jacobs J. (with whom Murphy and Aickin JJ. agreed) said (p.37):

*"The power to refer should have been one which the Court would frequently exercise."*

He attributed the rare use of Section 15 of the 1902 Act to an interpretation given to the Section some 40 years earlier which was reversed by the High Court in *Buckley v. Benell.*

His honour also pointed out that the power to appoint a judge as an arbitrator existed in the United Kingdom where it was sharply favoured by the legal profession.

When all was said and done, his honour said history showed that there were cases which should be sent to arbitration for the benefit of all concerned and that, provided care was taken, the provision would serve the interests of justice.

# THE BAR v THE LORD CHANCELLOR

In February 1986 the English Bar took legal action against the Lord Chancellor, Lord Hailsham, in the High Court for judicial review of the Lord Chancellor's decision to increase the fees payable to barristers under the Legal Aid in Criminal Proceedings (Costs) Regulations by no more than 5 per cent effective from April 1, 1986. The Bar sought a declaration that the Lord Chancellor's decision was unlawful and that, before making such regulations, the Lord Chancellor had been and remained obliged to consult and negotiate with representatives of the Bar.

The case commenced on March 20 before Lord Lane, Lord Chief Justice, Mr Justice Boreham and Mr Justice Taylor.

The background to the case is to be found in the Legal Aid and Advice Act, 1974 which required the Lord Chancellor in fixing scales of legal aid fees to pay a fair remuneration according to work done. Since 1974 fees had only risen annually by a small percentage, apparently adopted by reference to the rate of inflation. The 1985 increase was imposed on the Bar under protest and, at the time, the Lord Chancellor said he would welcome an in-depth examination of the remuneration and expenses of the Bar. The Bar commissioned Coopers & Lybrand to do the study. It was understood by the Bar that the study would be considered by the Lord Chancellor and discussed with the Bar and form a basis for negotiation between the Bar and the Lord Chancellor concerning the future revisions of the legal aid scales, including that to take effect in 1986.

*The Times* (21 March 1986) described the work done by Coopers & Lybrand and the report produced as follows:

> "Twenty four sets of chambers in London and in other cities were surveyed. They were doing largely but not entirely criminal work. They made regular returns to Coopers & Lybrand over 12 consecutive working weeks of barristers of five to nine years' seniority and of 10 to 15 years, who made individual returns.
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> To avoid the possibility that an individual study might be of an under-employed barrister, Coopers & Lybrand created a model barrister who was engaged solely on that type of work, who was assumed to be handling a mix of cases but was someone who was working as hard and often and as efficiently as any barrister who could properly be expected to work throughout the year.
>
> The result to which they came was that on the scale of 1984-1985 the median of five-to-nine year barristers in London would have an annual income of about 12,500 Pounds before tax, and for those of 10 to 15 years' call the figure would be 15,000 pounds before tax. In the provinces the estimated income would be slightly less."

Paragraphs 16 and 17 of the summary of their report read:

*Our conclusion that the present criminal legal aid fee scales are inadequate and fail to meet the principle of 'fair and reasonable reward for work reasonably done' is supported by evidence of declining quality of entry to the criminal bar, a trend which once established will become increasingly difficult to arrest.*

*There is also evidence that able young barristers are leaving the criminal Bar through dissatisfaction with the financial rewards.*

*We have based our recommendations, not on a comparative study of the incomes of barristers with people in other walks of life, but on the principle that there should be consistency in the net rewards of barristers — whether they are salaried civil servants or self-employed — who rely wholly on government-funded work.*

*We have applied this principle with regard to the salaries and conditions enjoyed by barristers in similar age groups in the government legal service. This demonstrates that the incomes of self-employed barristers who specialise in publicly funded criminal defence work would need to be increased by between 30 per cent and 40 per cent at current rates if they were to be put on a similar earnings basis to government legal servants."*

The report was submitted to the Lord Chancellor in September 1985. On February 7, 1986 the Lord Chancellor wrote to Mr Alexander QC, the Chairman of the Bar of England and Wales and told him that he had "yet to be convinced that the main recommendations of the consultants' report — principally that an increase between 30 and 40 per cent in criminal legal aid fees is required to give fair and reasonable remuneration — can be justified." In that light he proposed to apply the same formula as had been used in previous years which would allow for a 5 per cent increase overall in legal aid fees.

