



MASTER OF
THE ROLLS

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Introduction

1. It is a delight to be back in Manchester. I have not been here since the last weeks of my time as Chancellor. It is an honour too to have been asked to deliver the keynote speech to your annual conference.
2. I have been much favoured today. It is the first time in a long time that I have not been required to provide a detailed title and precis of my talk longer in advance than it is sometimes convenient to provide it. Instead, I have just been invited to give a keynote address without limitation. That may have been a dangerous course for the organisers to have adopted. You – we – will see.
3. I want to talk this afternoon about a subject which I regard as falling into the category of unfinished business. It is the question of court procedure rules in general and the Civil Procedure Rules in particular.
4. Some of you may know that I was sometime Editor-in-Chief of the White Book – actually between 2017 and 2021. In my time as Editor and as Chancellor of the High Court, I repeatedly expressed the view that the Civil Procedure Rules were too long and too cumbersome, and that the process of resolving heavy commercial disputes was in need of significant, if not fundamental, reform.
5. To set the scene, let me quote a short passage from something I said to the Law Society in a speech about 20 years of the CPR in October 2019. I said this:

“I do not, in any sense, detract from the enthusiasm and audacity with which Lord Woolf approached the design of the new Civil Procedure Rules. History has, however, shown, I think, that his reforms were inadequately revolutionary for the time. The 1990s were difficult years. The internet was in its infancy, emails were taking hold, but social media was unheard of, and artificial intelligence was some way from reaching any kind of fulfilment. With hindsight, such a foundational reform would better have waited another 10 or 15 years. In another sense, it was already well overdue”.

6. I went on in that speech to suggest some of the reforms that I want to talk about again today.
7. Since then, of course, I moved jobs from being in charge of the Business and Property Courts to being Head of Civil Justice. As a result, my focus has changed from commercial cases to the larger bulk of civil claims and small claims often brought in the County Court. Some of you will have seen that I have also been vocally supporting the introduction of an holistic online digital justice system across civil, family and tribunals. This change of focus is relevant to what I am talking about today, so it is worth saying a little more about it.
8. Before I do, however, I might just quote, in support of consistency, what I said about a digital justice system back in 2019:

“Online dispute resolution will develop to absorb many types of case that at the moment are thought to be immune to it. That is because it provides excellent access to justice. It is economical in terms of legal fees, time, and travelling, and it provides online what young litigants and modern business people are expecting to be able to do – namely to resolve their disputes as they resolve or obtain everything else by the use of their various devices and the internet”.

The online funnel

9. My vision for a 21st century civil justice system is, as many of you will already know, shaped like a funnel. It starts with any would-be claimant being able to go to a single well publicised website or app to be directed, after entering some basic information about their claim, to the appropriate pre-action or court portal in which their claim can be either resolved or progressed.
10. Behind that point of entry, there will be a series of pre-action portals and ombuds sites which would aim to resolve industry specific problems for consumers and small businesses. The portals would, in an ideal world, encompass family claims and claims against the state as well as ordinary private law disputes. There is a whole range of pre-action portals already in England and Wales, ranging from the RTA Portal dealing with more than 600,000 small personal injury claims every year to ACAS resolving employment disputes and ombuds resolving financial disputes and those in numerous other sectors.
11. If the portals, which effectively replace the pre-action protocols introduced after the Woolf reforms in 1999, cannot resolve the dispute, the idea is that a single data set created within the portal would be transferred by an Application Programming Interface (API) directly into the digital court process, now epitomised by Online Civil Money Claims and Damages Claims Online. The former has already dealt with more than 300,000 cases. It will become ubiquitous for small money claims before the end of the HMCTS reform programme next Spring. The transformation will come when the nearly 1 million bulk claims that are now brought within MCOL (Money Claims Online) are transferred across to the OCMC service.

