South Eastern Circuit Response to the report by Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report', December 2015

Introduction

1. The South Eastern Circuit represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

2. This is the response on behalf of the South Eastern Circuit ('SEC') to the report by Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report', December 2015 ('the Briggs Report').

3. The Briggs Report proposes:
   (a) an online court ('OC'), and a departure from the adversarial system of law within it;
   (b) the introduction of case officers (court officials acting under judicial supervision);
   (c) a reduction in the number of courts and changes as to the deployment of judges;
   (d) changes to the rights and routes of appeal.

4. References to paragraphs within this document are to paragraphs within the Briggs Report unless otherwise stated.

An Online Court

5. The main proposal in the Briggs Report is the development of an OC, with no need for lawyers, for relatively straightforward debt and damages claims up to £25,000.

Paperless is not desirable or practical

6. The central assumption which underlies the Briggs Report is that it is now *'technically possible to free the courts from the constraints of storing, transmitting and communicating information on paper'* (paragraph 1.14). Even if it is possible (which seems doubtful in the near future at least), this does not mean it is desirable to move to a paperless system. As the Briggs Report observes, on-screen

documents are difficult to work with; they are less easily marked up, annotated and compared. At paragraph 5.126, the report records that several judges *'expressed the hope that, even in an essentially paper-free environment, they will still be afforded paper core bundles containing all the key documents'*, and that *'some judges with access to the current e-filing systems already available prefer to have court staff copy the court e-file onto paper in advance of preparation for a trial'*. There is no reason to assume that parties, and lawyers where instructed, would not prefer to work on paper when preparing for a trial. At paragraph 5.127, the report describes the difficulties of a paperless environment as *'not insuperable'*. The report states, *'There are document management systems which facilitate marking and annotation, although they are currently expensive. The use of twin screens, after appropriate installation, training and practice, readily enables documents to be compared, electronically, side by side.'* These facilities, which are in fact no substitute for working on hard copies, will not be available to litigants or in some cases their lawyers, who will face the difficulties of marking up and comparing documents in a paperless environment.

Undesirable departure from the traditional adversarial legal system

7. According to paragraph 6.15, the OC will mark a *'radical departure from the traditional courts'* by being '*less adversarial, more investigative, and by making the judge his or her own lawyer. By that [LJ Briggs means] that judges will receive no assistance in the law from the parties'*.

8. The proposal represents a fundamental shift away from our adversarial system, in which the parties are able to put forward argument as to the factual and legal issues in a case, and the appropriate procedure, and in which the onus is on the parties to identify the evidence upon which they rely. The proposed approach would place a heavy burden on the judge hearing the case to research the law, and reach the right answer, without the assistance of hearing argument by the parties. Such a fundamental shift would have to be considered by Parliament, and subject to widespread consultation. The SEC opposes this erosion of the adversarial system of law, which is a fundamental feature of our justice system, and (the SEC believes) one of the reasons why it is held in such high regard internationally.

Risk of two tier legal system

9. According to paragraph 6.6, the OC is *'intended to be used for the resolution of relatively simple and modest value disputes'* and *'the traditional adversarial system is pre-eminently well-suited to the resolution of complex issues of fact and law'*. There is a risk of the appearance and effect of a two-tier system of justice.

Access to justice reduced

10. The aim of the OC is to enable parties to pursue claims without the need for lawyers. Whilst the SEC recognises that some litigants may welcome the ability to commence proceedings online and upload documents into a central online location, without involving lawyers, it has grave concerns that access to justice for a large number of litigants will be reduced.

11. Paragraph 6.57 of the Briggs Report acknowledges, *'The proportion of potential OC users likely to find the use or even ownership of computers challenging is likely to be considerably higher than the same general proportion of the citizens of England and Wales'*. According to research available to LJ Briggs, *'the figure among current LIP court users may be well over 50%'*. According to this statistic, it is likely that well over 50% of current litigants in person would find the use or even ownership of computers challenging. In these circumstances, it appears that access to justice would be hampered, not improved, by the introduction of an online court.

