

National Experience – Change of civil procedure rules in the UK

Cyprus Judicial Conference

Lord Briggs, Justice of the UK Supreme Court

10 March, 2021

Madam President, fellow judges, distinguished guests, good morning. It is a privilege and a delight to be invited to attend this conference, and to celebrate the historic project of the introduction of your new civil procedure rules in Cyprus.

1. I have been a civil litigation lawyer in England since I qualified as a barrister in 1978, practicing as a business and property advocate until 2006, when I became a High Court Judge. So far as compliance with procedure rules is concerned, you might say that I am a player turned referee, or even a poacher turned gamekeeper. During my 43 years as an active lawyer I have therefore witnessed both the fundamental change, from the old Rules of the Supreme Court (“RSC”) to the Civil Procedure Rules (“CPR”), of the type you are now undergoing, and the whole of the process of change, by development and amendment of the CPR thereafter.
2. For two quite short but intensive periods I was a member of our Civil Procedure Rules Committee (“CPRC”), and therefore minutely engaged in that process of development and change, but only after the new CPR were introduced. The first was from 2006 to 2009 as a rank and file member of the committee. I was then called back at the beginning of 2016 to chair the meetings of the committee until late 2017, as Deputy Head of Civil Justice serving initially under Lord Dyson as Head of Civil Justice. So, I can claim to be able to comment on the process of ongoing change from the inside, as it were, both as participant and then as de facto supervisor.

3. Two other tasks caused me to stand back from the minute detail and look more fundamentally at the role played by our CPR in delivering access to civil justice. The first was my Chancery Modernisation Review in 2013 and the second was my Civil Courts Structure Review in 2015-16. Both are available on the UK Ministry of Justice website. They each involved intensive consultation with judges, lawyers, and court users, and many of the recommendations which I made found their way into the civil process by way of amendments and additions to the CPR.
4. I will return in a moment to the nitty-gritty of achieving ongoing change in civil procedure. It is a story of battles won, battles lost or drawn, a bittersweet experience with no end in sight. The CPR is a living structure which both needs, and benefits from, constant amendment. That is nothing of which we need to live in fear. But I think it fair to begin, [almost by way of mitigation], by outlining three of the extraordinary challenges facing civil procedure during the short life of the CPR since its launch in England and Wales in the late 1990s.
5. The first is the never-ending and almost exponential increase in the sheer detail and complexity of our substantive civil law. I would say that it has far outstripped the undoubted increase in the complexity of our civil life together which that law seeks to regulate. Not only are judges constantly refining and developing our common law to keep pace with changing times, but, much more significantly in terms of volume, our legislators are even more busy producing and then amending written statutory law.
6. The second challenge is the constant, unending battle to achieve proportionality between the cost of civil litigation and the value at risk, i.e. the amount being claimed, or the value of the property in dispute. Disproportionate cost is the implacable enemy of access to justice. Combatting disproportionate cost was a major reason for the introduction of the CPR in the first place, but the battle was by no means fully won by that change.
7. The third, perhaps more recent challenge, has been the need to mould civil procedure to accommodate the ground-breaking changes being brought about by the application of modern IT to the way in which oral and paper-based litigation had previously been conducted for

centuries. In the late 1990s (when the CPR were originally being designed) we were in the civil courts still entirely confined to paper documents (I have elsewhere called it the tyranny of paper), and there was only a very little, rudimentary, video conferencing to diminish the inconvenience of having to congregate judge, advocates, solicitors, clients, witnesses and experts, together with numerous copies of all the documents, in a single court room at the same time, not least when much of our business and property litigation has a cross-border element to it. And the CPR were originally drafted with continued paper and face to face hearings as an unquestioned assumption.

