MASTER OF THE ROLLS

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KEYNOTE ADDRESS

CIVIL JUSTICE SECTION CONFERENCE – LITIGATORS: SURVIVE & THRIVE

THE LAW SOCIETY

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Introduction[1]

1. It is a pleasure to have been asked to give the keynote address to your conference this morning. It is my first such address as Master of the Rolls, and I particularly welcome this early opportunity to say a few words about the Jackson reforms and to do so at The Law Society. It seemed to me particularly important that I do so, and do so here – not least because of the long historical relationship which exists between the Society and the Master of the Rolls. I say not least because it seems to me that at the present time – perhaps more so than before – it is crucially important for the judiciary and the legal profession – as far as they properly can do – to work together to ensure that this period of unprecedented change is one in which we increase effective access to justice.

2. I say unprecedented change because I think we must all – the judiciary, government, Parliament, the legal profession and, most importantly of all, the public – appreciate that

[1] I wish to thank John Sorabji for all his help in preparing this address.

that is exactly what is currently occurring. Those changes stem from both Jackson reforms, and the Legal Aid and Sentencing of Offenders Act 2012, and from the Legal Services Act 2007. The changes involve further reductions in legal aid and inevitably increase in self-represented litigants. This will produce increased pressure on the courts which are operating, as all sectors of the State are, with reduced budgets. They also encompass reform to conditional fee agreements, the introduction of damage-based – or rather contingency fee – agreements, and the non-implementation of a supplementary legal aid scheme or SLAS.

3. These structural changes and reforms do not stand alone. Their introduction is matched with equally wide-ranging reforms to the nuts and bolts of civil procedure as well as further reforms to its structure and culture, through the introduction of active costs management and targeted docketing of cases. Certain aspects of the Jackson reforms simply seek to implement some parts of the Woolf reforms not previously implemented. The introduction of fixed costs, for instance, which I have long been in favour of, on the fast track for personal injury claims is no more than a step towards implementing one of Woolf's recommendations[2]. I hope to see that first step taken further and fixed costs applied across the fast track. In due course, I think that consideration may well have to be given to the possibility of introducing a fixed costs regime in certain multi-track cases. But that is for another day. Other reforms, such as costs management, which are in many ways the natural complement to effective case management, complete the Woolf reforms. But they bring changes which are, it seems to me, as fundamental as those earlier reforms. Those changes will need time and careful application to become properly bedded into our litigation culture.

[2] H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, London) (1996), chapter 4; R. Jackson, *Review of Civil Litigation Costs: Final Report* (HMSO) (December 2009), recommendation 18, at (464) <http://www.judiciary.gov.uk/JCO%2fDocuments%2fReports%2fjackson-final-report-140110.pdf>.

4. And, of course, this is all taking place against a background of far-reaching reforms to the structure of the legal profession, which will inevitably have an impact on the provision of legal services to the public. External investment in law firms, partnerships between solicitors and barristers, alternative business structures (ABSs) on the one hand, and continuing regulatory reform on the other as the regulatory bodies continue to expand their range of responsibility: all have an effect on the quality and cost of legal services.

5. Each of these reforms on their own would present a challenge to the courts and the legal profession. Looked at on their own terms, none of them is unprecedented. Taken together, however, they clearly constitute massive change. On their own each set of reforms might bring unintended consequences. Each carries the risk that, rather than improving access to justice, they will weaken and undermine it. We all have a responsibility for ensuring, so far as possible, that this does not happen.

6. The introduction of the possibility of external investment in law firms may be a benign development, as the Legal Services Act 2007 no doubt intends and as experience in Australia – which I believe you are to hear about later today – has borne out. But equally, it may present, in practice, a real risk to the public interest; a point underscored by the immediate past President of the American Bar Association, William T Robinson III. He was reported to have said at the recent meeting of the International Bar Association in Dublin,

> '*There is a strong sense that in the ABS approach there is an inherent conflict of interest. Investors invest to make money and, as we say, "he or she who has the gold makes the golden rule".*[3]'

7. The risk is of course that the external investor will set the parameters of practice in their favour rather than in the consumers' best interests or the public interest. There are

[3] Reported in The Law Society Gazette (4 October 2012) <http://www.lawgazette.co.uk/news/iba-2012-former-president-american-bar-dismisses-abss>

equally reasonable arguments that such risks are exaggerated, that perhaps in a lesser form they have always existed in the lawyer-client relationship, and that the regulatory mechanisms we have are robust enough to manage that risk. We should not simply hope that this is the case. On the contrary we will have to take a great deal of care to ensure that the risk is properly managed. It cannot simply be ignored or treated with complacency, whether by lawyers, the professional regulators, the representative bodies, the courts or the government. A complacent attitude to inherent risk was, in all likelihood, a significant contributory factor in the financial crisis the effects of which we are still feeling. We cannot afford a similar crisis in the provision of legal services.

