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OF ENGLAND AND WALES

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IT FOR THE COURTS: CREATING A DIGITAL FUTURE

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Introduction

When I was asked by your President to deliver this annual lecture, I had two potential topics in mind.

First, whether I should venture further into an issue that is much troubling those drafting the Common European Sales Law in relation to consumers, namely how does the law respond properly to the consumer who does not understand why there should be a difference in the legal consequences of purchasing a product produced on paper in the traditional way or by downloading from the cloud whenever he wants to use it. I would like to have explored whether we are too much bound by our traditional concepts, whether we do not show an agility of mind and are over-influenced by the economic position of those who control the new way of buying.

The second topic I considered was a talk on the provision of IT for a modern court system. Whether I could speak on such a topic depended upon whether agreement had been reached to provide investment that would make this a reality. Happily such agreement on the provision of finance was reached at the end of March this year. I therefore decided that as this topic is one of pressing urgency, and one where the issues need to be highlighted, I would take this as my topic for tonight.

Why is modern IT for the courts necessary?

There are at least eight reasons I can identify for needing modern IT in courts and tribunals:

1. The present processes which rely upon manual issuing of process, re-entering information on different systems, using and holding paper files, diaries that are manual and unreliable telephonic and video communications are an inefficient and expensive way of operating a system that underpins the administration of justice.
2. Most modern businesses enable simple processes to be done online; there is no reason whatsoever why court proceedings cannot be commenced online and all communication with the court dealt with online. It is what people expect, and it enables better access to justice and to easier, and hopefully cheaper, resolution of disputes.
3. As anyone, who has had the task as a trainee of organising a filing system or using it, will appreciate, filing is a task which requires some degree of skill. Once papers are misfiled they are lost. In a number of parts of the country it is difficult to find people to do the filing at a wage which HMG is prepared to pay. It is a not uncommon feature of many hearings, including those in the Court of Appeal, that parties file papers in time but they do not reach the court for the hearing. Electronic files are essential.
4. Nor can we continue without a proper electronic case flow and diary system which should be at the heart of case management.
5. Continuous improvement for court and tribunal users requires data. At present the only way to gather meaningful information about the nature of cases brought to the courts, outside the Commercial Court, is to collect the data manually; this is a slow and variable process.
6. Save for using Outlook, judges have no electronic filing system for their administration. Outside the most senior Judiciary, very little clerical support is available for the judges. Recently I met a judge who had to take time out of his court sitting to organise the papers of various committees on which he sat as there was no-one to do it for him. All of this could have been avoided if there was a modern IT system. Now, more than ever, judges are used to working with IT and want to improve processes for court and tribunal users by doing so.

7. The systems that the court has were recognised as outdated more than 15 years ago. This includes the Crest system which is the basic operating system in the criminal courts and Caseman which is the basic operating system in the county courts. Modern IT will save a considerable sum of money in the operation of the court system.
8. Our international competition, which is particularly important in commercial matters, has adopted IT against which our systems, save in the Commercial Court, increasingly cannot compete.

These reasons and the compelling fact that a modern IT system, properly used and deployed, would enable significant savings to be made to the annual costs of running the court and tribunal administration convinced HM Treasury that there was a sound financial case for investment. Therefore at the end of March 2014, the Lord Chancellor, the Senior President of Tribunals and I announced that there would be this major programme of investment which would have three main strands.

1. The introduction of modern technology.
2. An improved estate.
3. Modernisation of current working practices.

This, it was intended, would bring about a more effective, efficient and high performing courts and tribunals administration. I will not say anything about the estate or working practices, but the key to the success of this programme is the ability successfully to introduce modern IT for the administration of justice.

The use of history

Hegel once observed:

> "What experience and history teach is this – that nations and governments have never learned anything from history, or acted on any lessons drawn from it."

However, I would prefer to put it in a way often attributed to Winston Churchill:

> "Those who fail to learn from history, are doomed to repeat it."

It therefore seemed to me essential now to look back to events that commenced nearly 20 years ago and concluded more than 10 years ago, when IT was central to the reforms then proposed of the justice system. Undoubtedly, as I shall explain, there are lessons to be learned. My lesson of history begins with the Reports by Lord Woolf, then Master of the Rolls.

