

## **What will the proposed on-line court mean for litigators?**

### **Original news**

On 27 July 2016 Lord Justice Briggs published his 299 page report: '*Civil Courts Structure Review: Final Report*' which contains various proposals relating to judges, appeals, mediation, enforcement, the number of trial centres as well as that for an on line court. It is proposed that this court would have its own rules, be on-line only and be used for all disputes with a monetary value of £25,000 or less. The proposals will effectively abolish the small claims and fast tracks as all those cases would have to be brought in the on-line court. There is one thing that is clear – these proposals are all about reducing costs by the Ministry of Justice ('MoJ') however Briggs LJ dresses it all up – the word 'cost' is mentioned a staggering 145 times in his final report.

### **What did Lord Justice Briggs recommend in his interim report?**

He recommended a 3 stage system for this new on-line only court:

- **Stage 1** - automated triage process by which litigants identify their case (or defence) online in terms sufficiently well ordered to be suitable to be understood by their opponents or court, and upload the key documents and evidence relied on,
- **Stage 2** - conciliation and case management by a court case officer either conducted by email or telephone,
- **Stage 3** - determination by a district judge (or deputy) on these documents by either
  - telephone,
  - video, or
  - face-to-face hearing

### **What feedback was sought on the initial proposals during the consultation phase?**

Briggs LJ sought specific feedback in his interim report on these aspects:

- Whether the Online Court should be a separate court with its own rules, or a branch of the County Court governed by the CPR,
- The types of claim within its remit,
- Citizens who are not IT literate,
- Costs shifting, and
- Routes of appeal.

### **What feedback was provided on the initial proposals during the consultation phase?**

In his final report, Briggs LJ summarises his recommendations on these aspects as follows:

- The MoJ has decided that the Online Court will have its own separate rules and is preparing the necessary primary legislation for Parliament. There will be a new separate rules committee for not just the Online Court but also for all courts and tribunals in civil or family matters which will be oriented towards litigants in person. There will remain a problem about how to regulate cases which pass from the Online Court to the County Court due to complexity.
- The Online Court will have an initial limitation for money claims which are unaccompanied by any other non-monetary remedy. A series of defined exclusions are proposed.
- Briggs LJ recommends leaving the identification and design of the best form of assistance for those who are not computer literate to a new group called LiPEG (Litigant in Person Engagement Group).
- Basic provision for costs shifting should be that already in use on the small claims track including costs sanctions for misconduct. It should also provide modest fixed costs recovery for early advice on the merits from a lawyer and for advocacy at trial where '*really necessary*'.
- An appeal should lie with permission to a Circuit Judge where the decision in the Online Court is made by a District Judge. This appeal can be on a matter of law or on factual findings or both. A second appeal should lie to the Court of Appeal subject to the usual more stringent

permission test. There will be new rules for appeals from the Online Court and CPR part 52 will not apply to these appeals.

### **What are the perceived advantages to these proposals?**

At the moment we don't know whether the new Online Court will be any cheaper than the county court because no-one has laid out the fees or costs. There should be the advantage of speed in getting to a final decision. The system is being designed for use on desktop or laptop PCs. There seems to be an aspiration that it will also work on smartphones or tablets too.

For debt and other bulk issued claims, where these have a value under £25k then although they will have to be issued in the Online Court there is meant to be a short-cut in Stage 1 where it is ascertained there is no dispute that the debt is in fact owed.

For litigators familiar with pre action protocols which require much information and documentation to be sent with an initial letter of claim, then the Online Court should not present much difficulty. Briggs says that he does *'not regard the erection of a pre-action protocol procedure as at all suitable to the Online Court'*. Instead Briggs envisages instead a *'simple exchange of correspondence'* pre-action. If the system is designed properly then that will constrict and restrict the ability to state either a claim or a defence. This should in theory make it more difficult for disgruntled litigants in person to bombard the other side or the court with voluminous amounts of irrelevant or incoherent material.

Presently there is a mediation service for small claims with a mediator attempting to settle claims by telephone mediation but this is limited to a 1 hour session only. The proposed conciliation service at Stage 2 seems to resemble this but whether equivalent results can be achieved by an exchange of emails rather than a telephone call remains to be seen.

### **Does the court service have the IT capability to support this?**

In the Rolls Building there is a relatively new system called CE File in which all court documents can be uploaded for all Commercial Court, TCC and Chancery business there. This is presently voluntary but is meant to become compulsory from April 2017. However CE File is designed to be used by professional advisers. In 2015, there were only 870 new cases in the Commercial Court whilst Money Claims Online issued 437,000 new cases in the first quarter alone of 2016.

Briggs seeks to brush most of the problems of scale aside thinking all IT issues can be sorted if there is a *'soft launch'*. Even Briggs LJ is forced to admit that the IT development work for Stage 1 is *'the most novel, challenging and time consuming'* and that he would expect it *'to be particularly vulnerable both to poor procurement and to under-funding'*.