8. How different it is now. The ground-breaking advantages available from the replacement of paper by digital files, and the use of virtual hearings, given a vigorous kick forward by the pandemic, are only just becoming apparent, while the potentially game-changing advantages of Artificial Intelligence are still hardly above the horizon. In my own court (the UK Supreme Court), the staff and judges have now entirely given up paper case files (though the advocates appear still to love and use them). All our hearings are, at the moment, virtual, with judges and lead advocates each on screen in separate places (sometimes abroad) while the rest of their legal teams, our judicial assistants, the clients, the press and the public (again all over the world) watch the proceedings live over the internet. To a greater or lesser extent this transformation is being replicated by all our civil courts, under pressure of absolute necessity, but constrained by cost.
9. The CPR have been in a process of constant change since their inception, and there is no sign that the process is slowing down. And the impetus for particular changes have been numerous, ranging from senior judicial criticism of ambiguity at one end (mercifully quite rare) to a perception that something should be done to make the CPR useable by litigants without lawyers at the other. A comprehensive review would take hours, if not days. In this short address I want to focus upon how the CPR has responded to the three big challenges just outlined.

10. But first I must briefly describe the machinery by which change is achieved. Under our Civil Procedure Act 1997 there was established from the outset a standing committee, the Civil Procedure Rules Committee (“CPRC”), which takes the lead in making and amending the CPR, although to bring rules and changes once agreed into force, the consent of the Minister of Justice and then parliamentary approval must be obtained.
11. The CPRC is a committee of judges, solicitors and barristers, lay people and civil servants of a minimum of 16 but usually over 20, who are appointed by a statutory process, and generally chosen for their experience and expertise in different areas of civil litigation, i.e. different types of work and different levels of court. It meets all day once a month in term time, once a year in public. Its private practitioner members are unpaid. For the judicial members it is part of their job.
12. The CPRC is served by a permanent but very small secretariat, and by a 3 person hugely expert and experienced MoJ drafting team. The committee also has a statutory obligation both to consult and to meet for the making or amending of rules.
13. In practice the ever-increasing pressure on the committee means that more and more work is done in working groups below full committee level (in their members’ own time), but everything goes through a full committee meeting line by line, before it can be sent forward for approval by the Minister and by Parliament.
14. Requests for new or amended rules and practice directions come from many sources. The majority come from Government, alongside new legislation, to enable it to be enforced in court. Some come from specialist associations of lawyers. Some come from the Civil Justice Council. Some from judges, on perceiving a weakness or ambiguity in the rules as they stand. And a few changes are made on the initiative of the committee itself, as part of a process of rolling review and modernisation.
15. Sometimes a desire to try out a new aspect of civil procedure, before being sure that it should be given permanent effect, leads to the making of pilot rules and practice directions, with a

limited life, sufficient to enable the trial to be run and the outcome assessed, before the relevant change is made permanent, amended or abandoned. This has been of particular value in enabling new forms of IT to be used in the court context.

16. Returning to the three challenges, the response of the CPR to the exponential increase in the complexity and detail of our substantive law could have taken one of two divergent courses. The first might have been to say that civil procedure is essentially about dispute resolution by courts, which ought to be able to determine disputes about any area of law or fact, however complex, by essentially the same simple processes: of service of claim, pleading, case preparation, trial and appeal, followed by enforcement. Our recently retired Lord Chief Justice Lord Thomas was passionately of that view, and it may be that our newly appointed Head of Civil Justice, Sir Geoffrey Vos, will prove to be also. But they have not so far prevailed and, to be fair, they arrived on the scene in positions of sufficient power far too late to prevail. For the opposite course, which the CPR (and English rule makers generally) have followed is to match the increased complexity of the substantive law with an equivalent increase in the complexity in the new rules made to accommodate it.

17. The sad and now much-lamented result is that the CPR, originally drafted upon the basis of simplicity, have just got larger and larger, and ever more complicated, despite the statutory requirement, in s.2(7) of the Civil Procedure Act 1997 that:

“The... Committee must, when making Civil Procedure Rules, try to make rules which are both simple and simply expressed”

And, lest any one of you thinks you might have spotted a loophole, making a rule includes amending it.

18. The consequence of this process of addition rather than maintaining simplicity has been that the White Book (which is the practitioner’s civil procedure rule book), now runs to two very large volumes rather than one and is criticised for being longer than the Holy Bible. The

comparison is not entirely fair, because the White Book contains a wealth of commentary and additional material beyond the rules themselves, but the underlying criticism that the CPR are already much longer and more complicated than the old RSC is both true and justified.

