

RULE-MAKING FOR A DIGITAL COURT PROCESS

The Civil Procedure Rules – 20th Anniversary Conference

Mansfield College, Oxford, 10 June 2019

1. I am delighted to be here today at this conference to mark the 20th Anniversary of the introduction of the Civil Procedure Rules. Reform of civil court processes has been and continues to be ongoing. The Woolf reforms were followed by the Jackson review, the Civil Courts Structure Review and now the HMCTS Reform Programme. The present reforms are, however, different. One aim of the Reform Programme is to deliver a more efficient, effective and high performing courts system through the use of new technology. Experience on the ground in developing a new digital civil justice process has made clear the need for a different way of approaching rule making.
2. I must dispel one myth at the very outset, a myth which is widespread. We do not have nor are there any plans for a single online court. The senior judiciary originally had a bold vision for a single common digital platform for Civil, Family and Tribunal claims, with, so far as possible, common forms and processes and without any formal jurisdictional divisions. That proposal was rejected by the Government in 2017. Accordingly, since that time the non-crime Reform Programme has proceeded on the basis of individual digital dispute resolution initiatives in each of the existing jurisdictions – Civil, Family and Tribunals. Each has its own rule-making procedures. Each has its

own arrangements for consultation and for collaboration with HMCTS and the MoJ.

3. So far as civil is concerned, digitisation of dispute resolution is currently focused on the Online Civil Money Claims project (OCMC). This was established as part of the Reform Programme in August 2016. OCMC is currently limited to claims for a specified sum of less than £10,000, with a view to an increase in due course to claims of up to £25,000. In other words, these are the claims which are currently classified as small claims and fast track claims. The importance of these claims cannot be overstated. In 2018, of the total number of money claims issued, 173,432 were allocated to a track. 53% of those were allocated to the small claims track and 40% were allocated to the fast track. Accordingly, only 7% of money claims allocated to track in 2018 were over £25,000. Certain claims are excluded from OCMC, such as personal injury claims and certain consumer credit claims.
4. The development of OCMC has proceeded with contributions from a number of different bodies aside from HMCTS. The Civil Judicial Engagement Group (the Civil JEG) provides a forum for liaison between staff working on the civil Reform Programme and members of the judiciary. Critically, a new sub-committee was established in October 2016 by the Civil Procedure Rule Committee (the CPRC) to address rule changes needed by the introduction of OCMC. The sub-committee has played a critical role in the review and approval of Practice Directions (PDs) for OCMC. Formally, a PD does not

need to be approved by the CPRC. A PD is issued by the MR with the concurrence of the LC. Since the CPR were introduced, however, it has been the practice of MRs to refer intended PDs to the CPRC for comment and approval in order to ensure consistency between PDs and the CPR.

5. It is necessary to emphasise the importance of PDs in the development of OCMC, and in particular PDs made under CPR Part 51. Part 51 provides for Transitional Arrangements and Pilot Schemes. Rule 51.2 provides:

Practice directions may modify or disapply any provision of these rules –
(a) for specified periods; and
(b) in relation to proceedings in specified courts,
during the operation of pilot schemes for assessing the use of new
practices and procedures in connection with proceedings.

6. This is a useful provision which allows PDs to override the CPR as part of a pilot scheme. Part of its utility is that PDs can be made and amended relatively simply whereas rule changes require a statutory instrument to be laid before Parliament. That normally occurs on a six-monthly cycle.
7. It was clear from the start that the work the sub-committee was going to do had never been done before. The drafting of the rules would go hand in hand with the construction of the computer system by the project team. I will come back to this theme in due course.
8. The new rules and procedures were to be designed in an incremental way, starting with the early part of the civil process, such as issuing and serving a Claim Form and Particulars of Claim. The system is intended to encourage

settlement and facilitate mediation at an early stage. Later steps in the civil process would be added afterwards so that, if the dispute does not settle, the process would run all the way to trial and on to enforcement. In the same way the rules were also to be created step by step, in parallel with the system, again a theme to which I will return.

