

Access to Justice¹

Welcome address to Australian Bar Association Biennial Conference

Lord Neuberger, President of the Supreme Court

3 July 2017

1. On behalf of the judiciary of the United Kingdom, it gives me great pleasure to welcome members of the Australian judiciary and legal profession to London. We are delighted that the Australian Bar Association has chosen London as one of the two centres in which to hold its biennial conference this year. The close relations between the judges of Australia and the UK, and between the legal professions of the two countries, is very valuable indeed. All my visits to Australia to meet and talk to judges and lawyers have been enormously enjoyable, but there are deeper benefits from keeping in touch. As countries at opposite ends of the world (only a lawyer would suggest that a globe can have an end), with a common heritage and common values, it is very important that we can exchange ideas and experiences and learn from each other. More specifically, both our countries have the benefit of a common law system, which has a unique combination of flexibility and principle, and which we should maintain, treasure, and promote in a largely civilian law world. In a number of recent judgments, the UK Supreme Court has emphasised the importance of the common law jurisdictions learning from each other and where possible marching together². I also welcome the fact that you are going to Dublin, the capital of another common law country. The close and mutually respectful relationship between the judiciary of the UK and Irish Republic was self-evident at a two-day conference which I attended a couple of weeks ago in Dublin.
2. Talking of mutual respect, this is a good opportunity to record publicly the great assistance I have obtained in reaching many decisions in my twenty years as a judge from reading many illuminating and learned judgments of the Australian High Court, Federal

¹ I am grateful to Charlotte Gilmartin for her invaluable help with this talk

² See eg *FHR European Ventures LLP & Ors v Cedar Capital Partners LLC* [2014] UKSC 45, para 45, *Starbucks (HK) Ltd v British Sky Broadcasting Group PLC* [2015] UKSC 31, para 50, *Patel v Mirza* [2016] UKSC 42, *passim*. Though we don't always agree – see *Cavendish Square Holding BV v Talal El Makdessi*, [2016] AC 1172, paras 42, 85-86 and 129, and cf *Jogee and Ruddock v The Queen* [2016] UKSC 8 and *Miller v R*; *Smith v R*; *Presley v DPP* [2016] HCA 30

Court and Supreme Courts. That is of course a tribute not only to the judges who gave those judgments but also to the advocates who raised the arguments. In common law systems, the judges rely on advocates to find, raise and develop the arguments, which form the raw material from which we try and extract, apply, and develop the principles which underpin the common law.

3. There is a more parochial reason for welcoming you to London. The judiciary and legal profession in the UK take pride in the leading role which this country takes in the provision of legal services and dispute resolution. We are determined that the United Kingdom's forthcoming exit from the European Union will in no way undermine London's status as the world centre for legal services generally and dispute resolution in particular. The common law which is so attuned to the needs and realities of the commercial world, will remain as attuned to the demands of international business as it ever was. Indeed, left, once again, to our own common law devices, we will in some respects be able to react more quickly and freely to developments in our fast-changing world. Brexit does not alter the fact that lawyers and judges in the UK are as internationally minded and expert as they ever have been. Indeed, like any significant change, Brexit is operating as a spur to encourage all involved in the provision of legal services in London to strive to ensure that those services are even better than they already are. It also serves to emphasise that the UK is globally minded and to reinforce the very close connections we have with our fellow-common law countries, and none more so than Australia.
4. I am conscious that my address so far has focussed on international issues and that my remarks have been relatively general in nature. I make no apology for that: as this is a gathering of Australians in London, an internationalist tone is appropriate, and as this is a welcoming speech, generalisations are to be expected. However, as a senior UK judge talking to senior Australian judges and advocates, I think it would be rather inappropriate to limit myself to airy feel-good generalisations, however genuine and justified they are. It is also right to focus on a serious topic, and I think that the right topic for this morning is the very important, if not entirely original, subject of access to justice. It is all very well for us to sing the praises of our legal systems, to congratulate ourselves on the high quality of our judges and lawyers, and to take pride in the popularity of the common law in international business. But we have a serious problem with access to justice for

ordinary citizens and small and medium sized businesses. In his message to this conference, your President writes: “Australia’s legal assistance services are increasingly under-resourced leaving thousands [I expect he could have written “millions”] of Australians without adequate access to quality legal advice and assistance”, and he adds that “whilst there is universal agreement that more funding is needed ... there is little appetite by Government to make this a priority”. Those words apply every bit as much to the United Kingdom, perhaps particularly to England and Wales, as they do to Australia.

