

**SIR TERENCE ETHERTON MR**

**LAWS, PROCEDURE AND LANGUAGE; CIVIL JUSTICE AND  
CYMRU**

**LEGAL WALES CONFERENCE, 11 OCTOBER 2019**

1. *Bore da*. It is a great pleasure to be invited to speak at the Legal Wales Conference today. I have been told that if I start by mentioning Bishop William Morgan all will be forgiven. As the translator of the first version of the whole Bible into Welsh from Greek and Hebrew, his was a major milestone in the history of the Welsh language. That is a relevant topic to which I will return later.
2. We have plainly reached an important period in the development of Legal Wales. For nearly five hundred years the laws of England and Wales moved together. One set of laws for one jurisdiction. There were, of course, notable exceptions. The Sunday Trading Act 1881, which required pubs to close on Sundays in Wales, was the first of these. A small number of others followed.<sup>1</sup> All this changed in 1998, with Welsh devolution and the Government of Wales Act 1998. The devolution settlement, subsequently built on through the

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<sup>1</sup> Welsh Intermediate Education Act 1889, the Welsh Cemeteries Act 1908, for instance.

Government of Wales Act 2006, the Wales Act 2014, and most recently the Wales Act 2017, has inevitably and rightly had significant consequences for law making relating to Wales. There is a growing body of Welsh Law distinct from English Law and from English and Welsh Law. As the Law Commission noted in 2016 in its final report on the form and accessibility of the law applicable in Wales *‘the law on devolved subjects in the two countries increasingly diverges as their governments introduces new policies.’*<sup>2</sup>

3. As the judicial head of civil justice in England and Wales, having judicial oversight of civil justice, these developments are of particular importance to me. As it happens, I had a special interest in Wales specific law well before I became MR. It was during my chairmanship of the Law Commission of England and Wales that the Law Commission published in 2006 its final report on Renting Homes, with its far-reaching proposals for the renting of residential property. The report did not receive a positive response from Ministers in London but it did from the Welsh Government. Following an updating of the Law Commission’s report to deal with the unique environment of Wales, it has ultimately resulted in the Residential Homes (Wales) Act 2016. I am, unsurprisingly, delighted with this outcome.

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<sup>2</sup> Law Commission, *Form and Accessibility of the Law Applicable in Wales*, (2016, Law Com No 366) at 7.

4. The Law Commission rightly continues to focus on the development of the law in Wales, as is shown by its November 2018 Final Report on Planning Law in Wales. Wales should undoubtedly take advantage of the unique resources and skills of the Law Commission, which is the leading and most effective independent law commission in the world.
  
5. Among other important developments, the Justice in Wales Working Group was established by Ministry of Justice and Wales Office Ministers during the passage of what became the Wales Act 2017. In the officialese blurb, it was established to consider the administrative and practical implications for the justice system of the emerging body of Welsh law made by the National Assembly for Wales and the Welsh Ministers, and to recommend improvements in administrative arrangements and procedures to ensure that Assembly laws are fully embedded in the civil justice system.
  
6. One of the Justice in Wales Working Group's recommendations was the establishment of an Independent Expert Advisory Committee. That committee has the task of ongoing review of the operation of justice in Wales. The Committee draws together experts from the judiciary, the legal sector and operational bodies as well as officials from the Welsh and UK Governments to consider the key issues affecting the delivery of justice in Wales under the framework of the Wales Act 2017 and to make recommendations where

justice can be delivered more effectively. The Committee published its first report in July of this year. Unsurprisingly, the key issues on which the Committee is currently focusing are legal divergence and the accessibility of Welsh laws. It is concerned to ensure that the impact on the justice system of diverging laws and legislation is properly identified, accessibility of Welsh laws is improved and there is continually improving collaboration between the Ministry of Justice and Welsh Government officials.

7. Finally, as you all will know, the Commission on Justice in Wales, chaired by Lord Thomas of Cwmgiedd, is due to report imminently. Much as you might want me to, there is no point, in the invariable style of the Today programme on Radio 4, of speculating up hill and down dale about what it might or might not contain when you can see for yourselves in the very near future what it does in fact say.
  