9. HMCTS' project team's initial approach was to run focus groups with court users to investigate how best to design a digital court process. This work did not involve real cases. It allowed the team to design prototype screens and the like. These prototypes were called "Alpha". The next step would be to create a system to handle real cases - so called "Beta". The project would be initiated using so called "Private Beta" and "Public Beta" systems. The new IT system would begin as Private Beta. That would involve a small number of real cases brought by claimants on an invitation only basis. The claimants would be selected by HMCTS from a pool of people who contacted the courts about bringing a claim. Once the Private Beta IT system was working well, it would be ready to be released to Public Beta. The Public Beta system would be open to the public in general. The cases would still have to satisfy the eligibility criteria (e.g. a claim below a certain threshold value) but anyone could access the system and try to bring a claim.

10. Accordingly, a "release" of the IT system, underpinned by suitable rules in a pilot PD, would be run first in the Private Beta. The cases would be closely

monitored. The small numbers of invited litigants meant that if problems arose with the new release (or the new rules) then they could be addressed. Assuming this worked successfully, the IT would move into public Beta.

11. By early 2017 the first drafts of the new rules for the Private Beta system were being considered by the sub-committee of the CPRC. The early version of the IT system was being considered at the same time. A number of rule-making issues were emerging. The rules needed to reflect the fact that a digital court process does not work in the same way as a paper based process (taking the simplest example, a tick box rather than a signature for a statement of truth). Another emerging issue was whether characteristics of the court process should be stated in the rules or be left simply as characteristics of the computer system itself.

12. The process of drafting rules alongside the development of the IT is a difficult iterative process. The sub-committee spent considerable time working with the technical team and the drafting lawyers to produce the draft PD. The technical team had both financial and time constraints and it was difficult to match the programme for OCMC with the meetings of the CPRC. It was as a result of those considerations that Sir Peter Coulson, the acting chair of the CPRC, with the approval of the CPRC, and I agreed that the PD and future amendments would be considered for approval on the basis of the sub-committee's recommendations without recourse to the full CPRC. The sub-

committee chair would continue to provide the full Committee with progress reports and revert to the full Committee if any particular matter arose which required their expertise. This new way of working has been in force ever since. It is plain that this is the only way the project could have been run given the amount of detailed work involved and the close liaison between the rule makers, HMCTS staff, MoJ drafters, and the IT programmers.

13. The first pilot PD for OCMC – PD51R – came into force and the IT system went live on 7 August 2017. That was private Beta (i.e by invitation only) for specified money claims under £10,000 brought by LiPs to be filed online.

14. In the work which led to the approval of the Public Beta system in March 2018 for OCMC the question of governance again came into focus on the project because the sub-committee wanted to be satisfied not simply that the rules of the pilot PD made sense but that the IT system itself would work appropriately before it started.

15. OCMC went into public Beta in March 2018. It has developed since then and as at today's date comprises the following features. LiPs can file claims online. As at 31 May 2019, 69,000 claims have been filed voluntarily by LiPs. A defence can be filed online. 16,000 defences have been filed voluntarily online. As from a couple of month ago, claims can be admitted in whole or in part. Where there is an admission but also a request for time for payment, the IT system will gather the evidence and calculate an appropriate repayment schedule. There have been 835 admissions online. Offers to settle can be made

on line. 668 such offers have been made. A standard settlement agreement online can be reached. There have been 223.

16. The IT system will cater for a request for a stay to negotiate or mediate. The system also gives information to litigants as to facilities for mediation. There can be a request for judgment in default of defence. 44,000 such requests have been made. The online forms to be completed by the litigants enable them to articulate their case in a more straightforward and chronological way than might otherwise be the case.

17. It is necessary to explain where the IT currently begins and ends. If a claimant voluntarily completes a claim on line, which includes a statement of truth and payment of the appropriate fee, the claim is issued. The claim form is printed in the Northampton Business Centre and posted, by way of service, to the defendant's address. If, in completing the claim online, the claimant has provided an email address for the defendant, the IT system instantaneously sends an email to the defendant informing them of the existence of the claim and giving them secure access to the IT system to be able to read the claim form online. Although that is not technically service, a number of defendants do immediately respond doing all the things that the IT system allows, and so there are cases where the claim is settled within minutes of the claim being completed online. If the case is defended and has not reached a settlement, it falls outside the pilot and the PD. It proceeds at Northampton. The litigants complete Directions Questionnaires and, on receipt of those, the papers are

sent to the appropriate court where the case proceeds in the usual way. If the defendant has responded online, it is likely in practice that the case will be sent to the appropriate local court more speedily than with a pure paper process. Feedback from members of the judiciary suggests that there will also be less need to give further directions for greater particularity in the claim or defence.

