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LAWWORKS ANNUAL PRO BONO AWARDS LECTURE 2016¹

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1. It is a real pleasure to have been asked to give this year's LawWorks Annual Pro Bono Awards lecture. My subject is Access to Justice. I am not interested in it as a slogan. I am interested in it because access to justice lies at the heart of any society that aspires to call itself just, civilised, and committed to democracy and the rule of law. And by access to justice I mean effective access to high quality legal advice and representation so that people can understand their rights and obligations, as well as effective access to the civil courts.
2. We are all acutely aware that there are real pressures on access to justice at the present time; particularly where litigants of limited means are concerned. I want to focus this evening on a number of current and future initiatives that seek to improve access, before outlining a proposal that I hope could be further developed.
3. My starting point is the Briggs' Civil Court Structure Review and its central proposal: the creation of a new Online Solutions Court or OSC. The court, when implemented, will mark a significant step forward in our approach to the administration of justice. That its primary, albeit not exclusive, focus will be the provision of Internet-based means to access court processes from issue through to and including trial is radical is not in doubt. It is. It has only been attempted once before, in Michigan in the United States at the start of the 21st Century. There the initiative was ahead of its time, and was focused not on increasing access to justice

¹ I am very grateful to John Sorabji for his assistance in the preparation of this lecture

for those with limited means but rather for businesses. The OSC is very much of its time. We are all familiar with and use the Internet everyday. Its focus will be on low value claims rather than medium to high value business disputes and will draw on experience in both The Netherlands, with its Rechtswijzer, and British Columbia, Canada, and its Civil Resolution Tribunal.

4. Its most radical aspect however is that it will be designed and operated for the litigant-in-person. Represented parties are not to be excluded. Rather all parties are to obtain the benefit of a simple, straightforward system and equally simple procedure and practices, designed for use by everyone whether they have a lawyer or not. It will therefore remove what is understood to be a significant barrier to entry to the justice system for those without lawyers and to being able to navigate it effectively: complex procedural rules designed for use by lawyers.

5. Ease of use is only one way in which the OSC will improve access to justice. It will do so in, at least, three further ways. First, I think we are all aware that the earlier a dispute can be resolved the better. Early resolution is less costly and time-consuming for all parties. It is also less likely to be less costly to the State in the broad sense. In the United States, for instance, empirical studies have shown that a dollar spent on legal assistance can *'save three to six dollars of public funds needed to deal with the consequences.'*² I am not aware of similar studies in England and Wales, although I would not be surprised if there were such studies.. Nor would I be surprised if, despite the differences between here and the US, the figures were

² M. Minow in S. Estreicher & J Radice, *Beyond Elite – Access to Civil Justice in America*, (CUP, 2016) at xv.

broadly similar. The message from across the Atlantic is that early intervention in the shadow of the court saves public money.

6. The OSC will facilitate early resolution of disputes. It will do so through giving an active role to new case officers, most of whom will be legally trained and under the supervision of the judiciary. This role will see them help litigants identify the real issues in the dispute, to explore means to resolve the dispute consensually. They will also be able to facilitate negotiation between the parties. And for those claims that do not settle at that stage, mediation and early neutral evaluation as a form of enhanced negotiation will be available. Every opportunity will be afforded for parties to obtain the benefits of early resolution.
7. Claims that do not settle will have the further benefit of assistance from case officers through the pre-trial phase of case management. Case officers will help the parties identify relevant evidence. Judges will be their own lawyers and research the legal issues applicable to the proceedings. Two areas where litigants-in-person traditionally are at a disadvantage – knowledge of procedure and the substantive law – will therefore be provided for by the OSC's process.
8. And thirdly, as the process will be an online one it will be much more accessible than court process is at the present time. As a litigant-in-person there can be little doubt that attending court can be a daunting process. This is undoubtedly compounded when the litigant has to address the court or question witnesses; two skills for which they will have no training and which even some skilled advocates find intimidating. Because the OSC will adopt an

investigative approach on the part of the judge, any hearings will be conducted in a way approximating the approach taken in the best run small claims hearings. And because many hearings will take place online (if not on the papers or by telephone), and only face to face where appropriate, they will eliminate any nervousness that a litigant may otherwise have about attending a court building for a hearing. For those litigants who are not adept at using the Internet, or do not have access to it, facilities will be provided and an assisted digital scheme established to ensure that they can and do secure effective access to the new court.

