

IMPLICATIONS OF BREXIT AND COVID-19 FOR UK LAW
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INTRODUCTION

1. It is a great pleasure for me to speak to you today, albeit through virtual means. I have been asked to speak about the implications of Brexit and COVID 19 for the UK's law and its legal system. These are large subjects, with significant legal consequences that are still unfolding and will continue to do so for years to come. Needless to say, in the time available I will have to focus on specific topics. So in relation to Brexit I will zero in on (i) the role of retained EU law and (ii) how our departure from the EU might strengthen our relationships with other common law jurisdictions. I will then turn to discuss the immediate impacts of COVID-19 on the operation of the UK's legal system, before considering some of the longer term opportunities it provides in respect of access to justice.

1. THE IMPLICATIONS OF BREXIT FOR UK LAW

Introductory comments

2. EU law has been deeply interwoven into the fabric of the UK's law for decades, and the UK's departure from the EU was always going to have a significant impact on the country's legal system. Since the UK's referendum on whether it should remain part of the EU took place on 23 June 2016, much ink has been spilled on questions of substance and procedure.
3. The various negotiations and agreements between the UK and EU have understandably received the majority of international attention during the last few years. The UK officially left the EU on 31 January 2020 and, from this point onwards, ceased to be a part of the EU's political institutions. However, the UK generally remained subject to EU law and the decisions of the

* I am grateful to my judicial assistant, Anisa Kassamali, for her help in preparing this paper.

European Court of Justice (or “the CJEU”) until the expiry of the Transition Period, which ended on 31 December 2020.

4. We are now a few months out of the Transition Period, and I will direct my attention to some of the implications of the Brexit arrangements for UK law going forward. I will concentrate the first part of my discussion on the treatment of retained EU law, particularly decisions from the CJEU, in UK law. Secondly, I will comment briefly on the impact that Brexit might have on the UK’s relationships with other common law jurisdictions such as New Zealand.

Role of retained EU law, particularly CJEU decisions

5. Following its departure from the European Union, the UK is technically no longer subject to EU law. However, the reality of the situation is that a large portion of the EU law that previously applied in the UK is effectively still in force in the form of ‘retained EU law’. This is a new category of domestic law created by sections 2 to 4 of the European Union (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement) Act 2020. The old procedure for references to be made to the CJEU has gone (save only for its retention to a very limited degree in relation to certain defined areas such as citizens’ rights and the Northern Ireland Protocol). Retained EU law is, broadly speaking, a snapshot of the EU law that was in force and applicable in the UK immediately before the end of the Transition Period. Among other things, this includes EU-derived domestic legislation, directly applicable EU legislation, and directly effective EU rights from non-legislative sources such as a right stemming directly from an EU Treaty which has been recognised in the CJEU’s case law. Treaty provisions continue to trump pre-Brexit conflicting legislation, save where the Treaty provisions have been disapplied by the Brexit legislation such as in relation to free movement of goods and persons. This means that several important Treaty provisions, such as that which prescribes equal pay for men and women, continue to have this form of superior status. But post-Brexit statutes can override them.
6. CJEU decisions handed down before the end of the Transition Period thus form part of the UK’s domestic law as part of the body of retained EU law. The status of these decisions in a post-Brexit UK has already been subject to significant change in the legislation.

7. EU (Withdrawal) Act 2018 in its original form proposed that these retained decisions should be treated as though they had been made by domestic 'courts of last resort'. This meant that they had to be treated as if they were a decision of the UK Supreme Court and, in relation to criminal matters in Scotland, a decision of the High Court of Justiciary. The Supreme Court and High Court of Justiciary would be able to depart from them, subject to the usual rules allowing for this in limited circumstances, but the decisions would have been binding on all other courts. The Supreme Court or the High Court of Justiciary had to "*apply the same test as it would apply in deciding whether to depart from its own case law*" (section 6(5) EU (Withdrawal) Act 2018 as enacted).
8. This position was amended by the European Union (Withdrawal Agreement Act) 2020. Section 26(1) of the 2020 Act inserted a new section 6(5A) into the 2018 Act. This gave Ministers a time-limited power to make regulations providing for the "*extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law*" (section 6(5A)(b)) and "*the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law*" (section 6(5A)(c)). Any such regulations had to be made before the end of the Transition Period.
9. Between July and August 2020, the Government consulted on whether it should use this power and extend the ability to depart from retained EU case law to courts other than the UK Supreme Court and the High Court of Justiciary. Its consultation document set out two options which it considered would "*be arguably capable of achieving a balance, between the benefits of extending the number of courts and tribunals with the power to depart from retained EU case law, whilst mitigating the risks to legal clarity and certainty*".¹ The first option was to extend the ability to the Court of Appeal in England and Wales, and equivalent courts in other UK jurisdictions. The second option was, in addition, to extend this ability to the High Court in England and Wales,