12. The SEC observes that increasing numbers of individuals have a smartphone or tablet but no computer; this would make completing online forms and uploading documents extremely cumbersome if not impossible. In any event, use and ownership of computers is only part of the problem with the proposed OC. Some households still do not have any broadband access and others have an extremely slow broadband service. Some individuals would not have sufficient data allowance, or speed of service, to allow them to upload or download documents. English is not the first language of large numbers of individuals residing in England and Wales; it would be difficult, if not impossible, for them to navigate the proposed OC.

13. The Briggs Report proposes that an 'Assisted Digital Service' is developed to assist litigants who would be denied access to justice by reason of challenges involving the use and ownership of computers. The costs of identifying litigants in need of assistance, and providing multi-lingual assistance for those individuals, throughout the United Kingdom, with waiting times kept to a reasonable duration, would be exorbitant, especially given the scale of the problem as identified in the Briggs Report. These costs would include premises and equipment, staffing costs (e.g. salary, recruitment, management, holiday pay and cover, sickness absence etc) and training costs. The training costs would be extremely high as it would be necessary to provide extensive comprehensive training at the commencement of employment and on an ongoing basis given the complexity of the extensive subject matter. The proposal to provide an Assisted Digital Service potentially exposes the government to claims for negligence to which it is not exposed in the current system. At present, all legal advisers are liable if they give negligent advice and the advice causes loss. If, as the SEC anticipates would be the case, no liability were to be accepted for negligent advice which caused loss in the new system, this would need to be explained clearly to users at the outset.

14. Insofar as the proposal to introduce an OC is taken further, the SEC suggests, in the strongest possible terms, that there should be a pilot scheme to test the proposals, and that, if following the pilot a decision is taken to implement the OC, the use of the OC should be optional. Litigants should be permitted to bring or to defend

proceedings in the traditional manner should they elect to do so. The key weakness in the current system is said to be *'the lack of access to justice provided to ordinary individuals and small businesses due to the disproportionality between the cost of legal representation and the value at risk in their disputes, and the grave disadvantages which they do or would encounter if pursuing their claims as a litigant in person'*. If the OC did eliminate this weakness, litigants would elect to use it in any event; there would be no need to force it upon them.

Three stage structure of the OC

15. According to paragraph 6.7, the OC is '*likely to adopt a variant of the three stage structure'* proposed in the report *'Online Dispute Resolution for Low Value Civil Claims*' ('the ODR report'), by the Online Dispute Resolution Advisory Group chaired by Professor Richard Susskind in February 2015, and adopted by JUSTICE in its report, *'Delivering Justice in an Age of Austerity'* in April 2015. These stages are addressed below.

Stage 1 – 'triage'

16. According to paragraph 6.7, stage 1 would be a *'mainly automated process by which litigants are assisted in identifying their case (or defence) online… and required to upload (i.e. place online) the documents and other evidence which the court will need for the purpose of resolution'*.

17. The Briggs Report proposes the introduction of an online portal which acts like a decision tree so that a litigant can answer a series of questions, with answers available in drop-down boxes, leading to the automatic generation of particulars of claim (see paragraph 6.8). The SEC doubts that it is possible in practice to devise an online portal that operates like a decision tree in this way and is effective. A decision tree could not adequately capture the complexity, sophistication and nuances of the law of England and Wales. There is often no 'right answer' or 'right approach' to a case but a range of options with competing merits in a given case. Moreover, the body of information is not static; law evolves and changes on a daily basis. The SEC considers that distilling this material into a decision tree would be impossible, and notes that there is no working example available, even in a relatively straightforward area of law. A working example would show what output would be produced in a particular factual scenario and how it would be reached. This is a question of content, not software, and working examples could therefore be produced without the need to write any software. The SEC strongly suggests that this be done before funds are spent writing or purchasing licences for software for a pilot scheme. Other practical questions arise which are not addressed by the report: Who would be engaged to distil the vast body of legal principles into questions that would give meaningful answers to all hypothetical scenarios that could arise? Who would fund the work? Who would keep it up to date? Who would bear the risk of incorrect advice?

