

## A Summary: Lord Justice Briggs on the Future of Civil Justice

Lord Justice Briggs attended BBP University in Leeds at an event organised by Leeds Law Society on 11 April 2016 in order to take part in an interactive session based on his Interim Report into the Civil Courts Structure Review.

This is a summary of the main points discussed in Lord Justice Briggs' (LJB) session, and focuses on the questions asked by attendees and the answers given by LJB in relation to his Interim Report and its wider impact on the profession.

His Honour Judge Gosnall introduced Lord Justice Briggs.

LJB began by stressing that he wanted to use the session as an open oral public consultation, and for it to be as interactive as possible.

He then gave attendees the background to his Interim Report. It was commissioned in July 2015. LJ Briggs then went through a period of learning and consultation until November/December 2015, including visiting 14 cities in September. The Interim Report was then delivered to the Lord Chief Justice & Master of the Rolls on 24 December 2015, and published in early January 2016.

There had been a period where written responses were provided, which had now closed, due to the tight timetable.

LJB stated that he was now in the third stage of consultation (in preparation for the Final Report) which involved public visits to cities and meeting stakeholder groups, both in London and in the regions. This process will end in May 2016 before the Final Report is published hopefully in July 2016. LJB noted that he had visited the Netherlands and wanted to visit USA and Canada for a lateral view prior to the publication of the report.

At the centre of LJ Briggs Report is the HMCTS Reform Programme. This started in early 2015 and has a strict four year timetable until 2020. HMCTS runs the court service and is also doing the review programme. Money has been provided for the reforms, and any money not used by the end of the reform period would be returned to the government. The reform programme covers all courts.

LJ Briggs then briefly went through the main points contained in his Interim Report and the wider initiatives currently under review:

- The Online Court (OC) – making it possible to litigate with minimum lawyer involvement for lower value claims. Not a judge-free court, nor completely lawyer-free. The OC is intended to mean that parties are able to litigate moderate level claims with little to no support. Everything will start online but determination will

still be by judges using appropriate methods, be it face to face or other alternatives.

The Online Court will have three stages. Stage 3 is determinative, by a Judge, but with no assumption of a court hearing. LJB made it clear that not everything happens online, and in fact "online court" referred mostly to Stage 1, when the case was issued. Determination is still by human beings.

- The next stage of the reforms is to achieve the complete digitalisation of everything outside the Online Court. As far as possible, the goal is trial in a paperless court.
- Greater use of case officers where possible.
- Rationalisation of the physical court estate, with fewer but larger hearing centres, and utilisation of business centres for the "back office" functions.
- A fundamental part of the review is making the cost of moderate claims proportionate.
- Better focus on civil specialisation outside London with more resources for specialist judges. This involves deciding how many centres of specialisation are outside London. Encouraging the notion that no case is too big for the regions.
- Raise the threshold of the County Court versus the High Court, and prevent cases leeching up to London.
- The divisional split between the Queen's Bench and Chancery Division; there is no great passion for a unified Civil Court. The main opposition is in London. LJB asked if a High Court operating here is a badge of value, and how we would feel about having a unified Civil Court in Leeds.
- How to speed up the routes of appeal, which LJB didn't want to discuss in depth. He did say that an important meeting had taken place in March.
- The possible rationalisation and centralisation of enforcement, using IT as far as possible, and by choosing the best procedures for a unified enforcement structure. For example, bringing together County Court bailiffs and High Court enforcement. Perhaps follow overseas examples of enforcement.

## Questions and observations

### Richard Copnall – Parklane Plowden Chambers

**Q:** What is the logic behind the public sector doing litigation more cheaply than private sector?

**A:** It is essentially an automated process that doesn't involve vast amounts of people. Effectively the public sector becomes involved at Stage 2, which is conciliation. There have been successes – for example the Small Claims Mediation Service, who settle 70 per cent of cases when an appointment is available, and Family Dispute Resolution (FDR). It is not public sector litigation, but

litigants who don't have to incur excessive costs in relation to the value of the claim; enabling litigants to litigate themselves.

**Q:** What are lawyers doing if not helping people?

**A:** LJB is not saying lawyers shouldn't do it, but it is not always appropriate. Early bespoke advice can never be automated. There may need to be a fixed recoverable cost for such advice. Some cases may need discretionary recoverable cost at other stages.

