A greener future for litigation?

Is litigation in its current form consistent with the UK's carbon reduction commitments? Dr Mike Wilkinson & Eimear McCann make the case for rule reform

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IN BRIEF

- Litigation can be hugely carbon inefficient.
- Many clients will want or need to pursue carbon reduction strategies, sometimes due to personal environmental beliefs, but also to meet ESG obligations.
- The courts can already find ways to litigate more sustainably, including through e-service, e-disclosure, e-bundles or hearings (or parts of them) being held virtually.
- However, such carbon reduction measures are far from routine and if we are to meet our legal obligations to transition to net neutrality, a shift in mindset is needed.

Litigants pay the courts not insignificant sums to litigate their civil disputes, not only through taxes but often through an issue fee of 5% of their claim's value, capped at £10,000. If clients want or need to reduce the carbon emissions produced by litigation, neither the courts nor their lawyers should stand in their way.

Many clients do want to reduce carbon emissions. Some hold strong beliefs and views on the subject. Increasingly, corporate clients are operating within an environmental, social and governance (ESG) framework and are beholden to their stakeholders. They may have contractual commitments to endeavour to reduce their emissions; their funding may even have been subject to such commitments. Increasingly, regulations require companies to report on their carbon emissions and transition plans, and shareholders may call for more environmentally responsible behaviour.

Unfortunately, litigation still emits lots of carbon. Travelling in order to physically appear at hearings plays a big part, as parties, witnesses and lawyers (not to mention judges and administrative staff) travel to court while hauling hard-copy documents with them, often across the country and sometimes from abroad. Unnecessary printing also plays a role, with some parties printing out every single document provided for disclosure for physical review, or producing multiple copies of hard-copy hearing bundles.

It is not always easy to contemplate the carbon footprint of steps taken in litigation or to picture how it all adds up. Visualising how to offset carbon can help. Cast your mind's eye over a forest and picture as many trees as you can possibly take in. Now contemplate this carbon footprint: according to the Campaign for Greener Arbitrations, the average international arbitration takes nearly as many as 20,000 trees to offset. If offsetting was the magic solution, dispute resolution would call for a lot of tree-planting. But offsetting is beset by its own problems and complications, and it is no substitute for reducing emissions in the first place.

Tapping into technology

The reality is that most of the emissions produced by litigation and arbitral proceedings can be avoided. We already have the technology to reduce carbon. We witnessed throughout the COVID-19 pandemic just how remarkably adaptable the legal profession was in making use of such technology. Remote hearings and e-bundles were very quickly embraced.

Platforms such as TrialView (among others) emulate real-life hearings, with bundling tools, evidence presentation and integrated videoconferencing all captured in one place. Layers of AI allow users to interrogate evidence across an entire case, asking questions and retrieving answers in seconds. Witness preparation tools, such as automated video transcription, empower legal teams to take statements from anywhere, with an editable transcript at their fingertips.

Automation can thus replace many of the repetitive and mundane tasks in preparation for litigation, with advanced bundling tools facilitating easy uploading, automatic hyperlinking and tagging, all within a one cloud-based workspace. A single log-in can now replace superfluous communications and remove the need for paper to be printed or couriered to various locations around the world.

Using this technology significantly reduces emissions. A detailed study by Herbert Smith Freehills in 2022 found that an arbitration hearing in London has a carbon footprint 19 times greater than what it would have if the hearing was held remotely—not to mention its greater expense.

The door to a greener way of resolving disputes has already been opened. There is a tentative sense that the virtual and hybrid lessons learnt in the pandemic are here to stay. A working-from-home trend has emerged across all sectors, with workforces

now demanding increasing flexibility as to their working location. Most lawyers demand access to their cases on their mobile devices. Advances in AI have also accelerated an appetite for autonomous tech tools. Insights and patterns that could take hours to identify on paper can be quickly automated and enhanced, and the process of taking witness statements by pen and paper, for example, can be replaced with recording and transcribing software, capturing evidence almost in real time. With data creation increasing at an exponential rate, manual ways of working appear to be simply unsustainable. The management of the vast amounts of digital data being created can only really be achieved by using the very technology that creates it.