8. I will return later to my role in relation to civil justice policy. I want now to talk about my judicial oversight role for the operational delivery of civil justice, particularly at the local level. My focus on local justice in the County Court may seem strange. At the end of the day, however, the overwhelming majority of civil disputes are County Court disputes. It is not always appreciated that only some 7% of cases have a value above £25,000 and more than half of the remainder are under £10,000. Translated into approximate

figures for 2018, that means that, of the 173,000 or so civil cases allocated to a court track, about 92,000 were allocated to the small claims track for cases under £10,000 and about a further 69,000 were allocated to the fast track for claims between £10,000 - £25,000.

9. I must emphasise that I am not underestimating the importance of cases above £25,000, including those heard in the Business and Property Courts, such as Cardiff. The work done by the B&PCs and its judges is essential to the economic wellbeing of our commercial enterprises, whether undertaken by individuals or corporations, and to our international standing. It is, nevertheless, critical to realise that, for the overwhelming majority of the members of our community who have a legal problem that can only be resolved by the court, their interest is in the efficient, cost effective and competent disposal of claims under £25,000, and mostly under £10,000.

10. Until relatively recently, civil justice was always the very poor relation of criminal and family justice when it came to resources, organisation and policy. Apart from the greater political profile of crime and family cases, which still persists, there were structural reasons for this. Leaving aside for the moment family cases, prime responsibility for the oversight of local justice lay with the High Court Judge Circuit Presiders, who reported to the Senior Presiding Judge. In practice, the principal interest of all of them was crime, particularly

criminal cases on the Circuit. So far as concerns family, the creation of the single Family Court, and the energetic leadership of the last President of the Family Division, Sir James Munby, resulted, and has continued to result, in the diversion of much local civil resource into family. There was no one at the top table who was effectively able to oppose these twin constraints on local civil justice.

11. When I became Master of the Rolls in 2016 I concluded that to improve the way in which the head of civil justice could play a more effective role in relation to the operation of local civil justice it was necessary to create a more effective support and reporting structure. With HMCTS reform underway, as well as the growth in Welsh law, its establishment was imperative.

12. The way in which this now works is as follows. At its heart is a chain of accounting and responsibility from the district judges at the local level, through the Designated Civil Judges, through one of the two Presiders of each Circuit to be designated the Civil Presider, and from there to the Deputy Head of Civil Justice, currently Lord Justice Coulson, to myself. All relevant information is, course, shared with the Senior Presiding Judge and the Deputy SPJ. There is now a team of judges to support the DH CJ, called the Civil Executive Team. In addition to Coulson LJ, it currently comprises Lady Justice Simler, Mr Justice Waksman, HHJ Bird, and DJ Tim Jenkins. Finally,

at the top of this accounting line, I set up a Judicial Civil Justice Board, which I chair, and on which sit the SPJ, the deputy SPJ, the President of the Queen's Bench Division, the Chancellor, the Senior President of Tribunals, the DHCJ and the members of the Civil Executive Team.

13. In this way, for the first time, not only is there a coherent chain for passing information about civil justice from the locality to the centre but civil justice has an effective and properly briefed person, the Master of the Rolls, at the head table – the Judicial Executive Board, which is effectively the cabinet for the judiciary presided over by the Lord Chief Justice. The MR can also, if and when necessary, engage with the highest levels in HMCTS and MoJ, including Ministers. There is, through the JCJB, effective coordination between all the senior judges involved in civil justice. This structure is intended to address, from a judicial perspective, oversight of both ongoing performance of civil justice – to ensure that business as usual is carried out properly – and reform. Its aim is to ensure that decisions made concerning the operation of the justice system are as responsive as possible to local needs, while pursuing a coherent national strategy for both Wales and for England. If there is an issue with local civil justice, particular to Wales, then this reporting system – from the DCJ, through the Civil Presider, to the DHCJ and then myself - should enable it to be considered and addressed at the appropriate level and, if necessary, at the

top level within the judiciary, and taken up with HMCTS and the MoJ, again at the appropriate level.