9. The hope is that the OSC will not just improve access to justice for those who are currently struggling through the traditional court processes as LiPs, but will also increase the number of individuals who feel able to and then do bring claims. Its success will not just be measured in improving the quality of access for those using the system, but by giving effective access to those who do not currently issue claims. We should not forget that it will also assist those of limited means, who have potential defences, to bring them into play when they might otherwise be deterred from defending a claim for fear of the consequences of being sucked into expensive litigation.
10. One of the matters about which some concern has been expressed in the consultation on the Civil Court Structure Review, and particularly in relation to the OSC, is the need for those of limited means to have access to legal advice on the merits of their claims. The unbundling (a hideous word) of legal services by solicitors, or to use more easily understood language, the willingness of solicitors to provide a free standing limited service (such as advice on the merits of a claim or its defence unconnected with subsequent legal representation) and the

expansion of direct access service by the bar, would help in this regard. This is a general point, not limited to the OSC.

11. The OSC is one, even though one significant, step forward. There will be many claims that will not fall within its jurisdiction, which initially at least will be set at £25,000, and may be trialled at a lower level initially. Steps are being taken to improve access for those other claims. One way in which this is being done is through continuing efforts to reduce the cost of litigation. The latest effort in this regard is the consultation being carried out by Sir Rupert Jackson on the question of setting the level of fixed recoverable litigation costs. I have every confidence that he will devise a robust set of evidence-based recommendations, which will then be subject to detailed government consultation.

12. The aim is straightforward: if we can set a fixed tariff of recoverable costs litigants will be in a better position to predict their potential cost liability of a claim. And with a fixed level of potential recoverability there will be a closer relationship between solicitor-client costs, and one that will align itself to the level of recoverability. Thus costs will come down as they will no longer be capable of being set on an hourly rate basis. I am sure that Sir Rupert would welcome any contributions you may have, and I would encourage you to submit any before the deadline of 23 January 2017.

13. Setting and implementing a fixed recoverable costs regime has a benefit over and above that of reducing litigation costs. There is a second way in which it can and may well increase the prospect of better access to justice. It will play a role in promoting new routes for litigation

funding. Funding is one of the most, if not the most, troubling issues where effective access is concerned.

14. Sir James Munby, the President of the Family Division, and Lord Dyson, my predecessor as Master of the Rolls, articulated the problems that the sharp reduction in legal aid has produced when they gave evidence to Parliament earlier this year.³ Those problems have got no better. It is I think unlikely, however, that the current approach to legal aid will be reversed. This places an onus on us all to think of ways in which litigation funding can properly be secured for the very many low and middle income individuals, and small businesses, who are unable to fund litigation privately.

15. This is where fixed recoverable costs come in to the picture. One alternative means of providing litigation funding is through the provision and use of before-the-event (BTE) legal expenses insurance. A number of countries rely on such schemes to provide the main source of litigation funding. Germany is a prime example. There are others, and others still like Canada which are looking at the idea.⁴ While we have BTE insurance here it is not used as widely or as readily as it is in those jurisdictions. One of the reasons why this is the case is that we have not had a system of fixed recoverable costs. As Professor John Peysner has pointed out on a number of occasions the success of BTE insurance in Germany is predicated on the symbiotic relationship it has with fixed recoverable costs.⁵ If we remove the stumbling

³ Justice Select Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, (8th Report, 4 March 2015), chapter 6 <<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31109.htm>>.

⁴ See S. Choudhry et al, *Growing Legal Aid in Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance*, in M. Trebilcock et al, *Middle Income Access to Justice*, (University of Toronto Press) (2012).

⁵ J. Peysner, *Access to Justice – a critical analysis of recoverable conditional fees and no-win no-fee funding*, (Palgrave) (2014)

block by introducing such a costs regime, we may be able to develop an across the board BTE insurance scheme that will work as well as that in Germany. To that end the Civil Justice Council, which I chair, is just about to start work. It is going to examine what steps are needed to develop a properly viable BTE scheme.

16. Our creativity should not stop there. Another possible source of funding that is being looked at once again is that of a contingency legal aid fund or CLAF. Such schemes have been established in, for instance, Australia.⁶ Earlier this year, the Bar Council, The Law Society and CILEx⁷ – established a joint working party to examine the viability of such a scheme.⁸ Both Sir Rupert Jackson and Dame Heather Hallett have been high profile judicial supporters of this initiative. Its initial findings have been mixed: its viability for low value claims was viewed as doubtful (perhaps not an insurmountable problem given the creation of the OSC); and more significantly the question of where its funding was to come from was, as it had been in the past, seen to be problematic. Substantial seed corn funding was understood to be necessary to get such a scheme off the ground. I hope this can be overcome, and The Law Society are presently seeking views on viability and funding questions. Again, I would encourage all who are interested to respond; the deadline is, I believe, 9th January 2017.⁹

17. Our creativity should not stop with litigation funding. We have a duty to think creatively about all areas of our civil justice system, and consider how they might be improved. One way in which we can do this is through the use of pilot schemes authorised under CPR Pt 51.