¹ Ministry of Justice, *Retained EU Case Law: Consultation on the departure from retained EU case law by UK courts and tribunals* (2 July 2020) (web accessible version) available at <https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals> accessed on 31 March 2021, pp.17 – 18.

and its closest equivalents in other UK jurisdictions. Of the 75 consultation responses that were submitted, the Government said that 56% of respondents were not in favour of extending the power to depart from retained EU case law to courts and tribunals beyond the UK Supreme Court and the High Court of Justiciary in Scotland.²

10. The Government published its consultation response in October 2020, deciding to extend the power as far as the Court of Appeal in England and Wales and equivalent courts in the other jurisdictions.³ The test that these courts have to apply when determining whether to depart from CJEU decisions is the same one that we in the UK Supreme Court apply when deciding whether to depart from our own case law, which is hedged about and intended to be restrictive but is formally framed as ‘whether it appears right to do so’.⁴ The Government also sought to explain that, by restricting the power to the two levels of appeal court, it would “*minimise the risk, identified in the consultation responses, of adverse impacts which may arise out of any legal uncertainty resulting from additional litigation being brought, and the risk of divergence of approach between courts across the UK*”.⁵ It is hoped that allowing the Court of Appeal to diverge from CJEU decisions will mean that the Supreme Court will not be overburdened with the initial task of making appropriate adjustments in the new Brexit environment across the whole legal field.
11. The Lord Chancellor accordingly made appropriate regulations - the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 - which came into force immediately after the end of the Transition Period.
12. Following these developments, the position in post-Brexit UK is that the UK Supreme Court, the Scottish High Court of Justiciary, and the Court of Appeal in England and Wales (as well as its

² House of Commons Library, *Proposal to extend the power of the UK courts to depart from retained EU case law* (November 2020) (web accessible version) available at <https://lordslibrary.parliament.uk/proposal-to-extend-the-power-of-the-uk-courts-to-depart-from-retained-eu-case-law/> accessed on 31 March 2021.

³ Ministry of Justice, *Government response to consultation: Response to the consultation on the departure from retained EU case law by UK courts and tribunals* (October 2020) (web accessible version) available at <https://www.gov.uk/government/consultations/departure-from-retained-eu-case-law-by-uk-courts-and-tribunals> accessed on 31 March 2021.

⁴ *Ibid* (n.3), p.36.

⁵ *Ibid* (n.3), p.5.

equivalents in the other jurisdictions) are not bound by retained CJEU decisions. They can depart from these decisions where it appears right to do so. Moreover, the Court of Appeal in England and Wales (and its equivalents) can depart from their own decisions and those of the higher courts in relation to retained EU law which were handed down before the end of the Transition Period.

13. These provisions have generated significant comment at all stages of the process, including in parliamentary debates. There have been questions about whether Ministers should have the power of designation of relevant courts by subordinate legislation and also about the impact on legal certainty, given how far EU law has been woven into domestic law.⁶
14. The Government's consultation response acknowledged that some of the respondents to its consultation had raised the possibility that the extension of the power to disregard retained EU law decisions beyond the Supreme Court might contribute to legal uncertainty. Its answer was that the limited extension of the power would sufficiently address these concerns and "*strike the appropriate balance between the need for legal certainty and for timely departure from retained EU law*".⁷
15. In the common law world, the doctrine of *stare decisis* is important. It has been a guiding principle in our systems from the very beginning and mitigates the risk of inconsistent decision making and law. Its significance is unchanged since comments made by Justice Reed of the US Supreme Court back in 1938 where he stated that "*the doctrine of stare decisis has a philosophic necessity in the common law system which is not found elsewhere...in the philosophy of the common law jurisprudence...[t]here is no law but the judicial decisions themselves. The judge who decides a case fashions the law as he decides. His decision, at the moment of its pronouncement, joins the mass of decisions which constitute the common law...Right or wrong,*

⁶ See, for instance, David Feldman, *Departing from Retained UK Case law*, UK Const.L.Blog (11 January 2021) available at <https://ukconstitutionallaw.org/2021/01/11/david-feldman-departing-from-retained-eu-case-law/> accessed on 31 March 2021.

