Social contracts for the bar?

By Anthony Cheshire SC

The notion of a social contract has a very long history. In his dialogue Crito, Plato has Socrates argue that since the Laws of Athens had provided for his upbringing and opportunities and shaped his entire way of life, he had an overwhelming obligation to obey them. This meant that he had to remain in prison and accept the death penalty rather than escape and go into exile. Citizens who had grown up in the city had a choice whether to stay or to leave; and, if they chose to stay, they impliedly agreed to obey the law, which included accepting the sanction dictated for any breach of that law.

In its modern form, the social contract theory emerged and gained popularity in the Age of Enlightenment. Hobbes argued that in its natural state and without a social contract, life is 'solitary, poor, nasty, brutish and short'. In Hobbes' view, we therefore need to surrender our natural freedoms to an all-powerful state, 'Leviathan', in order to create an orderly society. We surrender some of our personal power and liberty to the state, which in exchange provides security and guarantees our civil liberties.

Locke took the theory further and away from the ideas of a guiding monarchy. He focussed on the issue of the consent of the people. Thus, if the people did not agree with the decisions of the ruling government, they could join together to form a different social contract with a different government.

At the beginning of July, under considerable pressure from its backbenchers and its voting base, the Conservative Government in Britain announced that all COVID-19 restrictions would be removed on 19 July. Following public consternation, in particular from those practising in the medical field, within a week Boris Johnson announced that 'this pandemic is not over' and that there was a need for 'extreme caution'. He stated: 'We cannot simply revert instantly on Monday 19 July to life as it was before COVID' and said that he would 'expect and recommend' that face coverings be worn in many circumstances and that contact outside of households would remain limited.

It struck me that Johnson was moving away from the idea of a collective enforceable social contract with a ruling monarch or government established to impose sanctions as contemplated by Hobbes and Locke respectively. Instead, he was urging an individual voluntary code in which there was no ruling body to impose a sanction or otherwise ensure compliance. A similar example would be the etiquette of queuing.

In these current times of lockdown, I have been thinking about the relationship between the bar and the bench. There are rules of behaviour for both, but the relationship goes far beyond that. There are many things that we can do in court to further the smooth running of proceedings, whether in a sensible approach to objections, particularly on peripheral issues, in discussions between counsel about exhibits or timetabling, in making submissions without exaggeration or hyperbole or in making appropriate concessions. While some may have statutory force derived from the various overriding objectives, their scope is much broader. Similarly, there are many things that the bench can do that advance those matters.

Their force derives from a voluntary social contract to which bar and bench subscribe and ultimately they depend upon trust, consent and cooperation. David Hume wrote of the 'sensible knave', who will break rules where he believes he can get away with it. There will always be dissenters and 'sensible knaves' in the legal system, but they are largely isolated by their reputation and the resulting absence of trust in them. Their existence does not undermine the need for the rest of us to strive to maintain the voluntary compact.

At a time where COVID has caused considerable difficulties in the administration of justice, that trust and the social contract between bar and bench is more important than ever; and yet those difficulties are making it harder to foster that trust and reaffirm the social contract.

An audiovisual hearing does not proceed in the same way as a case in court. It is a far more binary and formal process without the same opportunity for, and spirit of, helpfulness and compromise. Thus, for example it is not possible to give a sotto voce warning to an opponent about leading as the important subject matter approaches; it is not possible for counsel to have a brief discussion on their feet about compromising an objection; a correction of an error in a question or a submission often stops matters and has to be dealt with as a formal objection; there is far more scope for talking over each other inadvertently; surprise at a new piece of evidence cannot be indicated by a raise of the eyebrows and a turn of the head but requires it to be explicitly stated; and it is not possible to have a brief informal chat between counsel that may narrow issues, shorten matters or even further settlement. There are many other examples, but the personal contact that derives from an in-person hearing reinforces the trust between bar and bench.

Although I have learned to work with the new processes, I have on several occasions been left frustrated at not being able to say something in passing to an opponent without raising a formal objection or making a specific telephone call for that purpose. I have let objectionable questions go where the prejudice to the hearing of an interruption might outweigh the potential benefit to my client, but been left irritated and frustrated when they continue but any objection might sound petty. On occasion where I might have raised a matter informally with an opponent, either at the bar table or in the

corridor, after court had adjourned, I have been left shouting at the computer screen (although only after checking very carefully that my input was on mute).