14. Before leaving local justice I want to say something about the B&PC in Cardiff, not overlooking that the B&PC judges can sit elsewhere in Wales as required. When I was Chancellor of the High Court, the head of the Chancery Division, between 2013-2016, I made a number of visits to Cardiff. I said then, and I repeat now, that there is no reason why all local cases, whatever their size, complexity or length, cannot be heard in Wales. I, and now the present Chancellor Sir Geoffrey Vos and the current Civil President, Mr Justice Picken, have made clear that, if necessary, a High Court judge can be deployed in Wales, to hear a case whatever its length. I do hope, therefore, that more of the large cases with a Welsh background are heard here and not in London or elsewhere.

15. As many of you will know, it has been my own intention for some time to bring the CA (civil) to sit in Wales on some local appeals but I have so far been frustrated by events beyond my control, most recently a clash with a special session of the House of Commons Justice Committee on access to justice and the court reform programme. As a result of that, I have taken steps to re-schedule the sitting of the CA in Wales for early next year when I intend



to hear appeals with a member of the CA with Welsh connections and the Civil Presider for the Welsh Circuit.

16. Operational justice is given effect through procedural rules. They are made, for civil justice, by the Civil Procedure Rule Committee. I am the statutory chair of the Committee but, in reality, the chairmanship is conducted by the DHCJ, the very able Coulson LJ, to whom I am so very grateful for all that he does for civil justice. The Rule Committee was established under the Civil Procedure Act 1997 to make rules of court for the civil division of the Court of Appeal, the High Court and the County Court. It now has a specifically designated Welsh member, HHJ Milwyn Jarman QC, a highly respected Welsh judge who will be well known to you. Given the impact of Welsh legislation on the CPR, such expertise is as essential as it is beneficial.

17. CPR 1.5, which came into force on October 1 2018, makes specific provision, giving effect to the Welsh Language (Wales) Measure Act 2011 and the Welsh Language Act 1993, that the Welsh language has official status in Wales and that in any legal proceedings in Wales the Welsh language may be used by any person who desires to use it and that the parties are required to assist the court to put into effect those principles. This is reinforced by the recently updated Practice Direction on the use of the Welsh Language in the civil courts in or having a connection with Wales.

18. In another area, the CPRC is undertaking ongoing work on reforms to CPR Pt 55, concerning Possession claims, to reflect developments in the Renting Home (Wales) Act 2016, to ensure that the CPR are properly able to deliver justice effectively in both Wales and England.

19. There are, of course, many issues concerning the delivery of civil justice in Wales, as there are in England. Above all, we need to ensure that there are sufficient numbers of local judges to deal in an efficient and timely way with local cases. Although apparently not as acute in Wales as elsewhere, there are not enough of them. We are all only too well aware of this issue and of the daily pressures on the front line judges dealing with pressing and difficult cases. Across the country as a whole, there is a particular shortage of DJs and DDJs. The JEB, HMCTS and the MoJ are attempting to improve this unsatisfactory position. It is more important than ever before that the best solicitors and barristers apply to be DDJs, DJs, Recorders, Circuit Judges and High Court judges. Justice needs to draw on the experience of wider society.

20. Before I turn to the court reform programme, I want to take up the subject of civil justice policy and, in particular, my role as chair of the Civil Justice Council. The CJC is an advisory body established under the Civil Procedure Act 1997. Its brief is overseeing and coordinating the modernisation of the

civil justice system. The Council meets at least four times a year to discuss projects, to consider consultation papers, to provide advice to the Lord Chancellor, the judiciary and the Civil Procedure Rule Committee on the effectiveness of aspects of the civil justice system, and make recommendations to test, review or conduct research into specific areas. It currently comprises twenty-one members with a wide range of expertise, including the lay advice sector, business, insurance, ADR and civil justice policy. In the past 12 months the CJC has published or considered papers on LiPs, access to justice, LASPO, clinical negligence, low value PI claims, ADR, boundary disputes, anti-social behaviour injunctions and the treatment of vulnerable parties and witnesses in civil proceedings. It held a LiP national forum in December 2018, attended by some 200 delegates. Its report on ADR led to the setting up of the Judicial Civil Justice ADR Liaison Committee, as a sub-committee of the Judges' Council, to keep the judiciary in touch with the latest developments in ADR.