18. The Briggs Report also proposes that at the triage stage, litigants would be required to upload documents specified automatically by the online system. This approach would be much more interventionist and prescriptive than the fairly

robust approach to case management in the present system, and it allows for only limited input from the parties. The court would not normally prescribe the evidence which a party should adduce. It represents a fundamental shift away from our adversarial system. Furthermore, there are considerable practical difficulties for litigants; this proposal presupposes that litigants have access to a computer, a scanner or a smartphone, and a good internet connection with sufficient data allowance available. The proposal also assumes that litigants will be able to cope with document management, identifying and uploading the correct documents, with no pages missing, and discarding irrelevant or privileged documents. The Briggs Report proposes that online help and online advice is available; as above, distilling legal principles into a format readily digested by litigants without lawyers is impossible. By nature, legal principles are complicated, developed over time to deal with a wide range of factual scenarios.

19. The SEC considers it would be highly desirable for a prototype to be produced, in a narrow area of law, in order to test the proposal properly before it is taken any further. Once produced, it can be tried and tested, and its implications for users can be properly considered. As yet, no prototype exists.

Stage 2 – conciliation and case management

20. According to paragraph 6.7, stage 2 would be *'a mix of conciliation and case management, mainly by a Case Officer, conducted partly online, partly by telephone, but probably not face-to-face'*.

21. The SEC agrees that the functions of a Case Officer (i.e. court officials acting under judicial supervision) should not include the final determination of substantive rights (however small the value at risk); this is an inalienable judicial function. To the extent that case management functions are more than merely administrative tasks (such as issuing standard directions and subject to review by a judge), these functions also ought to be carried out by a judge.

22. The SEC agrees that conciliation should not be made compulsory; it should be an option open to the parties upon their election. However, the SEC considers that conciliation should not be given elevated status as suggested in the Briggs Report. The aim of the justice system is (or should be) justice; alternative dispute resolution will provide a good outcome for litigants in many cases, but as the courts have accepted in costs judgments in relation to refusal to mediate, there are circumstances in which it is not unreasonable for a party to take a case to trial. The SEC agrees that mediation is more appropriate than Early Neutral Evaluation.

23. The SEC considers that a face-to-face case management hearing is desirable, especially when a case involves a litigant in person. Litigants in person have typically never been involved in court proceedings before, and need the benefit of a discussion with a judge in order to understand what it is that the court requires them to do and why, and what the consequences may be of failing to comply. If this does not happen, directions are less likely to be complied with, causing problems at a later stage.

Stage 3 – no default assumption of a traditional trial

24. According to paragraph 6.7, stage 3 would consist of *'determination by judges… either on the documents, on the telephone, by video or at face-to-face hearings, but with no default assumption that there must be a traditional trial'*. A face-to-face trial would be regarded as the last resort if the alternatives of resolution on the documents, by telephone or by video conference were deemed to be unsuitable.

25. The SEC is firmly opposed to this proposal; there should be a default assumption of a traditional trial, and the parties ought to be entitled to a face-to-face hearing in every case. This approach safeguards the rule of law. The prospect of a traditional trial is also an important factor throughout the proceedings; for example, a witness knows, when signing a witness statement, that he or she may be required to swear to the truth of its contents before a judge. This powerful incentive to tell the truth would be lost if parties and witnesses thought that they would never have to face a judge.

26. As to the proposal, it is unclear who would 'deem' the alternatives unsuitable in any given case. It would be undesirable for a Case Officer to decide that a matter could be determined on the papers.

27. Further, the proposed alternatives are no substitute for the hearing of a case in open court, with live cross-examination of witnesses and submissions from the parties. There are practical difficulties of holding hearings by video conference. There are often difficulties in achieving a connection, and the connection, once achieved, is often weak or slow, leading to delays in transmission or audio and visual data, frequent interruptions and a stilted hearing. These problems arise in a two-party video conference; they are more acute in a three-party video conference (involving the Judge and the two parties), and more acute still as the numbers of parties increase (e.g. as witnesses are involved). Again, there is a misplaced assumption that the parties and witnesses will have the necessary computer equipment and software; two screens would be required in cases with an electronic bundle, or a hard copy bundle would have to be prepared and sent to each witness. The court cannot know what material is before the party or witness participating in the video conference, and cannot know if a witness, under oath, is being prompted by someone else in the room away from the camera, or is using annotated hard copy documents or other documents not available to the court, or is receiving prompts by text message or email on a screen rather than looking at an electronic bundle. The likelihood of witnesses not being available when required would also be considerable. A face-to-face hearing ensures real personal communication between judge, litigants and witnesses; this is, as the Briggs Report acknowledges, central and highly valued in our legal system, and it should be preserved.

