CLAN 2016 ANNUAL CONFERENCE: KEYNOTE SPEECH BY BRIGGS LJ ON HIS CIVIL COURTS STRUCTURE REVIEW

On 7 March 2016, Briggs LJ delivered a keynote address at the Commercial Litigation Association (CLAN) annual conference, outlining some of the key proposals in his Civil Courts Structure Review interim report, and seeking feedback from delegates.

Practical Law Dispute Resolution

SPEEDREAD

On March 2016, at the annual conference of the Commercial Litigation Association (CLAN), Briggs LJ delivered a keynote address outlining some of the key proposals in his Civil Courts Structure Review interim report, and seeking feedback from delegates. The speech usefully highlights issues for practitioners to consider, whilst the feedback from delegates puts into focus some of the challenges ahead.

Beverley Barton and Natalie Stopps, editors in the Practical Law Dispute Resolution team, attended the event, and have produced a detailed note that has been approved by Briggs LJ.

The deadline for written responses to the interim report expired at the end of February, but Briggs LJ emphasised the importance of consultation on the issues. Between now and the end of May, he will be engaging in meetings with stakeholders. Practitioners are strongly encouraged to read the interim report, and to take part in the consultation phase. The final report will be published by the end of July 2016.

THE CIVIL COURTS STRUCTURE REVIEW: A PRESENTATION BY BRIGGS LJ AT THE CLAN ANNUAL CONFERENCE, 7 MARCH 2016

I don't propose to deliver a speech or keynote address as such. Instead, I would prefer to use this as my first opportunity for genuine, open, "unvarnished" consultation on my Civil Courts Structure Review.

SUMMARY OF WORK TO DATE

In 2015, I started with a blank sheet of paper. Until November 2015, I undertook considerable learning and research, including Chatham House consultation, around the whole country, with judges and interested stakeholders. I then published my interim report – delivered at 10.30pm on Christmas Eve!

To set things in context, I would find it helpful to have a show of hands to see who in the audience has read my interim report thoroughly, who has skim-read it, and who has not read it at all. [On the show of hands, numbers were fairly evenly split, with a slight majority on those who had not read the interim report at all.]

Written responses to my interim report were invited up until the end of February 2016. I have received some very good responses from organisations including the City of London Solicitors' Company, the Chartered Institute of Arbitrators, the Federation of Small Businesses, the Manchester and Liverpool Law Societies, the Property Litigators' Association, city and regional firms and the Bar, to name a few.

Between now and the end of May, I will be visiting regional centres, and holding public meetings with stakeholders (of which this is the first). In May, I will be visiting Canada and the United States to see how their online courts operate. I have also visited The Hague.

We are already taking a number of important initiatives to assist with the review. For example, historically, the courts have not recorded how long it takes to do things at different procedural stages. Now, a three month time and motion study has been conducted in the Court of Appeal, audited by Dame Hazel Genn of UCL.

Similar exercises are being conducted at a target group of County Court centres around the country, to allow us to get a much clearer picture of the tasks that constitute their workload.

In June, I'll be locking myself in a secluded room, with a cold towel around my head, to prepare the final report, which will be published at the end of July.

My review is solely concerned with the structure of the civil courts, not with wider issues such as the detailed court procedures, court fees or costs (although I will need to look wider than my precise remit in order to assess what structural reforms might be able to achieve).

I am tasked with this review in my capacity as Deputy Head of Civil Justice, assisting the Master of the Rolls as Head of Civil Justice. I am also heading the judicial engagement team working with HMCTS on its reform programme, and am chairing the Court of Appeal working party that is seeking to find ways of tackling delays in the Court of Appeal (where there is currently a 19 month backlog of cases). The HMCTS reform programme is a key focus of the review. HMCTS runs the court service. It has a wide remit, covering not just civil justice but also criminal, family and tribunals work. In 2015, it published details of its reform programme, to be rolled out up to 2020. There is a public commitment to funding, and £730 million has been set aside to achieve the reforms. In part, this will be funded by rationalisation of the courts but "new money" has also been made available. The funding runs from April 2016 until April 2020, which means that there is a very tight timetable for implementing the reforms.