21. Historically, the CJC did not have a member who was specifically appointed to represent Welsh interests, although His Honour Judge Graham Jones, a very well-respected and experienced former Designated Civil Judge for Wales was a member for a considerable period of time. With the growth in Welsh law and increasing divergence, the absence of expertise in Welsh law and its impact on the delivery of civil justice was increasingly untenable. To resolve

that, and ensure that this advisory aspect of civil justice is as effective as the new civil structure, which I have just mentioned, I ensured that the CJC's membership should be expanded. In January this year Rhodri Williams QC was appointed as the first member specifically to represent the interests of civil justice in Wales on the Council. His membership and contributions will ensure that the Council's work, and particularly its modernisation proposals, are appropriate for the developing needs of local justice in Wales.

22. I turn to the HMCTS reform programme so far as it concerns civil justice. It is ambitious in its aim and scope. Its aim is to deliver a more efficient, effective and highly performing civil justice system. There is nothing new in that, similar aims have informed previous reforms. Its scope differs. Previous reforms have focused on procedure. The present reforms are centred on the use of digital technology. Efficiency, cost effectiveness and, above all, access to justice depend on harnessing the benefit of technology and that is what underlies the court reform programme.

23. The first point to note is that there is no intention to create a single online court covering civil, family and tribunals disputes. That was an early intention of the senior judiciary. It was, however, rejected by the government in 2017. The reform programme has gone forward as a jurisdiction specific one, for civil, family and tribunals separately. . So far as civil justice is concerned, the

manner in which it has done has been through a number of civil procedure pilot projects. The most important of these are focused on the Online Civil Money Claims project (the OCMC). This was established in August 2016. It is an online platform through which civil claims can be issued and managed. It is currently limited to claims up to £10,000. If all goes well, the present hope and expectation is to extend it to £25,000 in due course. It will then cover the vast majority of civil claims, and specifically those currently within the small claims track and the fast track.

24. OCMC's development has required the effective co-operation of HMCTS and a number of other bodies. A Civil Judicial Engagement Group (the Civil JEG), with a widely drawn judicial membership, facilitates discussions between HMCTS and the judiciary. Most significantly, the CPRC established a sub-committee to consider rule changes necessary to the CPR and its Practice Directions to enable the OCMC to work lawfully. Its work has been essential.

25. Another critical committee, which I set up under the chairmanship of Birss J, the Judicial Digital Steering Committee, has the very time consuming and unenviable task of giving guidance to the software coders and HMCTS on a proper court process. The overall purpose of the JDSC is to provide judicial leadership for the digital aspects of the Reform Programme in the civil jurisdiction, including providing judicial leadership for the OCMC pilot,

giving expert advice (including drafting guidance) on the procedure and rules aspects, providing assistance to HMCTS in relation to online projects, and contributing to HMCTS's understanding of the justice, lay advice, legal and tech professions' perspective when considering and designing digital systems.

26.I want to highlight how the OCMC is already demonstrating that it can improve access to justice. From March last year OCMC has been available for litigants-in-person to use on a voluntary basis as a means to issue their claims online. As at 12 September 2019, 90,347 claims had been voluntarily filed by litigants-in-person. 22,000 defences had been filed online. 5,413 admissions or part-admissions had been filed online. A standard online settlement agreement can be used. So far 289 have been reached. A critical change is the intention that mediation will be on an opt-out rather than an opt-in basis. This is currently being piloted on a geographically limited basis for cases under £300. In effect, mediation will be compulsory unless the litigant makes a conscious decision to opt out. Plainly, for an opt-out mediation scheme to work, it will need considerable resources devoted to it. Such resources will be money well spent in terms of securing effective early and consensual resolutions to disputes for litigants, and also in terms of ensuring more proportionate use of resources targeted on those claims that have to progress to trial and judgment.