**Q:** How will the State do it any better?

**A:** It will help those where it is not possible to get legal advice. It will enable litigants in person to do it themselves.

### **John McWilliams – Weightmans Solicitors**

**Q:** Is it purely a cost cutting exercise?

**A:** LJB doesn't think so. The aim is doing civil justice at less cost, and this is a fundamental part of the Reform Programme. It is not for LJB to comment, as a judge, but a policy decision has been made that civil litigation should make money for other parts of the system. The cost of a full legal service is often disproportionate to the matters at stake, with clients paying exorbitant fees. The aim is to save costs in modest value claims.

**Q:** The civil justice arm supports every other arm; are we not in danger of thrusting the cause of the problem where it doesn't actually lie?

**A:** LJB is not sure how much the civil justice arm does support the others, but it is policy that we should. There are problems with the CPR, but these are not necessarily the fault of lawyers. LJB agrees that the new system should have vastly simpler rule book produced by those who deal with Litigants in Person (LIPs), but we can't just strike down the CPR, it has been developed over many years. LJB confirmed that he isn't attributing the blame; the solution doesn't lie in ramming down costs but asking what can be done without lawyers holding litigants' hands from start to finish. LJB emphasised that claimants will often still need legal advice at the outset.

### **Sue Harris - Walker Morris and Leeds Law Society**

**Q:** There are concerns about unbundling and how it is dangerous for solicitors professionally, and for the clients, although recent cases offer a little more comfort. Will there be more judicial guidance or legislation?

**A:** LJB doesn't underestimate the problems and appreciates it is difficult. If unbundling was easy then we might not need an online court. He would like to see it happen more. As to primary legislation, what are the chances of it going through government?

### **Phil Morrison – Shulmans Solicitors, Leeds**

**Q:** Has anyone been looking at alternatives, for example adjudication (no costs awards; shorter timescale; not always lawyers)?

**A:** LJB and those assisting him have definitely looked at it. It has lessons to teach. PNLA tried to set up clinical negligence adjudication. The problem is people won't accept early neutral evaluation unless they feel they are getting the same level of judge who will decide the issue at trial. LJB also thought there were problems if these alternative methods were made compulsory, effectively removing the court as a final arbiter. If voluntary, these methods are OK. The question is, is there any reason why adjudication should be cheaper than litigation?

### **Steve Topson – PSU**

**Q:** Is there a role for advice agencies (such as PSU/CAB), particularly in Stage 1? What about accessing information through court centres and civil justice centres? Will members of the public access information through PSUs inside civil justice centres? At the moment people are discouraged from going in to the court without a hearing.

**A:** In relation to the first point, absolutely yes, they have a role. Lawyers will still be needed to offer initial advice on the law, there will need to be a computer technical person at Stage 1, and PSUs helping with all the language. LJB gave the example of the "Help With Fees" form that had recently changed to be more easily accessible. This does not mean that all of the assistance should be dumped on legal advice agencies though. In relation to the point about accessing information, the UK is at the bottom of the league table when it comes to public legal education. LJB raised the example of the Bristol courts, who do this well: judges conduct seminars outside of court hours. California is right at the top of the list. It happens in other common law countries. HMCTS is worried about the under-utilisation of buildings. Public legal education is at the heart of making things possible so that LIPs can sort things out for themselves.

### **Mohammed Riaz – Riaz Solicitors**

**Q:** In relation to the report, LJB mentioned that the Woolf Report and the CPR were "by lawyers for lawyers", should it not be for the people? What input has there been from the public? What information has been gained from universities? Other academics would get involved/ could have assisted.

**A:** There was not enough time to consult everyone, and LJB could not delay the Interim Report in order to fit with Reform Programme. Input from academics and universities was welcomed, and LJB has had written responses. LJB was not sure how he could meet up with individuals but received input from public facing agencies (voluntary and pro-bono) which was probably the best source to find out about public needs.

### **Amanda Howe - Walker Morris**

**Q:** Regarding the regional connection, how will this be defined/decided?

**A:** There is no "bright line" answer to that question. It is a facility to achieve objectives, and not focusing on minute details. Determining jurisdiction depends on a "sufficient connection" – e.g., parties, barristers, experts, travel by various parties – depending upon whose movement around the country would have the greatest effect on the resolution of the case. It can be used internally as well. As more cases go online then it will become easier to find a place for the hearing, which will not necessarily be the same as management location.

