LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON

2021 Legal Wales Conference

Closing Keynote

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It has been too long since we have met in person for a Legal Wales Conference. Covid-19 is not behind us but as life returns to something that looks like normal it is a great pleasure to be back in Cardiff and to join at least some of you in person. The programme today has been wide ranging and of great interest. I am grateful to you for allowing me to say a few words at the close of the conference. I would like to take this opportunity to look forward to developments in the jurisdiction of England and Wales as the crisis caused by Covid-19 moves into a sustained period of recovery.

Many events were cancelled including the opening of the legal year in Wales and this conference could not take place in its normal way. We will be marking the opening of the legal year on Sunday, as we did in London last week, albeit with much reduced numbers, and so now is a good time to take stock.

At the end of March last year when all parts of the United Kingdom went into lockdown a critical decision was taken not to stop work in our courts and tribunals. In all jurisdictions we carried on and made rapid adjustments to the use of the court estate. We pivoted to the increased use of telephone and video for hearings, and not just for urgent hearings. In many parts of the world courts came to a full stop. Unsurprisingly, restarting after a stop is more difficult than winding down and then winding up. It was necessary for me to pause jury trials until we could be confident, with the help of professional public health advice, that the precautions being taken were appropriate to provide protection to those in the buildings. But in the meantime, non-trial work was increased. The judicially led Crown Court working group, with the involvement of HMCTS, the Ministry of Justice, the professions, Crown Prosecution Service and other court users worked remarkably quickly and collaboratively so that Crown Court trials resumed in the middle of May 2020. Cardiff was in the vanguard of that process and across both Wales and England the volume of jury trials has grown steadily since. The picture in the civil and family jurisdictions whilst less visible, was equally impressive. Some of the higher courts carried on without missing a beat by enhancing the use of technology.

But the family and county courts and the magistrates' courts were not well equipped to do so. Urgent steps were taken to provide telephones capable of conference calls. Judges immediately started using a range of commercial video platforms. The pressures exerted on the judiciary, staff and court users were enormous. It is collectively to the credit of all involved

that so much work continued to be transacted. After some months, the Cloud Video Platform was rolled out across all jurisdictions. It provided a better medium to enable some or all participants in legal proceedings to attend remotely.

It was clear that the jurisdictions that had the benefit of more advanced technological support as a result of the reform and modernisation programme were able to cope better than those which did not. The digitisation of process is an obvious example. It is vital that the reform and modernisation programme is supported by Government to enable HMCTS to see it through to its conclusion. Digitisation in the Family Court is advancing and will lead to the much more efficient disposal of business; so too in the County Courts. We all know that technological change can be difficult for those who have to adapt their ways of working. Judges and lawyers are no different and rarely do big technical IT projects run without some problems, often serious problems.

I will touch on three projects, all close to general roll-out, which should help deliver significant improvements in the way our courts operate and play a part in increasing our ability to deal with outstanding caseloads.

First, the Common Platform which is the single biggest project in the reform programme developed to support the criminal courts and allow our existing antiquated systems to be retired. It will enable all the parties involved in a case to have access to relevant information on one system, to share what it is appropriate for them to share but to retain exclusive or restricted access when that is necessary. It will enable orders to be produced quickly and facilitate the immediate collection of data. HMCTS remains bedevilled, not only in the criminal jurisdiction, by an inability to extract reliable data from the current systems of sufficient particularity to enable properly informed planning. The pilots and then gradual roll-out of the Common Platform have been accompanied by some difficult problems and setbacks which the code writers and IT specialists responsible for the project are working to resolve. I am very conscious of the frustrations that have resulted in some of the Magistrates and Crown Courts into which it has been introduced. During August and September, its roll-out was paused to enable issues on system stability and resilience to be dealt with.

That work continues. But introduction and eventual roll-out of the Common Platform to all our criminal courts is vital. We are assured by HMCTS that it will come good; and it needs to because there is no alternative. Judges and Magistrates continue to be involved through working groups to assist HMCTS. The Senior Presiding Judge and Mr Justice Cobb, who I have asked to perform a coordinating role for the final stages of reform, are in constant contact with the relevant officials in HMCTS to ensure that the Common Platform provides the functionality that is required. The aim is to conclude the roll-out in the Spring of next year.

