



JUDICIARY OF
ENGLAND AND WALES

SIR TERENCE ETHERTON, MASTER OF THE ROLLS

THE CIVIL COURT OF THE FUTURE

THE LORD SLYNN MEMORIAL LECTURE¹

14 JUNE 2017

(1) Introduction

1. It is a pleasure to have been asked to deliver this year's Lord Slynn Memorial Lecture at this time of significant civil justice reform. You might ask when are we not. Since the 1990s there has been one reform after another. From Woolf to Jackson to Briggs, to Briggs again, and then once more to Jackson.² Civil justice reform is a subject that never rests. It is fair to say though that the present reform programme is the most far-reaching that we have had since the 1870s. The civil reforms, together with the contemporaneous reforms to criminal justice, are a £1 billion six year plan³, which I believe to be the most far reaching in any country in the world. This lecture is exclusively about civil reform.

¹ I wish to record my thanks to John Sorabji for his considerable assistance in the preparation of this lecture.

² H. Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1995); H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1996); R. Jackson, *Review of Civil Litigation Costs: Preliminary Report Vols. I & II* (May 2009) (TSO); R. Jackson, *Review of Civil Litigation Costs: Final Report* (TSO) (December 2009); M. Briggs, *Chancery Modernisation Review: Provisional Report* (July 2013) M. Briggs, *Chancery Modernisation Review – Final Report* (December 2013); M. Briggs, *Civil Courts Structure Review – Interim Report* (December 2015); M. Briggs, *Civil Courts Structure Review – Final Report* (July 2016); R. Jackson, *Fixed Costs Review* (2017).

³ Intended to conclude in April 2022

2. I am aware that that epithet “far reaching” has been given to previous civil reforms from the early 1990s.⁴ Without doubting the accuracy of that attribution, the argument in favour of the present reforms taking the accolade is undoubted. One reason above many others stands out: it is reform in the shadow of the internet. Just as the internet has, and continues, to change very many aspects of our lives, so it is also bringing about fundamental change to our civil courts.
3. In this lecture I will look at why and how the present reforms are changing the system. In particular, I will consider three issues:
 - the background to reform;
 - the nature of the reform system; and
 - design issues.

Background to reform

4. Given that I have identified the internet as the most prominent aspect of the radical nature of the reform process, you might be forgiven for thinking that the background to reform starts at some point after the turn of the century. A reasonable guess might have put its origins around 2007, the year the iPhone was released. It is certainly a date that future historians might mark out as the real start of the 21st century. While 2007 does have a specific role to play, this is not it.
5. The starting point was the Civil Justice Review in the late 1980s. It recommended the use of computers to manage court listings. As Sir Henry Brooke, who was more involved than anyone in the long struggle for digitisation of our courts, noted: little came of it. What developments there were, were slow and piecemeal.⁵
6. The call for greater use of computers was repeated by the Woolf reforms in the 1990s. No doubt due to the increasing sophistication in computing since the 1980s, ambition had grown. Information technology was to be the engine through which the, then, new court-

⁴ J. Jacob (ed) *Supreme Court Practice* Vol. 1 (London, Sweet & Maxwell) (1993) at vii;

⁵ A detailed history is set out in H. Brooke, *Technology and the Judicial Process*, in *Essays in Honour of Sir Brian Neill: The Quintessential Judge*, (Lexis Nexis UK, 2003) <<https://sirhenrybrooke.me/2015/10/25/my-2002-essay-on-technology-and-the-judicial-process/>>.

based case management systems would work.⁶ Lord Woolf considered it a ‘*vital tool*’ necessary to enable judges to make a new approach to litigation work.⁷ It was equally necessary to ensure that the court administration would work effectively. It was fully recognised that its implementation would be a ‘*massive undertaking*.’ It would have required significant expertise, time and resources to bring about. As history has shown, this was yet another false dawn, which was to persist for many years. Further reforms would call for IT to be upgraded, while noting that previous calls had gone unheeded. The position was summed up by Sir Michael Briggs in 2013’s Chancery Modernisation Review commissioned by me as the then head of the Chancery Division. He said this,

‘In Chapter 43 of his Final Report [of 2009], headed Information technology, Jackson LJ said this . . . 13 years have now elapsed since Lord Woolf published his final report. 10 Years have elapsed since the introduction of the [CPR]. The courts still do not have an IT system which is adequate to the delivery of civil justice at proportionate cost. . . The Jackson Report was published in December 2009. Nearly 4 years have elapsed since then, and no progress at all has been achieved in relation to the provision of effective IT . . .’⁸

