HARBOUR
LITIGATION FUNDING

Harbour View

Spring 2017

Featuring topical articles by guest authors and the Harbour team.

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10TH ANNIVERSARY

Contents

Innovation
Change our attitude to change

By Susan Dunn, Head of Litigation Funding.

This year Harbour celebrates its 10th anniversary and to mark the occasion, we devote this edition to 'innovation'. We invited the judiciary, the Bar, law firms, a legal consultancy and the media to explain what 'innovation' means to them and what the legal sector should do to remain competitive.

For years there has been talk about the detrimental impact of technology on the legal sector. I don't share Richard Susskind's view that lawyers will disappear altogether, but technology can take us a long way to making the process more efficient and cost effective, taking lawyers away from the administrative burden so that they can focus on why they became lawyers.

As the Global Legal Post reported on 3rd March, the effective use of artificial intelligence and technology is still more of a myth than a reality as law firms are slow on the take-up of technology. Groups such as the disruptive GCs should help drive this agenda more, and could have an impact on the market, not least because a lot of them come from technology-based businesses.

Technology could be used to provide better management information for law firms and their clients. Too few firms are capturing data thoroughly enough to drive real insight and budget prediction skills. Lawyers use sophisticated billing systems and have data they could analyse better, enabling them to decide which services they could charge on a fixed costs basis. Understanding their own business better, allows firms to charge with greater precision and thus offer a better service to their clients.

Bright, entrepreneurial lawyers join firms but lack sufficient opportunity to shine in the early years of their career. Technology can help with the standardised part of their job and junior lawyers can then focus on legal strategy and add real value.

The structure of law firms is less conducive to dealing with change which nowadays is pretty much relentless. Firms which have been flexible or innovative, stand out from the crowd. Keystone Law integrated mobile and flexible working structures in their day-to-day practice. Clifford Chance and Gowling WLG appointed Heads of Innovation. Pinsent Masons combines legal know-how and technology to create services such as Cerico (regulatory compliance solutions), Out-Law (daily legal news) and Vario (a hub of freelance legal professionals).

Of one thing I am sure: if law firms won't use technology, their clients will. One such example is JP Morgan's program COIN which interprets commercial loan agreements in seconds with

less errors and no holiday requests, replacing 360,000 legal hours annually.

In his article Jaap Bosmans, author of 'Death of a law firm', looks at the law firms' business model more closely and sets out what lawyers can learn from retailer Poundworld.

Catherine Dixon, former CEO of the Law Society; John Mackenzie from Shepherd and Wedderburn and Chantal-Aimée Doerries QC, previously Chair of the Bar, offer their take on how the Bar and law firms can innovate. Although what they say is refreshingly straightforward, some chambers and firms still struggle with its implementation.

Legal journalists Rachel Rothwell and Ben Rigby also offer their views. The media often writes about the diminution of litigation. One of the reasons often quoted is its high price tag. The irony is that if costs were better managed people would in fact litigate more. I am convinced of this.

We see increased consolidation of law firms in the legal market but rarely are such mergers presented as opportunities to innovate and modernise.

What about our courts and the pressure they have been under? Lord Justice Briggs' current proposals for civil litigation reform are a great step in the right direction and I hope the profession embraces what he is proposing. Most of our guest authors refer to his work and you can read his views in 'Innovation and digitisation: a civil justice revolution'.

This brings us back to third party funding and Harbour's 10th Anniversary.

As a funder whose origins date back to 2002, we have an amazing window on the legal services market. Both law firms and general counsel talk to us about cases as well as their respective challenges in running their businesses. Two sides of the same coin. A common observation from corporates is that legal services are expensive and should be delivered more efficiently. We heard this 10 years ago, and we still hear it today, so it seems that not enough progress has been made.

GCs are required by their management to extract value from every pound spent. Budgets are generally more constrained and decreasing annually and GCs are interested in hearing how third party funding (TPF) can help them with that. Clients expect their law firms to mirror the challenges they are facing and to provide solutions for them.

Clients mostly act individually, rather than collectively. If they'd act in a more 'unionised' way they might be able to implement the changes they are asking for more quickly and help drive innovation. I hereby think about groups such as the Disruptive GCs mentioned before.

Costs remain disproportionately high for the administrative aspects of legal service provision. If legal costs were lower - by which I mean reducing the cost of the administrative part while preserving the genuine strategic and insightful legal thinking - more claims would be pursued.

Some law firms have been very pro-active in embracing TPF as a means to assist their clients, but others are of the view that their clients are not interested. This does not tally with what we hear.

GCs, and their CFOs, value funding as a commercial tool to offset the risks of litigation/arbitration: another party is paying for the legal costs with no recourse when the case is lost. With legal expenditure taken off their books, the capital can be used for other projects, even if it means they need to share the proceeds. Some have approached us directly for assistance with both funding as well as law firm selection, recognising the breadth of firms we work with. They value that we are accustomed to finding solutions enabling them to pursue good claims.

People often ask me what has changed most in the world of TPF? The biggest change must be in the use of TPF itself. Initially used by those who had few options financially to pursue their proceedings, it is now increasingly used as a tool to manage risk by every type of client. Blue chip companies routinely fund ongoing litigation as a means of removing significant legal costs from their balance sheets.

That change is marked by the range of law firms with whom we now work. Firms have woken up to the fact that their clients demand that they understand the use of funding. Those embracing this early on, have the leader's advantage.

Harbour will continue to explore and discuss opportunities; fund a wide range of cases and help drive innovation beneficial to all parties involved.

May I take this opportunity to thank you for your continued support over the years. I am looking forward to the next 10 years and more. Exciting times ahead.

Enjoy the edition.


"The skills lawyers need to deliver their services will differ from the skills mastered by lawyers over centuries."

My predictions of legal change
The new legal landscape

By Catherine Dixon, former CEO of the Law Society.

"Some things never change… and some things do". It sounds more profound when said by Morpheus in the film The Matrix, but it certainly sounds true of the legal profession and legal services over the next few years.

Lawyers will always focus on their clients' best interests, providing expert legal advice and adapting to meet their changing needs. Whatever the future brings, lawyers will continue to respond to their clients – meeting and, hopefully, exceeding their expectations.

The way legal services will be delivered in the future, however, will change and the skills lawyers need to deliver their services will differ from some of the skills mastered by lawyers over centuries.

Developments shaping our legal future

Firstly, globalisation will play its part. The complexity of doing business overseas and across borders, steering through the multiplicity of regulation, will continue and be challenging. The legal and business complexities after our departure from the EU will undoubtedly add to this. At a time of increasing internationalisation, despite resistance from President Trump and others, a complex legal landscape will emerge which will require the advice of lawyers if it is to be successfully navigated.

Secondly, the way we buy legal services is dramatically changing. Legal services will increasingly be bought online. We will use the internet to shop around on price and quality. A significant number of price/service comparison sites are set to launch and will continue to emerge - encouraged by the Competition and Mergers Authority (CMA) in its recent report, and arguably market driven. Whether clients will be better informed or whether we will see a "rush to the bottom" on the quality of certain legal services as prices are squeezed, remains to be seen. For those who can navigate online, there will be a greater choice and these on-line services are likely to put pressure on the traditional high street provider.

On the business side, one prediction is that in-house counsel in England and Wales will make up 1/3 of the solicitor profession by 2020. In-house counsel are sophisticated purchasers of legal services and will, for certain legal services, shop around for the best deal. This will include purchasing services from a range of providers, rather than from one or a limited selection, to make cost savings.