Next, List Assist which is a scheduling and listing tool. Listing is a judicial function, of course, but the basic allocation of cases to available slots is carried out by listing officers in each jurisdiction subject to general judicial listing policies. Individual judicial decisions are then needed in a minority of cases. List Assist will introduce consistent digital tools and new processes. They will provide better support for judicial decision-making on scheduling and listing across all courts and tribunals. The tool will replace standalone diaries which have, to use the jargon, 'limited functionality'.

In some places List Assist will replace paper diaries and will ultimately merge with case management systems that will make it easier and quicker for listing officers to perform their role whilst reducing the need to re-enter information across multiple systems.

The List Assist tool will support judges to exercise their listing function by improving the collection and management of a wide range of information about judicial availability, the availability of courts and the needs of court users. This in turn will provide more comprehensive and reliable data.

Third, the Video Hearings Service. As I have mentioned, as a consequence of Covid-19 the Cloud Video Platform was introduced rapidly across our courts and tribunals. The new service platform is better and will provide a higher quality and managed platform to enable some or all participants in legal proceedings to join by video from any suitable location. It was first demonstrated to me in May last year and its potential was clear. I have more recently seen it in operation in the Employment Tribunal in Bristol. Remote attendance at hearings has been with us for at least three decades and was growing slowly but surely before Covid-19 struck. But its role in supporting the interests of justice has become more widely apparent as a result of much enhanced use over the last 18 months.

The Video Hearings Service aims to deliver a flexible and efficient service for people using courts and tribunals as an alternative to attending. It will save participants the time and inconvenience involved in travelling to a court building and thus save expense for litigants, whether directly when they are unrepresented or because their lawyers are spending less time on a case. It should enhance access to justice for many.

The service has many additional features compared to other remote video platforms including; virtual consultation rooms, checks and guidance to ascertain compatibility for use, the explanation of court rules for the user and a monitored hearing network to check connectivity thus ensuring that no-one drops out unnoticed.

Modernisation and recovery are not distinct animals. Modernisation is necessary to aid recovery and resources must be made available to see it through.

The Lord Chancellor is currently engaged in the spending review process. There are other aspects of the funding of the courts which are clearly of importance. For many years the courts and tribunals have been the Cinderella of public services with the results visible before our eyes. Too many of our buildings are in a poor state with necessary maintenance deferred year after year. It projects an image of the value attached to the administration of justice but also has direct costs. Hearings are lost because of the failure of heating systems, lifts or leaks, for example. The poor state of the buildings and infrastructure in our courts is one of factors that has contributed to the difficulties in recruiting judges and saps morale of staff and judges alike.

Cost saving restrictions on sitting days during the period leading up to Covid-19 resulted in Crown Courts being available to hear cases, judges were available to preside over them and cases ready to be heard, but no was money provided to enable that to happen. Artificially

creating or maintaining backlogs through financial restraint is, I trust, a thing of the past. The Lord Chancellor and I share the same objective of bringing down outstanding caseloads in all jurisdictions and as quickly as possible. I was encouraged by the unequivocal commitment given by the Prime Minister in Parliament on 23 June this year to fund recovery.

But there is an important underlying point that, with respect to Government, may not be given sufficient prominence. The courts are not a service like any other. They do not exist simply to provide a service to those who happen to find themselves using them. They exist as one of the foundations of the rule of law. Lord Wolfson for the Government acknowledged earlier this week in a speech at the Mansion House, that they form one of the critical underlying building blocks on which civil society and all economic activity rests.

Courts that do their work quickly and efficiently contribute to the prosperity of the nation. The resolution of family disputes and child protection cases liberates adults to play their part in the economic life of the nation and children to grow into useful members of society. They save the haemorrhaging of expense in other parts of the public sector. Effective civil courts are vital not just to large businesses but to small and medium sized businesses and individuals to resolve disputes, recover debts and vindicate civil law rights. Beyond that, only a small proportion of civil and family disputes results in proceedings. The very existence of a properly funded, efficient and effective court system encourages the resolution of disputes because all know that the courts are there to exercise the coercive judicial power of the state if necessary.

