JUDICIARY OF
ENGLAND AND WALES

LORD JUSTICE JACKSON

REFORMING THE CIVIL JUSTICE SYSTEM – THE ROLE OF IT
SOCIETY FOR COMPUTERS AND LAW

THIRTEENTH LECTURE IN THE IMPLEMENTATION PROGRAMME

26TH MARCH 2012

"When Apple first started out, people couldn't type. We realized: Death would eventually take care of this".[1]

1. INTRODUCTION

1.1 Costs Review Final Report. The Costs Review Final Report was published in January 2010. That report proposes an integrated package of reforms, which are intended to facilitate access to justice for all civil litigants at proportionate cost.

1.2 Implementation. Both the Government and the Judicial Executive Board welcomed the report and expressed support for implementing the proposals. Implementation is, inevitably, a lengthy process and requires co-operation from many organisations. The primary legislation required is currently before Parliament and, if approved, is likely to come into force in April 2013. It is planned to implement a large number of other recommendations (which do not require primary legislation) at the same time.

1.3 Judicial Steering Group. The Judicial Steering Group ("JSG") was set up to oversee implementation on behalf of the judiciary. The Master of the Rolls chairs the JSG. As a member of the JSG, I have been asked to take a pro-active role in relation to the implementation programme. This role involves setting up pilots, assisting with drafting the new rules, attending numerous meetings and so forth.

1.4 Implementation lectures. In order to assist the profession in preparing for the coming changes, I am giving a series of lectures to explain the reforms and the thinking behind them.[2] This lecture forms part of that series.

---

[1] Steve Jobs, interview, 28th May 2003
[2] These lectures can all be found on the judiciary website http://www.judiciary.gov.uk/. The tenth lecture in the series (on docketing) was delivered by the Master of the Rolls.

1.5 Abbreviations. In this lecture note "FR" means the Costs Review Final Report. "TCC" means the Technology and Construction Court. "ADR" means alternative dispute resolution. "SCL" means Society for Computers and Law.

2. THE GENERAL REFORMS TO CIVIL PROCEDURE

2.1 The proposed reforms are set out in the FR and only a very brief summary can be attempted in this lecture. The detailed steps being taken to implement specific recommendations with effect from April 2013 have been set out in earlier lectures in this programme.

2.2 The essential elements of the reform package are:

- Eliminate funding mechanisms which drive up costs, in particular recoverable success fees and recoverable ATE premiums.
- Extend the range of funding mechanisms available to parties, e.g. contingency fees ('damages based agreements'), third party funding and 'contingent legal aid funds'.
- Ban referral fees, at least in personal injury cases.
- Introduce fixed costs in the fast track.
- Introduce costs management above the fast track.
- Promote judicial continuity or docketing wherever possible.
- Control disclosure and e-disclosure more effectively, so that the costs of the exercise are proportionate to the issues in dispute.
- More robust case management and tougher enforcement of court orders.
- Streamline the process for assessing costs at the end of a case.
- Promote ADR as a cost effective form of dispute resolution, which is still under-used.[3]

2.3 In addition there are numerous recommendations focused upon specific areas of litigation, such as intellectual property, commercial, personal injury, defamation clinical negligence etc. For a fuller account of the proposals, please see the FR or the other lectures in this series.

3. IT SUPPORT FOR SPECIFIC REFORMS

3.1 All of the planned reforms have consequences for the IT systems used by solicitors. Hence the importance of giving as much notice as possible to the profession about what is coming. Some of the reforms generate the need for specific software, as discussed in this section.

3.2 Standard directions and model directions. An application is currently in an advanced stage of production that will generate appropriate directions in county court cases throughout the country. It is intended that it should be used also for High Court

[3] See e.g. *Faidi v Elliott Corporation* [2012] EWCA Civ 287

cases in the QBD outside London. It will be the first step towards the implementation of the recommendations contained in paragraphs 5.2 and 5.3 of FR Chapter 39. It incorporates the standard directions which will form the basis of the new CPR Rule 29.1(2):

"When drafting case management directions both the parties and the court should take as their starting point any relevant model directions and standard directions which can be found online at … and adapt them as appropriate to the circumstances of the particular case."

