

Reforming civil litigation

Discussion document



The Bar Council
Integrity. Excellence. Justice.





Reforming civil litigation

**Recommendations by the Bar Council
of England and Wales**

Contributors

Michael Todd QC

Immediate Past Chairman of the Bar Council

Chantal-Aimée Doerries QC

Chairman of TECBAR

Timothy Fancourt QC

Chairman of the Chancery Bar Association

Stephen Moriarty QC

Chairman of the Commercial Bar Association

Martin Bowdery QC

Commercial Barrister

Geraldine Clark

Commercial Barrister

Contents

Introduction	4
Docketing and judicial case management	7
Improving the affordability of justice	7
Docketing	8
Case Management	12
Pre-Action Protocols	13
Witness Evidence	16
Electronic (paperless) trials and hearings	23
Unified Procedural Guidance for the Rolls Building Jurisdictions	30
Conclusions	33

Introduction

- 1.1 In a speech delivered at the Offices of Clifford Chance on 28 September 2011, the then Lord Chancellor and Justice Secretary, the Rt. Hon. Kenneth Clarke QC MP, launched the Legal Services Action plan aimed at promoting London as the legal dispute resolution centre of choice. In that speech he referred to the need “to modernise the UK’s ‘old-fashioned’ and ‘bureaucratic’ civil and criminal justice system.”
- 1.2 The speech was attended by a wide range of persons who undertake business in the City of London, and who use the services provided by, primarily, our civil justice system. In response to questions put to a panel of people who provide financial services, all panel members identified as essential requirements of an effective civil justice system:
 - 1.2.1 Cost effectiveness
 - 1.2.2 The speed of dispute resolution.
- 1.3 In early 2012 the Bar Council set up a working group to discuss improvements in civil litigation in the Rolls Building under the Chairmanship of the then Chairman of the Bar Council, Michael Todd QC. Its members included Chantal-Aimée Doerries QC, Chairman of TECBAR; Timothy Fancourt QC, the Chairman of the Chancery Bar Association and Stephen Moriarty QC, the Chairman of the Commercial Bar Association. This paper contains the views of the members of the working group only. It is not put forward on behalf of the members of any other committee or association.
- 1.4 This paper seeks to address, and make recommendations about, the two issues of cost effectiveness and speed of dispute resolution, in so far as they relate to the practices in the Chancery Division, the Admiralty and Commercial Courts and the Technology and Construction Court (“the Rolls Building Jurisdictions”).
- 1.5 The Civil Procedure Rules set out their overriding objective in Part 1. Rule 1.1 provides:
 - “(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
 - “(2) Dealing with a case justly includes, so far as is practicable –
 - (a) ensuring that the parties are on an equal footing;

- (b) saving expense;
- (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases”

1.6 It is our view that more rigorous application of these principles will both reduce the costs of civil litigation and increase the speed of dispute resolution in the Rolls Building.

1.7 We believe that this can be achieved through two main tools:

- Docketing (assigning a single judge to a single case), and
- Proactive judicial case management, including a greater emphasis on common practices and consistency between the jurisdictions.

1.8 Effective judicial case management must, in turn, be directed at addressing two significant cost centres:

- Witness statements, and
- The ambit of disclosure.

1.9 In relation to both areas, effective case management can reduce costs through the proper identification of the key issues to be decided, in order to minimise the production and dissemination of evidence and documents largely irrelevant to the case.

1.10 In addition, a single, electronic case management administration system should be implemented across the Rolls Building Jurisdictions.

1.11 This paper addresses all of these issues and makes a number of practical recommendations for the improved efficiency of dispute resolution in the Rolls

Building Jurisdictions, with the overall objective of reducing costs for the litigant and speeding up the path to judgment.

Docketing and judicial case management

Improving the affordability of justice

- 2.1 For all but the largest most profitable businesses and the very rich, the costs of litigation in the Rolls Building Jurisdictions are prohibitive, causing serious concerns about access to justice. In particular, tens of thousands of pounds are routinely spent in reviewing documents before and after disclosure and in the production and review of lengthy witness statements.
- 2.2 The length and cost of litigation would be reduced significantly if docketing and early, rigorous case management were introduced as standard across all the Rolls Buildings Jurisdictions.
- 2.3 Specifically, case management hearings (“CMC”) conducted by the intended trial judge should take place immediately after the close of pleadings, at which point both parties should be required to identify the issues to be decided, and thus the issues to which disclosure and any written and oral evidence should be directed.
- 2.4 Parties should be encouraged to seek advice on the evidence from trial counsel before the CMC. They should also be required to seek to identify and, where possible agree, the common ground and the issues for decision at trial.
- 2.5 At the case management conference each party should be required to identify those issues on which it seeks disclosure and those issues that it contends require witness evidence and be prepared to justify its position.
- 2.6 It is the intention that the judge will be able to identify the appropriate ambit and form of both disclosure and evidence, with irrelevant information being more likely to be excluded.
- 2.7 The case management order should require disclosure in line with any appropriate agreement previously reached by the parties or, if none, order disclosure so far as possible in relation to specified issues, stating the extent to which documents should be disclosed in order to deal with the case justly and how and when they should be disclosed.
- 2.8 The Working Group considered whether a more comprehensive change to the disclosure regime should form part of its recommendations. In particular, the Working Group considered whether the default position in relation to disclosure should be that there should be no disclosure. It would then be incumbent upon

any party wishing to have disclosure to identify particular categories of documents, the disclosure of which it sought, the issue to which the documents related and why it was necessary for those documents to be disclosed. However, in light of the proposed amendments to the CPR, the Working Group felt that this required further and substantial discussion.

- 2.9 The proposed amendments to CPR 31.5, following the recommendations of Jackson LJ, have the potential for allowing the court and the parties to be more pragmatic in relation to disclosure both in terms of the scope of disclosure and in terms of the way disclosure is given.
- 2.10 This would reduce the potential for solicitors to spend their clients' money on unfocussed searches for documents and witness statements that do not address the issues, as they do at present.
- 2.11 Both the consistency and effectiveness of ongoing case management decisions would be improved by the docketing of judges, which is expanded upon below.