7. IT reform was what might have been called a long-term aspiration, always being called for; always needed; but never delivered: more the gift always to be given, than the gift that keeps giving. Of course, as time went on the sophistication of IT systems became greater and greater: from basic word processing to the ubiquitous internet and the Cloud of today. Broadly speaking such developments were not being utilised to secure the introduction of a world class IT framework for our civil courts; the point Sir Michael Briggs emphasised.
8. The starting point then is simply this: reformers over the last 30 years have been calling for the introduction of effective IT systems to improve the delivery of civil justice. Given the track record, Sir Michael may well have been forgiven for thinking that when he raised similar calls in 2013, he would be one more voice crying in the wilderness.
9. There were, however, three historic developments that can be identified as the cause for a real change. What is particularly interesting is that they are rooted in very different aspects of the delivery of civil justice.

⁶ H. Woolf, (1995) at chapter 4, para. 19, and chapter 13.

⁷ H. Woolf (1995) at chapter 13, 3

⁸ M. Briggs, (July 2013) at 14.

10. First, at the very time that Sir Michael Briggs was carrying out his Chancery Modernisation Review, the IT systems in the Rolls Building were being radically modernised. The Chancery Division, whose work has increasingly become dominated by national and international business and financial work in addition to its traditional expertise in company, insolvency and Intellectual Property law, and the commercial court, the admiralty court and the technology and construction court of the Queen's Bench Division, became housed in the Rolls Building, off Fetter Lane, in 2011. It was clear that these, our world leading UK business courts, would need vastly improved IT systems to maintain their pre-eminent position and to provide the service that the national and international business users of legal services justly require. By 2013 there was already underway in the Rolls Building a project for online filing of claims anywhere in the world on any hour of any day and a digital case management system capable of providing not just information about individual cases and applications but a raft of management information about the use of the courts. It was called C-E File and was completed in 2016. It plainly always had the potential to inform a wider programme of digitisation in our civil justice system.
11. Now that was, of course, just one small and relatively specialised but economically crucial area of civil litigation. There were, in addition and crucially, other contemporaneous developments that were to have an historic impetus for digitisation across the wider civil justice system, so important to the wide spectrum of ordinary citizens and institutions in our society.
12. Those developments can be traced back to the financial crisis from around 2007. That financial crisis brought about, as Lord Thomas CJ noted in 2014, a significant retrenchment by the State or, as it has been called, a period of continuous austerity.⁹ This has had important consequences for the justice system, which was never immune to reduction in public spending from 2010. Those consequences include: a reduction in courts' administration and staff, a reduction in the maintenance - let alone improvement - of the court estate, and indeed a reduction of parts of the court estate, a reduction of the judicial complement in some areas, and lack of expansion of the judicial complement in some areas where the workload has increased. Such reductions and constraints, however, have had to be balanced against the continuing need for the provision of an effective civil justice system.

⁹ J. Thomas, *Reshaping Justice*, (3 March 2014) at < <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf>>

Without radical change, there was only the prospect of what has been described as “the managed decline” of the justice system.

13. At the same time as the looming prospect of managed decline came the sharp reduction in civil and family legal aid and the inexorable increase in litigation costs. Those twin financial pressures have resulted in an increase in litigants-in-person before the courts. This situation has caused, as Professor Zuckerman has noted, two problems.¹⁰ It creates a justice deficit: individuals who do not know the substantive law or procedure are in no real position to vindicate their rights effectively. It also creates an efficiency deficit: the litigants’ lack of knowledge of procedure, of how to prepare cases and how to conduct a trial place greater than normal burdens on the litigants themselves, the courts administration and the judiciary to secure an effective process. Digitisation of current processes, on its own, would not and cannot combat these problems.
14. Those two deficits are together properly characterised as problems of access to justice.
15. These constraints, deficits and other adverse consequences arising from financial austerity formed a critical part of the background to the HMCTS Reform Programme, agreed by the Lord Chief Justice, the Senior President of Tribunals and Lord Chancellor.¹¹ Long-term spending reductions were and are being balanced by a six-year period of investment to modernise the court estate and, most significantly, its IT provision. Digitisation of process and administration, which had been called for since the early 1980s, is to become a reality. And the programme for implementing that programme, which I will come to, is well underway.
16. The need to tackle the issues of decline in the court administration and estate and diminution of access to justice led the Civil Justice Council to commission a working party led by Professor Richard Susskind to consider how digitisation could help.¹² It also led

¹⁰ A. Zuckerman, *No Justice Without Lawyers—The Myth of an Inquisitorial Solution*, CJK 33 (2014) 355

¹¹ Joint Statement of Lord Chief Justice, Senior President of Tribunals and the Lord Chancellor, Reforming HM Courts and Tribunals Service, (25 July 2013) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/News+Release/REFORMING-HM-COURTS-AND-TRIBUNALS_2_.pdf>; Joint Statement of Lord Chief Justice, the Senior President of Tribunals and the Lord Chancellor (28 March 2014) <<https://www.judiciary.gov.uk/wp-content/uploads/2014/03/joint-letter-to-judges-and-staff-hmcts-reform.pdf>>.

