



# Master of the Rolls

**THE RIGHT HON. SIR GEOFFREY VOS**

## **JUSTICE IN THE DIGITAL AGE**

### **THE 150<sup>TH</sup> ANNIVERSARY OF THE TECHNOLOGY AND CONSTRUCTION COURT**

**KINGS COLLEGE LONDON**

**THURSDAY, 2<sup>ND</sup> NOVEMBER 2023**

1. I am honoured to have been asked to deliver this keynote speech on the 150th anniversary of the Technology and Construction Court. I vividly remember my early days at the Bar when I frequently appeared in the “OR’s corridor” as it was known. I learnt that construction cases are some of the most hotly contested. Several of my early trials were before Official Referees.
2. It is interesting that, thus far, the Business and Property Courts have not been closely involved in the digitisation of Civil, Family and Tribunal cases and the work of the Online Procedure Rules Committee, which, as many of you will know, I chair. One might have thought that the Technology Court would be leading on technological litigation practices, but, I note without criticism, that is not really so. I say without criticism, because many TCC case, like many Commercial and Chancery cases, are complex, and much technology is used by both the lawyers and the judges within the process. What has not yet happened, however, is the complete digitisation of the process which is planned for most other CFT jurisdictions.
3. I want to examine today how the digitisation of the process and the creation of a digital justice system for all “small” civil family and tribunal cases will or may affect the handling and disposal of the larger cases dealt with in the Business and Property Courts. Along the way, I will consider the impact that generative AI and the Electronic Trade Documents Act 2023 are likely to have on business dispute resolution in the courts.

#### **Current technology**

4. I was Chancellor of the High Court when the use of CE-file was mandated in the Business and Property Courts in 2017. At that time, CE-file was seen as something of an interim solution, and I well remember being told by HMCTS at about that time that the digital systems that were being created for the Courts and Tribunals Service as a whole would, in due course, be rolled out to replace CE-file.
5. Since 2017, we have also had Covid, and the B&PCs were in the vanguard of keeping the show on the road. Remote hearings were adopted quickly and embraced by judges and practitioners alike. They are still extensively used for short and interim hearings saving travel and waiting time.

6. Moreover, transcription technology, such as Opus 2, has now become standard for most significant B&PC trials and even appeals. It provides tremendous versatility and digital access to documentation, but does not itself change the process.

### **The digital justice system**

7. The difference between current B&PC practice and the digital justice system that is planned for pretty well all ordinary CFT cases is that the litigation process will be undertaken end-to-end online. Orders will be made online and, therefore, instantly received by the parties. There will be the capability for automated notices, alerts and warnings to be sent to the parties and their lawyers to prevent default. The systems that are being created are smart, in the sense that non-machine-readable text is only used where absolutely necessary, so that the maximum possible level of automation is achieved. Of course, there will still be remote and face-to-face hearings where needed, but all the administrative, background and routine parts of the process will be undertaken electronically. I entirely accept that all this is very much work in progress, but the process of digitisation is absolutely underway.
8. Some of you may have heard me talk about the digital justice system in terms of a funnel comprising three tiers. At the first tier, a person's problem will be identified, in all probability by systems utilising AI. The objective will be either to direct the would-be litigant to the best online pre-action site for their specific problem or to online legal advice, whether from AI or human lawyers. The online pre-action site may be an ombudsperson, a mediation portal, or some other form of resolution. This second tier is composed then of a raft of online dispute resolution portals, of which the Whiplash or Official Injury Portal, the ACAS site for employment disputes, and the ombuds portals are pathfinders. Only if non-court-based dispute resolution fails will litigants or their lawyers be directed, using the same data set, created once only, to the online digital court process at the third tier, whether that is online civil money claims, damages claims online, family public, private or money claims, or employment or immigration tribunal claims online.
9. The way that the Online Procedure Rules Committee (OPRC) sees the Digital Justice System is developing and perhaps becoming more sophisticated.
10. The first thing to understand is that the digital justice system is not actually a new thing. It is simply a deliberate evolution of our current system. It brings together existing processes and providers that have been digitised and supports and encourages other to digitise. It uses the potential offered by digital technology to create a more coherent whole. The idea is that enabling individuals and businesses to access legal services and dispute resolution online in a coherent and interconnected way will provide greater access to justice. The system will be far better suited to the technological age in which we are all living. Of course, alternative equivalent access will be provided for the digitally disadvantaged.