Docketing

- 2.12 'Docketing', in this paper, refers to the allocation by the Court of a particular judge to a case, such that the judge is responsible for both the case management and trying the case – "designating judges to secure judicial continuity".¹
- 2.13 The Admiralty and Commercial Court has for some time had a procedure in place enabling parties to large complex cases to apply to the court for the appointment of a designated judge (Admiralty and Commercial Courts Guide 2011 D4). A similar practice also applies in the Chancery Division.
- 2.14 In the Technology and Construction Court (TCC), docketing is well established, and has been a feature of case management for many years. Lord Justice Jackson, who presided over this Court, noted, in his Final Report, that his experience in the TCC between 2004 and 2007 demonstrated to him how docketing produced cost-effective litigation.
- 2.15 The introduction of docketing on a wider basis has been promoted by a number of senior members of the judiciary, including:

¹ Speech by Lord Neuberger to the Solicitors' Costs Conference on 9 February 2012

- Lord Neuberger, in his speech of 9 February 2012: “Docketing: Completing Case Management’s Unfinished Revolution”
- Lord Justice Jackson, in his Final Report on the reform of civil litigation funding, and
- Mr Justice Vos, who has stated that, in his view, “there was a strong case for the introduction of a universal docket system in all the Rolls jurisdictions [...] [to] facilitate more active, consistent and hands-on case management, thereby reducing the time taken.”

2.16 Docketing has also been the subject of a pilot in Leeds’ County Court and Registry. The conclusions, as summarised on the judiciary website², were as follows:

- Docketing depends on an effective process for the allocation and distribution of cases. At Leeds that includes a system of ‘own listing’ and judicial specialisation which appear to bring additional benefits but are not key to docketing.
- The administrative staff are the key players in ensuring a docketed case gets back to the right judge at the right time
- Leeds’ system of docketing builds on an informal system operated for a number of years. In that sense the ‘working culture’ at Leeds allowed for its smooth introduction as a formal case management mechanism.
- Basing the docketing pilot on previous informal practice has meant that docketing has been introduced in a relatively light touch sense in that it attached to district judges alone and includes only pre-trial case management not the trial itself.
- To include circuit judges within an effective docketing system would require much more fundamental change.
- Practitioners did not see it as necessarily beneficial that the pre-trial judge and the trial judge should be the same person.

² <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/docketing-report.pdf>

- The district judges have been able to reflect on a number of advantages brought through docketing:
 - Satisfaction in bringing a case to settlement or trial
 - Greater opportunity to steer the case and check its progress
 - More consistent case management
 - Less ‘forum shopping’ or opportunities to mislead the judge
 - Potential for time to be saved in preparation and at trial.
- At Leeds, a larger court centre, there was no discernible loss of flexibility or inefficient deployment of resources caused by docketing. Small court centres may find that docketing reduces flexibility
- There have been no significant financial implications to Leeds to run the abbreviated docketing scheme.
- During the relatively short pilot period there was no clear perception from the judiciary that docketing would or did reduce costs but cases were managed better and were better prepared for trial.
- Local practitioners had not perceived a difference in costs to date though there was a perception that ultimately fewer management hearings might be necessary.
- The abbreviated docketing pilot brought advantages using existing resources and without major reorganisation. There is little to prevent its adoption in larger court centres other than the potential reluctance attached to a change in working cultures.”

2.17 Whilst recognising the resource implications, we recommend docketing as a central tool for good case management. In short, having the same judge involved from the outset generally leads to:

- Consistent case management: both by avoiding the problem of different judges taking different views and approaches to the case and by ensuring that the parties carry out the case management as anticipated by that particular judge. As Lord Neuberger stated, “If the pre-Woolf period was characterised by the court’s passively leaving claims to progress at the pace set by the slowest party to a claim, the post-Woolf period was characterised by the court’s actively setting the pace, the post-Jackson era

will see the courts not just setting the pace in docketed claims, but actively taking steps to ensure the parties stick to it.”

- More focused case management by the court – in that the judge making the decisions or managing the case will actually be trying the case, and so will tend to be rather more focused on how the case will be heard
- Efficient case management – the judge managing the case or hearing applications will know the background to the case and will have been involved in the early identification of issues and the past case management decisions, and parties’ conduct in relation thereto
- More efficient trial process: again, the judge will be familiar with the background to the dispute and the approach which the court and parties have taken to the management of the process up to trial
- More consistent decisions: not merely is the management more consistent, but the parties know what to expect with the same judge handling a case from the beginning, and
- The above will generally result in a reduction of cost and time taken to deal with the case management and the trial.

2.18 Lord Neuberger put the case for docketing succinctly when he said:

“As implemented, the Woolf reforms did not, in at least one crucial respect, provide the means to maximise the effective use of case management. That respect was their failure to introduce an effective docketing system. As a revolution in our approach to the conduct in civil litigation, the introduction of case management is one which is unfinished. It is the introduction of a form of docketing or, in the terms of the Jackson Report, of ‘measures . . . taken to promote the assignment of cases to designated judges with relevant expertise’, which will help to complete that revolution. In doing so, it will assist the court’s attempts to maximise the benefits which accrue from case management.”

2.19 Should docketing be generally commended or be subject to limitations? It is clear, as set out in Lord Neuberger’s speech, that, with the introduction of the Jackson reforms in April 2013, it will be “formally established as part of the landscape of civil litigation”; but he also makes it clear that it will not apply or will not be implemented across the board.