⁷ Consultation response (n.3), p.36.

*they are the law. Accordingly, the common law judge who does not follow stare decisis does more than to differ with his predecessors; he quite literally changes the law.”*⁸

16. However, the UK's approach to retained EU law effectively creates an exception to the doctrine. Courts which have the power to depart from these decisions are free to decide whether to follow judgments on retained EU law made on or before 31 December 2020 not only by the CJEU, but also by themselves, and particularly significantly, by the UK Supreme Court. The Court of Appeal is thus theoretically able to depart from the Supreme Court's decisions on retained EU law which were handed down before the end of the Transition Period. Albeit only in limited circumstances, this removes some of the protections through which our system has traditionally ensured legal certainty in the sphere of decision making.
17. Is it appropriate to introduce this element of legal uncertainty in the circumstances? The Government's position is that this approach will help the UK depart from retained EU law in a “*timely*” manner.⁹ Professor David Feldman considers the question from a rule of law perspective and reaches a different conclusion. Whilst the highest courts should retain the power to depart from their own judgments, this is in order to allow them to correct their mistakes and adjust the law to new circumstances. Their decisions cannot otherwise be reviewed and so, if they do not depart from them themselves, they will remain ‘bad’ law. The slight legal uncertainty their power of revision creates is justified on the basis that it offers a solution to this problem. However, Feldman argues that the position is not the same in respect of lower courts. He says that “*judgments of lower courts, by contrast, are usually subject to review or appeal, so the rule-of-law arguments for allowing them to depart from their own case law is less persuasive, and there can rarely, if ever, be any justification for allowing them to depart from case law of the apex court (although that case law needs to be interpreted like any other).*”¹⁰

⁸ Cited in Charles J. Cooper, “Stare Decisis: Precedent and Principle in Constitutional Adjudication”, 73 Cornell L. Rev. 401 (1988), 406.

⁹ Consultation response (n.3), p.36.

¹⁰ Feldman (n.6).

18. In practice, it is perhaps unlikely that we will start to see the Court of Appeal routinely overturning Supreme Court decisions on retained EU law. Feldman goes so far as to say that *“departing from a Supreme Court decision would be a step too far from traditional respect for judicial hierarchies. It will virtually always be more appropriate to follow the earlier decision, even if thought to be wrong, and leave the Supreme Court to decide whether to overrule itself”*. Whilst this might be true, we are nonetheless in a different situation where we are relying on judicial traditions rather than established doctrine in this area.
19. A hugely complicating factor, which undoubtedly will contribute to legal uncertainty, is a new interpretive structure that has been introduced in relation to retained EU legislation under section 6 of the 2018 Act. Where it remains in a form which is unmodified by domestic legislation, it will be interpreted in accordance with retained EU caselaw and retained principles and having regard to EU competencies. But where it has been modified by domestic law post-Brexit, it is to be interpreted as if unmodified so long as that *“is consistent with the intention of the modifications”* (section 6(6)), and otherwise according to domestic canons of interpretation. This framework contains many points of uncertainty, as UK law gradually peels away from EU legal structures on which in many areas it has been based. For instance, what will count as modification by domestic law? It *“includes”* but is not limited to *“amend, repeal or revoke”* (section 20 of the 2018 Act). What if the domestic law supplements the existing regime, is that a modification? And how should one identify what counts as interpretation which is consistent with the intention of the modifications?
20. A final issue to mention which will affect the Supreme Court is, to what extent should domestic courts have regard to and treat as persuasive CJEU judgments handed down post-Brexit which interpret legislative instruments which are part of the corpus of retained EU law? This is an area which has scope to be politically charged and the court will wish to be able to show that it is following the directions given in the legislation. Domestic courts are not bound by post-Brexit CJEU decisions. According to section 6 of the 2018 Act, they may have regard to such caselaw *“so far as it is relevant to any matter before the court or tribunal”*. That is quite an open-ended

test. It remains to be seen how it is applied in circumstances where the CJEU and the domestic courts are interpreting the same legislative text but in the context of very different wider legal orders. The UK courts may find themselves looking at the caselaw of the EFTA (European Free Trade Area) Court which interprets the European Economic Area agreement, which replicates many provisions of the EU Treaties, and does so by looking at CJEU jurisprudence but “aiming off” to the extent necessary to take account of the different treaty architecture applicable in relation to the EFTA states.¹¹