SOME KEY PROPOSALS

CLAIMS UP TO £25,000

- **A new online court for money claims up to £25,000.** Although it is planned that claims will start online, the system will not be lawyer or judge-free (like the eBay online dispute resolution scheme, for example). I anticipate that legal advice on the merits will still be important. However, the system is intended to be simple and cost effective, and to enable small disputes to be litigated without the current level of lawyer involvement. A big culture change will be required: moving to an investigatory rather than adversarial approach. Conciliation (usually mediation) will be the cultural norm, but will not be compulsory. For claims up to £25,000, it tends to be disproportionate to have a full legal service.

CLAIMS FOR £25,000 PLUS

- **Digitisation.** For claims of £25,000 plus, there will not be a fundamental culture change in the same way. The focus will be on digitisation of the court process and "breaking the tyranny of paper". There are a number of facets to this, including:
  - Increased use of telephone and video hearings.
  - Where appropriate, matters will be resolved on the documents (generally only where agreed between the parties (due to the Article 6 right to a hearing)).
  - As far as possible, there will be a move to a paperless court.
  - Digitisation should provide many benefits. For example, when the court papers are online, there is no longer a need for the hearing to take place where the court file is located, and hearings can be located much more flexibly. It removes enormous restrictions. Some paperless trials have already taken place but, to date, that has necessitated the use of private solutions (such as Magnum).
  - CE-File is a step forward, but only relates to issue of proceedings and the court file, not trial of the case. The ultimate aim is to go much further with a view to being as paper-free as possible.
  - Engagement of lawyers and other professionals will be key. We already have judicial engagement. There is also an ongoing process to bring on board pro bono and other organisations who assist litigants in person. Engagement at all levels is essential to the success of what are revolutionary changes. We need people who are prepared to volunteer their time and expertise to make the changes work.
- **Improving the expertise and resources available for big cases outside London.** In my interim report, there is a strong focus on the need to improve the expertise and resources available to deal with large cases outside of London. No case should be too large to be heard in the provinces. This raises some big challenges: for example, in terms of deciding which courts should get most investment for this type of case.

Many other important issues are up for consideration, including:

- **The use of case officers.**
- **Should the County Court/High Court threshold change?** It seems clear that something needs to be done to prevent cases from leeching to the High Court, and to focus the High Court on the larger cases. Currently, the annual rate of transfers up to the High Court greatly exceeds the number of transfers down.
- **How can regional judicial recruitment issues be tackled?**
- **Has the District Registry had its day?**
- **Does it make sense to have the split between the Queen's Bench and Chancery Divisions when, for example, many business cases could be done in either division?**
- **Should the current routes of appeal be revised?** The Court of Appeal currently has a 19 month backlog of cases. It is clear that something needs to be done to tackle this. There are a number of possibilities, including:
  - To allow more appeals from circuit judges to go the High Court (recognising, though, that the High Court, too, has limited resources, and that is not a complete solution).
  - To raise the first appeal threshold so that it is necessary to show that there is a "real arguable case", for example.

  - To cut down on the number of oral renewals.
  - To move to more two-judge courts.
  - To recruit more Court of Appeal judges or appoint more High Court judges as deputies to assist the Court of Appeal.

- **Should large business cases be treated as urgent?** When addressing this point, it is clearly necessary to consider all the potential implications: for example, for non-business cases.
- **Is there scope to improve enforcement mechanisms?** Enforcement procedures are another area of real focus in my interim report. One approach I am considering is to unify County Court and High Court enforcement measures, taking the best from each. This seems to have met with a lot of approval. I have also proposed that judgment debtors should bear the onus of providing information: for example, on their financial position, rather than judgment creditors being forced to take steps to obtain the information they need. I will be considering a number of overseas models to see if there are helpful lessons to be learned. It seems clear that civil justice does not achieve the effective rule of law if it does not achieve good results on enforcement.

OBSERVATIONS FROM THE FLOOR

[The summaries below are intended to capture the broad issues raised. They were noted down at speed and might not capture the precise words used by the speaker in each case.]

- **I was Secretary of the Guildford Court Users' Committee for 15 years. What I learned about dealing with court process was that, if we had a problem, we talked about it in committee meetings, but it would not necessarily improve. All the discussions identified a fundamental problem as being the lack of money in the system. This causes issues finding and recruiting good quality court staff. My understanding is that they have to be recruited through Job Centres and, after they have been trained, if they are good, they are "poached" by private practice because they are not paid enough. The fundamental problem in the civil justice system is lack of money. There are fewer staff and, even at a judicial level, there is disillusion.**

Briggs LJ's response: One of the seven principles on which the interim report is predicated is that, due to digitisation, there will be a move to fewer, but more highly qualified, court staff. Currently, a tremendous amount of resource is deployed in moving and checking paperwork. I do take the point however.