19. A parallel cause of complexity has been the tendency for the rule makers to think that every rule, however simple, must have its sister practice direction, often longer than the rule itself, and of equally binding force. In the days of the RSC senior judges occasionally issued practice directions, usually orally in court, before the start of the day's case, to give authoritative guidance on how a general rule might best be applied in a particular, perhaps specialist, context. The oral guidance was then set out in the Law Reports, for all practitioners to read, mark, learn and inwardly digest. Now they are drafted by the CPRC, alongside the rules to which they relate.
20. But under the CPR regime, sanctions, including costs orders and even striking out, may follow upon a failure to abide by a practice direction to the letter, just as much as a failure to comply with a rule. And it is often the case that substantive rule-like provisions appear in the practice direction, accompanied by guidance in the parallel rule, rather than, as it should be, the other way round. Sometimes primary black letter law is only to be found in a practice direction, such as the rules governing when a claim may be served out of the jurisdiction. I am happy to hear that your new version of the CPR will avoid splitting the procedural code between rules and practice directions right from the outset.
21. That said, the use for almost all rulemaking of the same small dedicated drafting team has at least brought about a welcome uniformity and (to those in the know) clarity of language in the CPR. It is to their great credit that there are only few occasions when a real ambiguity in the rules has had to be resolved by the higher courts. Once you understand 'CPR speak' you can generally understand what a rule means without having to read the reported cases to interpret it.
22. This stampede towards complexity is not a particular fault of the CPR. It is, quite generally, the way in which rule making is currently done in England. Similar examples may be found in the

Tribunal Rules, the Family Court Rules, the Immigration Rules and the Insolvency Rules. But it is a great shame, because it feeds directly into, and exacerbates, the next challenge, namely maintaining proportionality in civil procedure and thereby access to justice. I have been told that simplicity has been a founding principle in the drafting of your new rules. Long may that remain so.

23. Proportionality, leading to the saving of time and cost in civil litigation, was a founding principle of the CPR, written into the 'overriding objective' by which the rules are to be interpreted and applied. But the hopes of the original promoters, and Lord Woolf in particular, that the CPR would put right this perennial problem of disproportionate time and cost at a stroke were only partly fulfilled. Hands-on case management by judges, the discouragement of expensive and time-wasting interlocutory hearings, the erection of a sanctions and costs regime designed to punish disproportionate conduct all made a valuable contribution to improved access to civil justice.
24. But the inevitability of having to engage lawyers to undertake every step of the complicated procedural dance ensured, as I reported in 2016 (after extensive enquiry and consultation) that for small or moderate value civil disputes, the process of litigating under the CPR still burned up a disproportionate amount of effort and cost, relative to the value at risk, and at the same time exposed the litigant to an equivalent risk of having to pay their opponents' costs if unsuccessful. The result was that, for ordinary citizens with small or moderate value claims, and with very little Legal Aid now available, the cost and cost risk of going to court to make or defend civil claims was just not a sensible deployment of their hard-earned financial resources, even if they could, literally, afford to pay.
25. I reached this reluctant conclusion only quite shortly after one of the most far-reaching processes of the reform of the CPR had been completed, generally called the Jackson reforms, after Sir Rupert Jackson, the inspired, incredibly hard-working but now retired Court of Appeal judge who designed them, largely drafted them and, by his passionate advocacy, brought about

their implementation. They included a change in the overriding objective itself, by the introduction of rule compliance as part of the objective, and fundamental changes in the costs regime, including costs budgeting, judicial costs management alongside case-management, and a start along the road towards a fixed costs regime, where a losing party compensates the winner by reference to pre-set scales of costs rather than by reference to what the winner has actually spent. The timetable by which our experience with the CPR was fed into the drafting of your new rules, under Lord Dyson's leadership (at our end at least) will I hope make you, as well as us, the beneficiaries of Sir Rupert's inspired work.