5. That is the topic I want to discuss briefly this morning, but before I turn to the details, let me make it clear that, while much of the responsibility for ensuring access to justice lies with the government, that is the legislature and the executive, it is not just the government which should be expected to facilitate access to justice. Lawyers and judges have an equal duty. So while I shall concentrate on the role of government, it would be quite wrong for me to give the impression that lawyers and judges can get away with standing on the sidelines and criticising: they have a heavy duty to do all they can to support and improve access to justice for ordinary citizens and small businesses.

6. One access aspect of the rule of law which is sometimes overlooked is access to the law itself, in other words access to statutes, secondary legislation and case law. It is of course a fundamental requirement of the rule of law that laws are clearly expressed and easily accessible. To put the point simply, people should know, or at least be able to find out, what the law is. Particularly in a common law system that includes the case law. AUSTLII does a brilliant job in relation to Australian cases in that connection. BAILII does a similarly brilliant job in relation to UK cases albeit only in relation to cases over the past sixteen years or so: it is more sketchy in relation to the period before that. That is not a criticism of BAILII: it is more a criticism of the UK government’s somewhat parsimonious funding of BAILII, which provides extraordinary value for money. So far as statutes and statutory instruments are concerned, the UK government does well in ensuring that new statutes are available on the legislation.gov.uk website reasonably promptly. However, the updating service to deal with amendments and repeals is little short of lamentable, with amendments and repeals sometimes not being recorded more than six years after the event. It should not cost much for the UK government to ensure

that its legislation website is kept up-to-date, so that current legislation is freely available to everyone.

7. While access to law is important, access to legal advice and representation is equally important but more challenging. Access to legal advice and representation is of course a fundamental ingredient of the rule of law, and the rule of law together with democracy is one of the two principal columns on which a civilised modern society is based. It is simply wrong, and fundamentally wrong at that, if ordinary citizens and businesses are unable to obtain competent legal advice as to their legal rights and obligations, and competent legal representation to enforce and protect those rights and test those obligations in court. Obtaining advice and representation does not merely mean that competent lawyers exist; it also must mean that their advice and representation are sensibly affordable to ordinary people and businesses: access to justice is a practical, not a hypothetical, requirement. And if it does not exist, society will eventually start to fragment. That is not merely a fragmentation in the sense of the gulf between rich and poor, which leads to real frictions and difficulties if it gets too wide. It is a fragmentation which arises when people lose faith in the legal system: they then lose faith in the rule of law, and that really does undermine society. The sad truth is that in countries with a long peaceful and democratic history such as the UK (and, I suspect, Australia), we face the serious risk that the rule of law is first taken for granted, is next consequently ignored, and is then lost, and only then does everyone realise how absolutely fundamental it was to society.

8. It is peculiarly ironic that this is happening at a time when we have never been more concerned to ensure that all citizens enjoy rights. In this country, it is less than seventy years that we signed up to the UN Universal Declaration of Human Rights, less than 65 years since we subscribed to the European Convention on Human Rights, and less than twenty years that we effectively made the Convention part of our domestic law. In Australia, you set up your Human Rights Commission some 30 years ago, Victoria passed its Charter of Human Rights and Responsibilities Act in 2006, and the Australian Capital Territory enacted its the Human Rights Act two years earlier. It verges on the hypocritical for governments to bestow rights on citizens while doing very little to ensure that those rights are enforceable. It has faint echoes of the familiar and depressing sight of repressive totalitarian regimes producing wonderful constitutions and then ignoring

them. Quite apart from human rights, the increased complexity of legislation and the substantial growth in regulation makes it harder than ever for non-lawyers to work their way through to establishing what their rights and duties actually are. Thus the growth in complexity and in regulation renders the need for access to legal advice all the greater than it ever was.