27. In addition to the sheer numbers using the OCMC, data has been obtained on what users think about the new process. It is apparent that satisfaction is high. Of 8269 user responses, there is an 88% satisfaction rate. One user is reported to have said that the OCMC is “Excellent – making justice accessible”.

28. The present pilot is expected to finish in June 2020, that is to say it is hoped and intended that OCMC will by then be fully tested and operational. Before then there will be fully tested online Direction Questionnaires, the online filing of evidence and submissions, and, in a small number of selected pilot courts, legal advisers giving case management directions in claims under £300 and claims under £300 being determined without an oral hearing.

29. A number of broad concerns have been raised by a variety of commentators about digitisation, particularly in relation to open justice and access to justice. The major ones were put to the LCJ, the SPT and me by the House of Commons Justice Committee on 11 July this year. It is clear that in certain respects there has been considerable misunderstanding about what is happening and what is intended. The catchphrase, Online Court, has given rise to some of this. As I have said, there is no such thing as an Online Court. The expression has been used as a convenient catchphrase to describe the digitisation of certain court processes, so far limited to a pilot scheme for

money claims up to £10,000. I am not aware of any intention that there should be some kind of civil court trial conducted by an online exchange of messages between a judge and the parties. If there is a trial, the judge and the parties will always be visible to each other, either because they are all together in a physical building in a court room, as at present, or because it is a case which is authorised in procedural rules, yet to be made (other than for one of the pilots), to be conducted as a full video hearing. At present, the only pilot that is to be conducted on full video hearings is for certain applications in a particular court centre in respect of claims under £300. There is also, as I have mentioned, a pilot for hearing claims under £300 without a hearing, something which at present can already happen under the CPR for claims under £10,000 if both parties and the judge agree. What is absolutely clear is that the decision on all those matters will not be dictated by the MoJ or HMCTS but will depend upon procedural rules to be made by an independent body, whether that be the CPRC or some other body, on which the judiciary will be represented, and ultimately a matter within the discretion of the judge hearing the case in question.

30. The question of who should make the rules for the new digital court processes has been under consideration for some time. At an early stage, the suggestion was made that there should be a new body to make the online court rules, the so-called Online Procedure Rule Committee, which would have the power to



make online procedure rules for civil, family and tribunals proceedings. A new body was felt necessary to ensure simplicity and economy in the rules. Provision for a new committee was originally set out in the Prison and Courts Bill 2017 which fell with the general election. More recently provision was made for it in the Courts and Tribunals (Online Procedure) Bill 2019. In the event, the rules for the OCMC pilots are currently being made by the CPRC, which has ably adapted and learned how to make rules for a digital system. I explained in a lecture in Oxford earlier this year how, in a digitised process, many of the rules are effectively embodied in the software which produces the image and gives the instruction on the screen to the litigant. The consequence is that digitisation has the potential to make procedure more simple, intelligible and accessible than the procedure rules for conventional litigation processes.

31. Another frequently mentioned concern, has been the preservation of the principle of open justice. The concern appears to have been based on a misconception of how a trial for OCMC would be conducted, that it would in some way be a process to which no one could have access but the parties. Everyone involved in the digitisation of court processes has the intention that the principle of open justice should be maintained. As I have said, if there is to be a trial (and subject to any rules which may be made in due course allowing for determination of certain small cases on the papers, subject to the

discretion of the judge hearing the case), it will either be held in a physical court as at present or by video hearing. In the latter case, it ought to be perfectly simple to arrange for the viewing by the public of what appears on the screen of the judge and the parties, either by a large screen in the court building or in booths or in some other way.

32. Finally, on the issue of concerns about digitisation of court processes, it has always been the intention that, where individuals are unable to use the online system, currently limited to OCMC, either due to lack of access to computers or for other reasons, the option will remain for them to use the present paper-based process. I am assured too that facilities are also being provided through a range of options to assist people in using OCMC where they lack the confidence or skill to do so.