¹² Civil Justice Council, *Online Dispute Resolution for Low Value Claims*, (2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>>.

JUSTICE to set up a working party with a similar aim led by Sir Stanley Burnton.¹³ The two working parties reached broadly similar conclusions: IT needed to be put to use to devise a new online court utilising online dispute resolution (ODR) techniques to secure efficient and effective access to justice for individuals who did not have access to a lawyer. Inspiration for their ideas, and particularly those of the CJC working party, was taken from developments in online dispute resolution in The Netherlands and Canada, where ODR platforms had been developed to resolve divorce, property and small claim disputes.¹⁴ Their recommendations were considered and broadly adopted by Sir Michael Briggs in his Civil Courts Structure Review, which recommended the introduction of a wholly new, standalone Online Court – the Online Solutions Court. This would differ in three fundamental ways from a traditional court: it would be predominately online both in terms of its processes and hearings; it would formally incorporate ADR into its processes; and, it would be designed to be used by non-lawyers.¹⁵

17. It is convenient for the purpose of this address to continue to refer to the Online Solutions Court but that is not an official name for what is in effect a digital platform for access to several civil law jurisdictions, including tribunals. The important point is that the Online Solutions Court was conceived to be only part, albeit a critical part, of an ambitious plan to reshape fundamentally how we deliver justice, and which now forms part of the overall package comprising the £1 billion, six year HMCTS Reform Programme to which I referred at the very beginning of this address. Parts of that Programme, including the Online Solutions Court, require primary legislation. The vehicle for that legislation was to be Prisons and Courts Bill 2017¹⁶. As you know that Bill fell due to the general election. It is to be hoped that its successor will form part of the new government's programme. For this evening's purposes, I work on the assumption, and I stress assumption, that it will do so.

18. Finally, I return to the issue of financial and business work, which is carried on primarily in the Rolls Building in London but also in 5 main regional centres: Manchester, Leeds, Birmingham, Bristol and Cardiff. In this area, in which our jurisdiction has traditionally enjoyed a pre-eminence with New York, there is increasing competition from other

¹³ JUSTICE, *Delivering Justice in an Age of Austerity*, (2015) <<http://2bquk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf>>.

¹⁴ <<http://www.hiil.org/project/rechtwijzer>>; <<https://civilresolutionbc.ca>>

¹⁵ M. Briggs, (July 2016).

¹⁶ Clauses 37-45.

jurisdictions.¹⁷ As the Lord Chief Justice has recently outlined, there is a developed and developing market for justice for business and commercial disputes in Paris, Amsterdam, Singapore, New York and Qatar; many others places around the world are also enhancing their commercial courts to compete for litigation globally.¹⁸ Brexit will almost certainly increase that competition. Such competition has brought an acute focus on how our business and commercial courts operate. It has made us examine how and in what ways we can improve their practices and procedures. Inevitably this links back to greater use of information technology. But it also goes beyond that. IT is a necessary condition for improved access to justice in commercial and business disputes. It is not, however, a sufficient condition, as the challenge posed is one that also requires review of the structure of our business and property courts, their practices and procedures and their expertise so as to provide the court services that are required by the most sophisticated financial and business enterprises in today's fast moving world.¹⁹

19. These then are the very different causes underpinning the need to take radical steps to shape our future civil courts: the long-understood need to improve and bring up to date court IT; the consequences for the courts and litigants of austerity; and increasing competition for our commercial and business courts from abroad. This leads to the next question: how are these causes reshaping our civil courts.

The nature of the reformed system

20. So, what will the civil court of the future look like? The blueprint has been summed up as being one where the court is digital by default and digital by design: that underpins both the HMCTS reform programme in general and the Online Solutions Court in particular.²⁰ This has a number of aspects.

The Court's Purpose

21. The starting point is the purpose of our civil courts. It might reasonably be assumed that the straightforward digitisation of court processes under the HMCTS reform programme would

¹⁷ As discussed by the Lord Chief Justice in J. Thomas, *Giving business what it wants – a well run court for commercial and business disputes*, (Cayman Islands, 2 March 2017) < <https://www.judiciary.gov.uk/wp-content/uploads/2017/03/grand-court-of-the-cayman-islands-guest-lecture-march-2017.pdf>>

¹⁸ Ibid at 3ff.