9. Whether we are members of the legislature, the executive, the judiciary or the legal profession, we are under a solemn duty to speak up for and to do all that we properly and reasonably can to support access to justice. In England and Wales, in terms of making money available to those who need it for legal advice and representation, the government's record has been a patchy. Parliament set up a legal aid scheme to assist ordinary people to get access to civil and family courts in 1949³. During the ensuing fifty years, Parliament and the executive the government made a number of changes, but in general, the system was adequate. For instance, in the mid-1980s around two-thirds of the population was eligible for legal aid, and there were relatively few exclusions of types of case from the legal aid eligibility⁴.

10. In 1999, civil legal aid was severely restricted and was replaced by a system which was frankly very hard to defend. The flag-wavingly named Access to Justice Act 1999 introduced a system whereby, without any cost to the government, claimants were able to obtain access to the courts by ensuring that they did not have to pay much in the way of costs if they lost and they recovered all their costs if they won. If that sounds too good to be true, it is because it is. It was based on the proposition that the claimant's lawyers recovered nothing if the claimant lost and double (or sometimes less than double) their normal fee (a so-called uplift) if the claimant won. That sounds okay, unless you feel that lawyers should have no interest in the outcome of the case. But the real catch was that if the claimant won, the defendant did not just pay the claimant's costs: the defendant paid three times the claimant's costs: once for the actual costs, once for the uplift and once for the claimant's costs of insuring against the risk of losing. This unsatisfactory system was unsurprisingly replaced, or rather very substantially modified, in 2012⁵, pursuant to recommendations made Lord Justice Jackson, a Court of Appeal judge. The recommendations included reducing the maximum uplift, forbidding recovery

³ The Legal Aid and Advice Act 1949

⁴ <https://www.lrb.co.uk/v36/n21/frederick-wilmot-smith/necessity-or-ideology>

⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012

of the uplift from the losing party, permitting contingency fees, and, as a quid pro quo, increasing general damages by 10%. While the 2012 Act mitigated some of the more unfortunate consequences of the 1999 Act in civil justice, it also confirmed a severe shrinking in the type of civil law cases for which legal aid could be available and a severe shrinking of legal aid in most private family law cases. Apart from being inherently questionable, such policies can have unattractive, albeit often predictable, unintended consequences: for instance, limiting legal aid in disputes between husbands and wives to those involving domestic violence encourages people to make allegations of domestic violence so as to qualify for legal aid.

11. These changes over the past 20 years in civil and family legal aid have resulted in many people being faced with the unedifying choice of being driven from the courts or having to represent themselves. The substantial increase in litigants in person represent a serious problem for judges, for court staff and for other litigants and their lawyers. A trial or any other hearing involving a litigant in person is likely to last far longer (apparently reliable research suggests three times longer⁶) and involve far more work for, and pressure on, the judge than a trial with legal representatives on both sides, and an inevitable result of longer hearings is delays to other cases. The effect on an undermanned and demoralised court staff of having to deal with more litigants in person can only be imagined. The voluntary and charitable bodies, many of whom it is only fair to record are assisted by the government (but not, it must be said, generously) are heroic. There are a number of law centres and citizens advice bureaux which provide free legal advice, and where some full-time lawyers are paid, but many busy lawyers give up some of their free or even earning time for nothing. The Access to Justice Foundation, set up by the Law Society, the Bar Council, the Chartered Institute of Legal Executives (CILEx) and various voluntary bodies, supported by the Judiciary, the Ministry of Justice and the Attorney General provides a very valuable service in “support[ing] the delivery of pro bono advice or assistance⁷. And there are a number of schemes whereby lawyers, including barristers in court, provide their services free. The Free Representation Unit is the largest single provide of *pro bono* services in the UK and it provides representation for those who are less well off, in employment, social security, and criminal injuries compensation tribunals.

