Following the rules

Dominic Regan on what to expect from reform of the civil procedure rules

Civil procedure never stands still. The Rules need to be revised to ensure they keep abreast of developments and address failings and anomalies. The May meeting of the Civil Procedure Rule Committee was an open one, and gave us a clear steer on what is on the reform horizon. I am as ever grateful to Matthew Maxwell Scott of the Association of Consumer Support Organisations for his wisdom.

Before looking at the many areas to be reviewed, it is noteworthy that there are two issues where change is unlikely. Since 2017 there have been noises about imposing a fixed costs regime for low-value clinical negligence claims worth no more than £25,000. A misguided minority was sure this would be implemented last October. It was not, and nor will it be introduced this October either. This remains on hold and is being considered by the government, was the terse comment in minutes of the May meeting. This is so sensitive a topic and I suspect it will continue to drift.

Likewise, it was made clear that the CPRC is adamant it will not intervene in the ongoing personal injury litigation war over medical agency fees. The late HHJ Michael Cook held in *Stringer v Copley* (2002) that such agency fees were recoverable in principle. The question of the moment is whether a paying party is entitled to a breakdown of the composite fee charged by the agency, so that the fee payable to the expert is revealed. HHJ Bird delivered judgment on 22 May 2023 in *Northampton General Hospital NHS Trust v Hoskin*. The paying party was asked to discharge invoices for the fees of two consultants. The defendant wanted to know how much each consultant had billed. The judge ordered production within 14 days, failing which each of the two items be assessed at nil. The defendant secured leave to appeal but that was not pursued.

Our new senior costs judge Rowley heard *JXX v Scott Archibald* (2025) EWHC 69 (SCCO), where the agency was not Premex, which was involved in *Hoskin* and subsequent cases, but MAPS. The defendant wanted a breakdown of agency fees of £120,946. It was a very serious injury case. The defendant latched onto the massive disparity in the charges relating to Mr Elston, a consultant ophthalmologist. His first report was commissioned directly from him. Subsequent reports were secured via MAPS. The defendant counsel described the difference as 'stark and shocking'. MAPS declined to give a breakdown. The judge decided that if a breakdown was volunteered, costs would be assessed based on the expert fee and the reasonable work of the medical reporting agency. If not, the work of MAPS would be ignored altogether, and so only the fees of the expert would be allowed. The judge indicated that if either side wanted to appeal he would readily give them permission. Leading counsel tells me that this dispute, coupled with another, goes back to the senior costs judge for fully four days of argument in November! The Rule Committee believes that it is for the interested parties to resolve their differences; statutory intervention is not on.

REFORM AGENDA

Turning to the reform agenda, it has been announced that Lord Justice Birss will be chancellor of the high court from 1 November. Those lucky enough to have met him will know that he is a charming pragmatist, ever keen to improve the litigation process. He understands technology and will drive changes through.

Electronic documents

Recognition of an unfettered right to serve documents electronically is long overdue. The master of the rolls is passionate about such service. I remember on the second day of the aborted *Belsner* hearing in February 2022, that counsel introduced printed further authorities. Sir Geoffrey Vos could not resist saying that he would have much preferred them to have been sent to him electronically!

EXPERTS

On 20 June Sir Colin gave the keynote speech at the annual conference of the Expert Witness Institute. Speaking as the deputy chair of the Civil Justice Council, he revealed that: 'At our March meeting this year I suggested that an area for future work for the CJC was experts. For example, as I hope you know, in 2014 the CJC published guidance for the instruction of experts in civil claims, which sought to assist litigants, those instructing experts, and experts themselves to understand best practice in complying with Part 35 and court orders. At our meeting it was agreed that this existing guidance should be reviewed, with the view to either updating it (or indeed politely retiring it if it is completely outdated or ineffective) or launching a wider review to answer broader policy questions. Now that work is still very much at the planning stage, but this means that if any of you have any particular issues you think the CJC should consider, it would be very helpful for you to make contact now.'

Intermediate track

The intermediate track came into being on 1 October 2023. It is still early days, and I am not aware of any reported authorities on potential problem areas such as the appropriate complexity band for a given dispute. This is certain to arise because the Ministry of Justice declined to give detailed guidance on banding. It is important to the parties because the amount of costs recoverable between the parties could vary by thousands of pounds. For example, a claim settling at Stage 8 will generate a lump sum in costs of £19, 614 if in complexity band 3; but if it was just one band higher, then an extra £10,324 would be recoverable. Nevertheless, the Civil Procedure Rule Committee is to conduct a stock take of the changes this autumn.

It will be remembered that the intermediate track excluded residential property claims under CPR 45.1.4. This was to operate until October this year. I understand that the exclusion will now be extended until October 2028. I also hear that the 35% uplift on costs where a good Part 36 offer has been made has attracted some criticism, and no doubt will be looked at in the stock take.

Small claims

Next up will be a consultation on small claims. These cases worth up to £10,000 take up so much court time. Often the litigants are unrepresented, which only adds to the pressure on overworked district judges. Mandatory paper-only determination is being mooted. The right to a hearing in person could well be abrogated.

Enforcement

Enforcement of judgments is definitely up for reform. In the first speech that I heard Lady Chief Justice Sue Carr deliver after her appointment, she identified this as a problem area that was known but ignored, because it resided in the 'too difficult box'. Last April, the CJC Enforcement Working Group, led by HHJ Karen Walden-Smith, delivered a final report. It frankly and accurately concluded that court enforcement 'does not work'. We need a single unified digital court to achieve the satisfaction of all judgments, whether secured in the High Court or County Court. The current process, untouched for decades, is handicapped by arcane processes and prehistoric forms. It costs a staggering £303 to make an application to set aside a County Court judgment, which in many a matter was entered in default. It might be for a trifling amount, perhaps an alleged balance on a long discontinued mobile phone account, but bad enough to impair a credit rating.

I attended the meeting chaired by Judge Walden-Smith at the annual Civil Justice Council forum in London in November 2024. Both creditors and debtors had plenty to complain about. 'Can't pay, won't pay' is the battle cry of many who have had a regular judgment entered against them. Securing judgment might just be the beginning of an arduous struggle to satisfy it.

On the other side of the fence were debtors. Each adverse judgment against them was looked at in isolation. A more sophisticated approach was called for so that indebtedness could be considered in the round. A grandstand view would enable the court to consider a comprehensive package of enforcement proposals. Of course, these proposals will need funding, and as we know the courts are dependent on the state - and the latter is bust.

Further matters

July saw publication of the parliamentary Justice Committee report on the work of the County Court. It painted a grim picture of a failing, underfunded entity. It requires a massive investment, which I confidently predict is not coming.

The May minutes addressed the conclusion of Phase 1 of the simplification project launched in 2021, which ended this April with tweaks to Part 25, dramatically renamed 'Interim Remedies', having been 'Interim Remedies and Security for Costs'. No decision has yet been made about Phase 2; will there even be one? Progress was ponderous and trifling.

Fingers crossed, primary legislation to retrospectively reverse the Supreme Court decision in *PACCAR* (2023) UKSC 28 about funding could be implemented next year. This was recommended in the Civil Justice Council Working Party report published on 2 June.

Finally, in his speech delivered to the international forum on online dispute resolution on 30 April this year, Sir Geoffrey Vos MR spoke of the roughly 15m civil, family and tribunal disputes that arise each year. His heartfelt ambition is that the Online Procedure Rule Committee established over a year ago will now start to deliver easy access to already existing online pre-court dispute resolution mechanisms best suited to those who need them.

It will be a long haul, but I do not doubt his determination to deliver.

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