The Future of Holiday Claims - A Response to Government

Position Paper - Supplementary Report

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Introduction:

This supplementary report has been submitted because it contains additional but nonetheless important points for consideration by the Consultation on Holiday Claims. The report is brief and sets out a key judgement in the case of R (on the application of UNISON) (Appellent) v Lord Chancellor (Respondent) 26 July 2017 (Contains public sector information licensed under the Open Government Licence v3.0). That case examined the imposition by government of court fees and whether they impeded Access to Justice. Unanimously the Court decided that Access to Justice was impeded. The analogy to the present case is not only stark, but within the Judgement, the Lordships cite many examples, including those of Local Authorities in which the question was asked in one quoted case of ***'whether there was a real risk that the increase in fees will cause local authorities not to make applications which objectively should be made"***? The question therefore must be, whether, in complicated cases, the imposition of fixed fees will impede Access to Justice by causing Consumers not to bring a case because of serious case cost concerns or, whether such an impediment will present little or no opportunity to secure a solid legal experience in the field of Legal Representation? Will the Courts become littered with Litigants in Person or unskilled Legal Representation, as a direct result of this flawed Consultation and the danger of a pre-determined outcome to satisfy agenda? This case and the questions that flow therefrom must become central to the government's thinking on this matter.

This report should be read in conjunction with the earlier Report submitted to this Consultation.

About the Author:

I am a retired Police Officer and a self-funded Solicitor. I work extensively in the media, providing comment on Travel Consumer related issues. I am not connected to nor do I work within or with any Law Firm or other Legal entity.

In the last 10 years, I have provided extensive comment to the UK & EU about Travel Consumer issues, creating over 60 reports to highlight their detriment.

For 14 years, I was the Consumer Director of the Independent Travel Consumer Organisation, HolidayTravelWatch (HTW), until I left that post in July of this year.

I have some 20 years experience, both in the handling of holiday claims and latterly as a Consumer Campaigner, helping Consumers deal with their Travel Complaints. Whilst at the helm of HTW, we proudly aided 97.5% of holidaymakers to self-resolve their complaints and worked with specialist lawyers to help progress less than 2% of holidaymakers cases, where it was clear that they would not be capable of settlement by self-resolution methods.

I do not receive any funding from any source and my continuing work to independently advocate the Consumer position is entirely self-funded.

R v Lord Chancellor (2017)

For the sake of brevity I will not offer further commentary on this case. The dicta in this case should be central to Ministerial thinking and cause them to rethink the basis for this Consultation. The dicta establishes very clear points of the Law on Access to Justice. If those principles are breached, is it likely to have the effect of giving rise to potential Judicial Review by Consumers.

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Reference is made to paragraphs 66 to 85 of the Judgement:

“66. The constitutional right of access to the courts is inherent in the rule of law. The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the “users” who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings. The extent to which that viewpoint has gained currency in recent times is apparent from the consultation papers and reports discussed earlier. It is epitomised in the assumption that the consumption of ET and EAT services without full cost recovery results in a loss to society, since “ET and EAT use does not lead to gains to society that exceed the sum of the gains to consumers and producers of these services”.

67. It may be helpful to begin by explaining briefly the importance of the rule of law, and the role of access to the courts in maintaining the rule of law. It may also be helpful to explain why the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit, are demonstrably untenable.

68. At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.

69. Access to the courts is not, therefore, of value only to the particular individuals involved. That is most obviously true of cases which establish principles of general importance. When, for example, Mrs Donoghue won her appeal to the House of Lords (Donoghue v Stevenson [1932] AC 562), the decision established that producers of consumer goods are under a duty to take care for the health and safety of the consumers of those goods: one of the most important developments in the law of this country in the 20th century. To say that it was of no value to anyone other than Mrs Donoghue and the lawyers and judges involved in the case would be
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absurd. The same is true of cases before ETs. For example, the case of Dumfries and Galloway Council v North [2013] UKSC 45; [2013] ICR 993, concerned with the comparability for equal pay purposes of classroom assistants and nursery nurses with male manual workers such as road workers and refuse collectors, had implications well beyond the particular claimants and the respondent local authority. The case also illustrates the fact that it is not always desirable that claims should be settled: it resolved a point of genuine uncertainty as to the interpretation of the legislation governing equal pay, which was of general importance, and on which an authoritative ruling was required.

70. Every day in the courts and tribunals of this country, the names of people who brought cases in the past live on as shorthand for the legal rules and principles which their cases established. Their cases form the basis of the advice given to those whose cases are now before the courts, or who need to be advised as to the basis on which their claim might fairly be settled, or who need to be advised that their case is hopeless. The written case lodged on behalf of the Lord Chancellor in this appeal itself cites over 60 cases, each of which bears the name of the individual involved, and each of which is relied on as establishing a legal proposition. The Lord Chancellor’s own use of these materials refutes the idea that taxpayers derive no benefit from the cases brought by other people.

71. But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.

72. When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. It does not envisage that every case of a breach of those rights will result in a claim before an ET. But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail. It is thus the claims which are brought before an ET which enable legislation to have the deterrent and other effects which Parliament intended, provide
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authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution.