8. Taken together, however, the risks inherent in the three areas of reform multiply because each area will have an impact and an effect on the other, and those effects may in turn have further effects. I have only been Master of the Rolls for just over two weeks, but the enormity of the reforms is readily apparent to me. However, the question for me today is one which focuses on one area of reform only: effective implementation of the procedural aspects of the Jackson reforms.

9. As you know I am the third Master of the Rolls to have been involved in those reforms. Lord Clarke set the ball rolling in November 2008, when he commissioned Sir Rupert to carry out the daunting task of completing a fundamental review of litigation costs within twelve months. This he achieved magnificently. No other judge could have done this. Lord Neuberger, to change metaphors, took the baton in October 2009 when he succeeded Lord Clarke. With Sir Rupert, Mr Justice Ramsey and the Judicial Steering Group, he then oversaw the implementation of those aspects of the reforms which fell to the judiciary to effect. The work which they have carried out, and which Sir Rupert in particular has carried out, was herculean and it is only right that I pay proper tribute to it.

10. The baton has now passed to me, and with it the responsibility of seeing the reforms brought into force and then applied in an effective and sensible way. It is a responsibility which, broadly-speaking, falls into two discrete parts. First, to oversee the last six months of implementation before the Jackson reforms come into force in April 2013. Secondly, to oversee their effective implementation – in practice – in the coming years. I have heard dome whispers that it may not be possible to complete the implementation process by April. Let there be no doubt about it: the reforms will come into force next April.

11. Today's conference focuses on how civil litigators can '*survive and thrive*' in the years to come. It is a forward-thinking conference, which given the present challenges is exactly the right thing to be. In that spirit, I want to concentrate on effective, practical implementation of the Jackson reforms following April 2013. In particular I want to focus on what will be necessary to ensure that the reforms work, and work in the public interest by lowering litigation cost and consequently increasing access to justice. I also want to sound a warning.

Jackson - Implementation

12. Turning first to implementation, I want to focus on the need for consistency, for a degree of certainty.

13. One of the problems which I remember from my time as deputy Head of Civil Justice which bedevilled the effective implementation of the Woolf reforms was the degree to which they gave rise to satellite litigation. I can well recall some of the criticisms which were made of those reforms, and which were strongly articulated at the time of the tenth anniversary of their introduction. Satellite litigation concerning the proper application of the rules is a real bane in any civil justice system. It is time-consuming and costly. It has a negative impact on the immediate litigants involved in the litigation. It has a negative

impact on the courts and their scarce resources. It has a negative impact on the ability of other court users to obtain timely access to the courts.

14. While it is inevitable that new rules and procedures will give rise to some satellite litigation, it is vitally important that the courts and lawyers do what they can to minimise the risk of such litigation. The new rules will need, therefore, to be drafted so as to ensure that they can provide as much certainty as possible. In that respect the role which the Civil Procedure Rule Committee has been playing has been of fundamental importance. Rule drafting is however, only part of the story. It prepares the ground. In this respect conferences such as this one also prepare the ground. They raise practical issues. They enable, and have enabled over the past twelve months, Sir Rupert, Lord Neuberger and Sir Vivian Ramsey to explain, through the Jackson Implementation Programme, how a large number of the reforms are intended to operate in practice. The fifteen lectures in the series provide a detailed user-guide to the reforms, and ought to be looked at carefully by both practitioners and the courts.

15. Further Implementation Lectures will be given over the coming months, just as further conferences will no doubt take place. The further opportunities this will provide will no doubt benefit us all. But April 2013 is not far off. The court will thereafter need to speak clearly through its judgments in explaining how the reforms are intended to operate. I hope it will not have to do so often. But we must be realistic. There will be a need for clear guidance from the Court of Appeal. With that in mind, the key will be to ensure that the Court is not called on more than necessary to provide authoritative guidance. How do I envisage that this can be achieved?

16. The answer is consistency in approach. If the Court of Appeal fails to provide consistent guidance, no-one should be surprised if that breeds more litigation: a lack of clarity and consistency on its part will only generate confusion in the County Courts and the High

Court and amongst the profession, and ultimately it will undermine the aims of the reforms.

17. In this regard I think the approach recommended by Sir Rupert and subsequently endorsed by Lord Neuberger was the correct one: a small number of Court of Appeal judges will be designated to deal with procedural cases[4]. I will also sit on those appeals as will the deputy head of civil justice. I must, therefore, be circumspect in what I say about the detail of the reforms. We will not sit on all the appeals, nor will we form the entire constitution which hears those appeals. But at least one of the designated judges will sit on each procedural appeal.

18. In this way I hope, as I am sure Sir Rupert did, that the consistent approach to procedural cases which was secured when, as deputy head of civil justice, I heard a series of cases arising out of the provisions relating to service of claim form, will be replicated. The consistent approach adopted by the court in those cases provided clear guidance to both courts and lawyers. And it yielded results. Litigation culture did change. Fewer applications for relief from sanctions imposed for failing to serve a claim in time were made. Why? Because the consistent guidance from the Court embedded the new culture of compliance: reducing cost and delay, and reducing satellite litigation arising from relief from sanction applications.