18. When OCMC is in full operation, there will be an online end to end process.

This means that, in addition to the filing online of claim and defence, the directions questionnaires will be completed online, the order giving management directions will be online, the parties will upload their evidence online in accordance with the timetable and deadline specified online, and, following a determination on the merits (which may be online or not according to circumstances to be determined), an order will be generated online.

19. It is currently contemplated that the end to end process in the public Beta pilot

will be completed by June 2020. In the meantime, the next steps will be Directions Questionnaires online, opt-out mediation, legal advisers giving case management directions in claims under £300 for 4 pilot courts (Manchester, Birmingham, Edmonton and Clerkenwell & Shoreditch). After that, the pilot will cater for online upload of evidence and for determination on the evidence online, without an oral hearing, for claims under £300 for the 4 pilot courts.

20. By way of clarification on opt-out mediation, which is a major aspect of the new digital process, this will be by way of referral to the existing small claims mediation service, which is a telephone service. My own hope is that this will be translated in due course into a full online mediation process.
21. It should also be mentioned that, as part of the general civil Reform Programme, there is a video pilot currently under way for a “skype” type hearing for applications to set aside default judgments.
22. An end to end online process of this kind requires not only electronic filing but also a digital case file management facility. A digital case file management system is currently being extended from the Rolls Building to the rest of the High Court and the Civil Division of the Court of Appeal. Another digital file management system is currently being piloted in the family justice system. With the unattractive name of Core Case Data this is to be rolled out in county courts starting with the 4 pilot courts.
23. As I have said, the current public Beta pilot for OCMC is a voluntary process limited to LiPs. It is intended that in due course an online money claim process will be extended to professional court users based on the same file management system as OCMC.
24. There is, of course, currently a digital filing process for money claims in the form of Money Claims Online – MCOL, which operates out of Northampton. This is limited to online filing, including bulk issuing by organisations such as HMRC, and to filing requests for judgment and warrants. It has a higher

money limit than the current OCMC pilot. It does not have the other facilities currently in play or planned for OCMC and also has a character limit. In due course HMCTS has said it will be closed down.

25. What I have so far described is the factual setting for the practical and policy issues about rule making for a digital court process. There are several aspects to this. Firstly, as I have already mentioned, the creation of a digital court process and additions or alterations to it involve an intense, ongoing, interaction between software writers or coders, those with a knowledge of litigation process and drafters. There is a continual trial, error and refinement of the steps by which the user is to be taken through the litigation process by responding to instructions and information on the screen and of the responses from the user which the IT system will accept or reject.

26. Secondly, that iterative process would be unworkable if there had to be formal approval by a rule making body – whether the CPRC or some other body – of each such decision reached between the various groups building the system and each refinement of the IT system. The drafting process is being carried out at the same time as the digital system is being designed. There is no system specification which exists in advance and which can be given to a rule drafter.

27. Furthermore, the process requires a very considerable judicial resource to provide the coders and HMCTS with guidance on a proper court process. It was for that reason that I recently set up the Judicial Digital Steering Committee (JDSC), under the chairmanship of Birss J, with HHJ Chris

Lethem as vice-chair. Both of them are also members of the CPRC digital sub-committee. There are 8 other civil judges – 2 CJJ, a QB Master and 5 DJJ. I recognised that, in addition, it would be sensible to include representation from the Family and Tribunal jurisdictions so that all the jurisdictions can be aware of what is happening and learn from each other. The overall purpose of the JDSC is to provide judicial leadership for the digital aspects of the Reform Programme in the civil jurisdiction, including providing judicial leadership for the OCMC pilot, giving expert advice (including drafting guidance) on the procedure and rules aspects, providing assistance to HMCTS in relation to online projects, and contributing to HMCTS's understanding of the justice, lay advice, legal and tech professions' perspective when considering and designing digital systems.