The particular relationship that the bar has with the bench is important to practitioners in making sure that their case receives every advantage and opportunity and, as such, it provides a significant advantage to our clients. It is an advantage that the bar generally holds over solicitors, but it is difficult for practitioners to develop it with judicial officers remotely.

It is also difficult to deploy remotely and to the same effect the skills of court craft that we have developed as specialist advocates.

Even before COVID hit, I had noticed that solicitors had taken over much of the work of directions hearings and interlocutory appearances from the junior bar. That was occurring in spite of the barrister's advantages of being a specialist advocate and self-employed and thus with considerably less overheads. Virtual hearings are likely to have accelerated that trend since they have largely removed travel and waiting time and also removed the impact of the immediacy of appearing in person in front of a judicial officer.

There are, then, many reasons why I believe that I am a more effective advocate, in terms of both serving my client and assisting the court, when appearing in person.

At first glance, it might be thought that this would mean that I would enthusiastically endorse the comments of the President of the Victorian Bar Council, Christopher Blanden QC, towards the end of Victoria's lockdown in March. He encouraged members 'to take every opportunity to attend court in person' and said:

> 'Shorts and thongs under the desk are convenient, but it's not who we are and it's not what we do'.

This message prompted an admonishment from a significant body of Victorian barristers, who responded:

> 'The consequence of the transformation to remote work is that it has removed many significant obstacles to a successful career at the Bar. For working parents, this is specially the case…The flexibility gained during this time has greatly reduced, for working parents, the shame and embarrassment previously associated with admitting their relentless responsibility for parental and domestic duties that coexist alongside their involvement in every large and small matter before the court.'

I have no issue with Blanden's encouragement to get back into court in person. I believe that a court system operating only remotely is less than ideal and that I can provide a better service to clients when hearings are in person. It undermines the advantages of the bar and ultimately would lead to the disappearance of the bar and a fused profession. Furthermore, practising only remotely would eventually seriously impact upon my mental health.

However, remote hearings are sometimes more convenient and equally, if not more, efficient and productive. For instance, they have allowed me to conduct directions hearings from my chambers, from my home or on holiday, conveniently and without travel or waiting time and where otherwise I might have asked someone with less knowledge of the matter to appear.

Blanden's overstretch was in trying to define 'who we are' and thus generalise not only what constitutes a barrister but also how a barrister practises.

I am acutely conscious that the answer to who I am is that, consistently with the archetypal image of a barrister, I am white, middle aged and male. There is nothing I can do about that, but it is vital that others who do not fit that description are encouraged to come to the bar, not only by words of encouragement supported by an absence of discrimination, but also by positive steps to allow for flexibility in working practices at the bar.

My preferred model is that most hearings, particularly final hearings, are held in person but there is flexibility for shorter or largely procedural matters to be dealt with remotely. There will be other people, however, for whom the balance is the opposite and there may be some who would wish to practise wholly remotely. Issues of family responsibilities, disability, residence and the like are likely to be relevant factors, as indeed may be personal preference.

We need to be prepared to recognise and work with such differences without preconceptions as to how things should be done. Some years ago, when agreeing on dates for a four day hearing, my opponent suggested that we start on a Tuesday so as not to impact upon the time spent with children over the weekend. I was initially surprised as no-one had ever suggested such a thing, but then enthusiastically adopted it and ever since have thought what a wonderful idea it was!

Difficulties will arise where there are different preferences between the various stakeholders: the judicial officer, each barrister, the solicitors and the witnesses. We need to encourage a position, however, where there should be no embarrassment about raising a preference and explaining its basis, even if ultimately the views of others mean that some other course is adopted. For instance, a request to finish a court hearing early due to childcare responsibilities should be seen as a perfectly acceptable and indeed normal request rather than something worthy of criticism and not reflecting 'who we are'.

In the 1970s, John Rawls developed a theory of principles of justice, which were to be assessed on the basis of a hypothetical objective and neutral observer ignoring subjective, self-interested views. These were to form the basis and object of society's social contract.

There needs to be a discussion in the bar and then with the bench about flexibility in how hearings are to be conducted. In having that discussion, we must put aside our natural adversarial tendencies. We also need to try to adopt what Rawls called a 'veil of ignorance' as to our own subjective characteristics and preferences. In this way, we must seek to identify and reach a consensus as to objective principles of fairness in how practise as a barrister may look and in the range of ways in which hearings are to be conducted. BN