There must be a concern for credit reference agencies ('CRAs') too. At the moment, default judgments in the county court are reported to Registry Trust where they remain unsatisfied after a month. The Registry Trust data is then uploaded to CRAs and is used to make credit granting decisions by banks, insurers and utility companies. If all debt claims under £25k will be required to start in the new online court, then the IT architecture will have to be built to replicate this but this is not addressed by Briggs LJ in his report.

### **Will there be any exemptions?**

At page 119 of his final report, Briggs recommends only these 6 very limited exemptions:

- Claims for possession of homes should be excluded **'at least initially'**,
- Personal Injury or clinical negligence claims **'should'** also be excluded if they would otherwise fall within the fast track or multi-track,
- Professional negligence claims **'will'** initially qualify for exclusion *'until a means of having them determined by specialist judges .... can be developed'*,
- Intellectual property claims **'should'** be excluded because the specialist IPEC court already exists,
- Claims for damages only for breach by **landlords** of repairing obligations **'should not'** be required to be brought in the new court but tenants *'should be able to do so if they wish'*, and
- Claims seeking an order that the landlords do repairs and/or counterclaims in response to possession claims **'should'** be excluded

There is little provided in the way of justification as to why these exemptions should exist or even why the list is so short. The language used by Briggs LJ is troubling too as all the proposed exemptions would seem to be only transitional ones.

#### **What claims will this apply to?**

Unless the claim falls within one of the above narrow exemptions, where its monetary value is £25,000 or less, then when the Online Court is operational, these cases will have to be started there. However if a claimant is also seeking a non-money remedy as well (such as an injunction or declaration) then initially such claims can be brought in the High or County Court.

#### **What issues arise from having a different set of rules?**

Lawyers advising on lower value cases will need to understand another set of rules. Briggs LJ is proposing too that cases started in the online court will transfer to the regular County Court through what he describes as a '*permeable membrane*'. At that point these cases will then be subjected to the CPR. When the Woolf reforms were introduced in 1998, for the first time they introduced a single set of rules which applied to all civil claims. This seems to be a step backwards.

#### **Do any other systems use on-line systems for dispute resolution?**

The Briggs report mentions ODR systems used by eBay, Cybersettle and the Traffic Penalty Tribunal.

#### **What is the Canadian experience?**

The Civil Resolution Tribunal ('CRT') has just started operation in the province of British – [www.CivilResolutionBC.ca](http://www.CivilResolutionBC.ca). It accepted its first claim on 13 July 2016. No other Canadian province has yet adopted it. However the CRT is just accepting **one** class of claim (relating to condominium rights or charges). It is charging the equivalent of £90 to issue a claim, £15 to lodge a defence and £60 for a tribunal decision. Judges are paid £315 a day. Underpinning the CRT is a piece of primary legislation (112 sections) and a 26 page set of procedural rules. The CRT law excludes lawyers unless an adjudicator decides otherwise. The CRT offers compulsory non-binding paper adjudication. The CRT seems very similar to our First Tier Tribunal (Property Chamber) **except** that it **only** handles cases relating to complaints about the level of service charges from leaseholders.

#### **Do practitioners believe that the proposed court will be a lawyer-less one?**

Briggs LJ does not envisage the Online Court will be lawyer-less. Where a lawyer is used, then stage 1 can be shortened. Briggs LJ wants parties to have '*early bespoke advice*' on their claims but wants the costs of this to be 'unbundled' from the cost of a traditional retainer. At paragraph 6.38 Briggs says that the cost of such advice could be '*an element of fixed recoverable cost*'. Where cross-examination is needed at a hearing, again Briggs tepidly recommends '*some fixed recoverable cost*' for trial advocacy.

#### **Will the proposals be piloted first?**

Surprisingly given the scale of the changes proposed, Briggs LJ is not recommending any piloting of the proposals. He notes at paragraph 6.92 of his final report that in British Columbia in Canada, the promoters of its online court is starting with a soft launch focused upon one case type only and that this will be run as a pilot scheme from which lessons can be learned about the final design.

Briggs LJ's only proposals on piloting relate to the concepts which underlie stages 2 and 3. He says at 6.68 that '*this does not mean that the concepts which underlie stages 2 and 3 cannot in the meantime be piloted within existing courts.... but it would be wrong in my view to delay the development of stage 1 of the civil Online Court until stages 2 and 3 have been put in place.*'

#### **What about costs and fees?**

Briggs LJ refuses to elaborate on this. In paragraph 6.131 of his final report he merely says '*its processes would not be free*' and then adds '*court fees are not part of my terms of reference.*' At the moment we don't know the answer to this vital question and whether the new court will represent a good deal or a poor one.

**What about disabled people or older people who do not have any IT skills?**

Briggs recognises that there is a class of older people who are not IT literate or others without broadband access. He rejects demands for a parallel paper version of the court. Instead, he refers to 'assisted digital' saying it will be left to advice agencies to assist these litigants.

**What will the new court be called?**

It has the working name 'Online Court'. The MoJ will have to adopt this unless it can come up with a better name. Some suggestions (Citizens Court, Open Court, Accessible Court or Court 21) have already been considered and discounted. Briggs LJ prefers 'Online Solutions Court'.

**What is the timetable for the next steps?**

Rather ambitiously Briggs LJ is working towards the delivery of the project by April 2020.



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