73. A Lord Chancellor of a previous generation put the point in a nutshell, in a letter to the Treasury:
“(i) Justice in this country is something in which all the Queen’s subjects have an interest, whether it be criminal or civil.
(ii) The courts are for the benefit of all, whether the individual resorts to them or not.
(iii) In the case of the civil courts the citizen benefits from the interpretation of the law by the Judges and from the resolution of disputes, whether between the state and the individual or between individuals.”
(Genn, Judging Civil Justice (2010), p 46, quoting a letter written by Lord Gardiner in 1965)

74. In English law, the right of access to the courts has long been recognised. The central idea is expressed in chapter 40 of the Magna Carta of 1215 (“Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam”), which remains on the statute book in the closing words of chapter 29 of the version issued by Edward I in 1297:
“We will sell to no man, we will not deny or defer to any man either Justice or Right.”
Those words are not a prohibition on the charging of court fees, but they are a guarantee of access to courts which administer justice promptly and fairly.

75. The significance of that guarantee was emphasised by Sir Edward Coke in Part 2 of his Institutes of the Laws of England (written in the 1620s, but published posthumously in 1642). Citing chapter 29 of the 1297 charter, he commented:
“And therefore, every Subject of this Realme, for injury done to him in bonis, terris, vel persona [in goods, in lands, or in
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person], by any other Subject ... may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay. Hereby it appeareth, that Justice must have three qualities, it must be Libera, quia nihil iniquius venali Justitia; Plena, quia Justitia non debet claudicare; & Celeris, quia dilatio est quaedam negatio [Free, because nothing is more iniquitous than saleable justice; full, because

justice ought not to limp; and speedy, because delay is in effect a denial]; and then it is both Justice and Right." (1809 ed, pp 55-56)
More than a century later, Blackstone cited Coke in his Commentaries on the Laws of England (1765-1769), and stated:
"A ... right of every [man] is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein." (Book I, Chapter 1, "Absolute Rights of Individuals")

76. In more modern times, many examples can be found of judicial recognition of the constitutional right of unimpeded access to the courts (as Lord Diplock described it in Attorney General v Times Newspapers Ltd [1974] AC 273, 310, and again in Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corpn Ltd [1981] AC 909, 977), which can only be curtailed by clear statutory enactment. Thus, in In re Boaler [1915] 1 KB 21, where the question was whether a statutory prohibition on vexatious litigants instituting legal proceedings extended to criminal proceedings, the Court of Appeal held that it did not. Scrutton J said at p 36 that although a statute might deprive a subject of the right to appeal to the courts, "the language of any such statute should be jealously watched by the courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension." Similarly, in Chester v Bateson [1920] 1 KB 829, where delegated legislation prohibited the bringing of certain legal proceedings without a minister's consent, the Divisional Court held that the regulation was invalid. Avory J stated that "nothing less than express words in the statute taking away the right of the King's subjects of access to the courts of justice would authorize or justify it" (p 836). To similar effect was the decision of the House of Lords in R & W Paul Ltd v The Wheat Commission [1937] AC 139, where an arbitration scheme established by delegated legislation disapplied the Arbitration Act 1889, under which arbitrators could state a special case for the opinion of the court on a point of law. That element of the scheme had not been expressly authorised by the enabling legislation, and was held to be ultra vires. As Viscount
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Simonds observed in Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260, 286:
"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

77. Another important general statement was made by Lord Diplock in Attorney General v Times Newspapers Ltd at p 309:
"The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law."

78. Most of the cases so far mentioned were concerned with barriers to the bringing of proceedings. But impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible. More recent authorities make it clear that any hindrance or impediment by the executive requires clear authorisation by Parliament. Examples include Raymond v Honey [1983] 1 AC 1, where prison rules requiring a prison governor to delay forwarding a prisoner's application to the courts, until the matter complained of had been the subject of an internal investigation, were held to be ultra vires; and R v Secretary of State for the Home Department, Ex p Anderson [1984] QB 778, where rules which

prevented a prisoner from obtaining legal advice in connection with proceedings that he wished to undertake, until he had raised his complaint internally, were also held to be ultra vires.

79. The court's approach in these cases was to ask itself whether the impediment or hindrance in question had been clearly authorised by primary legislation. In Raymond v Honey, for example, Lord Wilberforce stated at p 13 that the statutory power relied on (a power to make rules for the management of prisons) was "quite
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insufficient to authorise hindrance or interference with so basic a right" as the right to have unimpeded access to a court. Lord Bridge of Harwich added at p 14 that "a citizen's right to unimpeded access to the courts can only be taken away by express enactment".