⁶ Civil Justice Council, *Improved Access to Justice – Funding Options & Proportionate Costs*, (June 2007) at 20.

⁷ M. Fouzder, *CLAF revived to support access to justice*, (Law Gazette) (18 July 2016) <<http://www.lawgazette.co.uk/news/claf-revived-to-support-access-to-justice/5056628.article>>.

⁸ R. Jackson (2016) *ibid*.

⁹ <<https://www.lawgazette.co.uk/law/substantial-confusion-over-contingency-fund--law-society/5058843.article>>

This rule allows practice directions to be made which modify the existing rules to allow innovative approaches to civil procedure to be tested. It is currently being used to test a number of such schemes, such as the Shorter and Flexible Trials Pilot Scheme.¹⁰ This scheme and a comparable one in respect of insolvency proceedings¹¹ by providing a streamlined, speedier – and hence less expensive – form of process, enable parties to gain greater access to the courts and judgments. Such flexibility ought to be built on, so that all parties have the option of choosing a speedier, streamlined process – one whereby they can match the process to their means if that is what both parties agree.

18. Since its introduction in 2001, Pt 51 has only been used 15 times to promote such schemes. It seems to me that we should use this provision more readily than we have done so in the past in order to develop and test new practices and procedures. One way in which it could be used might be to help expand the provision of pro bono legal advice. This would involve collaboration between the courts, pro bono agencies – of which LawWorks would be ideally placed – the professions, universities and law schools, and law firms.

19. There have been a number of very successful such initiatives. Schemes such as the Chancery BAR litigants-in-person support scheme or CLIPs, the equivalent in the Queen’s Bench Division, the Insolvency pro bono service, and the Court of Appeal pro bono scheme, are all providing an excellent level of support for litigants-in-person; increasing their access to accessible guidance, advice and representation. As such they help provide a level and type of support – particularly where pro bono representation by qualified lawyers is concerned under

¹⁰ CPR PD51N.

¹¹ CPR PD51P Pilot for Insolvency Express Trials

the various schemes – which is immeasurably better than that provided by unqualified and unregulated paid McKenzie Friends. In that regard I can only echo the recent words of caution given by Lord Thomas, the Lord Chief Justice, that where such individuals provide assistance there is a ‘*real risk of exploitation*’.¹²

20. Some have sought to draw a distinction between different categories of paid McKenzie Friends. There are, for example, those who have passed their academic and vocational legal exams but have not been able to secure a training contract or a pupillage. It has been suggested that it would not be inappropriate for such people, in appropriate circumstances, and some advice agencies who use such persons, to charge a moderate fee if the client can afford to pay something.

21. I do not express any personal view about such suggestions since I hope that the Judicial Executive Board (of which I am a member) will shortly be in a position to reach a conclusion on the steps (if any) it recommends should be taken to reform the courts’ approach to McKenzie Friends in order to promote more effective access to justice.

22. That brings me conveniently to the whole subject of looking afresh at taking a more strategic look at a potential linkage between the increasing numbers of individuals of modest means seeking to obtain access to advice and assistance from legal professionals and at the same time assisting with the development of the next generation of lawyers. Such advice could help them within the OSC process; particularly that aspect of its process which is focused on

¹² Lord Thomas, Annual Press Conference 2016 at (7) <<https://www.judiciary.gov.uk/wp-content/uploads/2016/11/lcj-annual-press-conference-2016-transcript-1.pdfpdf-1.pdf>>

facilitating an early understanding of the issues in dispute and the promotion of settlement.

Equally, it could arise where claims fell outside the scope of the OSC.

23. My starting point here is two features of our justice system: an over-supply of law graduates who, having expended a significant amount of money on academic and vocational education, do not enter into practice. They do not do so due to the mis-match between supply and demand, due to fewer numbers of pupillages and training contracts than those seeking them. And they do not do so despite being qualified and willing to practice;¹³ and, secondly the increase in litigants-in-person as a consequence of the withdrawal of legal aid. Should we not consider how we can do two things: facilitate entry into practice of these law graduates and while so doing provide legal advice and assistance to LiPs? This answer to that question seems obvious. The real question, in fact, seems to me to be how do we do this, and not should we do this. One approach we could take, and this would need detailed consideration, might well be as follows.

24. The starting point would be collaboration between universities, pro bono advice centres and organisations, and law firms to create an expanded advice scheme. There are several examples of university law clinics, of which Kent University's award winning clinic is a prime example, which show how such collaboration can work well.¹⁴ Increased collaboration would build on such schemes and on the expertise of pro bono advice centres.