- 2.20 In particular, Lord Neuberger suggests that, first, small and fast track cases should generally not be docketed, and second, a straightforward multi-track case “is unlikely to benefit from docketing”; but he concludes: “as a general rule the more specialist or complex the multi-track claim, the more appropriate it will be to docket it. Many Chancery, clinical negligence, and complex personal injury, claims are likely to be appropriate for docketing, as would other legally or factually complex claims.”
- 2.21 It may be that there are exceptions i.e. straightforward multi-track cases, but we suggest that the vast majority of cases in the Rolls Building would benefit from docketing.
- 2.22 Those implementing these changes would need to bear in mind the following issues:
- Substantial changes will be needed to implement docketing in the Chancery Division; given that, historically, Chancery Masters have dealt with many more pre-trial case management issues than High Court judges. Consideration might be given to changing the allocation of work between the Chancery Masters and the Chancery Judges. For example, by working towards a system where a Chancery Master is both the case management and trial judge for the more straightforward cases and a Chancery Judge is both the case management and trial judge for the more difficult cases.
 - In the TCC, docketing continues, but from a users’ perspective, it has become a little patchy since the elevation of all of the judges to the High Court (and the fact that the judges now sit elsewhere frequently); although it is still very much the goal to have the same judge throughout. As Lord Neuberger remarked, “The success of docketing does not just depend on judges and the parties. It also depends on Her Majesty’s Courts and Tribunal Service. Its assistance in helping the judiciary implement modified listing practices so that cases can follow their judge will be of fundamental importance.”

Case Management

- 2.23 We recommend that an early case management conference (CMC) should be scheduled, and take place. For most cases in the Chancery Division and

Commercial Court, we recommend that the first CMC should be held when pleadings have closed, and earlier where necessary. In the TCC, the first CMC has for historical reasons generally been held earlier than close of pleadings, that is, after the acknowledgment of service has been filed or the defence has been served, thereby allowing earlier judicial involvement in the management of the case. TECBAR believes that this continues to be popular amongst TCC Users.

2.24 Two particular areas are ripe for active judicial case management:

- Witness evidence
- Disclosure

2.25 The required amount of disclosure can be considered by the Court, with the assistance of the parties, at the first CMC, when the List of Issues will have been produced and considered by the Court, and can be directed to those specific issues.

2.26 We address Witness evidence in part 3.1 of this Paper.

Pre-action protocols

2.27 The jurisdictions in the Rolls Building increasingly deal with claims which overlap. Furthermore, claims can be and are transferred between these three jurisdictions, with their separate practices and procedures.

2.28 In the Commercial Court, the practice relating to pre-action protocols is set out in section B3 of the Admiralty and Commercial Courts Guide which, at B3.2 states:

“Subject to complying with the Practice Direction and any applicable approved protocol, the parties to the proceedings in the Commercial Court are not required, or generally expected, to engage in elaborate or expensive pre-action procedures, and restraint is encouraged.”

“Practice Direction” refers to the Practice Direction – Pre-Action Conduct, which also contains a general protocol at Section III (see C1-005.1 of CPR).

2.29 Lord Justice Jackson, in his Review of Civil Litigation Costs, at paragraph 2.8 of Chapter 35, stated that there was no need for a commercial pre-action protocol, and that the general protocol should no longer be applied to commercial litigation. He said that the Admiralty & Commercial Courts Guide – after

references to the Practice Direction for Pre-Action Conduct had been deleted – would contain quite sufficient guidance in relation to pre-action conduct.

- 2.30 In the Chancery Division, the practice is set out at paragraph 2.1 of the Chancery Guide, where it states:

“Before issuing a claim parties should consider the PD on pre-action conduct. The PD applies only to claims begun as a part 7 or part 8 claim. It does not therefore apply to claims which are started by some other means (e.g. petition).”

- 2.31 Paragraph 2.1 then states that the court will not expect the Practice Direction to be complied with in particular circumstances (1 to 5). That part of the Guide also states, at paragraph 2.2, that, in other cases, the court will consider the extent to which the Practice Direction has been complied with.

- 2.32 Lord Justice Jackson, in his Review of Civil Litigation Costs, at Chapter 35 paragraph 3.4, stated that he was satisfied that there is no need to introduce any new pre-action protocols for chancery litigation and, in his view, the general protocol should no longer be applied to chancery litigation, and no formal protocol should be binding upon chancery litigation. Instead, it would be sufficient for the Chancery Guide to give general guidance about pre-action correspondence.

- 2.33 Jackson LJ also recommended that no special pre-action protocol should be introduced for commercial or chancery litigation, and that the pre-action protocol within the Practice Direction: Pre-Action Conduct should no longer apply in those jurisdictions.

- 2.34 In his Review of Civil Litigation Costs, at Chapter 35, Jackson LJ concluded that, for the time being, the Protocol should be retained as a pre-action process in the TCC. However, he also stated that there was a need for further review. He observed, at paragraph 4.16 of that chapter, that “the decision whether to retain a pre-action protocol for construction and engineering disputes is finely balanced.”

- 2.35 He recommended that “after the TCC has moved into the Rolls Building in 2011, the whole question of the protocol should be reviewed”. He elaborated on this in paragraph 4.17, stating:

“The three jurisdictions in that building will all deal with business disputes. There will be benefit in the TCC taking account of the position in the

Commercial Court and Chancery Division, when the different specialist jurisdictions have come together under one roof. The users of the TCC, both litigants and lawyers, may possibly conclude at that stage that their pre-action procedures should be aligned with those prevailing in those other jurisdictions. However, the outcome of that review must be a matter for the TCC judges and practitioners after 2011.”

- 2.36 It is our view that formalising the pre-action process adds to the length, and thus the expense, of proceedings, and is thus against the interests of legal consumers. Instead, the emphasis should be on ensuring that the pleadings clearly set out the material facts as the basis of the claim or the defence. Documents referred to should be served along with the pleadings. Pre-action protocols for all cases issued in the Rolls Building, should be abolished. They lead to unnecessary and avoidable delays. They serve to increase rather than reduce costs. This is all inconsistent with the ‘Overriding Objective’.

