



New Chapter Ahead

Courting change

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breakdown the key proposals in the Interim
Report on the Structure of the Civil Courts

In January, Lord Justice Briggs published an interim report of his review on the structure of the Civil Courts in England and Wales (the report). While the final report is due to be published by the end of July 2016, the report invites urgent feedback on a package of measures which will be of particular interest to commercial litigators—proposals aimed at improving waiting times in the Court of Appeal (CofA). Decisions on these proposals are to be made in early March.

The report is premised on the successful implementation of the wider HMCTS Reform Programme to make the court system, ie all the criminal, civil and family courts and tribunals, “digital by design and by default”. This is not expected to be completed before 2020. It also takes into account that there has been an increase in the number of litigants in person (LIPs) using the courts, and that such cases absorb more resources than those with representation.

While headlines have focused mainly on the possible creation of a new online court (OC) for civil claims with a value of £25,000 or less, the report contains much more than this proposition. It is aimed at trying to “unlock a log-jam” which affects all civil courts, improving the experience of court users at every level. This article focuses on some of the key proposals.

1. The Court of Appeal

In 2001, the CofA published projected waiting times for full, non-expedited appeals. The target of 10 months was

revised in June 2015 to 19 months because the original target was no longer realistic.

Despite this, appeals listed to be heard by the CofA are being removed from the list at relatively short notice so that other cases which have been certified for expedition can be heard. When civil appeals are removed at short notice (they are not “routinely expedited” unlike, for example, appeals about children and planning) this undermines the efforts of first instance courts to achieve satisfactory waiting times.

“The CofA’s workload is said to have increased by over 54% in the last six years”

The CofA’s workload is said to have increased by over 54% in the last six years. This is due mainly to applications for permission to appeal, of which a “substantial proportion” are by LIPs. If the judge at first instance refuses permission to appeal (as is commonly the case), appellants may then apply for permission on paper to the CofA. If permission is again refused, CPR r52.3(4) provides that appellants can ask for an oral hearing; about 70% of appellants exercise this right.

The average time taken by a typical Lord

Justice (LJ) in dealing with written applications for permission to appeal is only one third that of the time taken for an oral hearing of a permission application. Despite the increase in work, there has been no increase in the number of LJs.

Ongoing work

The report identifies two changes to the existing routes of appeal away from the CofA which are “likely to be implemented” in 2016. Rather than going straight to the CofA, appeals against decisions of Circuit Judges (CJs) on private law matters from the family court will be heard by the High Court Judges (HCJs) of the Family Division and appeals against final orders from the County Court (CC) will be heard in the High Court (HC) by a single HCJ. This would result in the CofA becoming a court of second appeal for all private law family matters and for all CC orders. It is anticipated that these changes will result in a reduction in the CofA’s workload of approximately 15%.

In light of the increased waiting times, a “hard working group” of three LJs and one of the CofA’s Masters identified four options to alleviate the court’s workload:

- ▶ Increasing the CofA’s resources: rather than adding to the 38 existing LJs (as the CofA would be “less likely to function as a collegiate body”) the report prefers greater use of HCJs sitting part-time in the CofA as deputies, though the HC and CC workloads would have to be eased to allow this.
- ▶ Reducing the CofA’s workload: it was suggested during the report’s consultation phase that the CofA civil division could follow the lead of the CofA criminal division, where there is often only one LJ on a panel of three, with the balance made up of HCJs and CJs. However this would not assist with hearing the increased number of applications for permission to appeal, which the report anticipates is more likely to be resolved by the increased use of HCJs sitting as deputies in the CofA.
- ▶ Improving the CofA’s efficiency: while the report proposes an increase in the number of judicial assistants (JAs) so that each LJ has their own JA, and commends the recent amendments to PD52C of the CPR which encourages respondents to lodge short written submissions in opposition to the grant of a permission to appeal (to reveal “short but conclusive objections” to the application) it notes that these and other methods being investigated will not make more than a modest easing

of the current overload.

- ▶ Reducing the quality or quantity of service: the report notes the risk that any proposed changes could be construed on this basis. One such is removing or reducing the right to an oral hearing of an application for permission to appeal (oral renewal).

Report proposals

A key objective in the report is to reduce the workload in the CofA and a key issue on which urgent feedback is sought is whether this could be achieved by removing or reducing the right to oral renewal.