80. Even where a statutory power authorises an intrusion upon the right of access to the courts, it is interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. This principle was developed in a series of cases concerned with prisoners. The first was R v Secretary of State for the Home Department, Ex p Leech [1994] QB 198, which concerned a prison rule under which letters between a prisoner and a solicitor could be read, and stopped if they were of inordinate length or otherwise objectionable. The rule did not apply where the letter related to proceedings already commenced, but the Court of Appeal accepted that it nevertheless created an impediment to the exercise of the right of access to justice in so far as it applied to prisoners who were seeking legal advice in connection with possible future proceedings. The question was whether the rule was authorised by a statutory power to make rules for the regulation of prisons. That depended on whether an objective need for such a rule, in the interests of the regulation of prisons, could be demonstrated. As Steyn LJ, giving the judgment of the court, stated at p 212:
"The question is whether there is a self-evident and pressing need for an unrestricted power to read letters between a prisoner and a solicitor and a power to stop such letters on the ground of prolixity and objectionability."
The evidence established merely a need to check that the correspondence was bona fide legal correspondence. Steyn LJ concluded:
"By way of summary, we accept that [the statutory provision] by necessary implication authorises some screening of correspondence passing between a prisoner and a solicitor. The authorised intrusion must, however, be the minimum necessary to ensure that the correspondence is in truth bona fide legal correspondence." (p 217)

81. The decision in Leech was endorsed and approved by the House of Lords in R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115, which arose from a prohibition on visits to serving prisoners by journalists seeking to investigate whether the prisoners had, as they claimed, been wrongly convicted, except on terms which precluded the journalists from making professional use of the material obtained during such visits. The House considered whether the Home
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Secretary's evidence showed a pressing need for a measure which restricted prisoners' attempts to gain access to justice, and found none.

82. A similar approach was adopted in R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532, which concerned a policy that prisoners must be absent from their cells when legal correspondence kept there was examined. Lord Bingham of Cornhill, with whose speech the other members of the House agreed, summarised the effect of the earlier authorities concerning prisoners, including Raymond v Honey, Ex p Anderson, and Ex p Leech:
"Among the rights which, in part at least, survive [imprisonment] are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. Such rights may be curtailed only by

clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment." (pp 537-538)
After an examination of the evidence, Lord Bingham concluded that "the policy provides for a degree of intrusion into the privileged legal correspondence of prisoners which is greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners" (para 21). Since that degree of intrusion was not expressly authorised by the relevant statutory provision, it followed that the Secretary of State had no power to lay down the policy.

83. Finally, in this overview of the common law authorities, it is necessary to note two cases concerned with court fees. First, the case of R v Lord Chancellor, Ex p Witham [1998] QB 575 concerned court fees prescribed by the Lord Chancellor under a statutory power. The order in question repealed a power to reduce or remit the fees on grounds of undue financial hardship in exceptional circumstances. The order had been made with the concurrence of all four Heads of Division, as well as the Treasury. It had also been laid before Parliament. The applicant was in receipt of income support of £58 per week, and wished to bring proceedings. The prescribed fee was either £120 or £500, depending on the amount claimed. The applicant said that he could not afford to pay a fee of either amount. There was also evidence that a person on income support could not afford the £10 fee to set aside a default judgment in debt proceedings, and that another person on income support who was facing eviction could not afford the £20 fee to be joined in possession proceedings. Laws J, with whom Rose LJ agreed, said that he saw no reason not to accept what was said, and concluded that there was a variety of situations in which persons on very low incomes were in practice denied access to the courts.
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84. Laws J accepted that, notwithstanding the wide discretion seemingly conferred on the Lord Chancellor by the relevant statutory provision, there were implied limitations upon his powers: the relevant provision did not "permit him to exercise the power in such a way as to deprive the citizen of what has been called his constitutional right of access to the courts" (p 580). The rule-making power in the primary legislation contained "nothing to alert the reader to any possibility that fees might be imposed in circumstances such as to deny absolutely the citizen's right of access to the Queen's courts" (p 586). Since that was the practical effect of the fees, the order was declared unlawful.

85. The second case is the decision of the Divisional Court in R (Hillingdon London Borough Council) v Lord Chancellor (Law Society intervening) [2008] EWHC 2683 (Admin); [2009] 1 FLR 39. The case concerned fees payable by local authorities in connection with applications made in public law family cases. The court rejected the Government's argument that the lawfulness of the fees orders depended on whether local authorities would (or there was a real risk that they would) be required to act inappropriately by failing to make applications which objectively should be made. Dyson LJ stated that the impact of the fees orders "must be considered in the real world" (para 61). The relevant question was therefore "whether there was a real risk that the increase in fees will cause local authorities not to make applications which objectively should be made" (ibid).

Conclusion:

I refer the Consultation to my report dated 16 October 2017.

This report is to be read in conjunction with that report.

The principles of the leading case on Access to Justice should be central to Ministerial thinking.

In my view, the questions from the Consultation mask real and fundamental issues for Consumers and indeed Society as a whole.

Ministers should recognise the increased potential of genuine Consumers simply giving up, acting as Litigants in Person or being driven into the arms of Legal Process Factories where Legal Skill should be questioned.

At its root, the government should rethink the basis of this Consultation and the propositions that underpin it.

A failure to understand the basic principles of Law will have undesired consequences; it is not too late to stop and rethink this entire 'compensation culture' strategy!

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