**Q:** What is the meaning of "no case too big for the regions"? What about resources?

**A:** There are lots of courts and few DJs who are "jack of all trades" and there is no scope for specialisation. It is believed that concentration (of the courts – with fewer court centres) will lead to better scope for specialisation. There is a desperate shortage of civil circuit judges (i.e. judges who have civil cases as the majority of their practice); there is scope for HCJs travelling outside of London to hear civil cases.

### **Blaise Smith - Weightmans**

**Q:** What are the ambitions of the government to extend the scope of the Online Court beyond a limit of £25,000?

**A:** At the level of £25,000 and under, most people LJB has spoken to agree the costs and costs risk would be disproportionate, but there are differing views on the limit (ranging from £2,000 to £200,000). The government's ambitions depend on its attractiveness; it may grow. If it is a good

idea and it works then it could be extended upwards but there is no concrete plan. There is currently not much of a debate about the £25,000 figure.

**Q:** Does it have to be extended without access to lawyers?

**A:** To some extent as everything will be online. For cases above £25,000 the reform programme it is not intended to change the culture or the rules; it is just intended to digitalise it. LJB could not see why, if extended, lawyers could not be involved. We would have to consider the costs regime. At present the OC borrows the costs recovery rules from the small claims track, with some limited costs recovery.

### **Unknown**

**Q:** What happens to the fast track?

**A:** In LJB's Interim Report, personal injury is not to be included in the Online Court. It is a satisfactorily developed system providing access. If, as per the government's proposal, the bar is raised for PI (up to £5,000) then there is a case for including in OC.

### **Sue Harris – Walker Morris and Leeds Law Society**

**Q:** At the moment DBAs are not being used. We would like to see the abolition of indemnity principle. Will the reform of DBAs take on more urgency?

**A:** LJB was tasked to consider a structural solution. Anxious thought is being given to DBAs. We are conscious that DBAs have not flourished. This issue is at the edge of LBJ's brief, therefore he has not looked into it in detail, but he does note that at present DBAs are not providing access to justice.

**Q:** What feedback has been received regarding the use of case officers? Should they be legally qualified?

**A:** Some say that qualification should be the absolute minimum. Depends on the level i.e. small claims mediators are not qualified and settle 70% of cases. Not sure there is a definite answer. Some case officer functions may not require qualification. Ideally there will be teams of case officers, in a business centre, some who are qualified and some who aren't. Plenty of people providing feedback have said that legal qualification should be a fundamental requirement.

### **Sue Harris - Walker Morris and Leeds Law Society and Richard Copnall – Parklane Plowden Chambers**

**Q:** You say in the report that judges may need more training on the law. Bearing in mind that issues have arisen from the limited training relating to cost budgeting will more training be available? How will this be implemented?

**A:** The traditional approach of the judge getting the law from the parties is expensive in small cases. We are already there in terms of DJs in small claims cases, but we might need to go further. The cases are of vital importance to the parties even though the sums involved are modest.

**A (His Honour Judge Gosnell):** In small claims the DJ often doesn't get much help, and they don't get it right all the time. They do get training; what is more worrying is making sure they can use computers and can deal with digitisation. HMCTS and/or the government should provide funding for this.

### **Richard Copnall – Parklane Plowden Chambers**

**Q:** Isn't it true that our complex system of precedent and a cheap & cheerful service for litigants in person can't go together?

**A:** We can't get rid of the complexity of the law. Complexity is all incorporated into the legal framework and there is not much judges can do. Judges may have to be their own lawyers. One advantage of the court system is the appellate system. It is difficult to say "we need more judges" to the government.

### **Alexander Dunne – Bevan Brittan**

**Q:** Shouldn't case offices be trained on more specific matters, i.e. specialised in certain areas?

**A:** LJB hopes that this will be the case, but the judicial supervision of case officers is vital. Judges should ultimately call the shots on how they perform their services.

### **James Perry – DWF**

**Q:** DWF offers debt recovery services and the CCBC is effective for this; how would the OC assist debt controllers? DWF's clients have commented that for bulk claims it is cheaper and easier to instruct solicitors, rather than the client having to employ someone in-house to deal with claims.