Relationships between common law jurisdictions

21. The UK's departure from the EU might have separate and positive implications for our relationship with other common law jurisdictions, such as New Zealand. The UK has a strong common law tradition dating back to the Middle Ages. In fact, during the medieval period, judicial decisions were generally seen as being on par with statutes as a source of law, with the latter being treated as being in effect part of the common law.¹² The balance between statute and the common law has since shifted, but case law still plays a very important role in UK law. This can be seen across almost all areas of the law. To take one example, Professor Alison Young writes that it is hard to deny its particularly crucial role in the development of English public law and that this is so pronounced that English lawyers tend to mark developments in public law through references to famous case names such as *Anisminic*, *Privacy International*, *Wednesbury* and *Miller*.¹³ Although a major project for public law in the UK since it joined the European Economic Community was been the integration of domestic law and EU law, and to that was added from 2000 the integration of domestic law and the law of the European Convention on Human Rights, domestic public law has also developed. There are potential contact-points with

¹¹ See C. Baudenbacher, *The Fundamental Principles of EEA Law* (2017).

¹² Philip Sales, *Modern Statutory Interpretation*, *Statute Law Review*, Volume 38, Issue 2, June 2017, pp125 – 132.

¹³ Alison Young, ‘Public Law Cases and the Common Law: A Unique Relationship?’ in Elizabeth Fisher, Jeff King, and Alison Young (eds.), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford University Press, 2020).

other Commonwealth jurisdictions both in the areas of integration of human rights norms and development of the common law. New Zealand is a particularly close cousin, of course.

22. The starting point is that the UK already enjoys a strong relationship with the rest of the common law world. Our shared legal heritage means that our courts frequently refer to each other's jurisprudence when considering how to approach similar questions in our own jurisdictions. Of the total 671 decisions from foreign courts that the UK's Supreme Court cited between 2009 and 2017, cases from New Zealand, South Africa and Ireland together accounted for 14%. 73% of these were from other common law jurisdictions: Canada, the United States and Australia.¹⁴
23. Similarly, UK jurisprudence is often cited by courts in other common law jurisdictions. In Australia and Ireland, the UK's decisions are cited more often than those of other foreign courts. They are also frequently cited in judgments emerging from New Zealand, Canada and India.¹⁵
24. Our strong relationships will not be weakened by the UK's departure from the EU. There is good reason to think that these connections might in fact be strengthened. It has been suggested that UK courts might now increasingly prefer recourse to our non-European rather than European counterparts, as we have retained our legal similarities with these jurisdictions.¹⁶
25. More specifically, commentators have already started to identify particular common law doctrines which might now regain importance in the UK's ever evolving body of law. For instance, Aidan Robertson QC has suggested that the common law doctrine of restraint of trade may be applied to restrictive covenants in agreements between undertakings. He explains that this was previously prevented by the application of EU competition law in the UK.¹⁷ In the coming years, we may well see UK law developing in ways that diverge from our European

¹⁴ Dr Hélène Tyrrell, *Human Rights in the UK and the Influence of Foreign Jurisprudence* (Hart Publishing, 2018).

¹⁵ Tania Groppi and Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing, 2013).

¹⁶ Written evidence from Dr Hélène Tyrrell (BED0015) to HL European Union Committee (2018) (web accessible version) available at

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-enforcement-and-dispute-resolution/written/78851.html> accessed on 31 March 2021.

¹⁷ Aidan Robertson QC, *The common law doctrine of restraint of trade – will it rise up again unshackled by Brexit and reformed by the Supreme Court?* E.C.L.R. 2021, 42(2), 62-64.

counterparts and, in doing so, finding renewed vigour and inspiration in our common common law heritage.

2. THE IMPLICATIONS OF COVID-19 FOR UK LAW

26. The COVID-19 pandemic has shaped the trajectory of the past year across the world, causing unforeseen tragedies, as well as economic and social difficulties for many. It has fundamentally changed the way in which we have lived and worked, with technology taking an unprecedented role in our daily lives in circumstances where we have had to keep our physical distance from one another.
27. There has been much discussion about the impact that COVID-19 has had on UK law and the country's legal systems. I will focus today on some of the short and long term implications of the pandemic on our legal systems. I will briefly discuss the immediate impacts of COVID-19 on the operation of the UK's legal system, before considering some of the longer term opportunities it provides in respect of access to justice.