Key recommendations:

- **Routine docketing should be introduced across the Rolls Building Jurisdictions, to ensure consistency and effectiveness of case management decisions**
- **Case management conferences, conducted by the trial judge, should take place no later than the close of pleadings, at which point the parties should be required to identify the issues to be decided, those which require disclosure and those which require witness evidence. This will serve to limit disclosure and the preparation of evidence, saving costs and speeding up the process.**
- **Pre-action protocols should be abolished as they add to the length and expense of proceedings. The emphasis instead should be on detailed pleadings in compliance with the rules.**

Witness evidence

- 3.1 The last 15 years have seen a number of important changes in relation to the giving of evidence in civil trials.
- 3.2 As a matter of substance, as a result of the Civil Evidence Act 1995, the rule against hearsay evidence has become almost wholly irrelevant in civil cases. Assertions of fact contained in documents, or utterances reported in statements of other witnesses, can be relied upon as evidence of the truth of their contents.
- 3.3 In addition, written statements of witnesses can be relied upon, with the absence of the witness in court and failure to serve a hearsay notice affecting only the weight of the evidence, and not its admissibility.
- 3.4 As a matter of procedure, the evidence to be given by a witness has to be disclosed in the form of a witness statement (or, if the witness does not co-operate or cannot be found, in a witness summary) ahead of trial.
- 3.5 The written statement, inevitably evidence in response to a series of leading questions by the party's lawyers, is invariably taken as the evidence in chief of the witness, with any inaccuracy left to be exposed in cross-examination. The procedure is intended to serve the dual purposes of advance disclosure (in principle always a good thing) and shortening of trials (in principle usually a good thing).
- 3.6 But do these developments serve the interests of justice? In other words, do they improve the prospects of a fair trial (or earlier settlement) that produces a just result, and do they improve access to justice by reducing costs?
- 3.7 Those questions must ultimately be answered in the context of other aspects of the procedural code intended to serve the same purpose (e.g. pre-action protocols; detailed pleadings and disclosure). Examined separately, however, the general conclusion would have to be that the current regime of witness evidence does not improve the prospects of a fair and just outcome; nor does it save time or costs.
- 3.8 Regrettably, witness statements are the product of a great deal of work by solicitors and barristers, who, having mastered the documentation disclosed by both sides, then put together an account of the facts of the case that fits (so far as possible) the documents, and serves the purpose of the party on whose behalf the

statement is put forward. There cannot be a barrister in practice who has not had repeated experience of witness statements which:

- Are too long
- Address issues of which the particular witness has neither personal nor direct hearsay knowledge
- Rehearse unnecessarily, and at inordinate length, correspondence between the parties or their agents
- Are simply inaccurate; sometimes seriously so
- Are slanted and spun so that they can easily give a misleading and inaccurate picture of events
- Contain evidence that the witness cannot, in fact, remember, and
- Are little more than a statement drafted to support the party's case.

3.9 The consequence is that, at the end of a process which racks up costs to a high degree, parties are either wrongly influenced by what the other side's statements say, or place no weight on them at all, knowing that they contain only spin and self-serving material. In addition, the conduct of mediations (which often only happen off the back of an exchange of evidence) and trials is hampered by virtually worthless statements.

3.10 As a likely though not inevitable consequence of the defects identified in paragraph 3.8, preparation time for all concerned is significantly increased; time taken to cross-examine a witness is increased; the truth only emerges gradually, at a relatively late stage of a trial (often when the defendant's main witnesses are cross-examined); much time in court is spent trying to discredit witnesses in relation to collateral matters contained in their statements; and little, if any, reliance is ultimately placed on the witness statement, except, pointlessly, by a party whose witness has been discredited or said something different in cross-examination.

3.11 It is no wonder that taking a case to trial becomes more and more expensive, and that dissatisfaction with lawyers and the court process increases. The danger inherent in dissatisfaction with due process and the Rule of Law is self-evident.

3.12 It might be argued that there is nothing wrong with witness statements as such; just with the way in which lawyers misuse the system and the rules to try to gain advantage for their clients. There may be some truth in this; although rules and

orders that require evidence to be contained in written form and for that form to stand as the evidence in chief will inevitably lead to long, carefully crafted statements that are intended (when read by the judge) to support the party's case. It is also wishful thinking to believe that highly-paid lawyers do not, given the current rules, do whatever they can, within certain bounds of propriety, to advance their client's case, and that the line of influencing what the witness says in his statement will not be crossed.

- 3.13 In this regard, it is instructive to note the amended guidance provided to barristers by the Bar Council in about 1998, when the Code of Conduct was relaxed to allow barristers to take (rather than settle) witness statements. See in particular paragraphs 6.2.4 and 6.2.5 of the Written Standards for the Conduct of Professional Work, where that guidance is contained. Part of this reads:

“A barrister should be alert to the risks that any discussion of the substance of a case with a witness may lead to suspicions of coaching, and thus tend to diminish the value of the witness's evidence in the eyes of the court, or may place the barrister in a position of professional embarrassment, for example if he thereby becomes himself a witness in the case [...]

“A barrister should also be alert to the fact that, even in the absence of any wish or intention to do so, authority figures do subconsciously influence lay witnesses. Discussion of the substance of the case may unwittingly contaminate the witness's evidence.”

- 3.14 The position of the barrister conducting the case is, of course, different from the solicitor acting for the party; but it could be questioned whether anyone who now takes or produces witness statements in civil cases, whether solicitor or barrister, gives a moment's thought to issues of direct or subliminal contamination of a witness's evidence, or the risk of influencing a witness's memory or understanding of events. The warnings given there seem like pious aspirations from a previous century (which, ironically, they are).

- 3.15 In the light of this, there has been considerable pressure recently for reform of the civil justice system, from the Jackson costs reforms to calls from judges such as Mr Justice Vos and the Master of the Rolls for court time to be even more compressed. Two possible reforms could be introduced easily, but they are at opposite ends of the spectrum, so to speak:

- **No live evidence:** keep witness statements, but abolish live evidence from witnesses, leaving lawyers to make submissions about the reliability and

weight of what has been said in a witness statement by reference to the disclosed documents, other witness statements and inherent probabilities, or

- **No witness statements:** do away with witness statements in their current form, substitute short witness summaries to serve the purposes of advance disclosure, and reinstate examination in chief, all with the benefit of detailed case management by the trial judge, calculated to identify and focus on the real issues in the case, limit the scope of the oral evidence and secure appropriate admissions or agreement on facts at an early stage.