¹⁹ A point made more generally in respect of the present reforms by the Senior President of Tribunals, see E. Ryder, *The Modernization of Access to Justice*, in *Being a Judge in the Modern World*, (Oxford) (2017) at 142.

²⁰ M. Briggs (2015) at 4.

have no impact on this issue. The transformation of court administration and processes from being paper-based to electronic ones could reasonably be seen as no different to the electrification of the railways. The trains continued to run to the same destinations. All that changed was the way in which they were powered. The introduction of the Online Solutions Court however goes further than changing the means of delivery. It expands the court's purpose. At the present time, it only does so in terms of its presently intended jurisdiction: claims up to a value of £10,000 in specified areas of civil work.²¹ This must properly be seen, however, as a template for securing now and over time in the future the critical object of greater access to justice.

22. The essential purpose of our courts can be expressed straightforwardly. They carry out a 'core function of government'.²² They do so as a former Chief Justice of New South Wales described it through,

*'[t]he enforcement of legal rights and obligations, the articulation of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by public process with public outcomes – these are all public purposes served by the courts, even in the resolution of private disputes.'*²³

The Online Solutions Court and the future civil court generally will not only continue to achieve these public purposes, but will do so more effectively than has been the case historically. They will better ensure that access to justice is a practical right. In terms of the Online Solutions Court this will be achieved by the exercise of its jurisdiction through a 3 stage or tier triage process.

23. The first of its three stages will cover the pre-issue stage of litigation. In some ways this will cover the same ground as the Pre-Action Protocols. It will, however, go wider than that. It will assist individuals to find the right sources of legal advice and help in order to enable them to consider whether they have a viable legal dispute, or whether a more appropriate means of complaint or redress is available, such as a relevant Ombudsman scheme. Assuming there is a viable dispute it will, and this will be carried out via a broadly automated online process, enable claimants to identify the nature of their claim and submit relevant

²¹ M. Briggs (2016) at 118.

²² J. Spigelman, cited in J. Jolowicz, *Civil Litigation: What is it for?*, in D. Dwyer, *The Civil Procedure Rules Ten years On*, (Oxford) (2009) at 60.

²³ J. Spigelman *ibid*.

documents, such as the claim form, online. It will equally help them to particularise their claims. This will be done through the use of standardised online processes.

24. The first stage of the process will therefore see the Online Solutions Court expand our ability to secure access to justice in two ways. First, it will help individuals identify the nature of their problem. The very essence of securing access is to secure an understanding of the legal framework. Such understanding will enable those individuals who have not yet reached the stage where a legal action has arisen to take steps to avoid that point being reached. It will secure access to preventive justice. Secondly, it will help other individuals to identify the alternatives to litigation. If the alternative identified is an Ombudsman scheme, it will help enhance two forms of justice: justice for the individual in the form of resolution under the scheme; and justice for others through the Ombudsman's ability to promote systemic improvement – so that other individuals in the future are not put into the same position. In that way, this also is a form of preventive justice, made accessible to all through the changes it makes. I think that no one can suggest that it is not a core function of government to promote access to justice in this way.
25. The second stage is also an expansion of access to justice. Again, it will primarily be secured through online processes, although telephone communication may also be involved. It is not, however, wholly automated. It will require case officers, court administrators exercising judicial functions under the supervision of the judiciary and independently of government, to assist parties to manage their claim and to facilitate settlement. This is a significant departure from the court's existing role as it will require a court officer actively to engage the parties in mediation and conciliation processes. Case Officers will promote the best resolution method for each case: mediation, online ADR, early neutral evaluation (that is, an evaluation of the legal strength of the claim, probably carried out by a District Judge) or proceeding straight to a full trial.
26. It might be said that the embedding of mediation and ENE into the process is not as radical as it might seem. Mediation and other forms of ADR are encouraged under the CPR. ENE, and in the family courts family dispute resolution, are now established features of judicial case management. There is, however, a fundamental difference between the present approach in civil cases and that under the stage 2 of the online process. The present approach encourages the use of such dispute resolution methods. The Online Solutions Court

embeds them into the pre-trial process for the first time, and requires the court actively to facilitate them. In future, they will be different paths to justice; paths that the court will help the parties to take. And in this we must bear in mind that our commitment to party autonomy includes the right of parties to withdraw and settle their disputes, and that settlement as long as it is just settlement is itself a public good. Stage two of the Online Solutions Court's process will give greater weight to this in civil dispute resolution than has previously been the case.