**A:** It is contemplated that bulk claims will go through the OC, but not all the way, and they don't have to at all. For example, a client could choose not to do Stage 1. There would effectively be "Stage 0" for bulk claims, using the usual processes. However the defendant may need the help that is envisaged in an online court if they defend the claim.

**Q:** What about the recoverability of fees?

**A:** LBJ assumes issue fee will be recoverable, but will not recover solicitor fees. Not looked at in that level of detail; may stay the same, may not (in bulk claims solicitors currently get fixed costs on issue). LJB agrees it is cheaper to instruct solicitors on bulk issues.

### **John McWilliams – Weightmans**

**Q:** Should the OC be a separate court with separate judges, seeing as judges will have to go from having lawyers tell them the law, to having to know it themselves?

**A:** The idea is that the court is ceasing to be a building; the OC will have a separate culture and separate rules, but the same judges. The judges who deal with the matter will be the judges in the place the cases are sent to be heard.

**Q:** We know that in small claims judges do have to know the law – but this is not how small claims *should* work according to the White Book. Wouldn't this make it better to have separate judges?

**A:** We only have a certain amount of judges and not enough to say that some will only do OC. Even now, civil judges cannot only do civil work.

### **Plexus Law**

**Q:** This is coming at a time when there are other radical reforms proposals ongoing, including Lord Justice Jackson's proposed reforms regarding costs; is there an appetite to pause on other costs proposals whilst OC is being considered?

**A:** LJ Jackson is looking at cases that wouldn't be within the OC proposals (i.e. the cases would be between £25,000 and £250,000). LJB and LJ Jackson are colleagues and do speak to each other: even this morning they were emailing whilst LJB was travelling. They are dealing with different problems.

### **Phil Morrison – Shulmans**

**Q:** We must take into account what the parties actually want – they want the courts to be accessible, fair, and to give results

**A:** The court is the final guarantor of the rule of law. LJB agrees that the court has to tailor itself to parties' expectations that disputes are resolved quickly and fairly. He is only dealing with the court and there are lots of other options.

### **Brian Addlestone - Addlestone Keane**

**Q:** Would the OC improve response time and speed of service?

**A:** This is one of the advantages of digitisation generally. The online form has to be filled in properly before it can be sent. Ultimately it is an economic question about the number of judges and conciliators, and the amount of work. If the OC is readily available then there will be more cases. In principle, it is meant to be self financing.

**Q:** Is there a risk the court will see more claims because lawyers are not involved at an early stage to evaluate the case and discuss ADR?

**A:** The online form will provide links to alternative methods of resolution. The risk can be managed.

### **Sue Harris – Walker Morris and Leeds Law Society**

**Q:** What about vexatious litigants? Will there be costs sanctions, as there is in small claims?

**A:** LJB envisages that vexatious litigants would be discouraged, because litigants have to pay a fee to issue a claim. LJB also discussed misconduct cost shifting (as in the Employment Tribunal), which the OC should have. Facilitating the issue of claims does mean that there is a problem area of vexatious litigants, but hopefully the cost sanctions and the issue fee should keep it under control. For each vexatious litigant there is a huge number of genuine claims.

### **Mohammed Riaz – Riaz Solicitors**

**Q:** In the Netherlands, they have an online divorce system. Do you think it would be useful to have a duty solicitor scheme in court?

**A:** LJB would like to see everyone have a solicitor. Parliament has set face against it (the policy decisions surrounding legal aid are not for LJB to comment on). He is conscious of the value of duty solicitor schemes, pro bono schemes etc, but cannot advocate what the taxpayer should provide. LJB interested in it and would like to think about it.

### **Sue Harris – Walker Morris and Leeds Law Society**

**Q:** If it does go ahead, will solicitors be included in the finer details? Will it also involve practitioners in the regions?

**A:** Absolutely. LJB is recommending that solicitors/barristers and others are involved in the finer detail. The most help is needed in Stage 1 triage scheme, and they need all the help they can get. The better the Stage 1 scheme is, the better the improvement.

### **Alexander Dunne – Bevan Brittan**

**Q:** As LJB had mentioned some form of costs recovery, how would this be calculated? Would it be a fixed fee, and what level would that be?

**A:** Fees are off LJB's brief. If a system is self funding, it may kill it to increase court fees. LJB is not getting into a debate about the precise details – it must be worth getting legal advice but should not discourage access because of recoverability. The fees may end up bearing some relation to the amount being claimed.