- **I specialise in financial services law, and undertake both claimant and defendant work. Much of my work involves regulatory matters in the County Court and in the lower reaches of the High Court. Often, they are cases that could be dealt with by the Financial Ombudsman (who has wide powers, including the jurisdiction to award damages up to £150,000 and to make directions). It seems odd that the use of the Financial Ombudsman is only compulsory on the defendant side. In Scotland, decisions of the Financial Ombudsman are enforceable as judgments, and, in England, you can ask a County Court judge for permission to enforce them. Many regulatory issues could be dealt with by the Financial Ombudsman in my view but many claimant firms have a tendency to issue in the County Court. This benefits only the solicitors. The consumer does have the benefit of the Financial Ombudsman Service, and I consider that recourse to the Financial Ombudsman should be mandatory, at least as a first step before issuing in the County Court. There is authority saying that the Financial Ombudsman Scheme is Article 6-compliant. That would relieve a lot of the pressure on both the County Court and the High Court.**
- **I am based in Milton Keynes and work on a wide range of cases, probably a greater range than if I was based in London. I think that the proposals for an online court are fantastic in terms of driving down the costs of litigation, and that they will help clients. However, I do have concerns about the small claims court. If parties can litigate without any costs risk (such as potential Part 36 consequences or adverse costs) then that might remove some of the incentives to settle cases. Although, there is some provision for costs to be awarded where there is "unreasonable conduct", currently, in the context of small claims, you have to go quite a long way to show that. I wondered if you had any feedback on that from the Federation of Small Businesses.**

Briggs LJ's response: You are one of a number of people to have made this point. There is a difficult balance between incorporating some degree of costs shifting and going down the route of no costs liabilities. I am quite open-minded currently. There may be a case for encouraging early advice on the merits (with costs recovery for that advice) but a big disincentive is the potential for unlimited costs liability where someone is litigating unreasonably. Of course, court fees also need to be factored in. They mean that no-one will be litigating "for free".

- **Access to justice issues concern me. We have already seen the removal of legal aid for huge tranches of cases, plus significant increases in court fees (with the maximum issue fee increased to £10,000) which make it more expensive to litigate claims for those with modest means. An online dispute resolution mechanism is proposed for claims up to £25,000 but it needs to be borne in mind that that is a lot of money for many people. Often small value claims like that will**

involve vulnerable parties, people with language difficulties, or those who can't access the internet, for example. What can be done to decrease the risk of a potential lacuna in terms of access to justice?

Briggs LJ's response: My interim report includes a trenchant statement making it absolutely clear that, if an online system is to be compulsory, the government will have to provide help systems to address all sorts of access issues, and that this is not something that can be left to pro bono agencies. HMCTS is well aware of the need for digital help, and is engaging with the pro bono agencies on this point. In my view, providing telephone helplines will not go far enough. Further, I suspect that the percentage of litigants in person having difficulty using the online system might be higher than the 10% figure that has been suggested. It will be necessary to calculate the costs of assisting those challenged by getting rid of paper.

- **If you get rid of paper, there is still the cost of technology to enable users to access documents online. What plans are there for longer-term investment in technology?**

Briggs LJ's response: £730 million has been allocated for design and set up costs, which is quite a lot compared with the investment made in the past. However it is true that software goes out of date and systems will need updating. The civil justice system is broadly self-funding, but government policy on court fees does not commit the government to investing all court fee income back into the civil courts, and it can also be used to support the Family Division for example.

- **I am an Authorised High Court Enforcement Officer in The Sheriffs Office. On a more positive note perhaps (a glass half full perspective), I'd like to make the observation that, in fact, a lot of infrastructure already exists. For example, as Enforcement Officers, we have "look up" systems to obtain vehicle details, and Registry Trust is now used for High Court judgments too. It shouldn't be forgotten that there are mechanisms already there and some useful infrastructure in place. These lend themselves very well to an online court.**

Briggs LJ's response: It is also interesting to note that British Columbia is about to roll out an online court, and real progress has also been made in the Netherlands. I have already visited The Hague, and will be looking at the British Columbia system in May. Others have led the way already, and there is a lot to be learned from their experiences.