27. The third stage will see the claim adjudicated by a judge. The process will not necessarily take place in a traditional courtroom. It may be carried out online by video-link, by telephone or on the papers. It will result in a judgment. And this may then be subject to appeal and then, if appropriate, enforcement.

28. So by these means we can see the core functions of the civil courts not simply maintained but augmented. This will be achieved primarily through the use of online processes. The processes will be designed and, where necessary, operated so that individuals can access the system effectively without the need for legal advice or assistance. It is recognised, however, that there will continue to be a valuable contribution which lawyers, whether solicitors or barristers, can make to the resolution of disputes and a fair adjudicative process. They will no doubt continue to play an important role in many cases in early advice on the merits of a claim and a defence and on ways of efficiently and effectively resolving it, whether by ADR or in court; and, if a case proceeds to disposal by a judge, they will undoubtedly continue to play a crucial role on behalf of their clients. It is in recognition of that reality that there may be provision for limited costs shifting (on a fixed cost basis).

29. The critical point, however, is that the Online Solutions Court will operate in what Sir Michael Briggs has rightly described as a 'problem-solving' way. That has not been the traditional approach, even when active case management is taken account of. It will be problem-solving in the sense that the Online Court through stage 1 and 2 of the process will help the parties find the appropriate solution to their dispute. A problem-solving purpose is the next step in the evolution of the Overriding Objective, which lies at the heart of modern case management²⁴.

²⁴ Civil Procedure Rules Part 1

30. The Online Solutions Court is currently focused on improving access to justice for litigants with low value claims. The Online Solutions Court's approach is not one that is obviously and necessarily a blueprint for the system as a whole; although in time it may be adopted more widely. This is not to say that the same thinking in terms of ensuring that the civil courts are more accessible does not underpin wider reforms. It does. The same use of technology that is to underpin the Online Solutions Court is already being rolled out to make the traditional, if I may call them that, civil courts more accessible.
31. The CE-File process in the Rolls Buildings' jurisdictions is the most striking example of this.²⁵ All professional court users are now required to issue their claim forms and applications in the Rolls Building electronically²⁶. Paper process there is now a fact of history. From a litigant's perspective, this means that their lawyers no longer need to incur the cost of physical filing. It also means that law firms can off-shore work or otherwise structure their businesses to reduce cost while maintaining quality: an off-shore office can file a claim online as easily as an office in the same city as the court. Again, cost-savings are possible. And where international commercial and business disputes are concerned, ease of filing over the internet enhances global as well as local accessibility of our courts.
32. Nor should we forget other intended aspects of the improvement in technology that lies at the heart of the reform programme, such as improved video screen facilities, screens for litigants in court, and paperless trials.

HMCTS and reform

33. This broad move towards greater digitisation of the civil process as a whole will have a number of consequences for the delivery of justice that will reshape HMCTS and the court estate.
34. We are all familiar with the present court estate: the Royal Courts of Justice and the Rolls Building in central London, District Registries and Crown, County and Magistrates' courts buildings across the country. The pattern is very much one that is an inheritance from the past, in terms of, for instance, number, location and jurisdiction. It also reflects the traditional nature of courts' administration. As a result of claims and applications having to be issued on paper, court offices and court staff have had to be located in court buildings in

²⁵ <http://www.ce-file.uk>.

²⁶ Under a Practice Direction intended to be made shortly all users will be required to file electronically.

order to be accessible to the public. Jurisdictional differences between the High Court and County Court also mean that parallel systems for issuing and processing need to operate.

35. This can mean that economies of scale and efficiencies that might otherwise have been introduced over time cannot be effected. Put at its most prosaic, it means that paper court files must be transported between court hearing centres where, as is often the case, judges hearing cases move between them. This has an inevitable cost, not least because it is labour intensive. It can also, unfortunately, result in case files going missing with the resultant cost and disruption to both the system and the parties. It also means that a relatively large court estate and administration need to be maintained in order to provide effective administrative offices in each court. A large court estate must also be maintained for another reason. Traditional courts require traditional courtrooms for cases based on papers and live evidence to be decided, and importantly, for them to be heard in public. Again, this is inevitably costly.
36. Digitisation generally, including the Online Solutions Court, presents an opportunity for more effective and efficient administrative practices to be developed. The replacement of paper files with electronic processes and filing means the replacement of physical storage and transportation with e-storage in the Cloud. A Cloud-based file cannot be lost in transit from building to building. On the contrary, as we all know, it is accessible from wherever the user happens to be. This has four important consequences.
37. First, it means that the court estate can properly be reduced and, if reduced correctly, without any material loss of accessibility to court users. It means that, rather than court administration being co-located in court buildings where hearings are to take place, they can be located in specialised administration centres. We already have models for this in the bulk county court claims issuing centres at Northampton and Salford. A common digital process for our civil courts ought to mean that we can establish a national courts administration, rather than the present localised one. It also means that there will be a reduction in the amount of physical processes of material, which can therefore be managed by fewer court staff than at present. This will have two consequences. It will enable court administration to be carried out more efficiently in an environment where HMCTS staff numbers have decreased since the financial crisis. It will also enable the transfer of facilitation and case management functions to case officers and judges of the Online Solutions Court.

