

## **DISCLOSURE OF BENCH MEMORANDA PREPARED BY JUDICIAL ASSISTANTS**

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### I. JUDICIAL ASSISTANTS AND OFFICE LAWYERS

The English Civil Appeals Office has engaged judicial assistants since 1997. The judicial assistants work alongside the office lawyers. Although there are similarities in the duties of judicial assistants and office lawyers, there are differences in their functions and terms of employment.

Judicial assistants are either trainee solicitors or barristers in pupillage. Their firms or chambers second them to the Court of Appeal for a period of time on either a full or part-time basis. Judicial assistants are assigned to a Lord or Lady Justice, and work closely with him or her during their appointment. The nature of the judicial assistant's role varies according to the requirements and style of each individual Lord or Lady Justice but their primary responsibilities are to highlight important issues in forthcoming cases, carry out research and write opinions on legal points and to prepare bench memoranda. Judicial assistants are also encouraged to spend time observing the Court in action.

The bench memoranda prepared by the judicial assistants normally consist of a history of the proceedings, the facts, an indication of the issues on the appeal and any opinion which the judicial assistant has on the merits of the appeal. The bench memorandum is provided to each member of the Court hearing the application. It seems bench memoranda are especially useful where litigants are not represented by lawyers. Bench memoranda are not made available to the parties.

Office lawyers are full-time, permanent members of the court staff. They are responsible for progressing cases and

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play an important part in ensuring that cases are in an appropriate condition to go before the Court. They frequently have to answer queries from the parties. They are managed by three Senior Lawyers who are empowered to sit as Deputy Masters. Office lawyers may discuss a case with the Lord Justice(s) who will hear the case and may prepare a Bench Memorandum if the case warrants it. The memoranda are not disclosed to the parties.

## II. DISCLOSURE OF BENCH MEMORANDA

The Court of Appeal has held that bench memoranda, prepared by judicial assistants which are provided to members of the Court of Appeal prior to the hearing of an appeal or application for leave to appeal do not have to be disclosed to the parties.

The issue of disclosure arose as follows:<sup>1</sup> on appeal, the Divisional Court upheld a decision of the Solicitor's Disciplinary Tribunal to strike Mr. Parker off the Roll of Solicitors. Mr. Parker was granted leave to appeal the Divisional Court's decision to the Court of Appeal. After the hearing for leave to appeal, the court associate handed back to Mr. Parker bundles which had been used by the court at the hearing. Accidentally, the bench memorandum prepared by the judicial assistant for that hearing was included in the bundles.

Mr. Parker wrote to the Civil Appeal Office expressing concern about the use of bench memoranda and described the bench memorandum he had seen as "a one sided bench memorandum which contained the wrong facts". On the hearing of his appeal, Mr. Parker added prejudice caused by non-disclosure of the bench memorandum as a new ground of appeal.

The Court of Appeal rejected this ground of appeal. Lord Woolf M.R. began by describing the role of judicial

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<sup>1</sup> *Parker v. The Law Society*, *The Times*, 8 December 1998; *The Independent*, 11 December 1998; 143 S.J. L.B. 45.

assistants. He stated that the judicial assistants were of great benefit to the Court. They assisted the Court to understand what were the issues on appeal and were especially helpful in cases involving lay litigants where the lay litigant had not prepared a skeleton argument.

He emphasised that the purpose of the judicial assistants scheme was not only to save the time of the Court but also to benefit the young lawyers. Members of the Court were encouraged to provide 'feedback' to the judicial assistants which could be of value to the judicial assistants in their future legal careers.

The Master of the Rolls stated that the Court of Appeal had never intentionally disclosed a bench memorandum. He gave the following reasons:

(i) Disclosure would be inconsistent with the relationship between judicial assistants and members of the Court and would inhibit judicial assistants from expressing their opinions.

(ii) Disclosure would result in unnecessary argument before the Court as to the accuracy of the memoranda and so on when they were only used by the Court as an aide to their preparations and regularly members of the Court take a different view of the facts or merits of the appeal from that of the judicial assistants.

(iii) Members of the Court draw to the attention of the parties any matter which they were proposing to take into account of which the parties were not already aware. This was already the practice where their own research uncovered relevant material.

(iv) It would be impractical to provide the parties with details of oral discussions between the judicial assistants and the members of the Court and to provide only written communications would be misleading.