The commoditisation of law, where routine and procedural legal services are delivered at lower cost, by using technology for example, results in firms and alternative business structures (ABS) continuously adapting to meet clients' requirement on quality and price. Such commoditised services can be differentiated from those requiring specialist knowledge and this is where clients still require a strong relationship with their trusted legal advisor.

Thirdly, Government policy on justice and legal services is having an impact and this is set to continue. The creation of an on-line court and the transformation of the justice system using technology will result in changed processes and procedure – and a move away from the reliance on lawyers for lower value cases. Lord Justice Brigg's article in this edition further explains. The move towards fixed recoverable costs and the continued reduction in the public funding of justice will also impact.

Finally, the use of technology to deliver legal services will possibly have the greatest impact.

As lawyers are more and more required to become IT technicians as well as legal experts, the way we train will need to be adapted and changed.

We already see a significant increase in the use of machine learning, predictive analytics and artificial intelligence. Examples include:

- KIRA, a software tool for identifying the relevant information in contracts significantly speeds up the due diligence/ disclosure process.
- IBM Watson improves the way research is conducted by using natural language processing and machine learning to gain insights from large amounts of unstructured data.
- Luminance software is being used by Slaughter and May to assist with M&A transactions by automatically reading and analysing hundreds of pages of documentation.
- Similarly, TAR (technology assisted review) is now accepted by the High Court for use in litigation by processing documents for disclosure, following the case of *Pyrrho Investments Limited and another v MWB Property Limited*.

Technology will enable lawyers to become more efficient at some procedural and commoditised work. It can reduce cost and time and can be used as a tool to test and support client decision making.

Whilst technology is likely to remove much of the procedural work carried out by lawyers, I don't believe that it will replace us. There most certainly is a need for expert legal advice on complex and specialist legal issues which considers clients' best interests and the complexity and multiplicity of their needs. This will remain the case.

Whether this will change as artificial intelligence and machine learning becomes ever more sophisticated is the pressing question. Perhaps if we all take the blue pill - the story will end. Whereas if we take the red pill, we will stay in Wonderland and see how deep the rabbit hole goes. You choose - but I am tempted, like Neo in the Matrix, to take the red pill and continue the journey.

Innovation and law firms
The language of the future

By John MacKenzie, Partner, Shepherd and Wedderburn LLP.

Innovation is a little like strategy – it is one of those nebulous initiatives that everyone says they are doing, but few know how to do well. I believe this is because innovation is not a "thing", it is a process. For example, in the legal world in which I practise, clients have three questions: am I going to win; how much will it cost; and, how long will it take? So, for me, innovation is the process by which I try to find a better answer to each of those questions.

Futurology

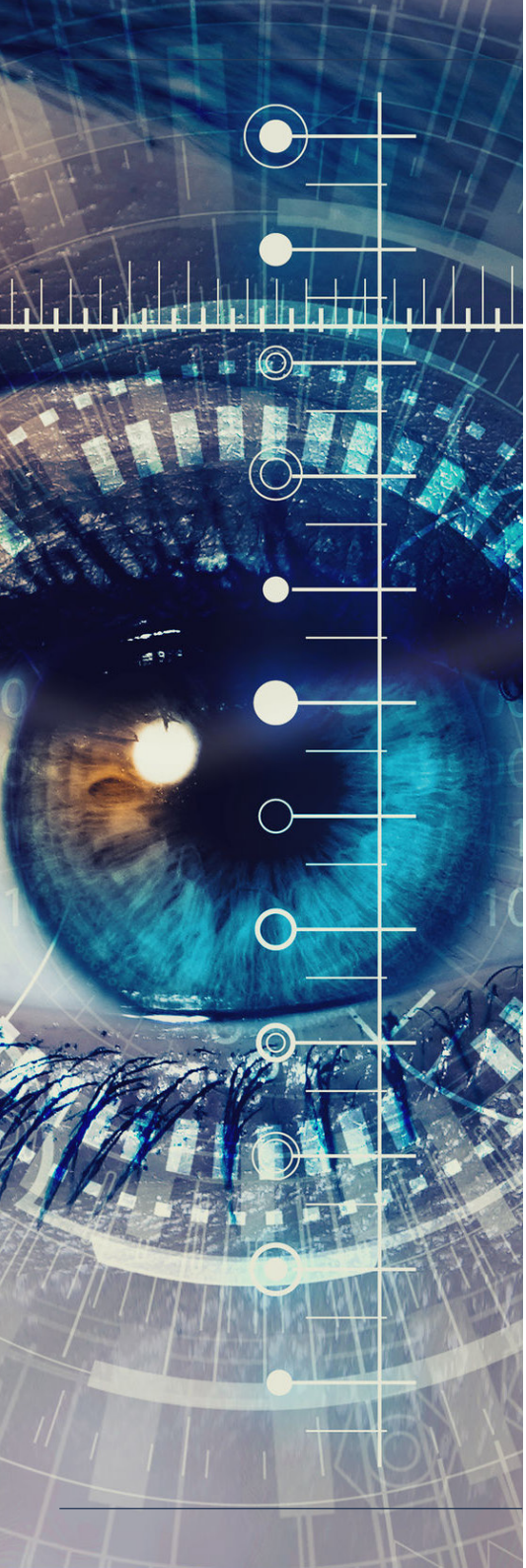
Implementing innovation in a law firm can be controversial. In one corner, the futurologists predict transformation; decline of the professions; the end of lawyers. They want change and they want it now. In the other corner, traditionalists warn that machines cannot be trusted and the world will always need the human element to guide and counsel clients. They are happy with things as they are, and see no need to implement untried, untested and risky ideas into a successful business.

In the middle sits the law firm, striving to deliver the highest quality advice to clients, with an eye to how law was practised in the past, while trying to anticipate what the future holds.

I propose to leave the future to the futurologists.

The purpose of this article is to look at what is happening now, and how clients and lawyers can adapt.

> "Innovation... one of those nebulous initiatives that everyone says they are doing, but few know how to do well."



Communication

For me, the role of the lawyer is to advise clients. Communication of that advice is therefore a prime target for innovation, particularly in two areas: "what" is communicated, and "how" it is communicated.

When trainee lawyers are learning to communicate with clients they are (hopefully) told that clients do not want to know what the law is, they just want to be advised on their best course of action. But sometimes clients need to be told what the law is. And when this information relates to something routine, such as a disclosure obligation, the client is rarely willing to pay for it.

The technology solution is to create a legal resource that can be used time and again when the same issue arises. As a result, legal firms now frequently offer FAQs, legal guides and free advice online. This approach works as much for high stakes litigation as for any other.

The other side of communication is "how" it is communicated. Clients want to communicate with their legal team quickly, cheaply and easily and there are many different ways in which this can be done. The key is to be flexible. Even though legal firms have offices, telephones, post, and email as standard, some clients may want to communicate by Skype, WhatsApp, chat or text message. Saying "we can't do that" or worse "what is that?" is going to drive clients away.

Language

A more subtly challenging issue is the use of language. As cases become more complex and data intensive, so lawyers must learn another language – that of data. Sometimes the only way to properly understand what you are looking at is to use mathematical tools and models to

interpret the information that is given to you. And lawyers are not taught maths at University!

Case analysis is another area where lawyers need to start thinking differently. Where there is a substantial data set, several tools can help identify relationships between people, places and other points of interest as set out in the previous article. And these tools are relatively low cost and can be deployed quickly.