Short term implications

28. It is fair to say that the short term consequences of COVID-19 on the UK's legal system do not give cause for much optimism. Court waiting lists, which were already long, have increased as a result of the pandemic. The Law Society of England and Wales reported in September 2020 that the backlog of cases in family courts was up by 23% (to 52,391) and in criminal courts was up by 26% (to 564,249).¹⁸ In March 2021, the House of Lords' Constitution Committee released a report entitled 'COVID-19 and the Courts'. In respect of the criminal courts, it found that "*the backlog of cases in the Crown Court, unacceptably high before the pandemic, has now reached*

¹⁸ The Law Society, 'Law under lockdown: COVID-19 measures, access to justice and vulnerable people' (25 September 2020) (webpage) accessible at <https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/law-under-lockdown-covid-19-measures-access-to-justice-and-vulnerable-people> accessed on 1 April 2021.

crisis levels".¹⁹ The statistics are not promising. In December 2020, 8,000 men and women and 130 children were being held in custody awaiting trial. The report similarly explained that the number of the outstanding cases in the family courts "*remains high*".²⁰

29. However, there is a parallel strand to the story of the UK legal system during COVID-19. Remote hearings are at the heart of this. The Coronavirus Act 2020 was enacted on 25 March 2020. This contained provisions enabling the use of technology in courts and tribunals. Courts and tribunals quickly adapted to delivering remote hearings and the House of Lords' Constitution Committee reports that the number of cases heard daily in England and Wales using audio and video technology increased fivefold from late March to late April 2020.²¹ Many have applauded the speed at which the system adapted. The Committee refers to this as "*impressive*" and the Lord Chief Justice characterised the courts' response to COVID-19 as "*quite remarkable*".²²
30. Appellate courts, including the Supreme Court, have been particularly well-placed to benefit from this technology. We are generally focussed on specific points of law, do not hear live evidence and deal with experienced legal practitioners who have been able to adapt to the new format of the hearings. On the other hand, the lower courts often have to cater for litigants in person who may not have any knowledge of the court system. They also have to hear and test live evidence, which is understandably much more difficult in a remote world.²³

Longer term access to justice

31. The Lord Chief Justice declared in May 2020 that "*there will be no going back to February 2020*" for the courts.²⁴ As the UK tentatively begins to emerge from the COVID-19 related restrictions, we must ask ourselves how we can learn from this experience in order to repair, and fundamentally improve, our legal system. The technology offers scope to improve access to

¹⁹ HL Constitution Committee Report, 'COVID-19 and the Courts' (30 March 2021) (web accessible version) accessible at <https://committees.parliament.uk/committee/172/constitution-committee/news/153596/report-published-on-the-impact-of-covid19-on-courts-and-tribunals-in-england-and-wales/> accessed on 31 March 2021, p.4.

²⁰ Ibid (n.19), p.44.

²¹ Ibid (n.19), p.16.

²² Ibid (n.19), p.17.

²³ Ibid (n.19), p.21.

²⁴ Ibid (n.19), p.65.

justice and decrease at least some of the costs of litigation, and the judiciary has been given a crash course in how to work effectively with it.

32. It seems likely that remote hearings are here to stay, at least in some circumstances. Whilst the UK Supreme Court is considering when it might be able to hold in-person hearings once more, it is quite likely that the hearings we sit in as members of the Judicial Committee of the Privy Council will often remain virtual. It may be difficult to justify the costs of advocates travelling from all over the world to appear before us where COVID-19 has shown us that they work sufficiently well in a virtual format.
33. I am not, however, suggesting that replacing in person hearings with remote hearings will remove the barriers to access to justice in the UK. As my fellow Supreme Court Justice Lord Briggs said in a recent seminar: *“if all we do is replicate paper-based and face to face processes with electronic documentation and video hearings, sticking slavishly to the same old procedural models as far as possible, then apart from printing and delivery costs and a few plane, bus and train fares, the cost may remain much the same.”*²⁵ Our online COVID-19 courtrooms bear much resemblance to what was described by Richard Susskind as *“the first generation of online courts”* in 2019, where it is still *“fully fledged, living and breathing judges”* who are making the decisions, albeit remotely.²⁶
34. However, COVID-19 has made the legal world more comfortable with the idea of online adjudication. Some of the legal profession’s concerns, which were repeated by Susskind as recently as 2019, already appear to be somewhat inaccurate. He reports that he has often been asked whether one could be confident that judges have actually read the arguments and evidence that have been submitted to them in electronic form when they *“come to dispense justice from the kitchen table or even the bath”*.²⁷ After a year in which much of our working lives has been conducted from more unorthodox locations, such issues seem unjustified. Susskind rightly

