Consumer Redress – An Overview

*Sir Gordon Borrie**

A society in which responsible consumers can be sure they deal only with responsible traders is an ideal which is never likely to be fully attained. There are many ways in which those of us charged with protecting the legitimate interests of consumers strive towards this ideal: by promoting legislation, by educating the public, by seeking to influence problem traders, and by prosecuting and taking other enforcement action against those who persistently cause trouble. But it is surely also desirable that workable redress schemes are available for consumers themselves to use when direct contact with the trader fails to resolve their problem. Such facilities are one of the elements which go to make up a healthy marketplace where responsible traders can flourish, and the irresponsible can be penalised and deterred.

The potential demand for redress is very great. A survey commissioned by the Office of Fair Trading in November 1990 showed that, in the previous 12 months, over 40 per cent of the adult population had had some cause for complaint about goods or services, some of them about more than one item. This means that each year millions of people have millions of causes for complaint. Earlier research[1] suggests that about two thirds pursue their complaints and around half of these are not satisfied with the outcome. I am certainly not suggesting that all unresolved problems are awaiting some form of dispute resolution. Nevertheless, it is perhaps worth reminding ourselves of some of the available figures on the use of consumer redress schemes. It has been said that fewer than 12,500 consumer disputes are handled each year by the small claims procedure of the county courts.[2] Only 1,915 complaints were completed in 1990 by the Insurance Ombudsman.[3] Only fifteen hundred complaints were handled by the conciliation section of the Retail Motor Industry Federation, and just 42 cases were decided under its arbitration scheme. Indeed some of the arbitration schemes offered by consumer codes of practice

* Q.C., Director General of Fair Trading. This paper is based on a speech delivered at the Office of Fair Trading Conference on Consumer Redress, London, 30 January 1991.

1. Summaries of this research are available from the Office of Fair Trading.
2. *Ordinary Justice. Legal Services and the Courts in England and Wales: a Consumer View*, National Consumer Council (1989), p. 287.
3. *Annual Report* of the Insurance Ombudsman 1990, p. 24.

which I have endorsed have never been used. The Office of Fair Trading's survey found that very few people sought advice of any kind. Fewer still used one of the existing redress schemes: over the preceding five years only six per cent of the sample had done so.

If we accept that there will always be a need for consumer redress schemes we must also ask ourselves: what form should they take? And are there today too many disparate schemes? In an interview I gave in 1978 I said:

> "What I feel is that many flowers should bloom in the field of suitable small claims machinery, because there probably is no one ideal way."[4]

The flowers have certainly bloomed.

First there is the county court system, and in particular the small claims procedure available for claims up to £500 and, from 1 July 1991, up to £1,000. The purpose of the procedure is to provide an accessible, quick, cheap and informal means of deciding claims which involve comparatively small sums of money. The Review Body on Civil Justice commissioned research into people – consumers and traders – who had used the small claims procedure. In its 1988 report it concluded that for most people the litigation process was likely to be seen as complex, strange and unpredictable.[5] However, the procedure emerged as substantially sound in that it was able to produce results, without major delay and cost, which satisfied a large number of those who used it. Moreover it was workable, in that it produced these results by a process which many litigants were able to operate without undue difficulty. But litigants could be prejudiced by a lack of uniform procedure and by considerable inconsistencies of approach around the country. County Court Registrars – or District Judges, as they are now called – may adopt very different approaches in how they handle small claims cases.

The Courts are for the use of everyone with a civil claim of any kind. But over the years various forms of alternative dispute resolution have come into being, either to remedy some of the perceived drawbacks of court action or to provide a redress procedure tailor-made for a particular sector and often benefiting from the specialist knowledge of those administering it. The first of these is arbitration. I have always encouraged the use of arbitration in claims that private consumers have in respect of breach of contract and other civil disputes. Nearly all the codes of practice drawn up in consultation with the Office of Fair Trading allow consumers the choice of having their disputes settled by arbitration. I have had two reasons for encouraging arbitration as an alternative to the courts. One is that, despite the evidence that consumers acting as unrepresented litigants are generally

4. *Law Soc. Gazette*, 28 June 1978.