Mr Alexander QC responded by pointing out that there had been no effective discussion of the report submitted by the Bar to the Government and there was no independent body to which the Bar could turn for further negotiation. The present level of legal aid fees was causing hardship and the proposed increase was "based on an unjustifiable formula which does not apear to relate to fair remuneration." The Lord Chancellor's letter had led the Bar to conclude that no further consideration of the Coopers & Lybrand report would take place.

The proceedings in the High Court were then commenced by Mr Alexander QC, as representative of the Bar Council.

The grounds on which the Bar sought relief were:

1. That the Lord Chancellor failed to consult or negotiate with representatives of the Bar before reaching his decision in breach of express assurances that such negotiations and consultations would take place and contrary to the legitimate expectation of such negotiations and consultations, and thereby acted unfairly.

2. That, in making his decision, the Lord Chancellor failed properly to fulfil his statutory obligations to "have regard to the principle of allowing fair remuneration according to the work actually and reasonably done" in relation to the level of fees applicable from April 1, 1986.

Both the Lord Chancellor and Mr Alexander QC filed affidavits which substantially reiterated the history of the conflict.

It appears to have been common ground between the parties that as at November 1985 the Bar and the Lord Chancellor and his officials respectively contemplated a timetable which would enable negotiations for a review of the criminal legal aid rates to be completed and proposals to be put forward by the end of January 1986.

Upon this basis Mr Phillips QC, Counsel for the Lord Chancellor submitted that although there was a legitimate expectation on the part of the Bar that the report would be fully considered, fully discussed and negotiations would take place with the Bar on the basis of the report and that the Lord Chancellor would have regard to the outcome of the negotiations in considering the proper increase in the criminal legal aid fees, nevertheless the doctrine of legitimate expectations did not require that process to be completed in time to affect the outcome of the regulations, due to take effect from April 1986.

He also submitted that the Lord Chancellor's letter of February 7, did not indicate that the Lord Chancellor had rejected the Coopers & Lybrand report but that he had decided to award the Bar 5 per cent to reflect inflation without prejudice to the claim advanced by the Bar.

This submission elicited a robust response from Lord Lane who said that it would have been so simple to spell that out in clear terms in the letter instead of which there were extraordinary cliches which seemed designed to be ambigious. He said the words "I am not persuaded", "nor would I accept", "remain to be convinced" meant "I reject." Mr Phillips QC agreed. Mr Justice Taylor said that the one thing that was totally absent was any suggestion of any further consideration of the report. Mr Justice Boreham said that the letter did not say or make clear that it was just a holding operation.

Lord Lane commented that it seemed to him to be a great pity that the matter was the subject of litigation at all.

He queried why the Lord Chancellor should not enter into a binding timetable, to which Mr Phillips QC responded that the only question was the uncertainty as to precisely what he would need to consider and his reluctance to bind himself.

Lord Lane then commented:

*"We have now got down to the very narrowest of narrow points. I wonder why we have been spending a day and a half over these matters which cause great unpleasantness, whatever happens."*

Mr Phillips QC said that the Lord Chancellor would undertake to exercise all reasonable endeavours to pursue negotiations.

On March 26 the Lord Chancellor undertook to agree to a timetable which would lead to him making a final decision on the Bar's claim by July 16. The timetable incorporated proposals for detailed consultation between the Lord Chancellor's Department, Coopers & Lybrand and the Bar to complete discussions on the report and for the Lord Chancellor to inform the Bar of any changes which he was minded to make to regulations setting the criminal legal aid fees scale and for the Bar to be allowed to make appropriate representations in respect to those proposals.

The Court awarded the Bar its costs which only related to the solicitors' costs as Counsel for the Bar provided their services free of charge.