This will be available to all judges and will enable them to generate orders for directions appropriate to any particular type of case. The intention is that templates of such directions, for the use of legal advisers and litigants in person, will be placed on a Government website, possibly the Justice site - although the precise home is still under discussion - so that they are accessible to all. There will be a facility to update them as required.

3.3 If this proves successful, it is hoped that it might be possible to provide a similar application for the QBD in London, whose administrative arrangements will require the present model to be modified in some respects and where there is a need to cater for unusual cases such as asbestosis and mesothelioma litigation, the majority of which is handled in London. At the same time, the working group (now strengthened by the inclusion of Mr Justice Edwards-Stuart) is exploring the possibility of providing a similar application that can be offered to each of the Chancery Division and the specialist jurisdictions, such as the Commercial Court, TCC, Mercantile Courts and so on. In each case the object would be to provide the facility to generate standard directions in the form appropriate to the division or specialist list in question.

3.4 Automated monitoring of compliance. FR recommendation 86 proposes stricter measures to secure compliance with court orders. The second half of that recommendation reads:

"If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions."

With effect from 1st April 2013, this recommendation will be implemented by a new rule enabling the court to monitor compliance.[4] However, IT is required to make this new rule effective.

3.5 Professor Richard Susskind is seeking to develop an automated system for monitoring compliance. It is envisaged that this will comprise (i) email prompts advising parties of impending deadlines and (ii) electronic alerts advising judges when deadlines have been missed. The former is technologically straightforward: important dates would be entered into a system and reminders would be sent out automatically. The latter would be more complex, requiring parties, effectively, to tick boxes online when tasks have been accomplished. Such box ticking would take time and therefore generate modest additional costs to the parties. This can only be justified in the heavier multi-track cases. Professor Susskind will be holding a

[4] See implementation lecture 5.

seminar at UCL under the auspices of the Judicial Institute on 27th April 2012 in order to develop proposals for automated monitoring of compliance. Whether it will be possible to implement these proposals in April 2013, I do not know. In the long term, however, I consider that IT support for the implementation of FR recommendation 86 will be essential.

3.6 Costs management. Costs management requires that the parties produce budgets at the outset of litigation and the court manages the litigation in accordance with approved budgets. The budget form which will be used when costs management is introduced generally[5] must be as user-friendly as possible – both for the solicitors who compile it and for the judges and advocates who use it at case management or costs management hearings. This budget form is now being developed with considerable input from (a) those who are monitoring the pilots, (b) practitioners with costs expertise and (c) Professor Susskind on the IT side.

3.7 Many solicitors now use costs budgeting software, some of which was demonstrated to me during the Costs Review. This software will need to be developed so that it can readily be used to complete the new costs management budget form.

3.8 E-disclosure. The Practice Direction on Disclosure of Electronic Documents which was envisaged in FR chapter 37 is now in force.[6] The IT systems which are constantly being developed and improved for the review of documents (in particular, predictive coding) have a major impact on the focus and indeed the overall costs of litigation. E-disclosure is too vast a subject to address within the confines of this lecture. However, I believe that many members of the SCL are involved in developing those systems. Your work is critical to the survival of effective adversarial litigation in the digital age.

3.9 Assessment of personal injury damages. FR chapter 21 reviews the software systems which – in practice – are used for assessing general damages in the vast majority of personal injury cases. The recommendation made at the end of that chapter is:

"I recommend that a working group be set up to establish a uniform calibration for all software systems used in assessment of damages for PSLA up to £10,000. That calibration should accord as nearly as possible with the awards of general damages that would be made by the courts."

3.10 Pursuant to that recommendation, a working party was set up under the aegis of the Civil Justice Council. Unfortunately, the working party failed to establish any uniform calibration as envisaged. This is an item of unfinished business, which members of the SCL may possibly wish to take forward.