11. Why do I say all of this isn't new? Well, you were, I am sure, invited here by email. There is little now that is done without technology. Digital systems are already ubiquitous, and their further use is inevitable. A number of ombudspeople have portals which mean their services have mostly been provided online for years. The legal advice sites such as AdviceNow and the Citizens Advice Bureau have been available for a long time. The Official Injury Portal is only 2 years old and has already dealt with some 650,000 cases, but even that was preceded by the Road Traffic Portal that was dealing online pre-action with some 600,000 cases per year. Mediation services are also widely available in an online setting – one just has to make sure that those in need of them can be directed to them in a timely manner. And I am sure that almost all the lawyers in the room use some form of electronic case management system. Digitisation is not new. It is not a question of whether it happens. It is just a question of how we do it.
12. The second thing to understand about the digital justice system is that the government and HMCTS is not building everything. It is creating connections between portals and services that were previously operating in isolation from one another. One example will make the point. A few months ago, I was speaking to the Housing Ombudsman, whose portal deals itself with some 60,000 cases per year. He explained to me that he had to turn away thousands of applicants every year, because they had come to the wrong place to solve their specific problem. In some cases, the landlords in question were not covered by the statutory ombuds scheme. In other cases, the person's problem was really not a housing one at all, but might be a claim for personal injury damages or a complaint about a decision by a public authority. As things stand, the Housing Ombudsman has just to send those people away. They can try to suggest other options, but there is no formal process for doing so. The digital justice system will provide the network and the information highway that will allow the person seeking a solution to be directed swiftly to another until they find the right place for their problem to be tackled either online or offline.
13. Analogies are difficult. This is a different way of thinking about the justice system. I imagine the ombuds and pre-action portals, mediation hubs, and advice sites as the atomic nuclei with the information highway made up of the electrons connecting them. Another analogy has the pre-action portals as the organs of the body with the blood being the information highway around them.
14. And finally, the third thing to understand about the digital justice system, is that it is not a single creation that will be "finished" in 2023, 2024 or even 2030. As the justice system has always been, it is a living developing phenomenon. It is now properly aimed at providing ongoing online legal assistance, and dispute resolution services of all kinds for all types of legal problems faced by our citizens and businesses.
15. It will be interesting to consider at some stage how far our digital system might be accessible by parties overseas, and might, in years to come, be connected with digital justice systems in other countries. The European Law Institute is doing a project on digitising justice systems looking at what the 27 EU member states are doing in this area.

We are not alone in seeking to create online digital justice platforms, but we are certainly in the vanguard.

**Where do the B&PCs fit in to this growing online dispute resolution structure?**

16. Let me declare my hand. I think it is inevitable that all civil family and tribunal litigation will be undertaken through an online system. It may take some time for the systems to be completed and expanded to cover everything, but eventually, there is no reason whatever why every type of dispute should not be dealt with in a very similar way using the online CFT platform that HMCTS is creating.
17. HMCTS explains its ongoing reform programme as having created two – and only two - online dispute resolution platforms. They are the common platform for crime and the CFT platform for CFT cases.
18. Specialists in different types of litigation often seek to say that their type of litigation requires specialist online systems. In fact, however, all litigation follows a simple intuitive model that lends itself to digitisation. One side puts forward some fact pattern and a claim for some specific relief. In many “small” cases, both the facts alleged and the relief claimed follow a familiar oft repeated pattern – whether we are talking about employment claims, private family claims, public family claims, possession claims, damages claims, personal injury claims or property disrepair claims. The opposing party then wants to respond with its factual contentions and possibly with a cross claim for relief. In some cases, there are multiple parties and interests, but each has some facts to proffer and sometimes a claim for relief to make. In short, there is nothing new under the sun. The specific kind of relief that a party seeks is not a reason why an automated system cannot be used. If the relief sought is not suggested by the system, free text can be added explaining what unusually is sought.
19. In B&PC cases, we have developed 10 different lists and courts. I accept responsibility for that approach back in 2017. They are the TCC, the Commercial Court, the Admiralty Court, the Intellectual Property List (including the Patents Court), the Insolvency and Companies List (including the Companies Court), the Financial List, the Competition List, the Business List (Ch), the Property, Trusts and Probate List, and the Revenue List. But all the cases in all these lists follow the same pattern that I have described, facts and relief claimed, followed, by response, facts and relief by opposing parties. What makes B&PC cases more complex is the identification of the real issues that require determination. We use cumbersome processes to achieve that essential objective, often creating thousands of pages of pleadings and witness statements before managing to identify and address what are often distilled down into a few central legal and factual questions that truly divide the parties.
20. I have said for many years that I do not believe that pleadings are required in every case. They are often over-complex and never referred to once the trial begins.