⁶ See eg http://www.familycourt.gov.au/wps/wcm/connect/f987e373-90f0-4ebe-a886-db7c7174080f/report20.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-f987e373-90f0-4ebe-a886-db7c7174080f-lh-ejy1, pp 50-52

⁷ <http://www.atjf.org.uk/about-us.html>

The Chancery bar has the so-called CLIPS system which provides free representation by barristers at various levels (including leading counsel) for people otherwise unable to obtain legal representation⁸. excellent organisations include LawWorks and the Bar Pro Bono Unit. The Law Society also goes out of its way to support its members in their pro bono work as does the CILEx Pro Bono Trust. The Personal Support Unit, which I have been proud to be associated with, has many volunteers who talk to litigants in person before they go to court and accompany them to court, and help them to be less stressed and more focussed. And a number of public-spirited circuit judges have produced an excellent handbook for litigants in person⁹.

12. Many people, including me, feel that things took a wrong turning in civil legal aid in 1999 and we have all been busy hoping or even trying to put Humpty Dumpty back together again – but like all the King’s horses and all the King’s men, I am not sure that we can do it. The sad thing is that the 1999 Act was introduced on the back of an assertion that civil legal aid cost too much, and, quite apart from the fact that there is reason to doubt some of the figures on which that assertion was based, one wonders whether that concern could not have been met by increasing damages in 1999 on terms that where a legally aided claimant received damages, he was required to pay the increase to the legal aid fund. But I fear that it is 20 years too late to turn the clock back to reincarnate the philosophy underlying the 1949 Act which was that “no one will be financially unable to prosecute a just and reasonable claim or defend a legal right”¹⁰.

13. In the end, the question whether the government should make large amounts of money available to enable ordinary people to get access to justice may depend on one’s view of the argument that access to justice is a special case when it comes to government responsibility. In a very interesting article¹¹ Frederick Wilmot Smith argues that the provision of legal aid is a primary responsibility of the government on the grounds that “[t]he least well off are owed relief from the costs of the legal system both by the state, which created the burdens, and (through taxation) by those who benefit by there being a legal system”, on the basis that the legal system enables the rich to protect and retain their assets. As trailed earlier in this talk, I would justify the same conclusion on the

⁸ <http://www.chba.org.uk/news/clips-chancery-bar-litigant-in-person-support-scheme-launch>

⁹ <https://www.judiciary.gov.uk/publications/handbook-litigants-person-civil-221013/>

¹⁰ See footnote 4

¹¹ See footnote 4

ground that the provision of legal aid is a necessary part of access to justice, which in turn is a fundamental aspect of the rule of law. Another way of putting the point is that the two fundamental functions of any government are the defence of the realm and the maintenance of the rule of law. Historically, these were the only two functions of government and even today, while social security, health and education may attract more attention and more money, they would be of little value if the government failed to defend the realm or to maintain the rule of law.

14. The idea of a privately funded charitable scheme to enable poorer people and small businesses to obtain access to justice has been mooted from time to time. It was actively considered in England and Wales around the time that Lord Justice Jackson produced his report in December 2009. It would have involved a substantial sum by way of “seed-corn” funding followed by arrangements whereby, in return for funding litigation costs litigants agreed to pay a proportion (which many thought would not have to be very large) of their damages or other relief to the fund. At the time, I understood that the conclusion of those who looked into it was that this proposal was not financially feasible. But I wonder. A similar scheme, funded by the Jockey Club, has been running in Hong Kong for some time, although it is fair to say that I believe that it is on a fairly small scale. Further, a number of privately funded non-charitable organisations have been established in London over the past ten years in order to facilitate (or, depending on your view, to cash in on) litigation in this jurisdiction. It is true that such organisations select the cases which they fund by reference to their potential profitability rather than the meritoriousness of those cases and the individuals who wish to bring them. However, these non-charitable organisations may represent a useful model.