The court-based dispute resolution process

12. Many have said that the current White Book which runs to some 6,600 pages - without the massive additional supplements and additional online material - is too long. That is an understatement. Many have also said that a system that requires so many rules and accompanying practice directions and notes is self-evidently not providing access to justice for ordinary people who cannot possibly be expected to find their way round such a behemoth. As you will know, a behemoth is an extinct creature.
13. In my view, the court-based procedure requires radical simplification. The process needs to be reviewed from the ground up. Pleadings have become far too long and are too often rambling and unfocused. The same is true of witness statements, experts reports and even lists of issues. The objective in court should be the same as it is within the online space, namely to identify quickly and efficiently the issue or issues that divide the parties and to make directions for the most expeditious resolution of those issues without being required to force every case into the same procedural mould.
14. In the digital justice system, there will be decision trees that will be directed towards identifying the main issues in the case. There will be no need for lengthy particulars of claim or lengthy defences. Instead, once the issues are identified, a resolution process will follow, whether that is an asynchronous on-screen decision or a live hearing remotely or in person. We now know, having learnt the hard way during the worst ravages of Covid, that remote or hybrid hearings can be extremely effective for a wide range of cases. Indeed, many barristers and solicitors actively prefer them as they save costly travelling and waiting time.
15. This is not the end of justice as we know it. Far from it. It is simply delivering justice in a manner more appropriate to the 21st century, which is an era where, as I now know I have been saying since at least 2019, almost everything can be easily obtained online or through our phones and smart devices. Lawyers do not need to be afraid of these developments. First, where the digital platforms throw up an issue that needs a full traditional hearing, one will always still be available. Secondly, litigants in person will be able to bring many simple claims without the assistance of lawyers, which will create greater access to justice. It will also mean that more claims can be vindicated than when the complexity of the justice process stood in the way of people being able to get their claims before a court at all. Thirdly, as the lives of consumers and businesses become ever more complex, there will remain an increasing number of situations in which legal advice is an imperative and where the lawyer's expertise will be invaluable both to the client and to the court.

Can the existing civil justice system learn lessons from the new digital justice system?

16. I believe it can.
17. First, pleadings are, in the existing analogue world, rarely read or relied upon as cases progress. They are hugely costly to draft. The digital justice system will, as I have said, make extensive use of decision trees, which will teach us that the old-fashioned art of

pleading is not needed in every simple case. The running down Statements of Claim that I was taught to draft with the help of “Odgers” at Bar School back in 1977 are actually not needed in order to identify and define the issue that divides the parties in a running down action. A series of simple online questions can and should identify the issue that really needs to be resolved, such as whether the defendant was driving too fast or ran a red light.

18. Formal pleadings should surely be reserved for the rare type of case that really needs them. Vast numbers of cases covered by CPR Part 8 have managed very well without pleadings for years. There is no reason why the default position should not change from pleadings to no pleadings. That would allow the judge at a CMC (held remotely or on-screen asynchronously) to require pleadings when the case genuinely merits them.
19. Secondly, the courts need actively to resist prolixity. Long witness statements, unnecessarily complex experts reports and the now often incredibly fleshy so-called “skeleton” arguments, are in too many cases simply a vice. Lawyers draft long documents, as the old saying goes, because they do not take the time to think hard enough about the case to draft short ones. It may be hard, but we should think carefully before rewarding incompetence by allowing long documents to be charged on the basis of hourly rate remuneration. Moreover, the message needs to go out that over-lengthy lists of issues are unacceptable. If the case does give rise to multiple issues, the judge really needs to take control and manage the case into smaller digestible pieces by way of preliminary or sample issues. There is no justification for trials that last weeks upon weeks because of a failure either of the lawyers or of the judge or of a combination of them to manage the case properly.
20. There has unfortunately in the last few years been a reduced focus on active and effective case management in many areas of civil justice. Years ago, the Commercial Court introduced the concept of case management. The Commercial Court Guide was rapidly adopted and adapted by other jurisdictions, but now pro-active case management seems in many areas to have stalled. How otherwise could we regularly see cases lasting for months and resulting in judgments running into many hundreds or even thousands of pages?
21. Thirdly, disclosure is still too much of a profit centre even, or perhaps particularly, in Business and Property cases – despite the Disclosure Pilot, which has helpfully forced an early concentration on where disclosure is truly needed and where it is not.
22. I cannot use this afternoon’s lecture to re-write the White Book, but I believe that its size and complexity has become unsustainable.
23. Lessons need to be rapidly learned from the growing digital justice system, and the emphasis needs to shift from accepting prolixity and long trials to proactively resisting them.