The Woolf reforms

In March 1994, the then Lord Chancellor appointed Lord Woolf to review the current rules and procedure of all the civil courts in England and Wales. In June 1995, almost 19 years ago, Lord Woolf published his interim report. In chapter 13 of that report he outlined the application of IT. He considered that it held the greatest promise for savings in time and improvements in access to justice. He pointed to experience in the United States which had demonstrated the successful role that IT could play in judicial case management. He referred to the systems then in use in the UK, such as Crest in the Crown Court and to the development of Caseman, a database then being developed. He referred to the reduction in the cost of video-conferencing and the introduction of laptops into the courtroom.

In his final report, published in July 1996, a longer chapter was devoted to information technology. He recorded the position that the Court Service, then an executive agency controlled entirely by the Lord Chancellor's department, was seeking to establish a long term partnership between the Court Service and a selected private sector PFI provider. He was assured that from a technical point of view the Court Service was confident that the modular approach it had taken to the development of IT could provide an appropriate platform for the implementation of new case management procedures. He expressed the view that provision for appropriate IT was crucial, if judicial case management was to succeed. He made specific recommendations. He also recommended an IT strategy for the civil justice system as it was his view that there had been no mechanism in the past to bring the various components together as one coherent system. He recommended that a representative IT strategy body should be established and that there should be close liaison between the new body and those responsible for IT in the criminal justice system so that there was a coherent approach to IT across the entire justice system.

None of this was revolutionary – it was all eminently sensible and necessary.

The decision to introduce the reforms without IT

Following the publication of the report a consultative panel of judges was established to ensure that the needs of the Judiciary were fully taken into account in planning and development of the new systems. Its initial advice in late 1997 was that a case file system

and a case management system and means for electronic communication with the parties should be in place at the implementation of the Woolf reforms in April 1999. The Judiciary were given an assurance that this would happen.

However, by June 1998, although the Court Service was able to assure the Judiciary that their contractor's proposal would provide the complete range of case management tools, the date for providing this was put back until January 2000. There was some debate as to whether the implementation of the Woolf reforms should be delayed until the IT was available. However an unfortunate decision was made to stick with the implementation date of April 1999 and to implement the reforms without IT. A public announcement was made that the full IT support system for case management was expected to be in place in early 2000. At about the same time in 1998, assurance was also given that an electronic case file was integral.

It was pointed out by the Judiciary that the highest priority must be given to establishing an electronic case file as they were nervous about the adequacy of the temporary manpower substitute for such a file. This was a very prescient observation. The temporary substitute is now in its 15th year and the inadequacy has grown as the years have passed

The muddled thinking and the further delay

The Judiciary, however, by this stage was internally being of the view that, "the idea that a satisfactory unified system could be ready by 'early 2000' appears to us more far-fetched than ever".

What in fact was happening was far more serious than the Judiciary had appreciated. By the end of 1998 it was clear that the Court Service was concentrating on a full case tracking and listing system, that is to say a back office system for the administration of the cases. This was an entirely separate system from what the judges had said was necessary.

It was not until May 1999, just after the decision to implement the reforms without IT, that the Government told the Judiciary what in fact was happening. It explained it in a

way which showed how muddled the thinking had been and how the basic aim and strategy had not been properly formulated:

1. The Court Service was working only on back office systems and that was all that would be available by 2000. The Court Service had proceeded on the basis that the back office systems would provide the foundation for the development over the following years of proper IT case management functions.
2. It had just been appreciated that the Court Service was overly ambitious in assuming that the system on which it was working could provide an adequate foundation for the development of the kind of IT support system which the judges required. The explanation was that the Court Service and its contractor did not possess a sufficiently clear picture of what that entailed and priority had been given to providing back office support for the introduction of the Woolf reforms in April 1999.
3. It was accepted that the judges had been given the wrong impression that the system available by 2000 would incorporate case management functions. It had always been the intention that what was being developed would only provide a platform upon which case management could be delivered over a number of years.
4. Regret was expressed for the fact that a number of judges had committed a great deal of time and effort, but to no avail.
5. The likely timescale for the delivery of the new systems to support the effective delivery of civil justice might be of the order of 2-3 years.