Use of Case Officers

28. The Briggs Report proposes the introduction of Case Officers (court officials acting under judicial supervision).

29. Paragraph 7.32 states, *'Many consultees have suggested that a minimum professional qualification of solicitor or barrister with a minimum period of practice of the law should be an invariable rule. While [LJ Briggs acknowledges] that it might be desirable for many of their proposed tasks, [LJ Briggs was] not persuaded at this stage that it should always be treated as essential. There are some very routine tasks for which it might be difficult to recruit legally qualified applicants'*. The SEC considers that it would be extremely undesirable to recruit individuals without legal qualifications and some practical experience to the role of Case Officer.

30. Further, as above, the SEC considers that the role of the Case Officer ought to be restricted to limited, administrative, functions.

31. At stage 2 within the OC, the Case Officer should not undertake case management functions (save for limited, administrative, functions); such functions are properly judicial functions.

Reduction in the number of courts and changes as to the deployment of judges

32. The SEC considers that the elimination of physical courts throughout England and Wales would be ill-advised. Face-to-face hearings cannot be replaced effectively by hearings by video conference or telephone, and permanent courts which are local to litigants throughout England and Wales cannot be replaced by temporary courts housed in local buildings when the need arises. The solemnity and formality of the legal system, a cornerstone of the justice system which inspires confidence in its users, would be lost.

Changes to rights and routes of appeal

33. The Briggs Report proposes reforms to the Court of Appeal, in order to address delays in appeals being heard as a result of an increase in workload. The SEC considers that the threshold for permission to appeal should not be higher, nor should the ability to renew a permission application orally be diminished. Experience shows that many renewed permission applications succeed when made orally; this suggests that reducing the ability to make an oral application would lead to injustice. (This also supports the arguments above for retaining face-to-face case management hearings and trials.) The senior judges should continue to state openly that funding cuts and reforms have led to a significant increase in numbers of litigants in person. This is the real cause of the current crisis. Trying to reduce the numbers of applications for permission to appeal addresses the wrong question. If the funding cuts and reforms are not to be reversed, then, in order to address the difficulty of the Court of Appeal in servicing its increasing workload, more judges should be appointed to the Court of Appeal.

Summary

34. In summary, the SEC makes the following observations:
    (a) there should be no move away from the adversarial system of law: this would be damaging to the reputation of our justice system, both domestically and internationally;

(b) a paperless court is not necessarily desirable;
(c) the introduction of an OC will hamper access to justice for a large number of court users, as reflected in the statistics set out in the Briggs Report;
(d) the OC, if introduced, should not be mandatory but an optional route open to the parties;
(e) it is likely to be impossible to introduce a 'decision-tree' as part of an online portal which provides useful output for litigants. A working prototype ought to be developed before the proposal is taken any further;
(f) the court should not adopt the role of identifying the evidence required by the parties;
(g) Case Officers should have no more than a limited, administrative, role in case management;
(h) conciliation should be an option open to the parties (i.e. without elevated status);
(i) the default position should be that every case will be heard in a face-to-face traditional trial, in order to safeguard the rule of law;
(j) the elimination of physical courts throughout England and Wales would be ill-advised;
(k) In order to address the difficulty of the Court of Appeal in servicing its increasing workload, the senior judges should continue to state openly that funding cuts and reforms have led to a significant increase in numbers of litigants in person, and if the funding cuts and reforms are not to be reversed, more judges should be appointed to the Court of Appeal.

SOUTH EASTERN CIRCUIT

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