28. Thirdly, there needs to be a record of the way the IT system will work and will interact with the user at any one moment of time. Otherwise, it would be possible for the system and so the court process to be changed without any formality or oversight by a properly authorised body. An analogy can be drawn with court paper forms. They are designed by HMCTS, but neither HMCTS nor its designers have the power or authority to turn them into CPR Forms. That comes from CPR r.4.1 and PD 4. The paper form can only become a lawful one when annexed to the PD. In a similar fashion, reason dictates that the digital design for an online court process can only become a lawful procedure when approved in a rule or a PD.

29. These considerations nevertheless raise the issue as to whether a distinction is properly to be made in a digital court process between, on the one hand, what may be called the specifications of the IT system, a function of the software, and, on the other hand, rules as we currently understand them. Take, for example, the limitation in MCOL of a claimant to 1080 characters. That is currently encoded into the IT system but is also written into the relevant rules (PD7E.5.2). In an end to end digital OCMC there would be hundreds of such instances. In a properly constructed IT system, however, the litigant in person would not be concerned to look at the rules at all or only minimally. The IT itself would determine, and inform the LiP, what is permissible and what is not and what the next steps are in the process. Take, as an example, judgment in default. OCMC allows a claimant to seek default judgment in certain circumstances. They are coded into the IT system. If the request is well founded a default judgment is issued without human intervention. In OCMC a claimant cannot make a request in the IT system for default judgment until after the time for the defendant to defend has passed. That would be 19 days after issue (or with an extension 33 days). That must be recorded somewhere but would it be better and simpler to have it recorded in an approved specification of the system rather than as a formal rule? In a digital court process there is, perhaps, the opportunity to have two types of public document, each tailored to its proper function. First, a set of rules in the form of simple guidance, simply expressed for the benefit of litigants to guide them

what to do. Second, and separately, an approved PD setting out detailed specifications of the IT system, to which litigants ought never need to refer, but which will still be subject to proper oversight.

30. At the present time, as I have said, these various considerations are being addressed by (1) providing the rules for the OCMC pilot in a PD, which can be added to and varied easily pursuant to my powers as Master of the Rolls, in concurrence with the LC, with review of the draft PD being undertaken by the digital sub-committee of the CPRC, and (2) the JDSC providing detailed technical, legal and judicial advice to HMCTS and the technical operatives. What is as yet undetermined is the formulation of a policy and methodology for formal approval of the IT specifications and to distinguish between what needs only to be approved and formally recorded as the specification and what needs to be formulated as a rule.

31. Into this complex and fluid but workable and working scenario, the Courts and Tribunals (Online Procedure) Bill has recently been introduced into Parliament by the Government. The origins of this legislation lie sometime in the past, in the form of the Prison and Courts Bill which was introduced into Parliament in 2017. Although the Government had by that time rejected the idea of a single online court covering Civil, Family and Tribunals, it nevertheless considered that it would be desirable for there to be a mechanism by which simply expressed common rules and common processes could be applied across the different jurisdictions. That was, of course, before the

development of the individual digital projects in the different jurisdictions and a full realisation of the difficulties and methodology of constructing a digital court process. That Bill fell with the dissolution of Parliament in 2017.

32. The aim carried over into the present Bill is that there will be a new Online Procedure Rule Committee comprising 2 judicial members, a barrister or solicitor or legal executive and two other individuals, one of whom must have experience in and knowledge of the lay advice sector and one of whom must have IT experience and knowledge relating to “end-users’ experience of internet portals”. Plainly, once enacted, it will require careful thought how practically to integrate the proposals in the current Bill with what we have now learned about constructing a digital court process and the reality of the existing procedural framework and functioning of OCMC on the ground.

33. Finally, looking at digital court processes in other jurisdictions, notably Canada, the US and Australia, one of the clear lessons is that we must be careful not to be overly ambitious but to proceed cautiously and incrementally, testing the functioning of the system at each stage. This is what has been done and will continue for OCMC. While we must ensure that those who do not wish to use, or cannot use, the online process are not disadvantaged, I have every reason to believe that OCMC will be a success and a great improvement to access to justice for the many tens of thousands of people with small or modest money claims and for those with limited resources.

Sir Terence Etherton MR