3.11 Bills of costs. FR chapter 45 recommends that a new form bill of costs be developed, as set out in paragraphs 5.3 to 5.8:

"5.3 The three requirements. There are three requirements which have to be

[5] April 2013
[6] See Practice Direction 31B.

satisfied:

(i) The bill must provide more transparent explanation than is currently provided, about what work was done in the various time periods and why.

(ii) The bill must provide a user-friendly synopsis of the work done, how long it took and why. This is in contrast to bills in the present format, which are turgid to read and present no clear overall picture.

(iii) The bill must be inexpensive to prepare. This is in contrast to the present bills, which typically cost many thousands of pounds to assemble.

5.4 How to meet those requirements. In my view, modern technology provides the solution. Time recording systems must capture relevant information as work proceeds. The bill format must be compatible with existing time recording systems, so that at any given point in a piece of litigation a bill of costs can be generated automatically. Such a bill of costs must contain the necessary explanatory material, which is currently lacking from the bills prepared for detailed assessment. Crucially, the costs software must be capable of presenting the bill at different levels of generality. This will enable the solicitor to provide either (a) a user-friendly synopsis or (b) a detailed bill with all the information and explanation needed for a detailed assessment or (c) an intermediate document somewhere between (a) and (b). The software must provide for work which is not chargeable or work which is written off to be allocated to a separate file.

5.5 Armed with such a software system, solicitors should be able to produce up to date costs information for the client or schedules of costs for summary assessment at whatever level of generality may be required. Also, at the end of the case, the solicitors will be able to produce a detailed bill of costs, which can be used either for negotiating costs with the other side or for a detailed assessment hearing.

5.6 I therefore recommend that work should be put in hand to develop existing software systems, so that they can (a) capture relevant information as work proceeds and (b) automatically generate bills of costs at whatever level of generality may be required. Two of my assessors, Senior Costs Judge Peter Hurst and Jeremy Morgan QC, have discussed the possibility of such software being developed with a firm of law costs consultants. The current proposals are that a bill should be presented in the order "phase, task, activity".[14] According to these proposals, the bill is divided into five "phases": (1) case assessment, advice and administration; (2) pleadings and interim applications; (3) disclosure; (4) trial preparation and trial; and (5) detailed assessment. Each phase is then broken down to identify different tasks. A summary sheet lists the profit costs and disbursements in respect of each task in each phase. In the body of the bill itself, each task in each phase is set out in chronological order, with an indication of the time spent and the amount claimed. A bill in this form could easily be transmitted in electronic form, provided that all those involved had compatible IT software. If bills were to be prepared along the lines suggested, and dealt with electronically, there would potentially be large savings in time and costs. One advantage of the proposed system is that costs information can be extracted at different levels of generality. The electronic formatting of bills should, in principle, provide greater transparency.

5.7 I readily accept that developing new software will be expensive. However, if successful, it will generate major savings. The huge costs of drafting bills of costs will be avoided. The suggestion made by the Association of Her Majesty's District Judges (viz that a print out of the solicitors' time record be used for detailed assessment) will

[14] The three-tiered structure of the scheme is based on the Uniform Task-Based Management System adopted by many US firms and by a limited but growing number of solicitors in this country who have US corporate clients. This is a budgeting and billing system designed to provide clients and law firms with useful standardised costs information on legal services. It is set out in the Codeset available on the American Bar Association website at http://www.abanet.org/litigation/utbms/.

not be adopted directly, but my proposal is a variant of that suggestion. The resulting bills will be easy to read and digest, thus meeting many of the concerns expressed during Phase 2. The work done on documents (often the largest item in any bill) will become intelligible. This will give effect to the very sensible advice given by the working group. Furthermore the software will be able to generate (a) simple schedules of costs for the purpose of summary assessment or (b) detailed bills for the purposes of negotiation or detailed assessment at the end of a case. The court must have IT systems capable of receiving bills in electronic format.

5.8 The long term aim. Consideration should also be given to developing a single software system which can generate both cost budgets and bills of costs. The ultimate aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment."