### III. PRACTICE IN THE COURT OF APPEAL, CRIMINAL DIVISION

Lord Woolf acknowledged that the issue of disclosure was dealt with differently in the criminal division of the Court of Appeal. On applications for leave to appeal in criminal cases, the members of the Court are provided with a bench memorandum prepared by lawyers on the staff on that court. These bench memoranda are disclosed to applicants for leave to appeal prior to the hearing and they have an opportunity to correct the facts set out in those bench memoranda.

However, the Master of the Rolls defended the practice of non-disclosure in civil cases. He pointed out that in a civil case each member of the court involved in an application for leave to appeal had his own bundle of papers and would therefore read the original relevant material. In a criminal case, however, only one of the three members of the Court has a bundle containing all the case papers and therefore the other two judges would usually rely extensively on the information contained in the bench memorandum.

Moreover, his Lordship stated that the relationship between lawyers employed by the criminal division of the Court of Appeal and the judiciary was also quite different from that between judicial assistants and members of the civil division.

### IV. 'WHAT HE DOES NOT KNOW HE CANNOT ANSWER'

Lord Woolf appreciated that Mr. Parker's argument was based on an important principle. He quoted Lord Mustill in *Re D and another (minors) (adoption reports: confidentiality)* where his Lordship stated:

... it is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the tribunal may take into account when forming its opinion. This principle is lame if the party does not know the substance of what is said against him (or her) for what he does not know he cannot answer.<sup>2</sup>

However, Lord Woolf was of the opinion that the Court could comply with this statement of principle without disclosing the bench memorandum. His Lordship was confident that the Court could be relied upon to draw to the attention of the parties any matter which it was proposing to take into account of which the parties were not already aware. The Master of the Rolls also stated that it was important to remember that all information relied upon in reaching its decision was made clear in the judgment of the Court.

Lord Woolf drew an analogy between the bench memoranda made available to the members of the Court and the advice given by civil servants to government ministers. He observed that ministers acting in a quasi-judicial capacity always receive advice from civil servants which is not disclosed to the parties provided it does not bring up a new issue. He cited the decision of the Court of Appeal in *R v. Secretary of State for Education, ex parte S*<sup>3</sup> where Russell L.J. quoted from Lord Diplock in *Bushell and Another v. Secretary of State for the Environment*:<sup>4</sup>

The collective knowledge, technical as well as factual, of the civil servants in the department ... is to be treated as the minister's own knowledge, his own expertise... This is an

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<sup>2</sup> [1996] A.C. 593; [1995] 4 All E.R. 385 at 388.

<sup>3</sup> [1995] 2 F.C.R. 225; [1995] E.L.R. 73.

<sup>4</sup> [1981] AC 75 at 94; [1980] 2 All ER 608 at 613.

integral part of the decision making process itself; it is not to be equated with the minister receiving evidence, expert opinion or advice from sources outside the department.

The Master of the Rolls also pointed out that the Court had communicated with other jurisdictions, including the United States, Canada, Australia and New Zealand and the Law Society had communicated with the European Court of Justice and the European Court of Human Rights to ascertain their practices. His Lordship stated that these inquiries revealed that disclosure was not made even though the use which was made of young lawyers was greater in those jurisdictions.

#### V. CONCLUSION

The Court held that there was no danger that the practice of not disclosing bench memoranda would prejudice Mr. Parker or any other party. On the contrary, Lord Woolf stated that Mr. Parker's criticisms of what was a fair and accurate memorandum merely highlighted the mischief which would follow from bench memoranda being made available to parties.

However, the most interesting aspect of the Court's judgment is the endorsement it gives to the institution of judicial assistants in the Court of Appeal. The introduction of judicial assistants was bound to cause suspicion and it was really a matter of time before some aspect of the judicial assistants initiative was challenged.

However, the judicial assistants survived Mr. Parker's probing and Lord Woolf was unequivocal in his praise of the young lawyers. Significantly, the Master of the Rolls took the opportunity to explain who the judicial assistants were and what they were doing. This should explode some of the misapprehensions about their duties and role.

Originally designed for the Court of Appeal, the judicial assistants scheme has since been expanded so as to

provide a judicial assistant to the President of the Family Division and to the Lord Chief Justice. It seems only a matter of time before judicial assistants are also assigned to the members of the House of Lords.