3.16 Both possibilities have some obvious advantages:

- **No live evidence:** trials are shortened, and in many cases the contemporaneous documents are the best guide to the truth (or inferring the truth), or at least reliably indicate where a witness is wrong, and
- **No witness statements:** huge cost savings in terms of preparation for trial, at the expense of more time spent by judges on case management and possibly longer trials in some cases (although, with proper case management, the time spent on examination in chief might be little more than the time saved by shorter cross-examination). Benefit to the judge in hearing live evidence in chief on the disputed issues (indisputably of real value).

3.17 The “no live evidence” system has clear disadvantages; namely that all of the existing vices inherent in witness statements will continue, and the knowledge that no cross-examination is to take place might exacerbate the problem with slanted or spun, self-serving statements, which would be seen as even more important to success in the case. There is no doubt that the fear of what may happen in the witness box if a statement is palpably untrue is a substantial disincentive to untrue statements for the majority of deponents.

3.18 The “no witness statements” system can be said to have the disadvantage that it brings back pressure on witnesses to “perform” on the day, and that, in such circumstances, the truth may not always emerge clearly. This has always been a concern with the traditional system of evidence in chief, but the civil courts have never made use of some of the new “special measures” that are now regularly used in the Crown Court to assist witnesses on the day (who are often under even greater pressure than in civil cases) to give their best evidence.

- 3.19 Special measures range from pre-recorded interviews of evidence in chief, away from the court environment at an earlier stage, to CCTV live links to locations away from the courtroom, use of screens etc, to protect vulnerable witnesses. The court can permit leading questions, in the case of a witness who is having difficulty remembering, or who is clearly nervous, with the judge then able to take into account the circumstances in which the evidence was given when assessing its weight. The problem with leading questions is significantly overstated where the fact-finding tribunal is a judge rather than a jury.
- 3.20 It would be possible to have both the “no live evidence” and the “no witness statement” system, with the judge deciding, at the first case management conference, with the benefit of detailed pleadings, which system to adopt, taking account of the nature of the case and the live issues, or even whether to permit live evidence relating to certain issues but not others. In certain types of technical or complex dispute, e.g. TCC or admiralty cases, the interests of justice might be served best by directing that the evidence in chief on certain matters be provided in the form of a signed witness statement. The court should have that discretion, although the presumption should be in favour of witness summaries.
- 3.21 Through examples of four reasonably typical commercial civil disputes, it is easy to see that one system or other could better suit different types of case, and that flexibility may be the key:
- **Conclusion of a binding contract:** issues about what was said orally between representatives of parties and whether or not they had or were held out as having the requisite authority; likely to require live evidence
 - **Promissory estoppel or estoppel by convention:** issues about what was communicated orally or in writing in the context of an existing contractual relationship, and whether or not reliance was reasonably placed on what was said; likely to require live evidence, at least in part
 - **Rectification of a contract:** whether the parties reach agreement on something different when negotiating the contract, or whether one was aware that the other was mistaken as to what had been agreed; likely to be decided mainly on the documents in a mutual mistake case, with parties’ subjective intentions and understandings only likely to be of significance in a unilateral mistake case, and

- **Whether negligence caused loss:** how the claimant acted and whether the claimant could have acted differently, or what would have happened if the defendant had acted differently; may be assisted by live evidence but depends on the particular case.

3.22 Greater flexibility would place more pressure on judicial case management. If forced to plump for one system or another, we recommend that it would be better to abolish witness statements and replace them with witness summaries and live evidence in chief, with case management directed to establishing what the real issues are at an early stage, and where live evidence is required. Greater costs savings for the parties (at an early stage) is likely to be achieved this way, and the trial process will be speeded up.

3.23 Some careful definition of the minimum requirements and maximum extent of a witness summary would be required, in order to avoid abuse by either failing to disclose important facts to which the witness is able to speak (and the risk of ambush at trial) or turning witness summaries into full-length statements. The summary should:

- Identify the witness (and usually their address, so that other parties can access the witness for the purposes of taking a proof of evidence)
- Indicate the witness's position at relevant times and the nature of their involvement in matters in dispute
- State on which factual matters in dispute the witness is able to give personal or first-hand hearsay evidence (and the person calling the witness at trial should not be able to stray beyond these matters without permission), and
- In relation to each of the factual matters so identified, summarise the effect of the factual evidence which the witness will give, and state any particularly important facts or words seen, heard or said.

We recognise that for some fact heavy cases witness summaries would not be helpful and would most likely not represent a saving of time or cost. Consideration of the most appropriate approach would form an important aspect of the case management at the outset.

3.24 We recommend that expert evidence should still be dealt with under separate provisions, as the main problems in this area tend to be a failure to define the questions to be addressed or the giving of permission for such evidence when it is not needed. The existing rules include provision requiring the permission of the court for expert witnesses to be called to give live evidence, and these can be enforced as appropriate.

Key recommendations:

- **In the Rolls Building Jurisdictions, at least, the CPR rules for witness statements should be abolished and replaced by rules for witness summaries, covering the areas recommended by paragraph 3.23, subject to the judge's discretion to exclude oral evidence or direct witness statements. This would ensure that huge costs are not expended on witness statements and that witnesses are not cross-examined at length on issues that are irrelevant to the real issues, or of which they have little or no knowledge, thus saving both time and costs.**
- **Expert evidence should remain dealt with under separate provisions.**