And speaking of numbers, identifying, tracking and reporting costs is an area where significant change is coming. As more and more attention is paid to where costs are incurred, and there is true transparency around how money is spent, clients can more easily question the way in which their money is being spent. This can only be a good thing, because if the cost cannot be justified then it should not be incurred. If everyone understands why money is used in a particular way, the scope for friction should be reduced.

Unbundling

At the Harbour's 4th Annual Lecture, Lord Justice Briggs gave a thought-provoking speech about the future of the courts. A controversial figure at the moment, he has brought forward proposals for an online court but more of that later. Focusing on the concept of unbundling, he suggests that instead of having a retainer or contract that covers the lifetime of the legal issue, clients should be able to pick and choose the specific services that they require.

Unbundling is a concept that other sectors are familiar with, but the legal sector is not. In very simple terms the challenge is this: why should a law firm do everything associated with a litigation, when there are specialists who can do an aspect of the job better and more cost effectively. For example, advocacy can be outsourced to barristers; document review can be outsourced to a low cost jurisdiction; and costs budgeting can be outsourced to costs draftsmen. It seems obvious when looked at in the abstract, but the prospect of proactively reducing fee income will make any law firm partner uneasy.

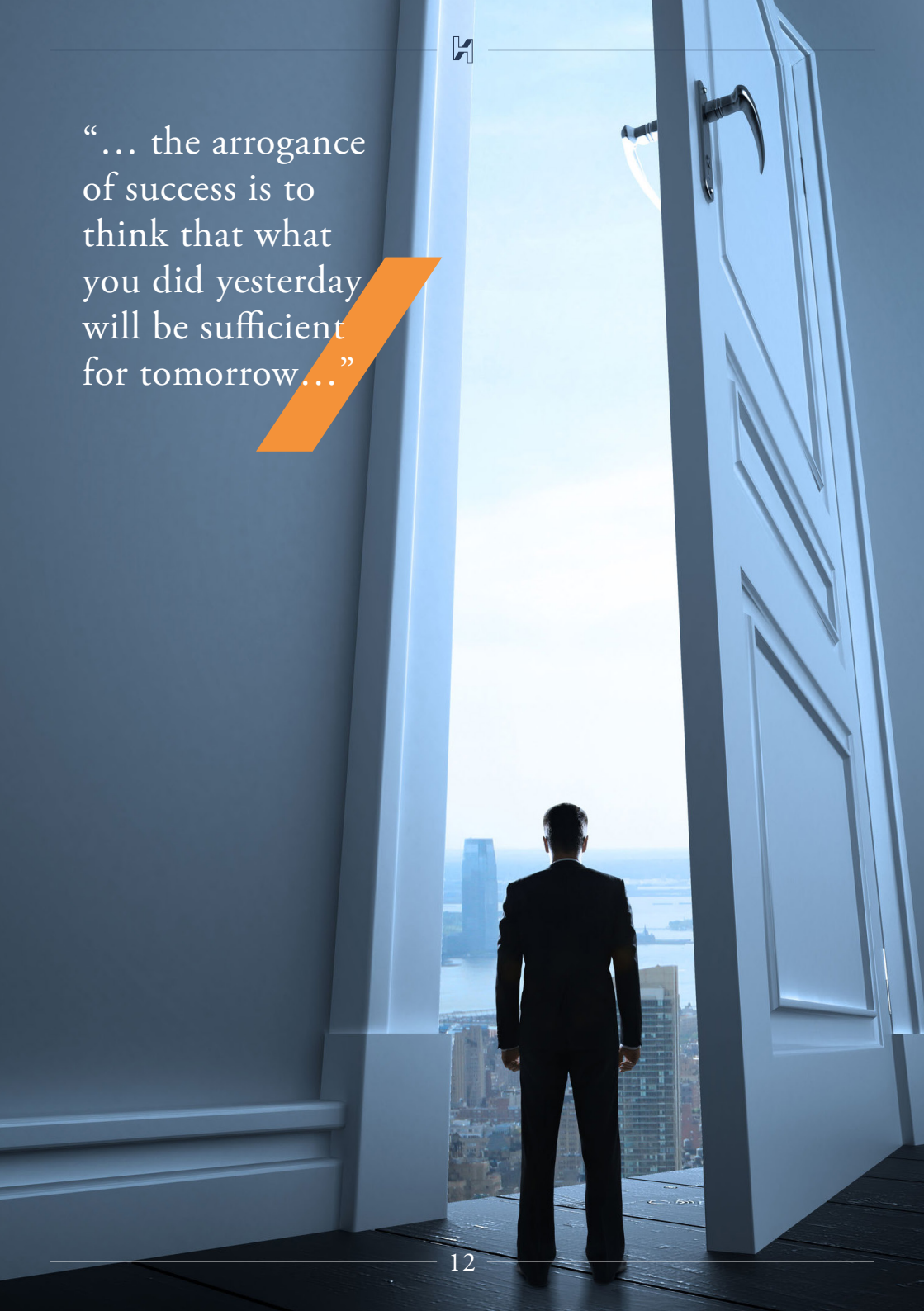
Prospects of success

A final area for discussion is around the language of prospects. Lawyers are used to using, and accept, the language of impression. "Are the legal merits good"? Is the case "clear"? Does the case have "good prospects"? Lawyers are less comfortable using numbers, but often happily do so. The case might be described as "50/50". Or worse, the prospects of success are about 60%.

The number 60% is no more than a rough indication of the strength of the case. Typically, the lawyer is reasonably comfortable on the applicable law: but are they able to prove the underlying facts? Will the witnesses perform well? Is there any documentary evidence that supports what the client said? How will the other side perform in court? What documentary evidence does the other side have?

It is relatively easy to see that a lawyer's meaning, when giving prospects of success, is very different from that of a mathematician. Put crudely, it's not so much the chances of winning that are important, it is the lawyer's confidence in the prediction that the client should worry about. The question that follows is "what can we do to improve our confidence in the prediction"?

This is an intensely practical and commercial issue. If you can identify what needs to be done to improve confidence in a prediction of success, you will know where you should be spending your money.


"… the arrogance
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The 21st century Commercial Bar

By Chantal-Aimée Doerries QC, Head of Atkin Chambers, Chair of the Bar 2016.

It has been said that the arrogance of success is to think that what you did yesterday will be sufficient for tomorrow. That is as true for the Bar, as it elsewhere. We need to recognise our core strengths and skills, and ensure that we are flexible enough to adapt to the times, and to rise to the challenge of change. In the 21st century the buzzword "innovation" occasionally sounds like a mantra, suggesting that any step that amounts to departure from the traditional or current is of itself good or to be commended. Not all change is good. The challenge for the Bar, and the legal profession more broadly, is to identify that which is good and offers improvement, or opportunity, from that which is illusionary, or, which would fundamentally change the profession without offering real benefit to the profession or the clients it serves. We are not unique in facing this dilemma.

Society faces this challenge – some industry commentators have suggested that over the next 1 to 2 years we will experience change at a pace equivalent to that experienced over the last 20 years. The scale is apparent when one considers how much change there has been over the last 25 years or so, when I started at the Bar. Partly this has been thrust upon us, but largely it has been because the Commercial Bar has embraced change. It has survived, and thrived, because it has been willing to adapt and change, while retaining its essence, excellence in advocacy and legal knowledge, without losing its competitive edge.

Today's commercial barrister is as at home arguing a case before the Commercial Court in London, as presenting in an arbitration in Singapore or Geneva and as likely to be receiving instructions by email and responding where necessary by email or over a video link as meeting with the client at the client headquarters whether within the Square Mile or elsewhere in the world.