19. Consistency of approach will also be important where costs management is concerned. It will be of particular importance in these areas because, to a very large degree, if the reforms are to be fully effective, and costs are to become proportionate, costs management will need to be carried out effectively and consistently in all cases. While the

[4] R. Jackson, (December 2009), recommendation 87, at (469); D. Neuberger, *Proportionate Costs*, Fifteenth Lecture in the Implementation Programme, The Law Society (29 May 2012) at [17] <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf>

reforms to CFAs will remove that inflationary element which they have brought to costs through recoverability of success fees and ATE premiums, effective costs management is intended to bring about a proper and proportionate reduction in costs. CFA reform removes an element of disproportionality from costs; an element which did not exist pre-1999. Costs management, in complementing case management seeks to cure that element of disproportionality which existed pre-Woolf and which Woolf only tackled to a limited extent. It is not an exaggeration to say that, from my perspective, costs management is the key to the Jackson reform: if it succeeds the reforms will succeed. If not, we run a heavy risk: that costs will unnecessarily and otherwise avoidably increase and the reforms will fail.

20. Guidance from the Court of Appeal, judicial training, and guidance in the form of practice notes from, for instance, The Law Society on the correct approach to costs management will therefore be of particular importance.

Conclusion – a word of caution

21. At this point I need to sound a word of caution. Shortly after the publication of his Final Report, Lord Woolf noted that his reforms were unlikely to be the last word. History proved him right. I am sure that Sir Rupert would agree with me that the present reforms are also unlikely to be the last word in civil justice reform, in the process of attempting to ensure that justice is delivered at proportionate cost.

22. I have spoken this morning about the need for the courts, and lawyers, to adopt a consistent approach to the implementation of the Jackson reforms, and most significantly to costs management. Consistent and effective implementation will show whether the reforms work. They may also show unexpected flaws and consequences, not least given the potential impact which the wider reforms may have on the operation of the Jackson reforms. They may show that reality does not match expectation.

23. If this is the case, we cannot properly maintain a slavish adherence to the reforms. If it becomes clear that further changes are necessary, then these will have to be made, but only if the need for further change is demonstrated on the basis of proper evidence. One of the great weaknesses of civil justice reform, both here and abroad, has been the lack of detailed evidence which not only demonstrates the nature and extent of the problem, but also points to its cause. Those with long memories will no doubt recall Professor Zander's criticism of the Woolf reforms on this very ground[5].

24. It is going to be incumbent on the Civil Procedure Rule Committee, the Civil Justice Council, as well as the Ministry of Justice which is to review the impact of the reforms in three years time[6], to do two things. First, they will need to monitor the effects of the reforms from the point when they come into force. If the reforms work as they are intended to, then we should be able to obtain evidence of costs reducing over time. We need to gather that evidence. Secondly, where it is apparent that an aspect of the reforms is not working, we shall need to take steps to identify the source of the problem and rectify it. In this I entirely agree with something Lord Neuberger said in a recent lecture: we simply cannot let reform continue to be a once a decade exercise[7]. We need to ensure that problems are identified as they arise and are rectified there are then.

25. I do not wish to give the impression that I do not have faith in the reforms. That is very far from being the case. I fully expect and anticipate that the reforms will succeed. Let me be clear on that. But one has to be realistic. In this regard, I must emphasise how I hope

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[5] A point he reiterated in his review of both the genesis of the Woolf reforms and of the lack of evidence obtained following their implementation, see M. Zander, *The Woolf Reforms: What's the Verdict?* In D. Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP) (2009) at 417 – 422.

[6] Ministry of Justice, *Cumulative Jackson Proposals Impact Assessment* (28 June 2012) at 1: Review Date set for April 2016 <http://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/Royal-Assent-IAs-and-EIAs.zip>

[7] D. Neuberger, *Keynote Address*, Association of Costs Lawyers' Annual Conference 2012, Fourteenth Lecture in the Implementation Programme (11 May 2012) at [11] <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-acl-lecture-may-2012.pdf>

that the Law Society and solicitors in general will play a central role in both the ongoing scrutiny of the reforms following on from next April. You have the expertise, and will have a great deal of the necessary evidence. In this I hope we can work together to secure proportionate costs and a well-functioning justice system which operates in the public interest. It seems to me that if we are to thrive and survive as a society committed to the rule of law, we will have to strive to ensure that the Jackson reforms work. Where practice shows they cannot work, or where a changed legal environment means we have to find new solutions to new and unexpected problems, we will equally have to strive to develop answers to those problems and ensure that they work. If we do this, then I think we can ensure that litigators will survive and thrive. They will do so because the justice system will itself not just be surviving but will be thriving.

26. Thank you.