Electronic (paperless) trials and hearings

- 4.1 In principle, the use of what will loosely be referred to as “e-technology” can provide a number of benefits for the courts, and for the parties to legal proceedings who use them. These include, but are not limited to, the following.
- 4.2 Not only does paper cost money, but so does the cost of shuffling it, organising it and storing it. E-technology is obviously not costless, but managing documents in an electronic format is certainly capable of being cheaper, quicker and more efficient. Savings to be made by replacing paper can be particularly substantial in cases where there is a large volume of it, as is common in cases in the Rolls Building Jurisdictions.
- 4.3 Albeit an extreme case, the solicitors to one of the parties in the recent *Berezovsky/Abramovitch* litigation in the Commercial Court have estimated, for example, that the cost of producing just one set of trial bundles in that case (280 lever arch files) ran to £26,000. If (as happened in that case), they were scanned in as PDFs and accessible by computer by the parties’ respective legal representatives and the court, fewer sets were needed, even if some counsel still preferred to stick with paper.
- 4.4 In addition to potential savings in time and money, the use of e-technology can also provide further benefits in terms of the manner in which a case can be presented to, and tried by, a court. For example, the use of hypertext links in skeleton arguments and witness statements to link electronically to the underlying documents or legal authorities being referred to can allow the reader to access and digest the relevant material more easily and efficiently.
- 4.5 E-technology can also enable parties and the Court to access documents more conveniently, without the need to carry around unwieldy bundles of papers. Very large volumes of material can be stored digitally, for example, on a single USB stick. With the increasing use of ‘cloud technology’, moreover, they can be accessed over the internet without having to carry anything at all.
- 4.6 Against this background, it seems obvious that there is a lot to be said for encouraging the use of e-technology in the legal process, and that it may have a valuable role to play in trials and hearings. This chapter focuses on the use of e-technology in trials and hearings, and briefly describes a number of systems which are in operation at the moment.

4.7 It is also worth mentioning, however, that, quite aside from having the potential to bring benefits in that context, e-technology can also be used for other, more limited, purposes. Electronic filing of proceedings can bring benefits in terms of speed and convenience, even if that does not lead to everything thereafter being paperless. Maintaining electronic case files can make it easier for the court to access and manage cases than is the case with paper files, even if, once again, its purpose does not extend to enabling the parties to work electronically. These more limited systems, however, are outside the remit of this paper.

4.8 There are three main e-technology systems already in operation which demonstrate the potential for paperless trials or hearings to be extended (if not yet always having that outcome). These are, first, the CPS's "paperless prosecutions" project; second, the Supreme Court's system for filing documents by electronic means; and third, Opus 2's "Magnum" technology.

The CPS "paperless prosecutions" project

4.9 Since the beginning of April this year, the CPS has been "paperless", in that all documents bearing upon the prosecution of offenders have been maintained electronically in digital case files. As much material as possible is created digitally from scratch, but even when documents are initially created on paper, they are scanned into the digital case file. All CPS case workers have been issued with Hewlett Packard laptop/tablet computers on which their cases are kept, and which they take to court with them. The following points about the system are worth mentioning in particular:

- All documents are kept as PDF files with OCR capability, enabling annotation, highlighting, word searching, and hypertext linking; and case bundling software is used to turn individual electronic documents into digital case files
- Electronic documents or the digital case file itself may be sent via a secure e-mail system (known as CJSM Secure eMail): not only do the CPS, the various police forces and the courts have access to this secure system, but defence lawyers can register to join the system as well
- Once approved and integrated into the system, defence lawyers can obtain access to their clients' digital case files, and can thereafter use it for all purposes, including on laptops at Court subject to adequate encryption

- CJSM Secure eMail can even be accessed over WiFi provided it is a secure system, and the HM Courts & Tribunals Service is currently trialling a number of wired and wireless technologies in various courts, and
- In addition to CJSM Secure eMail (which has a maximum capacity of 10MB for attachments), there is also an MOJ web-based, or cloud, system for storing and sharing digital files and other digital media (such as video footage from CCTV cameras), which is known as the Document Repository Service (DRS). This allows access to a wider range of digital media than simple PDF files, and also to much larger files than can be sent via e-mail (100MB, as opposed to 10MB). In principle, the DRS will be available to Defence lawyers on similar terms to CJSM Secure eMail, but it has not rolled out that far at the moment.

4.10 From this short overview, it can be observed that the “paperless prosecutions” project has all of the makings of a system which enables all documents and other digital media relevant to a case to be exchanged rapidly and efficiently between all of those involved in the prosecution (police, CPS, the defence and the court), and for hearings and the trial to be conducted “paperlessly” by making use of the digital case file.

4.11 However, a number of caveats need to be made about the ability of the system to do this at the moment, and also about the scope for it being applied more generally, beyond the criminal courts.

4.12 First, it goes without saying that the paperless trial of a case is impossible unless all interested parties have bought into giving up paper. The CPS plainly has, but many defence lawyers have to be persuaded to do so, and the courts seem to be nowhere near that position yet. They are sent the case file in digital format, but then print out hard copies for the court.

4.13 Second, it is also clear that the system is aimed at digital case files on a scale which is small compared to the amount of paperwork involved in civil litigation. The average case file with which the CPS deals is said to be something like 25 – 30 pages. Digital case files can cope with considerably larger files than this but, for cases which involved a substantial number of lever-arch files, I was told by the CPS that it would still use hard copy bundles.

4.14 Thirdly, it bears emphasis that the driving force behind this initiative is not the court service, but the CPS, because of the savings it envisages making as a result of electronic working. This being so, and as an institutional party interested in virtually all criminal proceedings, it has its own incentive, not just to finance the development of the system but also to make it freely available to the other side. This is certainly not the case in most, if not all, cases of civil litigation.

Filing of documents by electronic means in the Supreme Court

4.15 The Supreme Court and the Privy Council have their own system for filing documents electronically, which certainly has the capacity to enable hearings to be conducted entirely paperlessly. By UKSC Practice Direction 14 (in the case of the Supreme Court), and JCPC Practice Direction 9 (in the case of the Privy Council), parties must file by electronic means all of the paperwork required for an appeal, at the same time as filing it in hard copy. The following is to be noted:

- Like the CPS system, documents are, for the most part, required to be in PDF format, in a way which enables comments and annotations to be made to the text, and also allows for word-searching
- Hypertext linking must also be possible, and the index page is required to be hyper-linked to the pages or documents to which it refers
- There is no secure e-mailing facility available: parties are advised not to transmit electronically documents which are of a confidential or sensitive nature
- Where files or documents exceed 10MB, they must be submitted on memory stick, rather than by electronic transmission, and
- Although no hard and fast rules are yet laid down about hypertext linking (other than the requirement above relating to the index), it is plainly envisaged that the use of hypertext linking may play an important role in the digestion of the relevant material. The parties are encouraged to use hypertext links, particularly so as to link documents referred to the agreed Statement of Facts and/or in the parties' written cases to the documents in the appendix, and also to link their written cases to the legal authorities referred to in them.