No discussion of tomorrow's barrister can fail to consider the ongoing tech revolution and the promised future impact of artificial intelligence. Hardly a day goes by that we don't read about a new legal start-up or investment by a law firm, covering for example advise on standard form contracts, or providing a legal research tool.

I was in Ottawa last summer. The Canadian Bar Association had organised an innovative event, called The Pitch. Imagine Dragon's Den meets techies. Five early-stage legal technology start-ups, pre-selected by a panel of experts, were competing for a residency with LegalX at MaRS Discovery District in Toronto and the attention of investors:

- Beagle, chosen by the judges, offered an automatic contract review system which can be taught to quickly identify important clauses in contracts and offer advice in relation to them.
- Blue J Legal presented itself as an expert system that provides answers to legal questions.
- Knomos have created an app that allows for visualisation of legal information.
- Rangefindr combs criminal case decisions so that clients, lawyers and possibly even judges can have the appropriate range of sentences for particular offences at their fingertips.
- Loom Analytics, chosen by the audience as the winner, describes itself as providing hard numbers on case law, including win/loss rates, judge ruling histories, litigation trends over time, and much more.

Who knows if these start-ups will succeed, but their presentations offered an inspiring view into a future which will inevitably feature technology and AI in ways that we have only just begun to understand.

Equally, most weeks we also hear about an IT glitch, or more serious problem. High profile examples include the critical fault apparently found in the software used by HMCTS to calculate assets in divorce proceedings, identified some 14 months after the introduction of the software, or the apparent crash of the Judicial Appointment Commission's website during the latest recorder competition, with the result that all candidates have been invited to proceed to stage 2 of the process. Inevitably the failures or glitches attract more press and social media attention, than those systems which are introduced and which work well.

Where will the inevitable onward march in technology leave the Commercial Bar? It will require an increased focus on skills: expertise, not merely in the law or in a specialist area of the law, but even greater emphasis on advocacy (of different kinds and before a range of tribunals) and on strategic advice. Of course the Bar will need to retain its intellectual or academic expertise, but perhaps more importantly, it will need to ensure that it retains and burnishes those skills which clients will continue to need, and which cannot be easily replicated by artificial intelligence. In short, the ability to reliably judge situations and understand the necessary steps for putting the client in the best place given its interests, concerns and the underlying fact and law. The ability to chomp through dense files, and to have the latest case at your fingertips will not be unimportant, but it will not be the skill that allows the Bar to survive and thrive. We will see the impact of free or paid for legal research online and the increasing use of software to search documentation.

To date the Bar continues to show little appetite for MDPs or ABSs. There are and will continue to be exceptions, and some may prove to be successful. I remain convinced that the Chambers' structure, allowing a number of self-employed highly skilled advocates to compete within an increasingly competitive market will remain the most popular model. The overheads of this structure remain lower than most other models and the flexibility offered, both in terms of overheads and to the individual practitioners, is possibly second to none.

We are no longer only the bewigged court room advocates, but also advise clients much earlier in the process and against a commercial backdrop. As there are changes in the market around us, whether in the nature of business which clients conduct, or in the way they choose to fund litigation, we need to be on top of these developments, so as to best advise our clients.

The hallmarks of the Bar are excellence, advocacy, independence and competition - very modern attributes. Innovation for me means being open to change, change which is focused on improving what we offer, while ensuring we retain what makes us as a profession a success.

Innovation
It can be done

Ben Rigby is Editor-in-Chief of Commercial Dispute Resolution and African Law and Business. Former editor of Costs Lawyer magazine and features editor of Solicitors' Journal.

The cycle of innovation in the legal sector seems set to increase – and to evolve yet further.

The demands for innovation will spring from familiar pressures and the need to deliver cost effective legal services - thanks to pricing pressures and an increasingly sophisticated client audience - will be foremost in law firm minds. Examples of this can be seen in the Association of Corporate Counsel's **Value Champions initiative**, which should be required reading for every law firm.

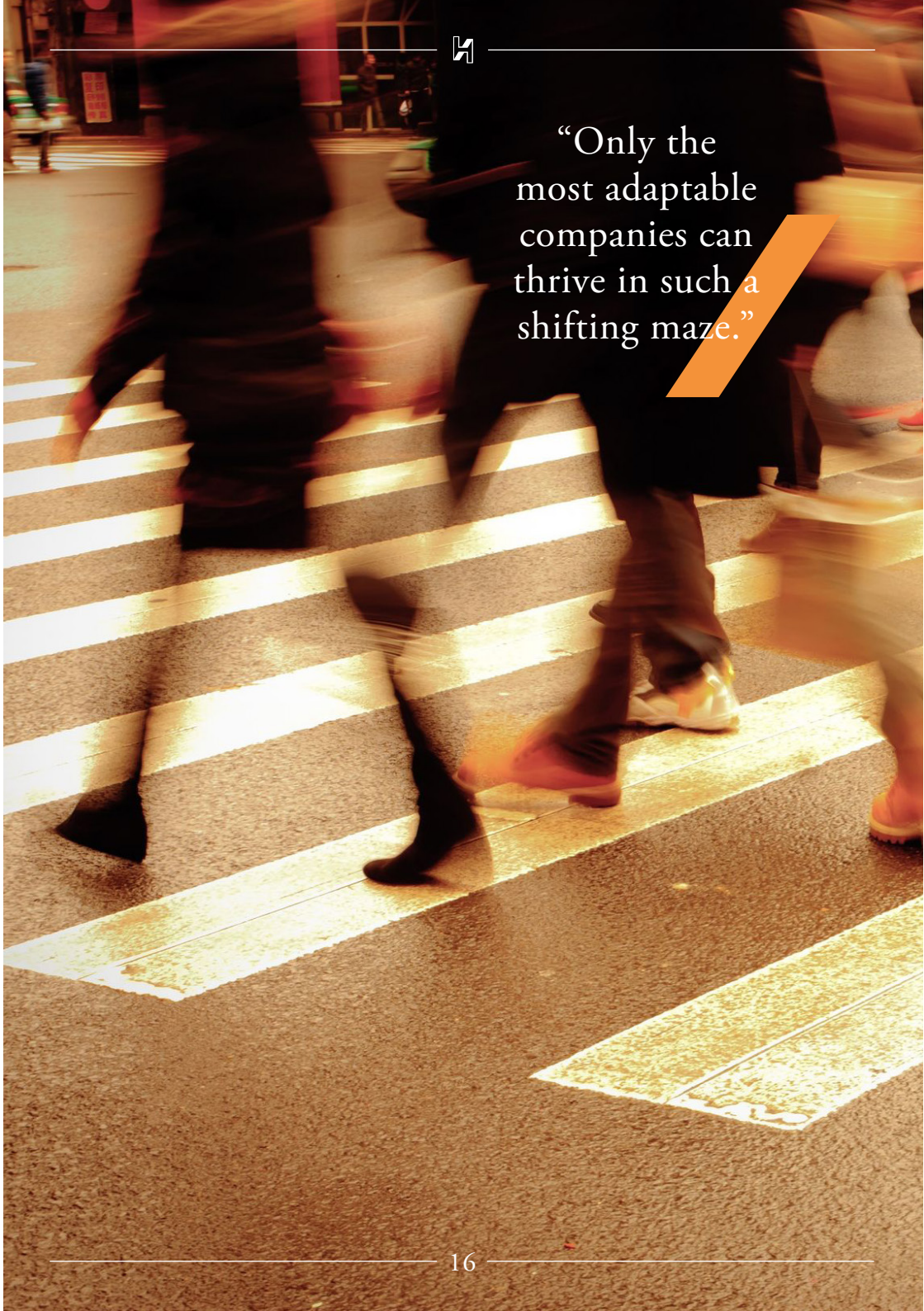
Other required reading includes studies that deliver deeper understanding of the ways in which procurement processes inform the pitch process, for both clients as consumers of legal services and law firms as their suppliers. The need to treat law firms as a business has never been more real, and disputes lawyers must be alive to the need for investment that helps them realise client needs.