38. Secondly, it means that we can reconfigure the design of our court buildings because traditional court rooms will only be required where such an environment is necessary for resolution of the dispute in a world where digital adjudication is otherwise available. This will mean a reduction in the need for back office space. Space will, however, be needed for public access so that litigants in person may file or otherwise manage their claims digitally or seek digital or telephone or other assistance to help them navigate the system. It is well understood that many in our society will for one reason or another be unable on their own to initiate and participate fully in civil proceeding digitally without some assistance. There will need to be provision for computer terminals and video-links to enable litigants and witnesses to conduct and give evidence in online or telephone hearings. The court building of the future will be one of fewer traditional court rooms, adapted spaces for litigants to access the civil justice system digitally and no doubt other areas for the general public. The exact nature of the design will need to be and is being worked out with care by HMCTS and the judiciary.
39. The third consequence of digitisation is that we will be in a position to reappraise where our court buildings are located, and hopefully co-located, so that there is no need to differentiate between a county court building, a Crown Court or Magistrates' Court building, or a Tribunals building: multi-court centres should become the norm due to digitisation. The Online Solutions Court will enable parties to carry out the conduct of litigation from, for instance, their own home computer. There will be no need for them to attend a physical hearing. Justice will be truly local. For other cases, there will be a need to ensure that our reconfigured court buildings are local to their users, taking account of who those users are likely to be, and the distance, time and cost of travel to the court.
40. Consideration will also need to be taken, as suggested by JUSTICE in its recent report entitled, *What is a Court?*, of the provision of flexible court hearing centres in, for instance, local public buildings such as Town Halls or libraries. The ability to establish court digital terminals and video-links in public buildings – 'Pop-up courts' – will again go some considerable way to ensuring that the future civil court is a local court. Excellent steps are already being taken to make this a reality. Tunbridge Wells Borough Council Chamber has, for instance, been used as a test centre for such an approach in civil claims. Lessons are and will be learned from this, and other similar pilots, to ensure that this development works and works well.

41. An overriding consideration will always be to ensure that court buildings and any other places where justice is dispensed are safe for the judges and staff that work in them and for the litigants who use them. Another is to ensure that justice is always open justice, no doubt by innovative ways to achieve this in a digitised system and one where many more hearing will be conducted remotely. This is a matter to which I will return later.
42. The final consequence relates not to administration or buildings, but to the process itself. The Online Solutions Court will require a new form of process to be devised to fit the novelty of its approach. The same must also be the case for the remainder of the civil courts. Digitisation outside of the Online Solutions Court could mean either of two things. On the one hand, it could mean no more than the transformation of present administrative processes into digital form: a steady state approach. On the other hand, it could provide the opportunity to reappraise the court's administrative processes, so that what is digitised is itself more efficient and effective than current practice: an enhanced approach. The latter approach is the one we should, and will, be taking.

Court Structure

43. The focus so far has been on improving the operation of the courts. Digitisation also provides an opportunity to realign the courts structure and tribunals. The aim here would be, as throughout the reforms, to make our courts, and particularly in this case, our future civil courts more accessible.
44. The most obvious way to achieve this will be through the design of a common online claims portal: common to civil, family and tribunals claims. An important intended component of this approach is the establishment of a new online procedure rules committee. Provision for such a committee was contained in the Prison and Courts Bill. That committee would have power to make common rules for the three jurisdictions. Common rules and common processes would be accessible via a common online platform. No longer would litigants have to go to different places, different courts or tribunals to issue their claims. Just as the 19th Century did away with the necessity for parties to use different courts for different claims, digitisation would facilitate a 21st Century version of unification. Ease of access will be central to the design. An advisory group is already undertaking some preliminary groundwork on rules and processes that could be implemented to achieve this common design. An important feature will be the use of ordinary, untechnical language that can be understood by

litigants in person and the absence of a mass of technical detail that, despite the best reforming efforts of Lord Woolf and the admirable work of the Civil Procedure Rules Committee, characterises the current Civil Procedure Rules.