4.16 Forward-looking as this is, two issues should still be noted:

- The obligation to provide all papers in electronic format is not a substitute for paper: at least at the moment, the obligation on the parties is to file everything, both in paper format and electronically, and
- It will also be appreciated that appeals to the Supreme Court and the Privy Council are something of a special case because of the (generally) limited nature of the documentation involved. By the time a case reaches that level, the facts are almost invariably not in issue, and there are tight requirements on the amount of documentation (other than legal authorities) to be included in the appendix provided to the court. This a far cry from litigation at first instance, and the amount of document which is involved at that earlier stage in trials of any significance.

Opus 2's "Magnum" technology

4.17 Quite independently of any court or Government initiative, Opus 2 (an offshoot of Smith-Bernal) has developed a sophisticated web-based electronic document handling service, which can be used by parties in preparation for, and in the presentation of, their cases at trial.

4.18 A very slimmed down service is provided free for parties who are using (and therefore paying for) Livenote. This involves having web access to the transcript (and any notes made in conjunction with it), plus a synchronised audio of the hearing. However, the full Magnum service, for which the parties obviously have to pay extra, offers many more benefits, including:

- The 'cloud' hosting of all the documents in the case on a secure server, which can be accessed over the internet, and with the ability to organise the documents in whatever way the parties wish, including the creation of electronic trial bundles, core bundles etc
- The creation of witness statements, skeleton arguments and opening and closing submissions, with hyperlinks to all of the documents and legal authorities referred to
- Likewise, the ability to hyperlink transcripts to bundle references, and

- The ability to highlight, annotate and hyperlink any of the above.

- 4.19 All in all, this seems to be the most ambitious of the systems under consideration here, by a long way. It is capable of handling and organising documents on a vast scale. As mentioned above, it was the system used in the recent Berezovsky/Abramovitch case in the Commercial Court, where the trial bundles ran to 280 lever arch files. Moreover, although the trial itself was not conducted entirely paperlessly, some counsel in the large legal teams ended up working paperlessly, and the judge herself did so too (making her annotations on the electronic bundles and submissions).
- 4.20 The system's key drawback is probably that it *is* a privatised electronic-working platform, which will only be used if the parties to a case agree to do so, and are prepared to pay for it (albeit that cost savings should be made by doing so, at least in substantial cases).

Observations

- 4.21 What may work for the kind of hearing which takes place in the Supreme Court may not provide an appropriate model for conducting litigation paperlessly in a substantial trial in the Commercial Court. Likewise, in the case of relatively small criminal trials. Added to that, there is something to be said for the development of different and competing systems, so that lessons can be learned from each other, and improvements made in consequence.
- 4.22 The issue of what sort of electronic-working system should be provided in any given part of the legal system does also beg an important question of policy about what kind of services parties are entitled to expect the court to provide for them (and therefore the taxpayer to fund), particularly in the current financial climate.
- 4.23 It may be one thing, for example, for the Government to be prepared to pay for an electronic case management system which enables the Commercial Court to manage its own case load more efficiently – and if there are incidental benefits to the parties in allowing them access to their electronic case file as well, so much the better. However, it might be thought quite something else to expect the taxpayer to fund an electronic document handling facility along the lines of the kind of platform which, for example, Opus 2 will provide to parties who are prepared to pay for it.

- 4.24 As mentioned above, the CPS Paperless Prosecution project was not a court-inspired initiative to offer an electronic document handling service to parties at tax payers' expense. It was a CPS initiative, because it envisages making savings in doing so, even though defence lawyers also get the benefit of that system without the cost of paying for it. There is no obvious analogy in the civil context.
- 4.25 Since, at any one time, a proportion of the judges of the Commercial Court are also away from London, sitting on circuit as Justices of the Queen's Bench Division, this too presents a challenge to the routine docketing of cases. We think the importance of docketing, however, is such that ways should be found of allowing it to operate effectively even when the allocated judge is outside London. Consideration should be given, for example, to facilitating the holding of hearings by video-link, or at a time when the judge may be freed up to return to London for a short period. In some cases, moreover, applications could be dealt with on paper. Where necessary, the parties' representatives could also travel to wherever the judge happens to be sitting for the purpose of an oral hearing
- 4.26 At present, we do not feel that it would be appropriate for the state to fund a system of electronic working throughout the entire trial stage. We do, however, recommend that the situation should be monitored closely, particularly in relation to the CPS system, the capacity of which may, in future, expand to cope with much larger trial bundles (e.g. for complex fraud cases). There may come a time when the cost of providing such facilities to all litigants, at taxpayers' expense, may be justified, given the savings it can lead to, both in court time and resources. For the moment, however, we believe the most which can be done is to encourage parties to consider the advantages of electronic working, and to co-operate in making use of it if it can contribute towards a reduction in the respective litigation costs.
- 4.27 Where we do believe a strong case can presently be made for court-funded e-working, however, is in the issue of legal proceedings, and in the initial case management of cases. In our view, it ought to be possible for parties to issue proceedings electronically in the Rolls Building jurisdictions. There should also be a common electronic case management system across those jurisdictions, allowing the judges to manage cases paperlessly by reference to an electronic case file, to which the parties could also have limited access.

Key recommendation

- **For a single, electronic case management administration system to be implemented across the jurisdictions of the Rolls Building, in order to improve the efficiency of (and time spent on) both case management conferences and docketing.**

Unified Procedural Guidance for the Rolls Building Jurisdictions

- 5.1 The Woolf Reforms have been bedeviled by over-embellishment, pandering to individual practices within different courts and between different judges. Extensive practice directions, practice notes and different guides for different courts have ensured that the objective of simplification has not been achieved or, if ever it was achieved, has been buried.
- 5.2 There are currently three Court Guides in use within the Rolls Building.
- 5.3 The Admiralty & Commercial Courts Guide is now in its ninth edition. It was published in 2011. Its foreword states:

“The guide is intended to promote the efficient conduct of litigation in the Admiralty and Commercial Courts. It does not provide a complete blueprint for litigation and should be seen as providing guidance to be adopted flexibly and adapted to the exigencies of the particular case. It should not be understood to override in any way the Civil Procedure Rules or practice directions made under them, or as fettering the discretion of the judges.”