Another example of innovation can be seen in the ever-expanding role of technology in law firms, not least in legal process outsourcing, where a combination of developed technologies, outsourced legal centres in lower-cost jurisdictions, round-the-clock coverage, and dedicated and motivated local personnel are augmenting, even enhancing, client experience in dispute resolution. The success of Herbert Smith Freehills alternative legal services solutions, ably identified by Sonia Leydecker and Libby Jackson, has seen it expand into Belfast, Shanghai, Perth, and Melbourne. It is a trail-blazer for many others.

The pace of change will increase thanks to the increasing role of IT in dispute resolution, not least in the courts. The digitisation, and delivery, of paperless courts; the creation of an online digital forum for the disposition of smaller claims; and associated reforms envisaged by the Briggs review into the civil courts will force law firms to adapt their services, including those servicing higher value disputes as well as lower value ones. The government and the judiciary are embarking on radical change; as a result, only the most adaptable and innovative dispute resolution lawyers will survive and flourish.

Others will cease practice, continuing a trend which has already seen reductions in the number of long established law firms unable to restructure. Changes to the maintenance and funding of actions, including the potential introduction of a fixed fee regime, force firms to innovate, just to survive.

The menu for disputes lawyers is one in which ownership, regulation, funding, service delivery, technology, management, and above all, people, will all feature in the innovation mix.


“Only the most adaptable companies can thrive in such a shifting maze.”

The client of the future

By Rachel Rothwell, Editor of Litigation Funding magazine and a regular contributor to The Law Society Gazette.

We live in a world where nothing stands still; and that is as true for the business environment as it is in our day-to-day lives. Much of this is technology driven – but we are also seeing huge political shifts with global ramifications that stretch across the globe.

Only the most adaptable companies can thrive in such a shifting maze, where opportunities can open up very swiftly for the most nimble-footed, but obstacles can be thrust in their path just as suddenly.

This demanding environment sets a challenge not only for businesses, but for the law firms that advise them – and dealing with it effectively will be the key to successful innovation.

What do clients who find themselves trapped in this mystical, moving maze of changing business regulation, international competition and technological developments want from their lawyers? Certainly, they want advisers with enough legal and business knowledge to be able to point out where the hidden traps are, where the beasts lurk, and where the rewards lie shimmering. They want their lawyers to be holding a map. But that alone will not be enough.

It is all very well for the lawyer to be standing safely outside the maze, shouting directions over the thorny hedgerows. If their compass turns out to be faulty or their map incomplete, they are not the ones who will be dinner for the beast.

Law firms that are truly innovators will not be on the sidelines – they will be deep in the maze, standing side by side with the client. No doubt all firms will claim to do so; but for it to be more than a glossy phrase, the law firm's pay cheque must in some way depend on the client's outcome. That is the only way to truly align the lawyer's interest with that of the client – and that is what I think clients of the future will expect.

Of course we already see this in litigation, where lawyers will act under a 'no win, no fee' agreement – and are increasingly involving third-party funders in helping them to achieve this. But does it have to end there? The big question for law firms is how can they share risk and reward with their clients in other areas – defence work, or transactional and regulatory matters, for example. The answer to that riddle will require some innovative thinking, and a certain amount of bravery. But firms that can achieve it will be the true heroes in the eyes of clients.


Renée's
Vinaigrette
CAESAR
CÉSAR
750 mL
Sensations
MAYONNAISE
½

What lawyers can learn from Poundworld.

By Jaap Bosman, strategy consultant and author of 'Death of a law firm'.

Recently I came across an episode of 'Pound Shop Wars' originally broadcasted by the BBC between 2012 and 2015. The series focuses on Poundworld and its rivalry with other pound shops. Poundworld, founded by Chris Edwards, has over 350 UK stores selling 99% of its merchandise at £1.

What struck me was the way in which the company was managed. Everything was focused on return on investment. No costs were made unless profit would come out of it. Poundworld is a business. Its owner is a businessman and entrepreneur and literally everything revolves around making a good profit. Buying goods and selling them at a profit is the most elementary form of business.

Law firms have been for decades one of the most profitable business models in existence. Few other businesses invest so little capital with such high returns. Many partners of law firms make more money than elected heads of state or CEO's of sizable companies. Over the last 50 years profits consistently have gone up. The business of law certainly must be doing something right.

In sharp contrast with Mr. Edwards, partners at law firms are not entrepreneurs. Even if in name and title they are the shareholders of the firm, in practice they behave as highly paid employees. Herein lies a problem. One could argue that partners at law firms have been spoiled by decades of rising profits. Making money without the need to be entrepreneurial created the false illusion that nothing could ever go wrong and that both work and money would keep coming in as by magic.

The eroding effect of commoditisation

The clients of law firms have become more and more sophisticated and professional. In-house legal departments have excellent legal skills and have a good oversight of what's out there in the legal market. For most matters clients have a choice between several law firms and/or partners to handle their case. If everything else is equal, the client will make a choice based on the price. We have already seen this during panel formation, but it equally happens for individual assignments. This is what is called commoditisation. When multiple law firms or lawyers can handle the same assignment equally well, the legal expertise in question has become commoditised.

Using this definition, it becomes clear that in a particular market a certain legal expertise is commoditised or it is not. The clients either

have a choice, without compromising on quality, or they have not. There is no grey area. It is either black or white. Letting this definition sink in for a moment, I should also make clear that commoditised work does not necessarily equal 'simple work' or 'bulk work'. It all depends on the competition in the legal market. In most mature legal markets, it will be possible at any point in time to find multiple law firms willing and capable to handle a matter. Even if it requires specialist experience and expertise. For example, the London legal market for Project Finance has become totally commoditised by now, even though it requires considerable expertise, making it harder for law firms to make a profit. That is the eroding effect of commoditisation.

Surprisingly when asked, most partners at law firms seem to suffer from 'commoditisation blindness'. They admit that such a thing as commoditisation exists, but are convinced that it will not affect their practice as what they do is invariably highly bespoke. If Poundworld had the same blindness to what was happening in their market they might have been out of business by now.

Understanding your business model

Unlike said retailer, the business model of law firms is quite simple. There is no buying and selling of goods; there is no stock to track and there is far less volatility in the workforce. Whereas the retail business is not rocket science, the business model of law firms is as simple as it can get: revenue minus costs equals profit. The only thing one should understand is that in the short term the costs are fixed. Comprising predominantly of wages, rent and IT infrastructure, costs do not vary according to revenue. This means that fluctuations in revenue will have a direct and leveraged effect on profit. Since profit is divided between the partners in full, any fluctuation will directly affect their income. As a market average, business law firms will have a cost percentage of about 66%, so a profit margin of 34%. This means that a 10% decrease in revenue will result in a 30% decrease in profit. This is why law firms should be worried about commoditisation. Except that they are not...