5. *Report of the Civil Justice Review Body* (L.C.D., 1988). Fuller materials are to be found in the *Consultation Paper on Small Claims* and the *Touche Ross Factual Study of Small Claims Cases* (L.C.D., 1986).

well served by the courts, the courts are insufficiently used. Part of the blame for this must lie with the fact that the county court – far from being the little man's court – is the place where the little man gets taken to court. Statistically, he or she is more likely to be sued there than to do the suing, and this can be expected to influence public attitudes and expectations of the procedure. My second reason is that because of the inherent flexibility of arbitration it has been possible to adapt it so that it suits the needs of some consumers better than the court procedure does. Arbitration under codes of practice recognised by the Office of Fair Trading is usually based on documentary evidence alone, which removes the need for personal attendance and can help speed up the decision and save costs. Moreover in some cases it has not just been an alternative procedure. For people wishing to make a claim over the installation of double glazing or a moderately expensive family holiday, for example, it has been the *only* procedure that was practical because of the low limit for the small claims scheme in the courts.

I am aware that arbitration under industry codes of practice has its critics. In December 1990, the Office of Fair Trading commissioned some discussion groups.[6] Those taking part in the discussions were people who had pursued a complaint beyond the first stage of going back to the retailer or the supplier of a service. The discussions showed that there was very little awareness of arbitration amongst consumers and some felt that the trader would only suggest it if he was likely to win. Sadly, and I am sure, wrongly, there was very little expectation of impartiality.

One feature of the code of practice schemes is that consumers must first submit their complaint for conciliation by the relevant trade association. Trade associations are set up principally to protect the interests of the trade. It is not surprising that very few members of the public believe they will deal sympathetically with a consumer. An arbitrator is of course completely independent of the trader, but it is evident that this fact is not widely understood. Public awareness – or otherwise – of the complaints procedure must also be a factor. I am sure that one reason why the arbitration scheme of the Association of British Travel Agents is well used is that it is described in every ABTA tour operator's brochure. Information is not so readily available to members of the public dealing with other kinds of business, and often the redress procedures are available but no one makes use of them.

The third flower to bloom is the institution of the *ombudsman*. The first ombudsman, appointed in 1967, was the Parliamentary Commissioner for Administration (commonly called the Parliamentary Ombudsman), who considers complaints, filtered through Members of Parliament, that a Government department has caused injustice as a result of maladministration. The same individual acts as the Health Services Ombudsman. Later, Local Government Ombudsmen were appointed, with more limited powers. These ombudsmen

6. A summary of the findings of the discussion groups is available from the Office of Fair Trading.

seemed to meet a real demand from the public. In 1981 the insurance industry created an ombudsman scheme which can be used by private consumers in their relations with insurance companies who subscribe to the scheme. The banks took a similar initiative in 1986. In the same year the Building Societies Act required the setting up of an ombudsman to deal with complaints against all building societies. In 1990 a corporate estate agents ombudsman scheme was established by fifteen of the largest chains in the industry. Two more statutory ombudsmen were also created. The Lord Chancellor appointed a Legal Services Ombudsman to consider the handling of complaints by the Bar, the Law Society and any other legal professional body. And the Secretary of State for Social Security appointed a Pensions Ombudsman, who will investigate complaints of maladministration, or disputes of fact or law, brought by individuals against the trustees or managers of a personal or occupational pension scheme. Every national newspaper seems to have an ombudsman now, and I am aware that some have already upheld complaints by readers against the newspaper which appointed them. There is even a timeshare company which has appointed a panel of ombudsmen – not before time, some may think! Indeed, the *Independent* ran a cartoon showing serried ranks of businessmen being addressed by a man wielding a megaphone. The caption read "Hands up, please, anybody who *isn't* an ombudsman."[7]