This demonstrated five matters:

1. The Judiciary had not been properly involved.
2. There had to be a common understanding of what people were describing. As your President pointed out in a paper written in 1998, there were five categories of system encompassed within the term "Case Management", including systems which either provided information, or helped the back office, or helped progress cases or systems that judges could use for their management of a case.
3. The Court Service's confidence that it could use the modular approach based on their existing systems was ill founded.
4. The Court Service had not understood what was necessary – the development of a coherent and well formulated plan.

5. Integration of the systems should be planned from the outset and the feasibility assured.

The establishment of the "Modernising the Civil Courts" Programme

In these circumstances, in October 1999 the Court Service decided to establish a programme known as "Modernising the Civil Courts". A board was established to run that programme. A judge was appointed to that board. That at least should have meant the first lesson had been learnt – the Judiciary had to be involved.

Although the Board was established, in June 2000 it became apparent that the Court Service took the view that funds were needed to put the necessary infrastructure in place before they could proceed with the software development.

To show that some progress was being made, in November of that year a judicial event was held at Highgate House where the strategy was presented and an electronic filing, case management and listing demonstration was put on by a private provider.

By January 2001 the programme for modernising the civil courts had prepared a Consultation Paper which it issued. The foreword stated:

> "As a Government were are committed to significant investment in the coming years to deliver these new ways of working."

The Consultation Paper pointed out that the Court Service had secured £43m in the spending review, SR2000, to implement their vision. The Court Service set out its priorities for the short, medium and long term:

1. In the short term (12-18 months) the Court Service would begin to develop or identify new systems which would support case management and listing activities.
2. In the medium term (18 months to 3 years) it would develop and implement further electronic transactions to support enforcement and case management.
3. In the longer term (3 years plus) the Court Service would implement new services to support business centres and case management and listing functions which would begin the introduction of the electronic file.

May I emphasise the word "begin", as this meant that the timescale for what was to have been the delivery of the electronic file had slipped first from 1999 to 2000, then to 2002

and by this time it was only to begin in 2004. Pilots would be established to assist in development.

Involvement of the CJS: A modernisation programme board

This was short lived as a standalone programme. Although as I have mentioned, Lord Woolf had in his final report published in July 1996 advocated a coherent approach across the whole of the justice system, this wise advice had not been followed.

However, just under five years after that obviously right recommendation had been made, it was decided to change tack and implement an approach that covered the whole of the court system. This was done in April 2001 by merging "Modernising the civil courts" with an IT programme for the Crown Court. The Board that was to run this was to be known as "The Modernisation Programme Board".

The impetus no doubt for bringing crime and civil work together was that on 14 December 1999 the Lord Chancellor, the Home Secretary and the Attorney General had appointed Lord Justice Auld to review the criminal courts. As part of the work, he was considering the right approach to the use of IT in the criminal justice system.

In September 2001, Lord Justice Auld published his report. Chapters 7 and 8 contained a detailed review of what was needed in respect of information technology. Having found that the division of responsibilities across the so called "criminal justice system" was contributing significantly to inefficiency and wastefulness, he concluded that:

1. A single information technology system was needed for the criminal court, drawn partly from the best design elements of existing systems but also taking into account developments in the civil and family jurisdictions.
2. The implementation of IT changes should be under the supervision of a Board upon which the Judiciary were represented.
3. The planning and the implementation of procedural reforms must go hand in hand with development and introduction of information technology.
4. A new integrated technology system for the whole of the criminal justice system must be based upon a common language and common electronic case files, and ultimately accountable to a Board.

But there was one other part of the system: tribunals. This was the subject of the Report of Sir Andrew Leggatt on the Tribunals System: *Tribunals For Users: One System, One Service,* published in August 2001. Chapter 10 was devoted to Information Technology. One sentence captures the approach:

> "Not dictated by any political need for "quick wins" or incremental improvements that might be made in the short term, we have sought to take a medium- to long-term perspective, basing ourselves on what we believe to be technically possible, socially desirable and jurisprudentially acceptable."