- **Costs are very close to my heart. We have seen a lot of developments in the costs arena with provisional assessment, costs budgeting, changes to the format of bills of costs, and the Hutton Committee and J-codes (albeit that that now seems to have been put on hold). How are these developments going to be managed from a digitisation perspective?**

Briggs LJ's response: Those costs developments are not strictly within my remit, as they are not structural, but digitisation is bound to form part of the process. It will be necessary to design carefully, given the fixed recoverable costs debate. Developments in terms of extending the fixed recoverable costs regime will almost certainly also have an impact on detailed assessment. I am afraid that I probably can't say more than that.

- **In terms of pro bono work, language barriers can be a real issue (for example, for Eastern Europeans) and many people struggle with court orders. It will be a big challenge to get good interpreters into court when you need them, in a reliable fashion. In big commercial litigation cases, where the parties will pay for interpreters, it is one thing, but it can be a challenge in other cases.**

Briggs LJ's response: I agree that the proportion of court users who don't have English or Welsh as their first language is constantly rising. However, I think that digitisation has a huge amount to offer from that perspective (although it will not make interpreters redundant). I quite strongly consider that Welsh should not be the only alternative to English but that there are other languages that a large proportion of the population of England and Wales speak as their first language that could be accommodated.

- **We act for the defendants in the context of a claim for about £1 million. Our client is based in Northampton and the other party is Midlands-based. The case was issued in London but we applied to transfer it to the Birmingham Mercantile Court, thinking it was exactly the type of case that was suitable for the Mercantile Court, and that that might also help to keep the fees down. We even had a letter from the claimant, saying that it was willing for the case to be transferred. Ultimately, though, our application was refused on the basis that a three day hearing could be listed sooner in London than in the Birmingham Mercantile Court. I think that there is definitely scope for more cases to be dealt with in the regions, and that there should be a greater appetite among regional judges to take cases from London. There can be real benefits for clients (for example, in terms of cheaper solicitors' fees, and having the benefit of a docketed judge).**

Briggs LJ's response: Obviously, here, there was an issue of judicial discretion, and I cannot comment on the individual case. However, as a general point of principle, in my view, no case is too big to be tried in the regions. I take that very seriously. I consider that the opportunity to move cases can only grow with digitisation. You are speaking to the "already converted" in principle. That said, one can't underestimate the challenge of recruiting high quality judges. There have been well-publicised issues over remuneration and judges' terms and conditions of

employment. These are matters beyond the scope of my report but I am live to the issues.

- **I have concerns about the suggestion that oral renewed applications for leave to appeal might be reduced, with a move to more applications being dealt with on paper. In my experience, oral applications are more effective. Are paper only applications really considered more effective?**

Briggs LJ's response: A time and motion study has shown that, at the moment, it takes at least three times longer to deal with an oral, rather than paper, application. This arises out of preparation time, time for the hearing itself, travelling for the parties and their representatives, uncertainties about when the next case can start, difficulties when cases overrun and so on. There can be huge time savings (for example by listing two-judge courts) if applications for permission to appeal are dealt with on paper. It is clear that we need more courts to sit in order to get a grip on the current 19 month backlog of cases in the Court of Appeal.

- **It is becoming clear that implementation of the "Jackson reforms" was just the beginning in terms of civil justice reform. We are now facing perhaps the most dramatic period of civil justice reform for decades. Just a few examples of the current overlapping initiatives include Jackson LJ's proposals for an extension of the fixed recoverable costs regime, your Civil Courts Structure Review, and pilot schemes such as the Shorter and Flexible Trials pilot schemes currently operating in the Rolls Building courts. There are different timeframes for these initiatives: for example, the writing seems to be on the wall for the extension of the fixed costs regime to be sooner rather than later, whilst the pilots in the Rolls Building courts are due to continue until October 2017. How will all of the separate strands of initiatives aimed at reforming civil justice be pulled together, so that the big picture is kept in mind and we end up with a cohesive system?**

Briggs LJ's response: I don't think that we can have one big revolution. Not all of the separate initiatives can be dealt with "side by side". Some can be done more quickly than others. As Deputy Head of Civil Justice, I will keep an eye on the different proposals and how they impact on one another.