An alternative described in the report is removing the oral renewal but giving a broad discretion to the LJ dealing with the paper application to direct that an oral renewal is required.

There is also a potential linguistic solution. If an appeal is found to be “totally without merit” (TWM) at the paper application stage, it cannot be orally renewed. The report notes this filter is under-used as the language is felt to constitute “a discourteous rebuke”. The TWM designation could be re-named to remove this stigma, and making increased use of this renamed filter could reduce the number of oral renewals.

Effect

As regards the ongoing work:

- ▶ The current changes to the existing routes of appeal away from the CofA could be adopted more generally to render the CofA a second appeals only court, save for appeals from first instance decisions of the HC. However further analysis needs to be undertaken to determine what effect, if any, this would have on the CofA workload; and
- ▶ making increased use of HCJs as deputies in the CofA is consistent with the approach adopted in the lower courts, and could be used to identify those HCJs who will ultimately be promoted to the CofA.

The report’s suggestion to give a broad discretion to the LJ dealing with the paper application to direct that an oral renewal is required places a large responsibility on that LJ. This could potentially result in LJs granting permission to appeal more often than is currently the case, because they would be mindful that the appellant only had that one opportunity to apply to the CofA for permission.

As regards the possibility raised in the report of more generally removing or abrogating the right to an oral renewal,

further consultation and analysis is required because:

- ▶ Some foreign clients find it hard to comprehend that there is no automatic right of appeal in this jurisdiction. There is a risk that any change which makes it harder for litigants to access the appellate courts may damage the international reputation of the English court; and
- ▶ it could arguably cause injustice to some appellants; for example there are occasions when a refusal on the papers is followed not only by the grant of permission at the oral renewal but a successful full appeal.

2. High Court

The HC is based in London and divided into the Queen’s Bench Division (QBD) and Chancery Division. It has numerous district registries around the country for the issue and management of claims; and while the HC has monetary thresholds below which a claim cannot be brought there (£100,000 generally, and £50,000 for personal injury claims), in practice it deals with more complex and higher value civil cases. The report identifies the co-habitation since 2011 of the Chancery Division and two of the QBD’s subsidiary courts (the Commercial Court and the Technology and Construction Court) in the Rolls Building as “a powerful magnet for international civil litigation and a powerful contributor to the high status of the UK as an attractive place in which both to do business and invest”.

The HCJs take on an increasing amount of civil tribunal work, and those in the QBD spend a large part of their time in the Crown Court, the Divisional Court and the CofA Criminal Division. They are assisted in the civil courts by a large number of deputies, whether retired HCJs or CJs (from the CC) operating as deputy HCJs, with specialist Masters and part-time deputies. These deputies take on a large burden: in the last measured year 30% of all civil trials in London, and 90% of all trials outside of London, were determined by deputies.

However the HC can lack the time to manage the costs of claims. The time for combined costs and case management conferences (CCMCs) has increased compared to “pure” case management conferences (CMCs), resulting in increased waiting times for CCMCs. The problem became so acute for the QBD Masters that costs management of clinical negligence cases was suspended until January 2016 to enable the waiting times for CMCs to reduce “to sensible proportions”.

Report proposals

The report notes that the administration of the courts in the Rolls Building is becoming increasingly integrated. One question is therefore whether the Rolls Building courts should be merged into one Division or Court, an issue flowing from the Bar/Law Society report on Civil Justice in 1993 which proposed the QBD and Chancery Division could be merged into a “Civil Division”. The report revisits this issue because if it “is not grappled with now, it probably never will be”.

The report identifies the key obstacles to a merger of the Rolls Building courts are that it would:

- ▶ water down the Commercial Court’s “distinctive brand and international reputation”; and
- ▶ dilute the criminal workload of the QBD judges.

The former issue could be resolved by merging the Commercial Court with the pure Chancery elements of the Chancery Division, retaining the name of the Commercial Court within any unified “Civil Division”. However, further consultation and analysis of the implications (including internationally) of a merger need to be undertaken.

To explore other potential ways of easing the workload of the HC, the final report will consult on the following options for moving work to district registries and the CC:

- ▶ reinforcing that no case is too big to be resolved in the regions;
- ▶ increasing resources in the main regional trial centres so they are competitors with London;
- ▶ ensuring cases too complex for generalist listing are transferred to these regional trial centres; and
- ▶ transferring out of London cases which would be more appropriately managed and tried in these regional trial centres.