33. For all those reasons, so far as I am concerned, the digitisation of civil court processes, currently limited to money claims under £10,000, far from restricting or compromising access to justice, is a colossal facilitation of access to justice, which the public have enthusiastically embraced as shown by the numbers in which they have both made and defended claims online wholly voluntarily in the present public pilot.

34. This takes me back to something I referred to earlier: language, which is here clearly the *eliffant yn yr ystafell*, and returns me at last to Bishop William

Morgan. An obvious and important lacuna in OCMC at present is the absence of the Welsh language on the screen. HMCTS has a Welsh language policy, which properly treats the Welsh and English languages as equal. It also has a Welsh Language Unit, which is committed to the principle that the reform programme must ensure that all civil, family and tribunal services it provides, for instance court forms, will be available in both languages. It has already started to roll-out Welsh online services for those parts of the reform programme that are live, such as Online Probate. The present intention is that by summer 2020 OCMC will be available in both Welsh and English. You may say that we will then have achieved digitally, but on a much more modest scale, what Bishop Morgan did in the 16<sup>th</sup> century.

35. This brings me on to a related matter, arising out of the Master of the Rolls' historic functions regarding national records and archives. That role is now represented by the Master of the Rolls' statutory position as chair of the Advisory Council on National Records and Archives. That is an independent body established by the Public Records Act 1958, which advises the Secretary of State for Digital, Culture, Media and Sport on issues relating to access to public records.

36. One of the recommendations of the Independent Expert Advisory Committee for ongoing review of the operation of justice in Wales is that further work

should be undertaken to improve the accessibility of Welsh law and, in particular, to collaborate with the National Archives. There are currently two strands to this. TNA, through its digital service “legislation.gov.uk”, currently puts online and keeps up to date all UK primary legislation and an increasing number of SIs. It also publishes both Welsh and English language versions of legislation passed by the Welsh Assembly. That legislation is sent to TNA by the Welsh Assembly for official publication in print and online on legislation.gov.uk. Plans are presently under consideration for the Welsh Government, working with TNA, to start creating up to date versions of legislation for Wales in the Welsh language. This will in turn help the Welsh Government improve the Law Wales website. The second strand is for TNA to consider the viability of better dedicated digital search facilities in respect of Welsh law embodied in Welsh legislation. I have made it clear to TNA that I am happy to assist in any way I can to promote these initiatives

37. I return to the issue of the distinct divergence between Welsh and English law. Housing and planning, education, stamp duty land tax and land transaction tax are all areas where there is such divergence. Further divergence may well come through codification of Welsh law. It may also continue to evolve as the law in England itself diverges through reforms enacted by the UK Parliament. The Expert Advisory Committee recognises that in this connection the Wales Training Committee of the Judicial College has an

important role to play in the continuing education and training of judges in Welsh law and practice.

38. In addition, we must ensure that in digitising the civil court processes account is taken of those divergences in law. Here we see the link between the reform programme, the CPRC and the OCMC. I have already referred to the CPRC's consideration of the need to change the CPR in respect of possession claims, in the light of developments in Wales via the Renting Homes (Wales) Act 2016. The Expert Committee's report has also observed that, as a result of the 2016 Act, the different pathway for landlords claiming possession in Wales compared to England should be reflected in the HMCTS' online portal for possession claims. If OCMC, develops to cover possession claims, it too will need to ensure that there is a digital process that complies with the requirements of the Welsh process. There will then be two digital processes via a single online civil justice system. It will be local and it will be national, reflecting the overall national digitisation reform programme and also what is unique to Wales.

39. Finally, I recognise that there is a great deal of change that has already taken place and will accelerate in the future affecting Legal Wales. I hope and intend that I and those who support me in my various responsibilities as MR will be up to the task of ensuring that civil justice is kept abreast of those changes, so

far as lies within my own power. I hope and intend that the various structures now in place, which I have described, to ensure that the senior judiciary are properly informed of the needs of court users in Wales, will assist in securing that civil justice in Wales is in the 21<sup>st</sup> century as accessible as Bishop Morgan's Bible translation was and continues to be.

40.I wish the conference every success. *Diolch.*