21. I think the B&PCs need to be pro-active in reforming its procedures for a digital age. The Commercial Court Guide led the way when I was starting out at the Bar. Then there were Lord Woolf's reforms and the introduction of the Civil Procedure Rules at the very end of the last century. Now we need to look again at the basic commercial dispute resolution process with a view to creating a properly digitised dispute resolution platform, whether that is the existing HMCTS one that I have been talking about or something more sophisticated.
22. As Head of Civil Justice, I am doing all I can to rid the County Courts of the delays and backlogs caused by the use of paper. The High Court and the B&PCs cannot be exempt. They too need to move quickly also to digitise.
23. So there is the point. What does digitisation of B&PC cases mean in this context? This is something that, thus far, has not been much debated. I want to emphasise that anything I say this afternoon is intended only to start, not to foreclose, that debate. I care as much as any of you about the quality of justice provided in the Business and Property Courts and would do nothing to jeopardise it. I do, however, think that the B&PCs of England and Wales should not lag behind. They should lead the revolution in digital justice for commercial cases in courts and even in commercial arbitration. The B&PCs must demonstrate that their international reputation for commercial dispute resolution is well-deserved and can be carried forward and enhanced in the digital age.
24. The first thing to say about digitisation of the B&PCs is that it means more than CE-file. As HMCTS itself said years ago, CE-file was an interim solution. It allows for digital filing and is well-liked by users. But it does not allow for the end-to-end online case management that is needed in commercial cases. The digital justice system will allow for online filing as well as online case management, online orders, online hearing bundles and ultimately online applications and enforcement. A smart system of that kind, whether as part of the digital justice system or separate from it is vital to the B&PCs pioneering reputation.
25. The second thing about digitisation of the B&PCs is that it must make maximum use of available AI technologies and of smart systems. The purpose must be to reduce unnecessary costs for users, and to squeeze delays out of the dispute resolution process. Our current procedures were formulated at the end of the 19th century – 150 years ago – just as we are celebrating today. We need processes that make maximum effective use of the technology of 2023, not of 1873. AI can help process the mass of data that modern TCC and B&PC cases create. It can help identify the issues that need to be determined. It can even suggest solutions to those issues, whether in the context of mediation or otherwise.
26. The third thing to understand about digitising the B&PCs is that the disputes that they will be resolving will be quite different in the digital age. I need not dwell on this point as many of you will have heard me speak at length about it before. But we will be resolving disputes about digital assets and smart contracts and distributed ledger technology, not just about

physical construction projects. We will be determining responsibility for error in the context of automated rather than human decision-making, where liability will be apportioned between programmers and technology producers, rather than between architects, construction companies and structural engineers. The cars, trains and planes will be driven by machines and liability for the accidents that occur will present new complex problems not contemplated in the analogue world. Now that Parliament has passed the Electronic Trade Documents Act 2023, we can expect to see bills of lading and bills of exchange and all other trade documents in digital form, simplifying international trade and reducing the scope for error and dispute. The use of electronic trade documentation will speed forward the adoption of digital payment mechanisms and blockchain.

27. Finally, therefore, the digitised dispute resolution processes adopted by the B&PCs will need to be integrated and streamlined. It will need to be accessible by the parties, the lawyers, the experts, the court administration and the judges. It will need to embrace AI and machine-readable documentation and, above all, will need to allow for the speedy identification of the real issues dividing the parties, so as to allow for resolution rather than prevarication. None of this will be at the expense of justice. But the users of the B&PCs will not forgive us if we do not use the 150th anniversary of the TCC as a launch pad for the digitisation of its processes and of those of all the B&PCs.