- 5.4 The Chancery Guide is now in its sixth edition. It was published as amended in October 2011. Its preface states:

“[...] the purpose and function of this guide [...] is to explain how the substantive law, rules and practice directions are applied in the Chancery Division; it cannot affect their proper interpretation or effect”

The introductory section goes on to say:

“The aim of this guide is to provide additional practical information not already contained in the CPR [Civil Procedure Rules] or the practice directions supplementing them. Litigants and their advisers are expected to be familiar with the CPR and the PDs. This guide should be used in conjunction with them. It is not the function of this guide to summarise the CPR or the PDs, nor should it be regarded as a substitute for them.

“This guide does not have the status of a practice direction. So it does not have the force of law. But failure to comply with this guide may influence the way in which the court exercises its powers under the CPR, including the

making of adverse costs orders. In case of any conflict between this guide and a rule or practice direction, the rule or practice direction prevails.”

- 5.5 The Technology & Construction Court Guide is in its second revision. It was published in October 2010. Its introduction states:

“The Technology and Construction Court (TCC) Guide is intended to provide straightforward, practical guidance on the conduct of litigation in the TCC. Whilst it is intended to be comprehensive, it naturally concentrates on the most important aspects of such litigation. It therefore cannot cover all the procedural points that may arise. It does, however, describe the main elements of the practice that is likely to be followed in most TCC cases. This Guide does not and cannot add to or amend the CPR or the relevant practice directions.”

- 5.6 As each Guide makes clear, their contents are not intended to replace or duplicate the Civil Procedure Rules (CPR). They are intended to supplement them.

- 5.7 The objective, surely, must be to simplify the rules, practices and procedures so that they are readily accessible to court users. It is an unattractive feature of our justice system that the practices and procedures of our courts are capable of being understood only by those “in the club” (i.e. in the case of the Rolls Building Jurisdictions, by legal practitioners specialising in commercial and chancery litigation).

- 5.8 Even for specialists, the existence of three guides requires constant checking of standard time limits, of the preparations required for case management conferences and the prescribed form of words for case management directions because of differences between the three guides. This is quite unnecessary.

- 5.9 Historically, there may have been good reason for the substantial differences in practice of the different jurisdictions that have recently been brought together in the Rolls Building. Now, however, the time has come to work towards simplifying and making more uniform those practices for the sake of simplicity and efficiency.

- 5.10 There is no justification for the current position, where the case management rules applicable to a substantial commercial action (such as an alleged investment mis-selling action), differ depending on whether it was issued in the Chancery Division or the Commercial Court. The general run of commercial cases should be managed alike

- 5.11 In proposing that procedural guidance should be uniform across the Rolls Building Jurisdictions, we do not suggest that all types of case should be treated alike.
- 5.12 First, each case needs to be managed appropriately. It seems obvious that, in giving directions for trial, the nature and complexity of the dispute, the amount at stake *and the resources available to the parties* are far more important than the court or division in which the case is brought. There is no reason in principle that a property dispute between individuals representing themselves and a substantial commercial action with both sides represented by Magic Circle firms should be managed in the same way just because they were both issued in the Chancery Division. The proposed unified procedural guide for the Rolls Building Jurisdictions will need to make special provision for access to justice for self-represented businesses and individuals; this is a nettle that needs to be grasped.
- 5.13 Second, some specialist disputes which require specialist rules e.g. Admiralty claims *in rem* and insolvency cases. However, the justification for having specialist rules is the particular requirements of the type of case, not the division or court to which that type of dispute is allocated.
- 5.14 We therefore recommend that steps should be taken to compile one guide for use in the courts in the Rolls Building, with particular appendices dealing with procedures and applications not common to the other courts/divisions in the Rolls Building.

Key recommendation:

- **There should be only one guide for the Rolls Building.**

Conclusions

The Rolls Building Jurisdictions are drawing an increasing number of foreign litigants to the UK, who recognise the excellence of our lawyers and our judiciary and the independence and reliability of their decisions. Whilst foreign investment is vital to our economy, we must not lose sight of the needs of British businesses and individuals. For access to justice to be ensured, the costs of litigation *must* be reduced.

This paper has sought to consider various aspects of case management, in order to reach a number of recommendations aimed at speeding up litigation and reducing costs. In summary, we recommend that across the Rolls Building Jurisdictions:

- All cases should be docketed to ensure consistency and effectiveness of case management decisions
- Case management conferences, conducted by the trial judge, should take place no later than the close of pleadings, at which point the parties should be required to identify the issues to be decided and the evidence required, thus limiting disclosure and the preparation of evidence
- Pre-action protocols should be abolished as, by formalising the pre-action process, they add to the length and expense of proceedings, and the emphasis instead should be on detailed pleadings in compliance with the rules
- The CPR rules for witness statements should be abolished and replaced by rules for witness summaries, covering a number of specified areas, and subject to the judge's discretion to exclude oral evidence or direct witness statements
- A single, electronic case management administration system should be implemented across the jurisdictions of the Rolls Building, in order to improve the efficiency of (and time spent on) both case management conferences and docketing
- There should be only one procedural guide for the Rolls Building

Further information

Charlotte Hudson

Manager of the Chairman's Office

The Bar Council

289-293 High Holborn

London WC1V 7HZ

Email: CHudson@BarCouncil.org.uk

Tel: 020 7611 1465 (direct)



Integrity. Excellence. Justice.

The Bar Council represents barristers in England and Wales. It promotes:

- The Bar's high quality specialist advocacy and advisory services
- Fair access to justice for all
- The highest standards of ethics, equality and diversity across the profession, and
- The development of business opportunities for barristers at home and abroad.

The General Council of the Bar is the Approved Regulator of the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

www.barcouncil.org.uk



@thebarcouncil