45. In terms of the rest of the civil courts, accessibility is being improved in a number of ways. The Rolls Building jurisdictions that I have already mentioned – the Chancery Division, the Commercial and Admiralty Courts, and the TCC – and the Mercantile Courts have been brought under the new overarching title of the Business and Property Courts of England and Wales. Mercantile Courts, to reflect more accurately their work, are to be renamed Commercial Circuit Courts. As I have said, 5 specialist Business and Property Court regional centres will be established across the country. The regional centres and the Rolls Building will be – as you might expect given the focus on digitisation – operate integrated processes. This will help to ensure that claims can be transferred easily between the centres and London and vice versa so that national and international claims can be heard where it is most appropriate and convenient for them to be determined.

46. This development follows on from the establishment of the Financial List in the Chancery Division and the Commercial Court and the Shorter and Flexible Trials pilot in all the Rolls Building jurisdictions. Those schemes exemplify the present approach to making the adjudicative process both more accessible than in the past and overseen by appropriate judicial expertise for particular disputes. These processes provide parties with the means to adapt the process, within constitutional limits, to best fit their dispute by, for instance, truncating the pre-trial or trial process or by reducing the scope of disclosure. The fact that the Financial List operates across both the Chancery Division and the Commercial Court means that those judges nominated to the Financial List from either jurisdiction can hear any case within it, whether the case was started in the Queen's Bench Division or the Chancery Division. In this way the right judge with the necessary expertise can manage and hear the right case, and access to justice is increased. This should be the model for reform as the future civil court evolves.

How will the reforms work – design issues

47. It will be readily apparent that the nature of the intended reform is very wide-ranging. Digitisation and reform generally would raise questions concerning implementation on their

own. The development of the Online Solutions Court inevitably raises questions of its own. In this final part of my lecture I want to look at some of those questions.

48. The first two issues relate to digital design and operation. The obvious point that could be made against digitisation is that past experience of public IT projects is not auspicious. That might be true if we were to ignore the lessons from the past. The judiciary and HMCTS, who are working closely together across the reform programme as a whole, are learning from the past. Pilot projects and prototypes are being designed and tested. The Civil Money Claims Project, which is intended to deliver the new processes that will lie at the heart of a digital by design and by default online court, is under way. Following intensive research and user feedback, it will enter a test phase later this year with invited users. The pilot will apply to claims below £10,000.

49. The second design issue arises from recent experience in The Netherlands, and is focused on the Online Solutions Court. One of the influences that lay behind the Civil Courts Structure Review's online court proposals was a form of online dispute resolution operated in The Netherlands called The Rechtwijzer. It was an online ADR platform for separating couples, which would help them resolve issues concerning asset distribution etc. It was developed as a collaborative project by the Dutch Legal Aid Board, Modria, a US company which designs and builds ODR platforms, and The Hague Institute for the Internationalisation of Law. Following a three-year collaboration, the decision was recently taken to discontinue the project. The basis of that decision appears to be limited take-up.²⁷ As a model for the Online Solutions Court, it might be thought that the failure of the Rechtwijzer does not augur well.

50. We should, however, be cautious in drawing conclusions here. There is a fundamental difference between the Online Solutions Court and the Rechtwijzer. Our approach is to develop a court, which incorporates ODR into its processes, rather than to develop an ODR platform which sits outside of the court system. The Rechtwijzer's failure should properly be seen as more a consequence of individuals preferring the courts to resolve their disputes than their rejection of online processes. The low user uptake of its consensual settlement mechanism will not apply to our court, as all cases within the Online Solutions Court will be subject to its three-stage process. Settlement and adjudication will not operate within rival

²⁷ S. Hynes, Digital law crashes out for now, *New Law Journal* (27 April 2017) <<https://www.newlawjournal.co.uk/content/digital-law-crashes-out-now>>.

systems, but as complementary mechanisms within an holistic system. We are seeking to enhance our civil court, not create an online alternative to it. As such the question of preference that undermined take-up in The Netherlands is unlikely to be replicated here.