I have always thought it a major plus point for the ombudsmen that they publish annual reports. These are well reported in the Press and they contain many useful observations on how the industry should be conducting itself. The discussion groups of consumers commissioned by the Office of Fair Trading were particularly interesting on the subject of ombudsmen. 'The ombudsman' – and in the popular imagination there is evidently only one – is thought of as a well-respected and impartial person. But he is also a remote, mysterious figure. People were uncertain who he was, what he did, or how they could find him. There are other signs that all may not be well. The first Unit Trust Ombudsman resigned after five months. The second found that his scheme crumbled away beneath him. Moreover the term 'ombudsman' is being applied to people operating very different kinds of scheme with different rules. As ombudsmen proliferate, and more people make use of them, consumers' experience of one scheme will be likely to influence their expectations from the others. But they may be misled. For example, building societies may, in certain circumstances, refuse to comply with a decision by their ombudsman. This could come as a shock to someone used to the binding nature of decisions by one of the other ombudsmen.

Ombudsmen are sometimes criticised when their decisions favour the company rather than the consumer. One example of this is the disputes over so-called 'phantom' withdrawals from automated teller machines. These are the most common type of complaint dealt with under both the Banking and the Building Societies schemes, and complainants have been particularly frustrated that the

7. The *Independent*, 23 June 1990.

ombudsmen have rarely found in their favour in these cases. Often further investigation has shown that the withdrawal was all too real, and was made by a relative or friend of the cardholder without his or her knowledge. Both ombudsmen have been at pains to explain in their annual reports that in these circumstances the cardholder is liable and that they cannot undo the legal effect of the contract between the cardholder and the bank or building society. Criticism of an ombudsman's decision often arises from an expectation, perhaps fostered by the media, that an ombudsman is a consumer champion and must always give consumers the benefit of the doubt. This makes it especially interesting that the decisions of the second Insurance Ombudsman, Dr Julian Farrand, have been more favourable to consumers than those of the first, although both Insurance Ombudsmen operated within the same scheme. Dr Farrand's more interventionist stance has led to mutterings of protest from the insurance industry. These made the *New Law Journal* comment that there appeared to be "a basic, although probably widespread, misunderstanding of the purpose of such operations on the part of the practitioners who provide them. Ombudspersons, they seem to believe, are a jolly good thing to have when telling the public how well they will protect their interests but turn into a major-league nuisance when they actually start doing so."[8]

Recently we have seen a new blossom of a different sort, the regulators of the public utilities which have been privatised. So far there are four of them, dealing with Telecommunications, Gas, Water and Electricity. Dispute resolution is of course not their primary function, but they do have a statutory duty to protect the interests of the customers of the utility or utilities which they regulate and they also have powers of enforcement. Different legislation has prescribed different procedures for handling consumers' complaints. The Director General of Electricity Supply and his regional offices can only deal with complaints about the generation, transmission, distribution and supply of electricity. The regional offices are supported by local Consumers' Committees which are concerned with the distribution and supply of electricity. Neither can deal with complaints about such activities as the supply and installation of appliances by the electricity companies. Customers of British Gas, on the other hand, can seek help from a statutory body with complaints about *all* its activities. As a general rule, the Director General of Gas Supply deals with disputes up to and including the gas meter. The Gas Consumers Council, which does not have enforcement powers, can deal with disputes arising on the other side of the meter – for example, the retailing, installation and servicing of appliances by British Gas and, as the figures in the conference pack show, these are a healthy proportion of all the complaints and enquiries which it considers. The Director General of Telecommunications takes the lead on complaints about the suppliers of telecommunication services, although he works closely with four national advisory committees. But the

8. *N.L.J.*, 18 May 1990.