### **The use of AI within a digital justice system**

28. Let me then ask a further subsidiary question. What do I mean by saying that the B&PCs should embrace the use of AI within the dispute resolution process. How will generative AI and large language models change what we do in the B&PCs.
29. It is now reasonably clear that large language models like ChatGPT can provide answers, reliable or not, to basic legal questions in seconds. They will get better at it when their training is dedicated to legal data rather than a range of more general and perhaps less reliable sources. That said, the products of LLMs will always need human checking, just as the AI diagnosis of cancer needs to be checked before the news is delivered to the patient.
30. Many of the litigation activities undertaken by junior lawyers and paralegals will change. We will be able to process and summarise large volumes of complex data in seconds without the need physically to read and digest thousands of pages or lever arch files. More importantly, because DLT will mean that more and more events are recorded immutably on chain, less and less factual dealings will be contestable and in need of judicial resolution. AI should make it far easier to identify the legal issues, and any residual factual issues, between the parties. Dispute resolution, adopting the assistance of LLMs and other technological tools, will undoubtedly be quicker and easier. But there will be a steep learning curve for all of us between now and then.

31. It seems obvious that whatever disclosure is required in commercial litigation will be, as much of it already is, entirely automated, and it will become far easier to interrogate the data sets.
32. AI will be used also to predict case outcomes. All this is available today and improving all the time. What litigant, one might ask rhetorically, would not want to know what an established AI thought about their prospects of success, even if they also want to know what their lawyers think about what the AI predicted.
33. My approach here is practical There are conversations in Bletchley today and elsewhere about the big ethical questions that AI throws up. They are important. Obviously we need to adopt the use of AI thoughtfully and safely, but we should not allow safety concerns to prevent us adopting demonstrably valuable technology to improve access to justice and to allow dispute resolution to be delivered more quickly and at more proportionate cost.

#### **The reputation of our B&PCs**

34. So why is all this so important for the future of the Business and Property Courts of England and Wales. It is because international litigants have a choice, and because, as I have mentioned already several times this afternoon, we need to ensure that, whatever else we do, we preserve the enviable international reputation of our B&PCs.
35. Some of you may have been present at the swearing in of our new Lady Chief Justice. I mentioned there that I had, this last summer, been dipping into Lord Campbell's three volumes on the Lives of the Chief Justices of England, first published between 1849 and 1857. I found something there that chimed with what I have been saying. What happened in the time of the discreditable Lord Chief Justice Sir Robert Wright must not be repeated today. The courts were shunned by litigants. That is something that timely and well considered reform and digitisation of our systems should avoid for the future.
36. Lord Campbell described Chief Justice Sir Robert Wright in his second volume (page 95), as the "*last of the profligate Chief Justices of England*". He was, said Lord Campbell notable for his habits of "*gaming, drinking and every sort of debauchery*". Having been patronised by the notorious Chief Justice Jeffreys, he was appointed as Chief Justice himself in 1687.
37. I want to read you one passage, which explains why the high quality of justice in our Business and Property Courts is as important now as it was in 1687. Lord Campbell wrote as follows at page 101:

*"Confidence was entirely lost in the administration of justice in Westminster Hall, for all three Common Law courts were at last filled by incompetent and corrupt Judges. Pettifogging actions only were brought in them, and men [I interpose to apologise for the sexist approach of the times] [men] settled their disputes by arbitration or by taking the opinion of counsel. The Reports during the whole reign of James II hardly*

*show a single question of importance settled by judicial decision. Thus having no distinct means of appreciating Chief Justice Wright's demerits as a Judge in private cases, we must at once follow him in his devious course as a political judge".*

## **Conclusions**

38. Let that stand as a warning to all of us. I hope that this short talk may serve as a starting point for an important and urgent debate. How can we now extend the digital justice system to B&PCs or, in any event, create a digital system of court-based commercial dispute resolution fit for the middle of the 21st century. The users will expect it, and we must always remember that they have other options.
39. The TCC has come a long way in the last 150 years. I am confident that that the TCC and whole B&PCs will go from strength to strength in the next 150 years serving the interests of new generations of commercial parties. Those parties will undoubtedly trade and document their trading in very different ways. The TCC will surely accommodate those changes.
40. I will happily answer any questions you may have.