Brave new digital world?

The Master of the Rolls is pursuing an ambitious transformation of civil justice as we know it—and he deserves all the support he can get, says **Stephen Shaw**

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In a series of addresses this year, the Master of the Rolls, Sir Geoffrey Vos QC, has been not so much thinking outside the box, but ripping up the concept of boxes altogether. In speeches at the Society of Computers and Law in March, the London International Disputes Week in May, and most recently in the Roebuck Lecture at the Chartered Institute of Arbitrators on 8 June, his message has been clear. He means to spearhead the biggest shake-up of the administration of civil justice in England and Wales since the introduction of the Civil Procedure Rules nearly 35 years ago. Indeed, by comparison, his reforms (which are already being implemented) will change the whole nature of civil litigation.

His central theme is that what he calls the 'analogue' approach to litigation, must be abandoned, in favour of 'digitalised' justice. He argues that the traditional methodology, involving initial heated lawyers' correspondence, followed by lengthy pleadings and discovery, expensive and prolonged satellite litigation, and ever more aggressive and lengthy restatements of case, in revised pleadings and repeated 'skeleton arguments', must all go. None of this, except in a small category of cases, is any longer helpful (if it ever was) in achieving what should always be the primary goal. That goal? The goal is dispute resolution—to be achieved in a timely, cost effective and administratively simplified way. And what will that way be?

Speeding through the system

There are two main prongs of attack. The first is that our system must be digitalised, but in a fashion far beyond our conventional ideas of computerisation. For the Master of the Rolls, data is, and will increasingly be, stored on the blockchain (look it up—I had to!). This renders the old ways of proving evidential facts completely pointless and redundant. The blockchain (a kind of unchallengeable sequential register of transactions and assets, and more—all on the net), coupled with a digitalised pre-action portal system for the management of disputes, will mean that the vast bulk of cases in the county court, and many in the High Court, will be sped through the system and resolved, generally with no need for the matter to proceed to formal proceedings and trial. The contentious issues will be narrowed and generally resolved at an early stage, and in those cases which do require a hearing, the case will be listed quickly and require a fraction of the hearing time.

Sir Geoffrey pointed out, perhaps with a degree of frustration, that our systems at present assume that judges know nothing about the case. They may have read into the case before, but only via lengthy and often repetitious documents that the parties will have prepared (laboriously, and at great cost), sometimes presenting the material with heavy partiality. The fact that the pure data is increasingly being made available online, in immutable form, means the information can be accessed by the court swiftly and economically, and without the need for production of voluminous lever-arch files of verbiage. The digital system will also be 'web-based front end' enabling the parties themselves to know where they need to go to assert their claims, and the format for doing so.

No alternative to dispute resolution

The second facilitator for dispute resolution will be that pre-trial procedures will have built into them automatic directives requiring (and not simply 'encouraging') genuine engagement in, and striving for, a mediated settlement. What used to be regarded as 'alternative' dispute resolution (ADR), will now be an integral part of the judicial process. In January 2021, the Master of the Rolls commissioned the Civil Justice Council (CJC) to report on the legality of compulsory ADR. Its report was published in July 2021, and it effectively swept away the concerns expressed by a previous Master of the Rolls, Lord Dyson (who himself was somewhat constrained by European Convention of Human Rights authority, to the effect that mandatory mediation may involve an infringement of Art 6 rights of access to court). The CJC concluded that, if there is no obligation on the parties to settle (always the case in mediation) then there is no 'unacceptable constraint' on the right of access to court. In the European context, the UNIDROIT Civil Procedure Rules (Rule 9(1)) indeed now require parties to co-operate in seeking consensual resolution.

One of the perceived problems in the past concerning court-mandated mediation has been conceptual and jurisdictional. Is it open to the court, to which the parties have come for the resolution of their dispute, to require them to go elsewhere to seek that resolution, while at the same time being seized of the case? The answer to this is, that it is based on the view that the court system and mediation are two different and distinct worlds. However, by virtue of the authority to be found in the Judicial Review and Courts Act 2022, the Online Procedure Rules Committee now has power to issue regulations integrating mediation formally within the judicial process—regulations which are presently being worked upon.

Also at the heart of these changes is the assessment by the Master of the Rolls (supported by multiple studies) of the emotional and economic toll taken on the lives of litigants. People involved in litigation can be overwhelmed by the strain of it all, and are often largely removed from both domestic life, and indeed the workplace, while the case proceeds. The losses to society caused by protracted litigation, both in terms of mental health, and the wider economy, are huge.

The campaign being pursued by the Master of the Rolls for the reframing of the civil justice system is supremely ambitious, but is driven by the desire to see the resolution of disputes achieved with the minimum of human and economic cost, while at the same time providing a court system second to none in the world. Surely, he deserves the support of all of us? NLJ

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