

## The courts they are a changin'

The Government and the judiciary have ambitious plans to change the procedures of the English courts for lower value claims. They want to make courts easier to use and more proportionate for the resolution of simple legal disputes. A new online court may be set up. The aims are laudable, but what will the consequences, intended and unintended, be in practice? Will the reforms make debt collecting easier or just add cost? Will making the courts easier to access encourage litigation, making a dash to the courts the first resort of the disgruntled rather than the last?

The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals have issued a joint statement entitled *Transforming Our Justice System*. They are not looking to transform the handling of the high value cases like those in the Commercial Court and the other courts in the Rolls Building. Rather, the triumvirate's aim is to reform the handling of the general run of claims, most of which now come before the County Court and involve less than £25,000. They want to move the conduct of these cases into the digital age by 2020.

The joint statement starts by recognising the reputation and strengths of the civil justice system, going on that reform must be based on three core principles: the system must be just, it must be proportionate and it must be accessible. These principles are treated as requiring all cases to be started online, with some cases being resolved entirely online, and a "new, highly simplified procedural code". This simplified code will include a number of options:

"a dispassionate evaluation of the dispute, followed by negotiation, conciliation, mediation or a tailored hearing to resolve the issues on

which the parties remain in dispute. These options are designed to minimise combative hearings and help the parties settle their disputes with the minimum of stress and acrimony..."

The statement adds that more needs to be done to control the costs of civil proceedings so that they are "proportionate to the case and more certain from the start". Fixed recoverable costs is said to be the way to achieve this, so that "losing parties should not be hit with disproportionately high legal costs".

The joint statement bestows a formal imprimatur on the undercover reform work that the civil servants who run the courts (HMCTS) have been doing for some time and over which the senior judiciary sought to exert control a year ago through the investigations and reports by Briggs LJ, culminating in his *Civil Courts Structure Review: Final Report* of July 2016.

### Issues

The court system currently operates largely on paper (though the Rolls Building courts have made significant progress in moving online). While facilities must continue to be made for those without online access, the costs

### Key issues

- Lower value claims are to be handled online by 2020
- Details of what this will involve remain scant
- The needs of all court users must be taken into account in designing the new processes

and administrative inefficiencies generated by this shuffling of huge volumes of paper are ultimately unsustainable, whether in an age of plenty or of austerity. The switch to online facilities is therefore as inevitable as it is necessary (even if the Government's record on IT projects leaves something to be desired).

Further, the triumvirate's aim of not simply moving existing procedures from physical paper to digital paper is also to be welcomed. It makes sense to try to harness the full capabilities of the digital world ("digital by design"), not merely to replicate digitally what happens now. But while modernisation is important, it is also vital to ensure continuing justice for all parties. The valuable experience

within the system, including what has worked and, as important, what has not worked in other recent reforms must be the foundation of any modernisation plans, not ignored.

Perhaps because of the practical difficulties of reforming court systems, the joint statement is at a very high level. It does not condescend to detail, which is where the difficulties lie. As a result, the joint statement begs many questions. For example:

**Online questionnaires:** Briggs LJ considered that lower value claims should be capable of being conducted without legal representation. He recognised that the complexities of the law are now such lay people cannot be expected to know the legal bases of their claims (contract? nuisance? negligence? breach of fiduciary duty?) or what facts are relevant. His vision therefore involved online generic advice, plus putative claimants answering a series of questions aimed at isolating the legal nature of their claims and automatically generating a substitute for Particulars of Claim. It is not clear whether this automation will be a necessary part of the triumvirate's new system. If not, the lot of the lay person in navigating the law and the legal system may not improve greatly; if it is a pre-requisite for the online court, preparing this all-encompassing legal lexicon by 2020 will be a massive task, assuming that it is possible at all.

**Defensive strategies:** The vast majority (83%) of claims in the County

Court are uncontested. This may be because the defendant doesn't understand the gravity of the court documents but, in many cases, it is because there is no defence to the claim (whether it be a credit card debt, a mobile phone bill, a utility bill or other similar debts). Encouraging parties to go through the menu of options or to believe that a settlement can be reached might only add cost and delay to litigation. Similarly, the aspiration that "losing parties should not be hit with disproportionately high legal costs" will be welcome to debtors, but not necessarily to claimants if it means that they cannot recover the full cost of the steps necessary to enforce their debts. Irrecoverable costs would, in these circumstances, just enable a debtor to bargain for a reduction of its debt.

**Recovery of debts:** Conversely, the joint statement's comment that "[w]e want to do more to make sure that if the court finds in your favour, you get back what you are owed" is helpful to creditors. The only suggested means of achieving this is extending to the High Court the power to make attachment of earnings orders (currently available in the County Court), which may not make much practical difference. State-run enforcement of debts would be controversial and complicated.

**Access to justice:** The ability to vindicate one's rights, ultimately though the legal process, is essential. But litigation can also become a weapon of ransom if it imposes irrecoverable costs on the defendant,

whether by way of legal fees or management time, regardless of the merits of the claim. Litigation can become the first resort rather than the last. Access to justice for claimants is good, provided that it doesn't rain injustice upon defendants. Difficult balances must be struck.

## Conclusion

Change in the conduct of lower value claims is coming, and apparently coming quite soon. The change will move the courts online, removing from the system the archaic burden of processing huge volumes of paper. But what the new court system will look like and what the implications of the changes will be for users of the court system are anything but clear. HMCTS must ensure that that it consults widely with all users of the system in order to ensure that any reformed system works for all parties.

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