The report pointed to the practicalities. First there were the likely challenges such as funding and project management. Drawing on the experience of what had happened since Lord Woolf's report, he warned that the Ministry should not underestimate the very considerable investment and effort that would be required. He stressed how important it was for the Ministry to identify the interrelationships between the systems that will come to underpin the civil, criminal and tribunal systems and, where necessary, ensures sufficient interoperability. Although there was probably no need to share data, there were:

> "[s]trong economic and policy arguments for the various systems running on a common technology infrastructure (telecommunications, data management, file servers and technical support, for example)."

In mid-2001 the Judiciary produced a report entitled, "Modernising the civil courts – the judges' requirements". It made clear that common information systems must extend across all jurisdictions and it needed to be delivered as soon as possible. It specified central requirements for four systems – something that had been done in 1998:

1. The electronic case record.
2. The electronic file.
3. The electronic diary.
4. The electronic case management system.

As Lord Woolf noted in his foreword, the Court Service had by then decided to carry forward its modernisation plans in a single integrated programme embracing the criminal courts and the tribunal system as well as the civil courts. He added:

> "If the vision of the common information system is to be achieved this will require a special sense of partnership between the Judiciary, Court Service and the Lord Chancellor's Department. From the judges' viewpoint it is most important that expectations are not raised and subsequently dashed. If the vision is delivered in a structured way, with early piloting and target dates being met, the

task started by the Children Act and by the Woolf reforms in delivering modern civil and family justice to the public will be completed."

The Courts and Tribunals Modernisation Programme

These various strands were accepted by the Government. Work was to proceed under "The Courts and Tribunal Modernisation Programme" (CTMP). A judge was appointed to the Board and five Judicial Advisory Groups were set up. The plans adopted took into account a number of matters, including:

1. The Government's requirement that 100% of new records be electronic by 2004.
2. The favoured option for case management systems involved adopting a suite of standard office systems which could then be "bolted together" to produce a common system. These applications would then be tested by judges and staff.
3. This would involve setting up model offices where tests could be carried out.

The establishment of priorities

While work continued on this it appears that by the end of 2001 the Courts and Tribunal Modernisation Programme was updated. This would be a five year programme lasting until 2006, with two main priorities.

1. The rollout of IT infrastructure
2. The creation of an electronic case management system incorporating the electronic case files, the electronic diaries and electronic record.

Within these priorities there would be set up a hearing and business centre pilot which would look at the civil side and the implications of Lord Justice Auld's report would also be taken into account. The programme had been costed at £640 million, £156 million of which had already been made available.

At the beginning of 2002 work started on preparing a bid to the Treasury for further money beyond the approximately £160 million that was in hand for the period April 2001 to April 2004. This was encouraged by what was then known as "a Gateway Review" which had been conducted under the auspices of the Office of Government Commerce, then in the Cabinet Office. It had produced a very encouraging report on the quality of the programme planning.

The Enabling Services Application Programme

At about the same time the CTMP programme began what was known as "The Enabling Application Services Programme" which would be responsible for the delivery of the case management electronic file, electronic diary and electronic case record system. It was decided that this programme would be based around a "lab environment" developing and testing future processes and applications. However, the lead time for finding a laboratory would be six months. It was anticipated that the new systems would be delivered across the Court Service by April 2004 – the date remained that which had been set in the January 2001 Consultation Paper. As I shall explain this programme was closed by the end of the year.

But first, more optimism.

The vision of May 2002

Sufficient progress had been made by 23 May 2002 when the Minister announced the publication of a report entitled "Modernising the Civil and Family Courts". The report stated:

> "We will introduce electronic files, records and diaries. The electronic file will replace the paper file and existing IT systems. It will include copies of all the documents filed in each case, details of the steps taken and copies of orders and other court produced documents. The electronic file will be available from all locations regardless of where the case is being heard or administered. The case management system supporting the electronic file will automate many of the processes that currently require staff intervention. The electronic diary will be a computerised record of all hearings and available appointments. Information about court hearings will be available on the Internet."

However, in a letter issued on the same day to the Judiciary the lead judge cautioned that, although the report set out the vision for the future, a lot of money would be needed and the speed at which the new services and system could be introduced would depend on the outcome of the bid to the Treasury for further funding under the Spending Review, the outcome of which would be known by the summer. Shortly thereafter the Court Service assured the Judiciary that the electronic file was part of all the plans and a working prototype was expected by November 2002 with a national rollout in April 2004.