Effect

The HC is rightly held in high regard, including internationally. The HC proposals need to be considered in more detail, but they identify that the administration of the HC could be made more efficient. The proposed strengthening of the main regional trial centres is to be welcomed. The greatest impact on the CofA would come from the proposed greater use of HCJs as deputies in the CofA; however this would require the workload of HCJs to be altered to free them up to take on this new work stream.

3. County Court

The CC handles the less complex,

medium and lower value claims: those up to a value of £100,000, or £50,000 for personal injury claims. However the report identifies the QBD Masters and TCC judges have an “understanding” that claims up to the value of, respectively, £250,000 and £500,000 can be transferred from the HC to the CC. These rules are not published but “play a central role in the allocation of business between” the HC and the CC.

Nominally the judges in the CC are the CJs; however, as with the HC, a large amount of the work is performed by more junior judges: over 85% of work is performed by District Judges (DJs) and Deputy District Judges (DDJs). There are few civil-only judges in the CC (the majority of whom are based in the Central London County Court). The report observes that, outside London, civil work is “something of a Cinderella” with criminal and family cases given higher priority. As an example of the resulting practical disadvantage, the report refers to the “substantial stream of cases transferred in from case management DJs outside London to the QB and Chancery Masters in the High Court”. It says “Some of the cases coming in are properly transferred to the High Court because of specialist complexity, but most are not.”

Report proposal

The report recommends greater use of case officers to manage cases in the CC, though they should not deal with the resolution of substantive rights, ie those rights and duties which litigants have come to court to have vindicated, defended, clarified, enforced or determined.

Effect

Increased use of case officers to manage cases could enable DJs to take on more civil disputes and “unlock a log-jam which currently inhibits the passing of work

downwards for the purpose of freeing up senior judicial capacity to assist in alleviating the excessive burdens on” the CofA.

4. Online court

The idea of a purely online court is not novel (as the report recognises), first appearing in the Susskind Report in February 2015 (subsequently endorsed in the Justice Report in April 2015) and now being actively developed by the HMCTS design team. The OC would be a legal process designed “for use by litigants without lawyers” to resolve simple and modest value disputes with three stages:

- i. software would assist parties in identifying their case to produce a document capable of being understood both by opponents and the court, including uploading relevant documentation and other evidence;
- ii. the case would be managed by a case officer (and alternative dispute resolution attempted) partly online, partly by telephone, but most likely not face-to-face; and
- iii. the case would be determined by judges—most likely DJs or DDJs—with no default assumption that there would be a traditional trial (the case could be determined on the documents, on the telephone or by videolink).

The report suggests that while the OC could be part of the CC, adopting the CPR, it would be preferable to create the OC as a separate court with dedicated software, staff, and separate rules so as to ensure it is a court “truly designed for litigants without lawyers”.

The report also proposes that:

- ▶ the OC should be compulsory for all claims with a value of £25,000 or less (unless they are claims for housing disrepair by tenants which would

likely be too fact-intensive for the OC); and

- ▶ given that decisions in the OC would be by DJs or DDJs, any appeal would preferably be to the next most senior rank of the judiciary, i.e. the CJ in the CC.

Effect

Removing the simpler, relatively low-value claims from the CC should free up judicial time in the CC; taken with the other proposals in the report, the effect should be felt all the way up to the CofA.

5. Conclusion

If implemented, the proposals in the report could result in cases being more appropriately distributed throughout the court system, easing the workload at all levels including at the CofA. Straightforward small value claims could be managed by case officers and be decided by DDJs in the OC, freeing up DJs in the CC to become more experienced in managing and trying civil disputes, so cases are not transferred to the HC unnecessarily, in turn freeing up HCJs to sit as deputies in the CofA to assist with its increasing incoming workload. This workload could itself potentially be reduced with a general move to make the CofA a court of second appeal, save for appeals from first instance HC decisions. While any changes to the right to an oral hearing of an application for permission to appeal should not risk the international reputation of the court system, a change in the TWM moniker and increased use of this filter could enable applications for permission which clearly will not be successful to be removed from the CofA's incoming workload.

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