¹³ Lord Neuberger PSC put the figure at approximately £100,000 in terms of expenditure on academic and vocational training in *Reforming Legal Education* at [28] <<https://www.supremecourt.uk/docs/lord-neuberger-121115-speech.pdf>>; and see Rivlin, *Criminal Justice, Advocacy and the Bar*, (2015) at 48 <http://www.barcouncil.org.uk/media/342215/rivlin_report_final_march_2015_.pdf>

¹⁴ <<https://www.kent.ac.uk/law/clinic/>>

25. It would do so by increasing the number of law graduates, those who have completed both the academic and vocational stage of qualification but not secure pupillage or training contracts, who would be able to provide legal advice to LiPs. They would do so as trainees registered with the university or pro bono advice centre. They would only be able to do so following training, akin to that already given by such organisations, and they would be supervised by lawyers. The lawyer supervisors would be both those who are permanent employees of the university's legal advice centre or a pro bono advice centre, where there are such, and/or lawyers provided by law firms and chambers on a pro bono basis. From the university perspective, such a development could be incorporated into their courses where they offered vocational courses, making them more attractive to prospective students. From the pro bono advice sector's perspective, it could increase the number of advisors available to them.
26. The second aspect of such an approach would require collaboration between the judiciary, the legal profession including the regulators, and the government. Having increased the availability of free legal advice through stage one of the process, there seems to me to be scope for increasing the availability of free legal representation in respect of some court proceedings. This would enable LiPs to be represented by law graduates who are taking part in the expanded advice scheme. Care would need to be taken to identify the nature and type of proceedings covered by the scheme.
27. Provision to enable such trainees to exercise rights of audience might then be provided by way of a pilot scheme made under CPR Pt 51, which could make provision for the exercise of rights of audience to such trainees in certain cases under the court's jurisdiction to grant such

rights as preserved by schedule 3 of the Legal Services Act 2007. Alternatively, it might be provided by way of an order made under Section 64 of the County Courts Act 1984. These possibilities would, of course, need further consideration by the judiciary, the government and the professional regulators.

28. It seems to me though that there is a good deal of force in the view that the proper administration of justice and litigants-in-person would benefit from the assistance in court of such graduates – who have undergone academic and vocational training and who are under the supervision of qualified lawyers under the expanded advice scheme – represented litigants-in-person. They would have proper legal knowledge. They will have had skills training. They will be subject to professional regulation, and they should also be covered by the university or pro bono advice centres professional indemnity insurance. They will be at the start of the careers, but they will be under supervision. Far better such an approach than that provided by unregulated, uninsured, professional McKenzie Friends of unknown skill and training.

29. And further to this, if the LiP's claim succeeds, a pro bono costs award could then be sought under section 194 of the Legal Services Act 2007. Such costs go to the Access to Justice Foundation, for distribution to '*agencies and projects that give free legal help.*'¹⁵ And further to this, if the LiP's claim succeeds, a pro bono costs award could then be sought under section 194 of the Legal Services Act 2007. Such costs go to the Access to Justice Foundation, for distribution to '*agencies and projects that give free legal help.*'^{16[1]} Although this is a matter for the trustees of the Access to Justice Foundation, there seems to me to be no reason why

¹⁵ See <<http://www.atjf.org.uk/pro-bono-costs-orders.html>>.

^{16[1]} See <<http://www.atjf.org.uk/pro-bono-costs-orders.html>>.

they should not be asked to consider whether at least some of those costs could not then be distributed to support the general development and further development of such schemes.

30. The benefit to the trainees would come from the fact that they would be able to gain experience commensurate to that of a training contract or pupillage, and for an equivalent period. They would gain entry into practice. And perhaps an increase in numbers of qualified lawyers practicing may, by increasing competition, result in legal fees becoming equally competitive.

31. There is, it seems to me, much to be said for the proposal. It calls for detailed consideration; not least to assess its potential incorporation it into any redesign of legal education. The important point though is that the provision of pro bono legal advice and representation can be harnessed, in collaboration, with the courts, universities and the professions to both secure effective access to justice to a much wider range of LiPs than at present, while equally helping to secure effective access to the profession for potential lawyers whose ambitions would otherwise stall, after the expenditure both by individuals and the State of considerable investment, at the pupillage and training contract stage. It would help increase skilled legal advice and representation both now and for the future.

32. I have no doubt that increasing access to justice is something to which we are all committed and unequivocally so. If we are to achieve that end, we need to think more creatively than we have in the past, put that creativity into practice; and do so through as many complementary and high quality initiatives as possible.

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