Director General of Water Services has established regional Customer Service Committees which handle the majority of complaints from water consumers; only a few, including alleged breaches of the water company's licence, are dealt with by the Director General. I do not have a view on which of these ways of handling disputes against public utilities is the best. Perhaps each separate industry really does require a separate procedure.

The latest flower in the field of dispute resolution is mediation. Like arbitration this was originally a means for resolving disputes between businesses but – again like arbitration – it is a flexible procedure and it could be adapted for dealing with consumer disputes. Mediation is an attempt to resolve a dispute in a way which satisfies both parties. A mediator will hold meetings with both sides, together and separately, in an effort to reach an agreement. Mediators may propose solutions, but they cannot impose them. The system is essentially conciliation conducted not by a trade association but by an independent third party, and it satisfies the desire expressed by many consumers to put their case in person. Moreover, it compresses what can be a long drawn-out process into a single session. However, much depends on the qualities of the mediator. It is also possible that the parties might come to the end of the process without having reached an agreement, and would probably then have to proceed to litigation. Finally there is the question of cost. Mediators will need to show the same willingness that arbitrators have shown to deal with consumer disputes at rates which consumers can afford.

Over the years, I have taken the view that it was healthy and desirable that a variety of dispute settlement schemes should be available for consumer disputes. However, one of the subjects that needs to be considered is whether it is in the public interest that such a multiplicity of redress schemes as now exist should continue indefinitely, and perhaps proliferate even more in future. Does a choice of avenues for redress bring more problems than benefits for consumers? Should the administrators of the schemes be learning more from each other about their strengths or weaknesses? If so, how should they do this? Should there be an established forum for consumer dispute resolution where those involved can regularly meet and is there a need for more research? Another question to consider is whether in the long term there should be a *single* consumer redress scheme, or at least a single point of entry where everyone can lodge a dispute regardless of its subject matter? Such a proposal would be a fairly radical innovation in the United Kingdom, and the question of how to finance it would be a particularly tough nut to crack.

My aim is to have more consumers with a legitimate complaint against a trader seeking redress, because that is their right and because effective redress procedures act as a curb on the wilder excesses of problem traders. This will only happen when consumers are presented with a scheme, or schemes, which they feel confident about using.

In my experience, consumers gain more confidence if redress schemes give a high priority to the following criteria.

(i) *Redress should be inexpensive.* This does not necessarily mean it should be free, but consumers should not be deterred from pursuing a complaint by the amount of the application fee, or by the fear that they might incur more expense if they lose. It is reasonable that if they win the trader should pay their costs, as well as any compensation they may have been awarded. It is *not* reasonable that if they lose their case they should also risk paying the costs of the trader, who in many cases will have incurred the expense of legal advice.

(ii) *Redress should take full account of consumer's lack of experience.* For most consumers this will be a once-in-a-lifetime battle. They are taking on someone whom they perceive to be more powerful and who will in all probability be more experienced at litigation, less troubled by delays, and more likely to have the benefit of legal advice and representation. At the most practical level, this means that litigants should be able to fill in application forms unaided. Information should be written in plain English, preferably with versions available in the languages spoken by the main ethnic minorities in this country. Officials – whether in the county courts, trade associations or in an ombudsman's office – should be trained to advise consumers on how best to present their case, so that the less literate or less confident do not suffer any disadvantage. But perhaps more fundamental reforms are also needed. Consumers may assume that the arbitrator, registrar, or ombudsman is more likely to sympathise with the trader, especially if the trader is responding to letters through a lawyer, because they all seem to come from the same social class or educational background or know one another. Is there a need for a forum specifically designed to be used by consumers? This is the kind of service which the Manchester Arbitration Scheme and the London Small Claims Court provided in the 1970s. They broke new ground by attempting to combine oral hearings with fast, cheap, informal and interventionist procedures. It can be intimidating – even for the most confident of consumers – to pursue a dispute, on a 'do-it-yourself' basis, through a court which is largely accustomed to dealing with professional representatives. Is it right that traders can be legally represented at a hearing when consumers are not? How should District Judges adapt to the new right of consumers to be accompanied by a lay helper such as a Trading Standards Officer or a Citizens Advice Bureau worker, or even a friend or neighbour? And, most importantly, how can District Judges arbitrating on small claims be encouraged to be more interventionist?