15. But the government’s role in achieving access to justice is not just about funding litigants. It also involves providing suitable courts and systems. In England and Wales, the Treasury has committed substantial sums of money to enable the current estate of court buildings to be rationalised and modernised and to update judicial IT systems. The court building programme will involve some hard decisions – closing a number of small courts, many of them not fit for purpose, and building fewer, but larger and much more modern new court buildings, and using them more efficiently and intensively. It is plainly much less costly and much more efficient both to service and to list for ten judges working out of one court building than ten judges each working out of different buildings tens of

miles away from each other. The shutting down of a number of local courts will improve efficiency but, unless mitigated it would risk, as it were, remove justice from the people – or maybe it would risk removing the people from justice. The solution as recently described by the Master of the Rolls is to be “‘pop up courts’ or ‘justice’ centres in other public spaces – e.g. libraries” and he adds that “Tunbridge Wells Borough Council Chamber has been a ‘test centre’ for this”¹².

16. Further, it is about time that we offered a more up-to-date electronic service not just for filing documents at the court or the court sending out documents, but also for more sophisticated purposes such as an electronic case file for each case accessible only to those concerned with the case, or for the purpose of agreeing or discussing directions. Indeed, like you in Australia, we have in this country experimented with the electronic courtroom in civil and in criminal cases. As Justice Blenby explained in the Supreme Court of South Australia¹³:

“The electronic court enables the trial to be conducted to a large extent in a “paperless” fashion. It goes beyond the electronic storage and retrieval of relevant documents on the court file, such as pleadings, particulars, lists of documents and notices to admit. It includes electronic presentation of witness statements, expert reports, chronologies, lists of authorities and outlines of argument. More significantly the database includes documents which will be, or are likely to be, tendered and the electronic version of the transcript. There is the option of incorporating real time transcript of the proceedings”.

As he went on to say¹⁴, the principal benefit of the electronic court is “the reduction in trial time”, and particularly in a case of length and complexity “[t]he expense involved in establishing and running an electronic court is insignificant when viewed against the costs which will necessarily be incurred in taking this matter to trial and also as against the amount of damages being sought. The reduction in photocopying and paper consumption alone, I believe, will contribute significantly to the cost effectiveness of the electronic court in this case”.

17. In the UK we are working towards an ODR, on-line dispute resolution, system, initially for small cases. The idea was propounded some time ago in this country by Professor

¹² Sir T Etherton MR *The Civil Court of the Future* Lord Slynn Memorial Lecture, 14th June 2017, available online at <https://www.judiciary.gov.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf>

¹³ *Harris Scarfe & Others v Ernest and Young & Others (No3)* [2005] SASC 407 at para 17.

¹⁴ *Ibid*, para 19

Richard Susskind, the longstanding IT adviser to the Lord Chief Justice (although some LCJs have been more eager to listen to him than others, but none more so than the present incumbent who deserves much praise for driving through the current modernisation programme. As he has graphically said, if the system is not modernised now it will fall over. To continue my brief tangential excursion, Professor Susskind has written a number of books about the future including *the End of Lawyers?* You will be glad to hear that there is a question mark at the end of the title). Reverting to my theme of ODR, it is worth mentioning that eBay has had a successful ODR system for years, and I understand it costs US\$15 to participate and ten days to produce an answer. Clearly there are insurmountable reasons of both principle and practicality as to why this is not a fair comparison with a Court ODR system, but it does represent a useful signpost and an encouraging, if heavily distinguishable, precedent. Professor Susskind chaired a Civil Justice Council working party which reported on the feasibility of ODR to resolve claims in English courts in February 2015¹⁵, which has now been taken forward by Lord Justice Briggs in his final report in July last year, Civil Courts Structure Review¹⁶, which Professor Susskind's committee contributed to through a response to the interim review in March last year¹⁷. The upshot is that the English and Welsh courts will be introducing ODR for resolving small civil claims as and when the IT and training can be responsibly rolled out.