26. Nor will the already embedded Jackson reforms be the end of this story. Both he and Lord Dyson were passionate advocates of fixed costs and, although they have both retired from the battle, they have lit a fuse which I expect will continue to burn for a long time, and in due course lead to a great deal of further reform.
27. But the fact remains that the CPR is a procedural code written by lawyers, for the almost exclusive use of lawyers, so that litigants wishing to bring or defend civil proceedings without the step by step intermediation of lawyers (i.e. as what we call litigants in person) are simply unable to understand and then comply with the complex rules of the game. And yet they are expected to know and comply with the rules, and their inevitably partial knowledge of them is not considered to be an excuse for breach. The problem is not one of language, but of complexity.
28. I believe that the real solution to this access to justice problem based upon disproportionality lies in making the best use of modern IT, so as to enable ordinary people to bring and defend small or moderate value civil claims online, without having to employ a lawyer every step of the way. This does not mean that the wise litigant will take no legal advice on the merits, or even where necessary (and statistically this is a very small proportion of cases) to use a lawyer to argue a point of law or cross examine a witness at trial. But it cuts out the huge expense of

doing the civil procedural dance necessary under our present CPR regime to get there, every part of which usually has to be, or at least is, conducted by a lawyer.

29. IT has already opened up major avenues for the cost-efficient conduct of some types of claim, for example personal injury claims arising out of road accidents, under an online Portal which leads to the settlement of the overwhelming majority of insured claims. Amendments to the CPR accommodated this process within the rules, alongside a new fixed costs regime which has proved very successful.
30. There is now in the process of development and public testing a new form of online court for small civil money claims of all kinds, which it is hoped will be the prototype for a radical recasting of the way in which, eventually, most civil litigation will in the future be conducted in England. Claims will be articulated by filling in boxes and answering intelligent questions on successive screens in a responsive electronic form, which will also accommodate uploading of documentary evidence. Defences will be articulated in the same way. Cases will then be determined by an appropriate mix of mediation, early neutral evaluation, or online, or trial by video, telephone, or face to face as appropriate.
31. This radical new process, in which England is led at the moment only by British Columbia in Canada, is still at a very early (some would say primitive) stage, made possible by a series of enabling pilot rules within the CPR, after a government decision (regretted by many) that this new process should be part of our existing civil courts (the County Court) rather than a completely new jurisdiction. Its scope and its prospects are well beyond the confines of this short address. But its relevance to the present discussion is: how will the CPR change to accommodate this revolution?
32. There are, again, two schools of thought, with plenty of room for compromise in between. The first is that the online court should be designed and regulated by detailed rules, as far as possible by amending the current CPR model, even though it was designed for paper and face to face encounters between lawyers and judges. That will mean that there will have to be a rule (or

practice direction) for every electronic step, and a rule amendment every time that the online creation undergoes an improvement, as, like software on a lap top, it is bound to do, very frequently, to avoid going out of date.

33. The alternative, more radical, view is that the online court (whether for civil, family or tribunal cases) really needs a completely new approach to regulation. Rather than prescribe every step by a written rule in a separate book, the electronic forms will themselves contain all the necessary rules and guidance for the litigant. The only or main rule will be, do what it says in the electronic form. And the guidance will all be accessible, as in most electronic forms these days, via help boxes. The regulation will take the form of authority to the software writers and may have to be couched in their (probably weird) scientific language. On any view the predominant make-up of a rule-making committee for that purpose will be techies, people who understand litigants in person, and perhaps a very few judges and or lawyers, but nothing like the current preponderance of them.
34. There has been a succession of recent bills before Parliament designed to set up just such an online rules committee with that very different constitution and function. For some reason each bill (over several years now) got shunted into a siding and died. So, for the time being the CPR and its lawyer-dominated committee remain in charge, even of the developing online court. But that may be about to change. Another bill is coming down the line this year. Who knows, it may reach its destination and become law. Meanwhile the thinking about a radical change which may call the long-term survival of the CPR into question remains firmly in the sky, just for the birds.
35. Let me end by saying that the process of living with, changing and developing the CPR has been one which I and my fellow committee members over many years have never ceased to enjoy. Introducing a whole new body of rules is a huge achievement. But it is only a start. Keeping the rules of civil procedure relevant and up to date going forward makes a unique contribution to the rule of law, and something to which I think all judges can contribute.