Immediately after the financial crisis, law firms started to cut costs in a response to the drop in revenues. At that point in time, it was quite easy to reduce costs. Secretaries were dismissed, support staff numbers reduced, offices relocated to cheaper locations outside London or even the UK, office space reduced and the less profitable partners were made to leave the firm. By reducing costs over time, some law firms even managed to increase profits. Today, 10 years after the financial crisis, the lemon has been squeezed and a new remedy is called for. In order to survive, law firms will have to fundamentally change their business model. Innovation in the business of law should be solely focused on maintaining a healthy profitability in an increasingly commoditised legal world. Innovation should be strongly purpose driven.

> **"If everything else is equal, the client will make a choice based on the price... That is what is called commodisation."**

By monitoring their business performance daily, retail chains like Poundworld incrementally adapt their business all the time. They permanently monitor sales, stock and turnover - and the speed with which these fluctuate - and they closely follow their competition.

Being true entrepreneurs, the owners of Poundworld remain agile and focus on maximizing profits in the long term. Law firms on the other hand, remain in their bubble as if nothing will ever change. Nothing fails like success.

Turning things upside down

Innovation has been the buzz word in the legal sector for a number of years. A few weeks ago, I was in Paris and a friend told me that there was a seminar or conference on innovation in the legal sector every week. Typically, these seminars repeat the same mantras: "disruption is coming to the legal sector and Artificial Intelligence is taking over from lawyers". It is a strange mix of gospel for the believers and fear and doom for those who don't.

Fuelled by these repeated messages many law firms start building apps, giving models away for free or embark on using software for such tasks as due diligence. The problem with this is that they start with working on a solution without defining the problem first. Innovation needs to be profit driven. I can't repeat and stress that enough. Maintaining a healthy profitability level in an increasingly commoditised world needs to be the starting point.

Innovation should be aimed at lowering the cost of production while increasing the profit margin. Automation can do that, but only if the costs of humans is decreased at the same time. Spending money on an automated due diligence and still maintaining the same level of junior lawyers in the corporate department is not going to work.

Poundworld would never automate its warehouse and still keep the same number of people working there. Law firms need to change the business model that now relies solely on leveraged hours.

Law is a business like any other business

The business of law has been very fortunate over the last few decades. Without any 'skin in the game' and with little entrepreneurial skills, they prospered. I would argue that most lawyers do not consider themselves business people or entrepreneurs but professionals instead. Much like doctors, except that doctors operate in a fully regulated market and do not need to be entrepreneurs.

Now, due to commoditisation, the time has come for law firms to innovate and adapt their business model. This will require courage, sense of business and entrepreneurial skills. I would recommend lawyers take inspiration from Poundworld where business is still practiced in its most elementary form.

The business of law where partners charge hundreds of pounds per hour or more, could learn from Poundworld were every item costs just one Pound.

Jaap Bosman is a leading strategy consultant, investor and one of the founding partners of TGO Consulting, a boutique consultancy focusing on the legal sector operating from New York, The Hague and Hong Kong. In 2015 he published the global bestseller 'Death of a Law Firm', recently translated into Chinese. Jaap is a regular speaker on the future of the legal sector.

Innovation and digitisation
A civil justice revolution

In this article Lord Justice Briggs sets out his proposed reforms to civil litigation and emphasises the need to embrace the digital revolution.

Continuing in the reforming tradition of the Acts of Judicature, the Woolf reforms and the Jackson review, another revolution is at the door with the potential to bring about great change to civil litigation. My Civil Courts Structure Review proposes a number of changes, which can be summarised under the following headings: digitisation, the Online Court, fixed recoverable costs, case officers, hearings, regional civil justice and enforcement.

Digitisation

Digitisation is the label for the ambition that by the end of the current Reform Programme, all processes for the issue, management and trial of civil proceedings will be digital and mainly online. All civil cases will begin with online issue through a single portal, ending with a paperless trial and mainly online processes for enforcement of the judgment. The same will apply to appeals. The tyranny of paper with all its inflexibility, cost, delay and sheer waste will be broken. As a recent report by JUSTICE has acutely recognised, the very concept of a court will be radically changed - from meaning the building where the case is managed and tried, to a virtual concept with no single geographical location, with files living on a cloud, accessible anywhere.

Real strides towards realising this ambition have already been made. We now have online issue, filing and document storage in the Rolls Building, the Crown Court is on the way to paperless trials, and County Court money and possession claims can be issued online. There is even a digital option in the Supreme Court. Successful government-sponsored IT programmes such as eJudiciary and the Traffic Penalty Tribunal are encouraging. Yet civil litigation is otherwise still overwhelmingly paper-based. A common software platform has yet to be designed, but work has started.

The Online Court

The Online Court is fast becoming the flagship part of the civil element of the Reform Programme. It will be a new court, accessed by online issue and filing. It is designed for the ordinary person or small business with no, or minimum and affordable, access to legal assistance. It will bring resolution (i.e. settlement of the dispute) within the mainstream of the process, taking the A out of ADR. I would call it the Civil Solutions Court. Its first ambition is to handle straightforward money claims valued at up to £25,000, with exceptions (such as for personal injuries) where there is already

satisfactory access to justice. It will have simple rules made by a new type of rule committee, with large input from LiP-facing people from the voluntary sector who know what plain language really means to ordinary people, rather than what judges and lawyers think it means.

This project is ambitious. Many aspects of it are already in limited use, such as small claims telephone mediation, video and telephone hearings and online issue. Others are novel, such as the automated stage 1 triage process designed to enable litigants to articulate their grievance in a form which will enable the court to get to grips with it, and to upload their key documents and supporting evidence. Ours will be the first fully-fledged online court, with binding judicial determination of cases which can't be resolved.

If this project bears fruit, it will plainly be revolutionary. It will be a wholly new way of litigating civil disputes: more investigatory than adversarial, judges will have to be their own lawyers, and resolution will lie at its heart. It will be characterised by the affordable provision of early bespoke advice on the merits by a qualified lawyer, and specialist services, such as cross examination, only where really needed. This will require a new emphasis on unbundling for solicitors and direct access for the bar. Neither are without their real difficulties. However, the continued use of a full retainer for disputes worth up to £25,000 (and many would say much higher) involves costs and costs risk which is just not proportionate.

Fixed recoverable costs

There is, by contrast, nothing revolutionary in the newly announced commitment of the MoJ to an expansion of the scope of fixed recoverable costs, from the relatively modest base already established by (in this respect) the slightly half-hearted implementation of Sir Rupert Jackson's

recommendations. Critically, this expansion will deal more economically with disproportionate costs recovery in areas where judicial costs management is itself arguably disproportionate in terms of the satellite litigation which it can engender.

Case officers

Although the name is new, there is again nothing apparently revolutionary about the concept of case officers. They have been around in most parts of the court system for many years. We need them because too much of the working week of a typical judge consists of dealing on paper with routine, often uncontested matters which could be done more cost-efficiently by civil servants.

What is new about case officers is finding common parameters which describe and regulate their training, work and supervision, and finding ways of engaging them more in the resolution of civil disputes. Case officers are not to be a new junior class of judge. However, important safeguards will ensure that some activities currently carried out by judges can safely be transferred to case officers.

They are to be answerable to the Lord Chief Justice and independent in their work from governmental control or influence, even though in HR terms they will be civil servants. They will be trained and supervised by judges. Finally, case management decisions taken by them will be subject to a party's right to have them re-considered by a judge.