(iii) *Redress should be the consumer's own choice.* First, consumers should be able to choose which redress scheme to use, and there should be no attempt to force them to use one scheme rather than another. An agreement which attempts to force arbitration on consumers is no longer enforceable, following the enactment of the Consumer Arbitration Agreements Act 1988.

But my officials still hear of cases where the trader tells consumers with whom they are in dispute that arbitration is the next step, without first directing them to an adviser who will provide information about the options so that they can make this decision for themselves. Secondly, it is important that no obstacle should be placed in the way of consumers who wish to use a redress scheme. Some of the schemes offered by professional bodies allow the member to refuse to be taken to arbitration. This is surely a case of giving with one hand and taking away with the other.

(iv) *Redress should be speedy.* It can take six months or more for a complaint to be dealt with by arbitration, through the small claims procedure of the courts or under a code of practice. Consumers might be prepared to tolerate this wait were it not that they first have to wait for the trader to respond to their initial complaint and, where conciliation is involved, for a trade association to attempt a settlement. The National Consumer Council found an *average* delay, for conciliation and arbitration together, of 45 weeks for ABTA's scheme and of 54 weeks for the scheme operated by the Glass and Glazing Federation.[9]

(v) *Redress should be enforceable.* Redress schemes supported by a trade association generally have a clear advantage here, because pressure to pay awards will usually be placed on a delinquent trader by the association. It can come as a shock to consumers who have won their case in court to find that their battle is not necessarily over, and that they now have to enforce their award.

(vi) *Redress must be well-publicised.* There is no point in having a redress scheme, however good, if its existence is not known to the people it is created for. To quote one person taking part in the discussion groups commissioned by the Office of Fair Trading: "the main problem is finding out where they all are. How do you go about finding them?" In my view traders belonging to a trade association which offers a redress scheme should always give details of the scheme to a dissatisfied complainant. I should also like to see an effective publicity campaign announcing the increase in the upper claims limit for small claims and other reforms to the county court procedures.

I have looked principally at the redress schemes which are there for consumers to use, but I believe there must also be changes in the attitudes of consumers themselves. I am concerned that so few members of the public are prepared to press for their right to redress, and in particular that they are reluctant to use the courts. Every day my Office receives letters and telephone calls from members of the public asking *me* to intervene in what are essentially civil disputes, where I have no powers to act. Quite often, it is apparent that they know they are entitled to

9. *Out of Court: A consumer view of three low-cost trade arbitration schemes* (National Consumer Council, 1991), p. 25.

go to court, or to use another means of redress, but that they do not think this is feasible. What are the reasons for this? Do they think the courts are too expensive? Or just too difficult? I don't know, but this view of the courts is certainly not shared by *all* those who have used them. One person taking part in the discussion groups which my Office commissioned said of the small claims procedure: "I was *shocked* at how easy it was, I couldn't believe it." Somehow the courts, and all the other consumer redress schemes, must get this message over to the public.

I raise these issues, not because I have an all-embracing solution to flourish - I don't - but because I am concerned that consumers are being denied their basic rights, either through their own ignorance or reluctance to pursue complaints or through the inadequacies of current redress procedures. Consumer protection legislation can only be effective if the rights it provides are enforced and no amount of civil (as opposed to criminal) legislation will succeed if consumers are unaware of it, or unwilling or unable to use it. Greater publicity of existing rights and avenues of redress will help, but we need further work on what consumers need from redress schemes, whether that need is being met and what should be done to improve matters in the future.