

Collaborative Law

London Collaborative Umbrella Group

Wednesday, 7 October 2009 - Shoreditch House, London

1. Among the most impressive of the many statistics that have been assembled for me is that which records the dramatic increase in the number of collaborative lawyers now practising in the United Kingdom. From a base of only four lawyers in London in 2003, the numbers have risen to at least 1408 in England and Wales (according to information given to us today by Resolution) and 100 in Northern Ireland. The increase in the number of cases dealt with in the collaborative system has – happily - reflected the rise in the number of collaborative lawyers with, I am told, an increase of 87% of cases in 2006/7. Perhaps the most inspiring statistic of all, however, is that of the settlement rate of collaborative law cases – a remarkable 85%. On any view no further testament to the success of the system is required.
2. It would be idle – as well as presumptuous before this audience – for me to dilate on the strengths of the collaborative law process since my knowledge of it is entirely theoretical. What I propose to do is to offer a few random thoughts that have been prompted by what I have been reading over the past days and then essay an answer to a question that has been posed to me by the organisers of tonight's event.
3. I have been struck, while musing on how collaborative law might have operated on my own practice as a lawyer, by the thought that it combines much of what was best in what I might describe as the traditional practice of the law with innovative and imaginative new techniques. As Lord Chief Justice of Northern Ireland it was my agreeable duty to welcome newly qualified lawyers to the profession every year and it was my invariable practice to say to them that our purpose as lawyers and judges is to help people. That is also, of course, our opportunity and our privilege. In its essence, collaborative law maximises the capacity of lawyers to give the greatest help to their clients. And in doing so, it consciously looks beyond the context of the dispute that the process seeks to resolve. Success is not measured in victory for one side over the other or the vindication of one viewpoint at the expense of an opponent's. Rather, the fundamental purpose of the process is to shape a solution to the problems experienced by the parties that not only resolves the immediate dispute but which will endure to sustain a relationship between the parties after the lawyers have departed the stage. As a concept, of course, this approach is not

new. One frequently advised clients to settle for less than might have been achievable by litigation for the sake of longer term interests.

4. What is different, I think, about the collaborative approach is that this goal is given a prominence that reflects its centrality to the entire process, rather than being an incidental side effect of civilised negotiations. What is required of the collaborative lawyer – as it seems to me – is much more than civility and courtesy in negotiations. A collaborative lawyer does not approach the case with the mindset, “What is the best result for my client” but with the aim of fashioning an outcome that caters as comprehensively as it may for all the interests at play. And it explicitly recognises that those interests may extend well beyond the protagonists in the dispute, most particularly in the field of family law, to the children of the family and to other relatives.
5. This requires of a lawyer a fundamental re-adjustment of the conventional approach to litigation. In the collaborative law process the lawyer embarks on a co-operative venture, combining with not only the lawyers on the other side but also with other professionals in a joint and constructive quest to achieve the best result for all. Naturally and necessarily, the process requires the dismantling of many of the long-established structures previously considered vital in pre-trial adversarial skirmishes such as the exchange of correspondence, disputes about discovery and other interlocutory combat. The nature of the relationship between lawyer and client is also, of necessity, different. It is, of course, axiomatic that at the heart of every successful lawyer/client relationship must be complete trust. Conventionally, this is founded on the client’s confidence in her or his lawyer and the conviction that the lawyer will do all that can be done for the client. In the collaborative law context, however, the client understands that the search for a settlement rises above a sectional approach and that the lawyer will be actuated by more than simply the client’s interests.
6. This fundamental element is, no doubt, why such emphasis is placed on effective screening of clients to determine whether they will benefit from a collaborative law approach. I have long been convinced that the happiest clients are not necessarily those who have achieved the best possible outcomes but are those who have felt best informed of the process in which they are participants and who sense that their views have been absorbed in a way that has allowed them to influence the result. That happy condition can only be achieved by patient, sometimes painstaking and repetitive, explanation. Better this, however, than the paternalistic attitude that I encountered so often in my early days as a lawyer when solicitors routinely advised

bewildered clients that they should leave all decisions to the 'big barrister' meaning their QC.

7. I can only imagine that the process of explaining to a client the benefits of a collaborative approach requires even more meticulous, sensitive and conscientious handling than anything that I ever experienced as a lawyer. And that thought prompts the conclusion that to be a successful collaborative lawyer, an entirely new skills set must be obtained. As the father of two lawyers myself, I am conscious that the challenges that face young – and even older – members of the legal profession are far greater and more complex today than they have ever been. Acquiring a whole new set of skills must seem a daunting prospect but I have no doubt that the ultimate reward that the legal profession offers its members, that of helping people, can be greatly enriched and enhanced by practice in the field of collaborative law.
8. And so, it will perhaps seem churlish if I sound a note, not of criticism, but of guarded reservation. A central feature of the collaborative law system is a commitment not to resort to the courts for a resolution of the dispute. I can understand why this is pivotal to the success of the process. The looming spectre of a bitter adversarial court battle, if the process did not succeed, could well inhibit wholehearted participation. What provokes in me a slight feeling of unease is that the very success of the collaborative process might operate as a disincentive to the courts to adapt our procedures to meet the challenge of change. Put crudely and simply, if court procedures are deficient, should the answer be the espousal of a system entirely outside the courts, or should the recognition of deficiencies act as a spur to bring about their modification and adaptation of the courts' procedures to meet the needs of those who have resort to them? While there is no reason currently to apprehend it, the creation of a parallel system for the resolution outside the courts of legal disputes over a wide array of areas could have profound implications for the development of the law and I believe we would do well to recognise this frankly.
9. This leads me to a brief reflection on the question that has been put to me by the conference organisers. The terms of the question are these: -

“Could the features that make collaborative law a successful method of dispute resolution – the participation agreement in which parties agree not to litigate, the focus on four-way meetings rather than on communicating by correspondence, the importance of positive ideals such as respect and non-aggression, the use of a team of professionals to resolve the dispute and the encouragement of

creative solutions – be applied elsewhere (in other types of legal disputes and disputes generally) with as much success?”

- 10.** The glib answer is, of course, “Well, why not?” But I think that a rather more thoughtful response is due, although I do not feel wholly confident in expressing it. The vast preponderance of collaborative law cases takes place in the family law sphere and the clear suitability of many cases in that field to collaborative treatment is so obvious as to require no disquisition on my part. And, as the President of the Family Division observed in addressing the London Launch Event some years ago, one can see scope for its introduction to some types of commercial dispute. Whether it could successfully translate to other forms of litigation such as public law is somewhat more imponderable. But that circumstance should not be a reason to place pre-emptive barriers to the possible extension of this laudable initiative to other fields beyond that of family law. Provided we have a clear-sighted view of the possible implications to which I have earlier alluded, I cannot conceive of any reason that it should not be at least tried in other areas.
- 11.** Certainly if that extension requires a herald, it could find no better harbinger than the success of the Collaborative Law Umbrella Group. As Coleridge J said last year, if he had bought shares in Collaborative Law Ltd., he could look forward to its successful flotation.
- 12.** I have great pleasure in recognising the achievements of the Umbrella Group, in applauding them on the success of this event, in joining with them in their celebration of six years of success of collaborative law and in wishing them well for the future.