Another new feature builds on the telephone mediation service for cases within the small claims track in the County Court. The Online Court case officer will be in charge of the resolution process at stage 2. He or she will be the first independent legal mind looking at the online case file, identifying the best means of seeking its resolution by the parties, and then case managing for judicial determination those cases which the parties cannot resolve themselves with assistance.

Overall, the case officer role responds to an underlying shift in emphasis towards making every part of the legal process proportionate - both in terms of effort and cost to the task which it is carrying out, and to the importance of its consequences to the parties and to the public.

Face-to-face hearings

This new and revolutionary focus on proportionality in the deployment of resources is also relevant to the question of deciding which matters need a face-to-face hearing.

Until now, at least in the civil sphere, the basic assumption has been that cases and interim matters must be finally determined at face-to-face trials and hearings. Departures from that assumption have grown in importance. Summary judgment is the preferred method of determination where the outcome is so clear that a trial is unnecessary. Evidence is increasingly taken via video where delay, expense or other inconvenience requires it. Case management by Masters and District Judges is increasingly done on the telephone.

The new approach being proposed within the Reform Programme is to abandon the very concept of a norm, let alone a face-to-face norm. We must address the issue in a completely open way, asking which of the processes available is best suited to achieving the desired outcome: online, on the documents, on the telephone, by video or face-to-face? The last three all amount to hearings (as may some versions of the first). Use of the more expensive modes must be justified on proportionality grounds.

Regional civil justice

I would also like to see a revolution in regional civil justice, although this does not, yet at least, form part of either the Reform Programme, or MoJ policy. For very many years, civil justice in the regions has, at best, struggled to maintain its profile, and at worst, been progressively hollowed out from inside.

The most glaring example has been the constant whittling down of civil Circuit Judge resources in the County Court outside London. The specialist civil court service in the main regional trial centres is also struggling to maintain its position in light of the very large investment of money and effort at the Rolls Building. Without the required minimum of 3 specialist Circuit Judges, Bristol, Liverpool and Newcastle struggle to provide a self-sufficient service at all. Further, leaving aside chancery work, there is no adequate listing arrangement to ensure that category A cases can get the required High Court Judge for a regional trial.

My proposed reform for building up regional civil justice is set out in full in Chapter 8 of my Final Report. No civil case should be too big to be managed and tried in the appropriate region. A sufficient cadre of judges, at Circuit Judge level in particular, should be civil specialists (i.e. devoting at least 40% of their working time to civil cases, rather than less than 20% as is prevalent at present).

Enforcement

Finally, always last but not least, comes enforcement. There can be no real rule of law in the civil context if final judgments cannot be enforced with reasonable speed, efficiency and effectiveness, albeit with appropriate awareness of the effect on judgment debtors.

Yet there are haphazard differences between the High Court and the County Court in the availability, procedure, effectiveness and cost of enforcement measures, all of mainly historical rather than rational origin. Too many of them involve inefficient use of paper forms, or grossly excessive judicial involvement, with grave delay and attendant expense.

I again propose what may fairly be described as a revolutionary reform. I favour the unification of all processes of enforcement, or at least those with no foreign involvement or arbitration element. A unified court for enforcement (not an office, because judicial oversight must remain at its heart) would apply only the best of the disparate remedies and procedures separately available now in the High Court and County Court, discarding the worst. Modern IT will work wonders in the simplification of the processes of application and checking.

I have suggested that the enforcement court should be the County Court, because of its better regional distribution and already established business centres, and that it should enforce both High Court and Online Court judgments, save where specialist expertise is required (as for cross-border or arbitral enforcement). This novel proposal met with not a single objection during consultation. However, it is acknowledged that unwinding the legislative tangle which regulates enforcement currently would be no easy task.

Considering my reforms together, it is clear that a revolution is starting to happen. Digitisation, the Online Court and a new approach to face-to-face hearings are its key components. Fixed recoverable costs and case officers, viewed in the aggregate, are also major contributors to an undoubted proportionality revolution. And if they can be pushed through, the coming revolution will also encompass my reforms to regional justice and enforcement.

The digital revolution and the speed of change

In this vein, the traditional pattern of slow, piecemeal court reform by building on a tried and tested model is now being replaced by a series of radical changes, coming in ever quicker succession, each more far-reaching than the last. An obvious explanation is what Harold Wilson once called "the white heat of the technological revolution". Yet there can be no doubt that the digital revolution has left the civil courts behind. There are good and bad reasons for this.

The 'bad reasons' include serious under-investment. It is now belatedly recognised that capital investment in the courts will eventually pay dividends, through greatly reduced running costs. A more serious 'bad reason' is the unfortunate trail of failed IT projects which preceded the recent encouraging success of CE File, DCS and eJudiciary.

A potentially 'good reason' is that access to justice requires courts to be accessible to all their customers rather than only the most advanced, IT literate and computer equipped. This is a very serious argument. National statistics suggest that about 10% of the population have no connection, no computer, or lack the requisite skills. This percentage continues to fall, though anecdotal but persuasive evidence from the voluntary sector suggests that around half of current LiPs are digitally challenged. Proper assistance for this group remains a sine qua non. However, there must come a point when going digital is a better solution than staying on paper until everyone is ready for the change. I think that this point in time has now been reached.

To begin with, there are many impediments to access to justice which are mitigated by technology. Some court users are challenged by having to use English, and digital communication

greatly increases the scope for simultaneous translation. Some have difficulties with articulating their grievances, which may be alleviated by online investigatory methods, such as the stage 1 triage process being developed for the Online Court, and already in use in British Columbia for their Civil Resolution Tribunal. Some have difficulties regardless of the medium of communication used.

Second, there is a fast growing younger generation which finds communication more natural digitally than on paper. Mobile phones and other smart devices have opened up the internet to a multitude who do not use computers, and the new court-based IT is being designed with those devices in mind. Third, an increasing number of civil disputes will arise out of transactions initiated online, making it much easier to present evidence digitally than on paper.

But most importantly, the savings generated from going fully digital, rather than twin-track with a parallel paper-based alternative, may amount to much more than the additional cost of providing support to the digitally challenged. There is no doubt that the necessary support has to be provided, and rigorously tested, before paper is abandoned as an option. HMCTS accepts that, and at my request set up a Litigant in Person Engagement Group peopled by representatives of the voluntary and pro bono sector to provide expert consultative assistance to that end. The wise and dedicated pro bono community is a cautious supporter of the move to digitisation, provided that properly funded assistance for the digitally challenged is made available.

Finally, the current LiP community may not be the correct comparator. The Online Court, which could not function otherwise than digitally, is aimed at providing access to justice not merely to current LiPs, but to that large silent class of ordinary, ordinarily computer literate, people and small businesses for whom litigating in the civil courts about a dispute worth £25,000 or less is simply not proportionate or practicable.

IT apart, the laudable efforts to bring proportionality to bear upon the cost of civil proceedings have, at best, only partially succeeded. It is not that the courts have necessarily taken wrong turnings. It is that these great processes of reform have been insufficient to counter the effects of the ever-increasing complexity of our law upon the accessibility of civil justice. Legal professionals - and sometimes even judges - have the relentless tendency to complicate that which ought to be made more simple. Those representing the taxpayer are disinclined to pay for it all through Legal Aid or endlessly expanding court facilities.

Yet I have confidence that the revolutionaries can win. The essentials of the HMCTS Reform Programme are firmly supported by both the judiciary and the MoJ, albeit at a mixed and inevitably high level of generality. The recommendations in my Final Report have yet to be considered in terms of decision making on implementation, although processes to do so are being put in place. Any reform that does eventuate will have to overcome challenges which may be grouped under the following headings: Technical, Financial, Organisational, and Stakeholder engagement.