All should have confidence that disputes which cannot be settled privately can be quickly resolved by the courts; and, obviously, the criminal courts must be in a position to deal properly and expeditiously with the cases that enter them.

There has been too little focus on the value that the rule of law, a properly functioning administration of justice and the courts contribute to the general prosperity of the nation, beyond the direct and substantial value of the legal sector. Nobody, for example, would add up the direct economic contribution to the gross national product of the education sector but overlook the fact that without an educated population much else would fall away. Nobody would fail to appreciate that the value of a healthy population to the economy is enormous and not to be calculated by reference to the direct contribution of the health sector. And yet the same thinking appears absent or muted when it comes to the administration of justice.

Only this week a report prepared by Oxera for LegalUK has demonstrated that the value to the economy of English law is colossal, because it underpins so much business, domestic business but even more international business. At its pinnacle sit the courts of England and Wales. I commend it as vital reading.

Proper resources are an important part of the picture but I recognise the responsibility of the judiciary, in all jurisdictions, constantly to be looking at how cases are dealt with to improve the efficiency of what we do, consistent always with our overriding duty to the interests of justice. Work continues in all jurisdictions to streamline procedures and iron out some of the problems which cause delay. That will never cease to be necessary.

Part of that exercise involves looking closely at our experience of the enhanced use of technology during the pandemic to conduct some hearings fully remotely and others with various participants attending via video link. The touchstone of whether a participant should be allowed to attend remotely is whether it is in the interests of justice to do so. That is an easy test to state but a far less easy one to apply. The interests of justice are not the same as the interests of judges or the interests of lawyers. That the personal attendance of a party, witness or advocate might be thought better is not determinative either. After all, our courts have been receiving evidence by video link for decades and long been hearing advocates remotely when physical presence might be better but for reasons of convenience and expense nobody would suggest that they attend.

We have learned in the last eighteen months that the use of remote attendance is not necessarily more efficient and quicker. Long lists in all jurisdictions seem to move more quickly when participants attend. That is a factor which is difficult to capture in clear rules or guidance but is very much in the minds of judges and magistrates. In the criminal courts the core rule, now statutory, is that a participant should be allowed to attend remotely unless it is not in the interests of justice to do so. There are red lines drawn by the statutory scheme in some respects. That scheme, introduced as a response to Covid-19, is likely to become permanent. In civil there have long been rules governing telephone hearings and the inherent flexibility of procedure has allowed remote attendance when it is sensible. The same is true in family. It is relatively easy to identify in all jurisdictions types of hearing that usually should be dealt with remotely – procedural hearings, arguments about law and so on. But it is difficult to draw up hard and fast rules, for example, for when a witness should be allowed to attend remotely. The interests of justice might be different when a judge is considering a vulnerable witness, or whether a litigant in person needs to be before the court.

A real difficulty arises in respect of preliminary or procedural hearings which, from experience, all know might lead to resolution of issues or indeed of the whole case because of the physical interaction between parties and lawyers, often outside the court itself. A classic example is the pre-trial and preparation hearing in the Crown Court.

Judges continue to feel their way, but I and the heads of jurisdiction recognise that a broad consistency of approach is necessary subject, of course, to local conditions. That said, the components of the interests of justice are unlikely to be capable of being reduced to a list. Nor will it be possible to construct definitive lists of participants who should be allowed to attend remotely if they wish, or types of hearings. Please bear with us while we draw on both domestic and international experience.

We have achieved in the last 18 months what might have taken five or ten years in advancing the use of technology in the courts. We have taken three steps forward and we will inevitably take one step back as things settle down. But there will be no going back, in any jurisdiction, to February 2020. As time passes all involved in the administration of justice will wonder how we managed for so long to continue the working practices that were familiar when I started at the Bar in the 1980s. The world has moved on around us. We should not be frightened of technological change. It should not be our master, but our servant and we should embrace it when in the interests of justice to do so.