The funding failure: SR2002

During June 2002, however, the judges were warned that the provision of the electronic file depended on funds being made available in the Spending Review. On 15 July 2002 the Spending Review, SR2002, was announced. No money would be specifically allocated for the Civil Court and Tribunal Modernisation Programme.

The Court Service decided that other means of raising funds would have to be considered, such as an increase in fees, PFI arrangements or sale of court buildings. It hoped this would provide the necessary funds.

No doubt as in earnest of its good intentions the Court Service issued in September 2002 a publication entitled "IT's Coming" which announced the setting up of the Walsall Business Centre Pilot. It said:

> "Change is on the way at last. In a small town in the West Midlands the biggest reform since 1846 in the way that courts operate will be piloted."

It was clear that this was intended to be a model for a network of back offices but the court staff and Judiciary would be limited to using the latest versions of Caseman and Familyman and whatever imaginative use could be made of Microsoft Office products.

This was really the only sign of progress for as the autumn wore on it became clear what the consequences were of a lack of funding. Although it was clear that a basic IT infrastructure would be provided in all Crown Court Centres and Combined Court Centres by December 2005, money was unlikely to be forthcoming even in the Crown Court during the next three years for the new electronic enabling application system as had been envisaged. The progress that was to be made, apart from providing the infrastructure, was with the pilot business centre at Walsall. As there was therefore to be no real progress, apart from these two items – infrastructure and Walsall - in October 2002 the Court Service disbanded the Enabling Applications team.

During the course of 2003 the infrastructure project continued, as did the pilot in Walsall. The Walsall project was brought to an end in May 2003 with the prospect that there might be a further pilot at a larger court.

The further funding crisis: June 2003 – Just infrastructure

Even that proved optimistic, for in June 2003 the whole of the Department's spending had to be reviewed as it had become apparent that the spending projections could not be met from the resources allocated to the Department by the Treasury for the years 2003-6. As a result, the money that had been allocated for the infrastructure was reduced by £20 million and a decision was taken to upgrade legacy systems.

The only civil project that was to go forward was a small project in the Commercial Court for which a small sum of money was made available.

By January 2004 it was apparent that the prognosis for SR2004 was even worse and that all that was likely was that £25 million a year for the next three years would be provided.

Conclusion on history

My history lesson has now reached a point where it is convenient to stop, as we are almost within 10 years of the present. Although some projects were undertaken, such as XHIBIT in the Crown Courts and the completion of the LIBRA project in the Magistrates Courts, the vision of Lord Woolf, Lord Justice Auld and Sir Andrew Leggatt, Ministers and the most senior officials ended with the spending cuts of SR2002 and SR2004. The effects of the subsequent financial crisis of 2008 meant nothing was re-started.

But we are about to begin again. I must therefore turn to see what I think can be learnt from that history that is relevant to the present position. There are nine lessons at least.

1. Security of Funding

The first and obvious lesson is that there must be secure funding for what is to be done. It is no use embarking on the project without such funding. The events of 1996-2004 which I have described show not only how expectations were raised and dashed, but also the mistake that was made in investing in infrastructure at enormous cost when there were no funds to develop the software at a time when it was obvious that technical change might deliver a solution which would make spending on infrastructure far from an optimum use of money.

The announcement made at the end of March this year was made on the basis that funding had been secured.

2. Integrated approach

The key reports made by Lord Woolf, Lord Justice Auld and Sir Andrew Leggatt all stressed the need for a common approach and common basic systems across the different jurisdictions: crime, civil, family and tribunals/administrative law.

Although this was made clear all those years ago, this lesson was not learnt. Probably because of the damaging effect of the lack of any real investment in IT since the events I have described, decisions were made during 2013 to proceed independently with the provision of IT for the Criminal Justice System and in early 2014 for the Rolls Building.

The importance of common planning and using as many common systems is obvious for the reasons spelt out by the Reports to which I have referred. However, there is even greater importance now because the other main component of the HMCTS reform programme contemplates first co-location of courts and tribunals in the same premises where this is possible and second more flexible deployment of judges. It cannot make any sense to have different systems, unless there is no way of avoiding it.