Technical

I am no IT expert but my best estimate is that the coming revolution need not, and will not, run into insuperable technical difficulty. The huge improvement in the judicial working environment brought about by eJudiciary is based on a very simple, almost off the shelf, software platform. It enables judges to work on their e-files almost anywhere. But alas case files for civil cases remain largely on paper. CE File in the Rolls Building is showing real promise as the way forward for the online issue of proceedings and management of court files. The relatively slow take-up while it remains voluntary has nothing to do with technical problems. Video hearings are already

part of the architecture. Finally, paperless trials are a reality in the Crown Court. True, most civil trials are much more heavily documented, but coping with them is only a question of capacity and scale, rather than re-inventing the technological wheel, as the Magnum system has demonstrated in some of the largest commercial trials. The Canadians have started to demonstrate that the creation of effective stage 1 triage in an Online Court is not limited by technical constraints. The big challenges lie in the knowledge engineering which precedes the encoding into software.

Financial

Now that government - both in the MoJ and the Treasury - have firmly got the point that capital investment pays financial dividends, I do not see running out of money as a potential deal-breaker for court reform generally, unless of course we are plunged into a new economic crisis. The risk continues that the civil courts will be under-prioritised, as against family and crime. This is not happening at the moment within the Reform Programme, where progress, for example on the civil Online Court, is proceeding apace. Nor will it happen where UK plc is at stake, at it is in the increasingly competitive market for international business litigation. There, again, recent ministerial announcements show an encouraging commitment to keeping our Rolls Building well out in front as by far the largest (and I would say best) business and property court in the world, and a magnet for the choice of English jurisdiction in international commercial transactions.

My concerns lie with the more humble parts of our civil courts, regional civil justice and enforcement in particular. That is where governmental support is yet to be demonstrated or given sufficient emphasis, and where digitisation has yet really to gain momentum. However, at least the commitment to digitise is there and has been funded.

Stakeholder engagement

Another area where the battle has yet finally to be declared won is stakeholder engagement. This means not just approval, but stakeholders taking an active part in, and responsibility for, success. HMCTS has shown unprecedented commitment to engagement, by setting up engagement groups with the judiciary, the pro bono community, and now the legal professions. The extent to which that is reciprocated by stakeholders is variable, and changes over time and subject matter. Let me give some examples, starting with judicial engagement. First, there was an early stage when many District Judges thought that to give active support to the case officer role or the Online Court would be like turkeys voting for Christmas. That perfectly understandable concern has now passed. There will be plenty of real judging for them to do after mindless box-work has been taken off their hands. Furthermore, the stage 1 triage process in the Online Court is recognised by District Judges as offering a real improvement in the process of identifying issues and exchanging documentary evidence.

Secondly, the often painfully slow roll-out of good Wi-Fi connectivity in court buildings has caused many judges to wonder whether digitisation will ever really work. But that is, I fervently hope, a passing phase as the big money starts to roll to fund digitisation. Good Wi-Fi saves time once installed, but its installation in existing buildings continues to be a painstaking process.

Engagement in digitisation by the pro bono community is something which started slowly, but has grown quietly and steadily, and their engagement is now a major plank in the growing confidence that it can be made to work for all, with appropriate assistance.

Perhaps the most uncertain area is professional engagement. A substantial part of my

consultation process was taken up with detailed, frank and often anxious discussion about the implications of the reform revolution for barristers and solicitors. The debate has at all times been polite and respectful and we have all listened to each other. Consultation has produced real changes of position by all concerned. There has also been valuable practical engagement. For example, to assist with digitisation, one City firm has made available its expertise in process mapping free of charge. Many individuals have offered the benefit of their experience and expertise, and I expect that their offers will be taken up. The Law Society and the Bar Council have stated their commitment to engage.

Moreover, by no means are all elements of the coming revolution contentious for professional stakeholders. Digitisation of existing paper based procedures is plainly of benefit to lawyers. I have encountered no resistance to my proposals to reinforce regional justice, and been met with unanimous support for the unification, rationalisation and digitisation of enforcement. The contentious areas are the Online Court, fixed recoverable costs and, to a lesser extent, Case Officers.

I will leave the fixed costs debate to others better versed in the pros and cons than I am. The concerns about the Online Court, the increased use of case officers and a reduction in face-to-face hearings have two underlying themes in common: they are said to threaten a dumbing-down of our civil justice system and the creation of a second class service on purely cost-driven grounds.

Of course, saving cost is an important driver of all these reforms. The government's commitment to the Reform Programme in an age of austerity is dependent upon a perception that the large investment will eventually pay dividends in reduced running costs. I do not accept that the outcome will be a second class service, either generally or in the Online Court. The second class service argument is, in my view, based upon a false comparison between what is proposed and a supposed ideal world in which all civil litigants enjoy the benefits of a Rolls Royce service from lawyers and from the court, at ever increasingly disproportionate cost, both to the participants and to the taxpayer. It is no answer to hanker for the return of widely available Legal Aid when the main problem is not that litigants cannot pay, but rather that the costs and costs risk of litigating about small or moderate claims is plainly a foolhardy investment even for those who can afford it.

In my view the reality is that the current system is one which excludes a silent, but growing, class of ordinary people and small businesses from any real access to civil justice. The true comparison lies between their continuing exclusion and the creation of an affordable civil justice system, using every aspect of modern technology which may be brought to bear for that purpose. Enabling litigants to do more of the work themselves, and empowering more of them to resolve their disputes without recourse to expensive judicial determination, should be the hallmarks of accessible civil justice in the future.

It may mean that, in some areas, lawyers will have less to earn from each case. But if the result is to enable many more people to use the courts, and for that purpose avail themselves of affordable, unbundled, professional legal services where really needed for the vindication of their civil rights, then lawyers should in my view have nothing to fear from this revolution.

Harbour news

After 10 years, we continue to grow. We are currently **recruiting** Associate Directors of Litigation Funding. At the beginning of 2017, Grant Elliott - previously at Deloitte - and Rene Levesley – previously at NatWest and HSBC - joined Harbour as Finance and Compliance Manager respectively.

Third party funding for international arbitration has become a reality in Singapore as the Civil Law (Amendment) Act 2017 came into force on 1st March 2017, together with the Civil Law (Third Party Funding) Regulations 2017 (the Regulations) and an amendment to the professional conduct rules for lawyers in Singapore. For any questions on third party funding in the Asia Pacific region, please contact the team in Hong Kong on +852 3978 2358.

On 14 March 2017, the DIFC Courts formally adopted **the Practice Direction** on third part funding after a public consultation at the beginning of 2017, during which we shared **our feedback**. For any questions on third party funding in the Middle East, please contact Mark King on +44 20 3829 9337.

At the very beginning of April 2017, the Supreme Court of Ireland will hear the appeal brought by Persona Digital Telephone Limited ("Persona") and Sigma Wireless Networks Limited ("Sigma") in relation to the High Court's dismissal of Persona's and Sigma's motion for approval of litigation financing from The Harbour Funds.

The Harbour team continued to travel, meet contacts worldwide and speak about third party funding globally. During March, April and May 2017 they will visit Sydney, Melbourne, Perth, Mainland China and Amsterdam.

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10TH ANNIVERSARY

If you wish to find out more about the information in the materials published, please contact **Silvia Van den Bruel** on +44 (0)20 3829 9336.

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