3.12 The Association of Costs Lawyers is now taking forward these recommendations and has set up a working group for this purpose. Jeremy Morgan QC, on behalf of the JSG, is liaising with that working group. He is seeking to ensure that the new format for bills of costs can readily be reconciled with the budget forms to be used in costs management. Once again Professor Susskind has kindly agreed to assist on the IT side.

3.13 Alternative Dispute Resolution. One of the valid objections to ADR is that the process may be expensive and, if no satisfactory settlement is achieved, the costs of the process may be wasted. I understand that in the USA *Cybersettle* (a web-based system) has been developed as an inexpensive form of online dispute resolution. This uses 'double-blind bidding'. Some forms of online mediation are already available in the UK, e.g. 'e-mediator' from Consensus Mediation or 'The MediationRoom'. Nevertheless there would be obvious advantage if online mediation is further developed, perhaps through the good offices of the SCL.

4. THE NEED FOR AN INTEGRATED COURT IT SYSTEM

4.1 The goal. Quite apart from the IT required to support specific reforms discussed above, there is an overarching need for the civil courts to move from "paper" systems to electronic systems, just as almost every other public service has done. A paper based banking system in which all major transactions are accomplished by means of hard copy documents would now be unthinkable. Sooner or later the same will be said about litigation.

4.2 An integrated court IT system. By an integrated court IT system, I mean a system under which parties can issue proceedings online, pay court fees electronically, serve online, file pleadings and applications online, lodge bundles online, access the court bundle online, receive judgments and orders online.[7] Some overseas jurisdictions already have such systems, for example Singapore and some courts in Australia and the USA.

4.3 What we have at the moment. At the moment we have some elements of the above, but they are incomplete and disconnected. For example MCOL and PCOL allow litigants to issue straightforward possession claims or money claims on line. The scope of MCOL and PCOL ends if the claim is defended. At that point the case

[7] See FR chapter 43.

is printed out and the documentation is transferred to the traditional court system.[8]

4.4 Rolls Building. An integrated court IT system is intended to be developed to serve the Rolls Buildings jurisdictions. I hope that in the future this will lead to electronic working systems being developed more widely.

4.5 IT systems in the public sector. There have of course been problems with various government IT systems in the past.[9] The fact remains, however, that other jurisdictions overseas have developed fully integrated court IT systems.[10] It should not be beyond our powers to do the same in the UK, especially if we purchase off-the-shelf systems and build on them.

4.6 Can we afford it? I would respectfully suggest that **we cannot afford not** to develop an integrated court IT system. Britain has long been and must remain a major centre for international dispute resolution. In those circumstances there should be no question of allowing our own court IT to lag behind that of competitor jurisdictions.

4.7 What happens if solicitors won't use the electronic system? The question of compulsion may have to be considered. It will be recalled that in Singapore, when practitioners were initially reluctant to use electronic filing, the rules were changed so that this became compulsory. Solicitors must be willing to change long cherished habits and accept service by email.

4.8 A helpful distinction. It is helpful to distinguish between two separate uses for IT in the courts. First, there is using IT to support the existing administration and paperwork of the courts: for example, e-filing, case management directions online and so forth. Secondly, there are IT supported processes which may replace some traditional court processes: for example, virtual hearings. My present concern is with the first category, for which there is now a pressing need. IT developments in the second category will no doubt follow in due course, but that is more a matter for all of you than for me.

5. CONCLUSION

5.1 The FR sets out – at a certain level of generality – a series of reforms which will be required if the civil justice system is going to deliver value for money to court users. All of those reforms, one way or another, require IT input if they are going to be implemented.

5.2 It is a great honour – indeed also an irony – for me as a slow learner in all matters of technology to deliver the annual lecture to the Society for Computers and the Law. I come before you this evening not as a judge to pontificate, but rather as an advocate for reform to seek your assistance and your support in the project which is under way.

---

[8] For a summery of the other existing court IT systems, see FR chapter 43, section 4.

[9] As commented on in Public Accounts Committee reports

[10] I saw a most impressive demonstration of such two such systems in the Singapore High Court and the Singapore Arbitration Centre last year.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Office Communications Team.