Taking the leap

Yet, here we are in 2023, in a strange hiatus. We know what needs to change, and what commitments we have made, but have yet to take the leap. There is a danger of slipping back into old ways and for convenience to undo progress. At least anecdotally, there is evidence that the courts are not equipped to implement carbon reduction measures. Requests to convert interim hearings into remote hearings are routinely not processed quickly enough, or they are listed as applications in person heard only on the day of the hearing itself. Applications to avoid witnesses travelling to court to reduce travel, if processed in time, are governed by rules which do not expressly take into account the need for carbon reduction (see CPR 32.2).

The Civil Procedure Rules themselves need not be an impediment to parties working together to reduce emissions. The aims of the overriding objective—efficient litigation, proportionality, saving expense, and getting a fair allocation of court resources—are not inconsistent with parties seeking to reduce their carbon emissions. In an interesting post-script to his judgment in *Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd and others* [2021] EWHC 3015 (Ch), [2021] All ER (D) 68 (Nov) (see para [426]), Hugh Sims KC (sitting as a deputy judge of the High Court) recognised how climate change is increasingly liable to factor into case management. He applauded the parties in that case for cooperating and commented that: 'efficiency under CPR 1.4(2)(l) can include the consideration of carbon reduction efficiency.'

Certainly, many lawyers are trying to litigate more sustainably. The Chancery Lane Project advocates choice of law clauses that incorporate a commitment to sustainable litigation, reducing unnecessary printing or cooperating to seek carbon efficient case management directions.

The Greener Litigation Pledge also calls on lawyers to seek directions to litigate proceedings in ways which produce less carbon. In particular, they call on lawyers to take steps including:

- corresponding electronically, unless hard copies are expressly required, while recognising that electronic communication has a carbon footprint and accordingly seeking to avoid unnecessary emails;
- limiting the printing of hard-copy bundles and other documents wherever possible;
- promoting the use of electronic bundles for court hearings where possible, and liaising with our counterparts at opposing firms and the court to seek agreement where necessary;
- considering the appropriateness of witnesses giving evidence by video-link and, where appropriate, co-operating with our counterparts at opposing firms and the court to implement the necessary procedures for giving evidence by video-link.

> *"The door to a greener way of resolving disputes has already been opened"*

In its climate change resolution, the Law Society calls upon not only solicitors but also organisations that support the legal industry (which would include the courts) to:

- adopt practical measures to reduce the environmental impact of their business and policies which mitigate their contribution to the climate crisis through the provision of legal services; and
- take a holistic and proactive approach to mitigating the climate crisis, including by promoting the development and application of legal rules, transparency requirements and policies in a manner that is consistent with climate change mitigation.

At present, however, it seems that lawyers and the courts are still some way away from doing what they can to reduce carbon emissions. Some lawyers are taking a more radical line. To the chagrin of the Bar Council, and notwithstanding the cab rank rule, the group Lawyers Are Responsible has asked all lawyers to withhold professional services if asked to prosecute environmental protestors and to refuse to represent parties involved in new fossil fuel projects (see 'The climate crisis & the cab rank rule', *NLJ*, 7 & 14 April 2023, p6).

It is unrealistic to expect the legal professions, which are already burdened with heavy regulation, to make the changes required without assistance. A change in mindset is needed. And that will require a concerted sector-wide effort—across the bench, the Bar and the various branches of the legal profession. Nothing short of rule reform is likely to bring that about. There is however a very good case for rule reform.

Legal professionals, the courts and the rules governing proceedings are expected to uphold the rule of law. In that connection, it should not be forgotten that the UK has made a legal commitment to achieve net neutrality by 2050. Under the Paris Agreement, it has a legal obligation to set its nationally determined contributions to result in a 7% reduction year on year. Those are legal commitments that contemplate collective endeavours to limit global temperature increase to 1.5 degrees above pre-industrial levels. Moreover, while a change in mindset is needed to reduce emissions, it would not take much to change the status quo to create another new normal and one which routinely requires service by email, e-disclosure, e-bundles, no printing and accommodates more virtual hearings and remote attendances.

In civil proceedings, modest reforms could go a long way towards discouraging unnecessary travel and printing. The overriding objective could easily recognise the UK's carbon reduction commitments and the rules governing service, bundle-preparation, and remote attendances could all be revisited and revised with relative ease to better conform with the UK's legal commitments.

On the occasion of Earth Day (Saturday 22 April 2023), it is worth pausing and asking whether the rules and the courts that uphold the rule of law could do more to recognise the planetary boundaries within which we operate, to contemplate the emissions litigation produces, and to endeavour to reduce them to encourage compliance with the UK's legal commitments and net-zero strategy. NLJ

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