It was agreed in the announcement made in March 2014 that all the programmes would brought under a common governance.

3. Judicial participation in governance

In April 2008, an agreement was made between the LCJ and the Lord Chancellor for joint governance of the Court Service; when the Tribunal Service was merged with the Court Service, the tribunals were brought within this system of governance.

This joint system of governance has specifically been applied to the Reform Programme (including the provision of IT) by the agreement made in the March 2014. This should ensure that the Judiciary participate on a joint decision making basis from the outset and the mistakes and misunderstandings that form one of the core elements of the history of 1996-2004 are avoided.

It will be important to ensure that the system of governance identifies immediately the type of issue which occurred in 1998 when serious errors in technical assumptions were made, but not reported or questioned. The governance needs to encompass a clear and robust system of technical reporting so that critical decisions are immediately identified to the highest level of governance, questioned and, if necessary, remedied.

4. Clear agreement of what is needed should be made at the outset

It is again evident from the history and in particular from the reports of Lord Woolf, Sir Robin Auld and Sir Andrew Leggatt, even if it was not otherwise obvious, that it is essential that there is clear agreement on what is needed at the outset.

I do believe that this is common ground. Plans are being made to ensure that such a clear agreement is set out.

5. Design of systems and procurement

The events I have described demonstrate how important it is to agree on the approach to designing systems at the outset in tandem with a rigorous system of procurement and the employment of those who have actually delivered design and implementation.

Again, it is common ground that this is the approach to be followed. We all know how important good contracts are and the importance of realistic management of such contracts. It is a lesson that always has to be applied.

6. Try and anticipate technical change

It is again evident that we must try and anticipate technical change. The huge sum of money that was spent on infrastructure has been money that has not in the result all been well spent. We must look and see what new developments are anticipated. I have asked Sir Brian Leveson as part to carry out a review of what can be done to improve the procedure and processes of the criminal justice system.

The one thing we cannot afford to do is simply to think in terms of what is being used now; we must find out *what is next*. One of the matters at which he is looking at is the use of internet based video communications to enable lawyers to appear at pre-trial hearings from their offices by video. No doubt we must look at the feasibility of conducting parts

of some types of civil trials in this way. We must be clear as to the security necessary – far too much cost and difficulty has been brought about by a failure to realise that the hall mark of our justice system is that court hearings are open to all.

7. Delivery and holding to account

I have not named any of the individuals involved for the Court Service or the Government in my history of the events, as it was neither necessary nor fair. Had I done so, it would have been apparent that there was no continuity. This is again a lesson. It is clearly essential that there is continuity for the duration of the programme with a clear plan for delivery and a clear and appropriate critical path.

8. Processes built around IT, not IT around processes

It was evident that Lord Woolf envisaged his reforms and IT being introduced together. This did not happen and processes have developed without IT. In a similar vein, Sir Robin Auld concluded that:

> "[i]nformation technology is not just a way of doing more quickly and otherwise more efficiently what we do now; it is also a way of changing to advantage the way we do it."

Much has happened to processes in all jurisdictions since the events I have described. It will be essential to review the processes of all jurisdictions to see what needs amendment to provide for a unified system for the future. This approach is agreed.

9. The need for realism to maintain confidence

By about 2001, it was evident that the Judiciary was very sceptical about promises made and the ability of the then Court Service to deliver. The vision enunciated by the Minister in May 2002 and the statement about Walsall in September 2002 cannot have helped.

It is essential therefore that when promises are made or visions enunciated, there is clear basis for them and complete confidence in delivery.

Conclusion

I have been as fortunate, as have my predecessors, to have the enormous benefit of advice from your President as IT Adviser to the Lord Chief Justice. He did much to shape the vision of Woolf, Auld and Leggatt and to assist thereafter. He is providing me

and other lead judges with much valuable advice, including a list of factors that will be critical to success.

This is a project on which we cannot fail for, if we squander it or fail to achieve a modern and working system, we will never have an opportunity of such investment again within the lifetime of those here tonight. That will be a disaster for the administration of justice in our country and seriously affect our ability to compete internationally. It is a huge challenge and in it HMCTS, the Judiciary and the Government as joint venturers will need all the help from your Society that it can obtain.