Online Rules

24. These thoughts bring me next to consider how online rules can improve upon the existing Civil, Family and Tribunal Rules. In England and Wales, the legislation allowing for an Online Procedure Rules Committee is close to the conclusion of its journey through Parliament. It will be a far more agile body than any of the existing subject-based rule committees. Instead of focusing on a 19th century process of dispute resolution, it will seek to regulate the digital justice system as I have described it. The digital justice system will offer the opportunity for smart systems that allow orders to be given effect without lengthy enforcement processes. It will allow for continuous mediated interventions to suggest imaginative ways of resolving the dispute at every stage. More than that, however, the online space does not need the detailed rules-based approach of an analogue system because the rules are hard-baked into the online platform itself.
25. To give an example, one does not need a separately published rule saying that one must give the online system your name and contact details. If you fail to do so, your claim or defence will not proceed. There is no need for a rule limiting prolix documentation. The system will simply not accept it. Of course, you will still be able to ask a judge to remove your case from the digital space or allow exceptionally lengthy argument or evidence, but the system will generally achieve proportionality automatically.
26. Make no mistake, this is indeed a revolution. But it is one that is, I think, long overdue. For too long, the legal system has neglected the interests of litigants in person, of vulnerable claimants and of those seeking quickly to vindicate small claims – all that has been sacrificed on the altar of historical concepts of what is fair and appropriate. The received wisdom has been that every case, however small, is entitled to be litigated as if it were life threatening or economically catastrophic for the parties. Proportionality is rightly the modern watchword.
27. For many years, I have been pleading with the lawyers and judges to understand that dispute resolution can be represented by a three-dimensional graph with scales for cost, delay and precision or accuracy of outcome. If a claim is worth £20 and is brought on E-bay (as some 6 million claims are every year), the claimant probably wants to spend nothing on it, wants it resolved very quickly and does not much care about the detail considered in reaching an outcome. Conversely, if a SME claims £5 million without which its business will collapse, it is probably prepared to invest something in the costs of lawyers, and it probably put up with some delay in the final resolution of the claim, always provided that an entirely just outcome is achieved. There is a vast range of cases in between the two I have mentioned, and cases involving children and families may not be governed by the same parameters, but cases against the state certainly are.
28. I made a very similar point in a lecture a couple of weeks ago, and became the subject of a twitter storm. Litigants are, in my view, entitled to prefer a speedy cost-free resolution for very small claims such as those that they bring on eBay. That is their choice. If they elevate a very small claim into a costly court battle that is disproportionate in both court time and party expense, the system sometimes has to put its foot down. That is not new. It was the revolution introduced by the overriding

objective, which expressly provides that it should enable the court to deal with cases justly and at proportionate cost. CPR Part 1 also embeds within those concepts the importance of the availability of court resources and the needs of other court users.

29. To return to online rules, I believe that they are crucially important to the reform of the existing rules. They can lead the way and show how high-level governance of the digital justice system creates a quicker less costly dispute resolution process without compromising on the principles of natural justice or justice itself. The process must still allow the parties to be heard, but it can do so whilst imposing a sustainable and proportionate structure upon the dispute and preventing peripheral and satellite litigation developing in the way it does now – all too frequently.
30. Moreover, the online procedure rules committee that is being created in England and Wales should also be able to provide governance for the pre-action portals that I have mentioned. Those portals already do, as I have said, resolve literally hundreds of thousands of claims without the need for legal proceedings to be commenced. Industry is already funding a large number of online ombuds processes, which sit in the pre-action dispute resolution space alongside the RTA portal and the Whiplash portal launched in May 2021.
31. There is much to be learned also from the UNIDROIT-European Law Institute's draft European Civil Procedure Rules, which have basic rules requiring party cooperation, a duty to achieve settlement, and court case management alongside rules requiring equal treatment and proportionality. The draft UNIDROIT/ELI rules have a forward-looking approach to the integration of (A)DR into the Rules themselves and into the dispute resolution process. They also introduce an excellent rule imposing a duty to seek settlement. This is something that is often honoured only in the breach. The next step will be to ask how real effect can be given to that duty.

Conclusions

32. I want to conclude by suggesting how we may be able to bring about the changes to the current court-based civil dispute resolution process. We will undoubtedly learn, as I have explained, from the innovations created by the new digital justice system and the governance processes of the Online Procedure Rules Committee. That will, of course, take some time. But time is important if one is determined, as I am, to bring about considered and sustainable changes that will maintain the confidence of consumers and national and international businesses in our first-rate justice system.
33. I am sure that the time for big name reports is over. Such reports can only deal with a snapshot in time and they cannot respond to the technological changes that are occurring rapidly throughout society. What is needed is organic and incremental reform of a system that has become too expensive and governed by a set of rules that seems to grow, but never to shrink.
34. I think the Disclosure Pilot provides a good blueprint. There should be similar processes designed to deal with the excesses I have mentioned in respect of pleadings,

experts reports and lists of issues, to name but a few, albeit important, parts of the existing CPR.

35. Judges and lawyers need to work together to revitalise active case management to ensure that meaning is given to the overriding objective and to the entire concept of resolving disputes within a reasonable time and at a proportional cost.
36. I look forward to trying to answer your questions.