²⁵ Lord Briggs, ‘What can the pandemic teach us about the costs of civil litigation?’, Association of Costs Lawyers Online Seminar (13 November 2020) (web accessible version) accessible at <https://www.supremecourt.uk/news/speeches.html>, accessed on 31 March 2021, p.4.

²⁶ Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019), p.143.

²⁷ Susskind (n.26), p.150.

responds that this objection should be resolved by a rigorous judicial appointment system in any event.

35. The increased familiarity with the use of technology in the legal system might provide a foundation for exploring more innovative structures of adjudication. These then offer the potential to reduce the time and cost taken to achieve the resolution of disputes and so improve access to justice.²⁸ Lord Briggs suggests that the forced digitalisation of our legal system brought about by COVID-19 will “*unlock enormous cost savings if we can use it as the impetus to analyse our dispute resolution processes from a completely new starting point, and one which takes full advantage of the benefits which e-working makes possible for the first time*”.²⁹ The newly appointed Master of the Rolls, Sir Geoffrey Vos, has similarly called for thorough-going reform to move towards an integrated online civil justice system to enable dispute resolution at much reduced cost.³⁰ I think that this should be the direction of travel, wherever it is feasible. We should be inspired by our experience of working in the pandemic to think big for the future. The limit on access to justice arising from the cost of litigating is a serious erosion of the ideal of the rule of law in our society.
36. Some examples are already underway. There are, at present, various pilots in operation in England and Wales to test the use of online courts in respect of specific claims. For instance, the Online Civil Money Claims pilot has been operating since 7 August 2017 and is due to continue until 30 November 2021. It is generally described as a quicker, more accessible, and user-friendly way for a litigant in person to start an action in the County Court against a single defendant for a claim of up to £10,000. Similarly, the County Court Online pilot has been in place since 12 September 2017 and allows certain legally represented claimants to issue claim forms electronically.

²⁸ Lord Sales, “Algorithms, Artificial Intelligence and the Law”, *Judicial Review*, 25:1 (202), 46-66, para 11. I restrict discussion of ‘access to justice’ to the provision of quicker, cheaper and less combative mechanisms for resolving disputes. See Susskind (n.26), pp.69 – 70, for a wider conception of ‘access to justice’.

²⁹ Lord Briggs (n.25), p.5.

³⁰ Sir Geoffrey Vos, “The Relationship between Formal and Informal Justice”, lecture to Hull University, 26 March 2021: available at <https://www.judiciary.uk/wp-content/upoads/2021/03/MoR-Hull-Uni-260321.pdf>.

37. Susskind also puts forward suggestions such as ‘continuous online hearings’ for low-value civil cases. These would require participants to iterate and comment upon case papers online over a reasonable window of time, removing the need for all parties to be present at a certain time for a hearing in the traditional sense.³¹
38. Exploring and implementing new structures and approaches such as these will come with its own challenges. There are outstanding questions as to how well these courts might operate at the appellate level, particularly if we reach the “*second generation of online courts*” where the decisions of case officers and judges might be taken on by machines.³² Our legal systems and doctrines are not necessarily yet equipped to deal with these issues and we will need to consider how we might adapt them accordingly. Any such developments will undoubtedly be a longer term project, but one which COVID-19 has, perhaps surprisingly, accelerated.

CONCLUSION

39. Brexit and COVID-19 have made for some eventful years for the UK’s system. There are advantages that can be derived from both and our relationship with our fellow common law jurisdictions will be crucial throughout. As the common law continues to develop post-Brexit, we will be looking to our counterparts for inspiration and comparative purposes when considering how to approach questions which have already arisen in their courts. As we seek to harness the advantages of technology in order to streamline and innovate our own legal system, we hope to collaborate with, and learn from, our overseas colleagues.

³¹ Susskind (n.26), p.146.

³² Ibid (n.26), p.149.