18. There may well be a risk that ODR will lead to more imperfect justice than traditional systems of resolving disputes in court, but I am firmly of the view that the resolution of disputes provided by the state should be proportionate to the issues involved. There are many cases where there is a bona fide dispute between parties about a sum of money which means quite a lot to both or one of them but in respect of which a trial conducted according to traditional principles would be wholly disproportionate. It cannot be right to say to such parties that their dispute cannot be resolved. Nor can it be right to say to the parties that their dispute can be resolved but it will cost the loser legal costs more than ten or fifteen times the amount at stake and the winning party will probably be out of pocket too; and, while the state may be obliged to make legal aid available in principle,

¹⁵ <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>

¹⁶ <https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/>

¹⁷ <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>

it would be equally wrong to expect the state to fund the litigation on that basis. The only solution is for the legal system to provide a dispute resolution mechanism which is cost-effective, a system which is, to borrow an expression used by valuation accountants, quick and dirty. In a phrase imperfect, but accessible and affordable, justice: it's better than no justice or absurdly over-priced justice.

19. If small claims are to go to a hearing then I suggest that there is much to be said for dispensing with the those two hallowed features of common law civil litigation, discovery and cross-examination. I doubt I made myself popular in many circles when I made that suggestion in a speech in Oxford recently¹⁸. So far as discovery is concerned, I am sceptical about the notion that many cases are decided by a “smoking gun” found on the often enormously time-consuming and expensive exercise of disclosure and inspection of documents, and in any event it is questionable whether the odd case where full disclosure really has made all the difference justifies the pointless expenditure in the countless other cases where it makes no difference. As for cross-examination, there is force in the contention that most of the best points that emerge from questioning can be made much more shortly in argument, and I am unpersuaded that there is any real force in the notion that it enables the judge to benefit from his or her impression of a witness. Sometimes it seems to me that factual disputes are resolved by reference to the better-performing witness, not the more honest witness, and I think that, at least in some cases, it may be safer to assess the evidence without the complicating factor of oral testimony.

20. Another feature which can substantially cut down the costs, delay and aggravation of litigation is of course mediation. It has its risks, as a failed mediation will normally add to the delay and costs, and will often add to the aggravation. However, anecdotal evidence suggest that mediations work much more often than not, and even those that don't work at the time sometimes have a delayed effect. The rules and standard directions encourage mediation, and, where appropriate, parties who unreasonably fail to mediate can find themselves penalised in costs. There is a Jackson ADR Handbook, which is so named because its creation was recommended by Lord Justice Jackson in his 2009 report, and which is now in its second edition.

¹⁸ <https://www.supremecourt.uk/docs/speech-170210.pdf>

21. Looking at IT more broadly and in the future, Professor Susskind's most recent book is *The Future of the Professions*, which he has written with his son and which examines a possible future where, as they become more and more sophisticated, artificial intelligence and robots take over many of the functions of lawyers, and I fear judges. It is no longer fanciful to think that artificial intelligence will be able to do the job of lawyers and judges better than humans: I use my words carefully, because I am not saying it will happen; merely that it is not fanciful to think that it will happen. AI has beaten the world champion chess player¹⁹, go player²⁰ and there have been recent reports that AI is starting to beat champion poker players²¹. And AI developed at University College London predicted the outcome of cases in the European Court of Human Rights with a 79% accuracy²². Clearly the involvement of AI in legal advice and representation, and indeed decision-making, could have enormous cost and efficiency implications – and many other equally far-reaching consequences.

22. With that quick glimpse into the future I must return to the Supreme Court for today's hearing and leave you with my very best wishes for a successful and enjoyable conference. Thank you for coming to London and thank you for listening to me.

David Neuberger

London, 3 July 2017

¹⁹ https://en.wikipedia.org/wiki/Deep_Blue_versus_Garry_Kasparov

²⁰ <https://en.wikipedia.org/wiki/AlphaGo>

²¹ <https://www.scientificamerican.com/article/time-to-fold-humans-poker-playing-ai-beats-pros-at-texas-hold-ersquo-em/>

²² N Aletras, D Tsarapatsanis, D Preotiuc-Pietro, and V Lampos. *Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective*. PeerJ Computer Science 2: e93 (24 October, 2016)