51. The next design issues concern the operation of the Online Solutions Court. They focus on rules, processes and open justice.
52. The central complaint concerning our ordinary civil procedure rules is that they remain complex and unwieldy despite the intention to ensure that they were simple. This design flaw is one that remains to be tackled. I do not share the commonly held pessimistic view that we cannot achieve greater simplicity. I have already referred to proposed online procedure rules to underpin the Online Solutions Court and ultimately the combined Civil, Family and Tribunal platform. I have described the different approach intended to be taken in relation to those rules in terms of simplicity of language and of description of processes.
53. Simple and accessible rules will play a different role within the online environment than our current Civil Procedure Rules. In an online environment the rules will to a significant extent be instantiated in the online court's operating code. As such, there will sometimes be no need to refer to rules. All that will be necessary will be to use the platform. This will not, however, stop anyone from looking to the rules if they want to do so. In this way, the practicalities of online design will help eliminate the procedural aspect of the justice deficit Professor Zuckerman identified. Litigants-in-person will not be subject to any disadvantage through a lack of knowledge of the rules. The online platform will guide them through a rule-following process. Where specific guidance is needed, online guidance or guidance from case officers will be available.
54. Separate rules will not, however, be redundant. Existing and accessible rules will continue to be necessary for a fundamental reason. Court rules are more than simply the mechanism through which the court process operates. Rules are an aspect of public accountability and transparency. They are the means by which government, Parliament and the public can see the choices that the relevant rule committee has made, choices that govern access to the courts. They provide a means by which the rule committee can be held accountable for those choices. This is particularly important where the rules will place a restriction on principles of procedural justice, such as the right of effective access or the right to open justice. Such

choices cannot be left simply to computer code. As such they must and will be publicly available. Democratic accountability depends on transparency.

55. This leads me to another significant design issue: open justice. This is a fundamental constitutional principle. It is the means through which the courts carrying out their role can be held to be accountable. Public scrutiny of the court process, of decisions made, not only helps ensure that court process does not become arbitrary or unjust in application or judgment, it also ensures that court decisions can be subject to public debate. Moving justice online may seem to pose a problem for open justice. The problem posed is one of which we have been acutely aware in the design process.

56. An online court will do nothing to alter the present position concerning the public availability of judgments. The online process will equally be subject to the appellate process, which again will continue to be an open process. There will continue to be public listing of cases. Increased transparency is already in place, for instance, in the Rolls Building where the public can access online case files under the CE-File system. As online case files become the default, they may be made available in the same way as CE-File is available. Enhanced use of technology may, in the future, enable civil proceedings generally to become more accessible. Under consideration are viewing booths for the public to gain access to proceedings in the online court. Moreover, depending on cost and practicalities, physical hearings may become capable of live streaming, particularly at the appellate level of the Court of Appeal. The ability to observe justice online and as it happens should not be reserved to the UK Supreme Court. Ideally, the delivery of justice should be as open to scrutiny as Parliamentary debate.

Conclusion: The Civil Court of the Future

57. Where does this leave us? What does it mean for the civil court of the future. Well, unfortunately for lovers of science fiction, it does not mean that we are to replace human judges with computers. While, as some of you may be aware, some studies have shown that artificial intelligence is nearly as good at predicting judicial decisions as it is at playing chess, the vision of the judge as HAL from *2001: A Space Odyssey* remains a long way off.²⁸

²⁸ N Aletras et al, *Predicting judicial decisions of the European Court of Human Rights: A Natural Language Processing Perspective*, Peer J Comput. Sci. (2016) 2:e93; V. McLoud, *The online court: suing in cyberspace - how the online court challenges us to raise our legal and technological game so as to ensure access to justice*, C.J.Q. 2017, 36(1), 34.

58. What it does mean is that our courts will become more accessible; easier to use for lawyers, businesses, and members of the public. Increasing accessibility will take a number of forms. It will be one that helps individuals take steps to prevent their disputes escalating into litigation. It will incorporate mediation and conciliation into procedure, helping parties resolve their disputes consensually. Where consensual resolution is not possible, it will provide effective online adjudication, the default option for many cases.
59. Procedurally, it will provide a far more tailored form of process than has historically been the case. The idea underpinning the Woolf reforms that process should match the claim will be more perfectly implemented. Effective electronic case management will not be limited to CE-File. Nor will it be something that other jurisdictions have as we look on enviously. It will be as standard. It will see rules and processes simplified in the Online Solutions Court and it will see greater flexibility in process and deployment of judges in the specialist civil courts. Underpinning all of this is a joint commitment by the judiciary and HMCTS to ensure that all our civil courts become more accessible than they have ever been and better able to target their expertise to the right case and to provide the most efficient and effective process for resolving disputes, and able to provide a better range of expertise than has been the case previously.
60. Reshaped by the opportunities provided by the Internet, spurred on by the need to upgrade to ensure the system is more efficient, we have the opportunity to build a civil court that will not just be fully accessible: it will be one more capable of securing equal justice for all.

Terence Etherton

Master of the Rolls and Head of Civil Justice

June 2017