

To what extent will the proposed model for an Online Civil Court in the UK promote access to justice? A critical review and comparison with the Canadian and failed Dutch models.

Thesis to be submitted to Faculty of Law at University of Oxford for the degree of Master of Philosophy by Syed Naman Ali

St Antony's College

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Chapter 1 – Introduction

‘Access to justice’ has been amongst the most dominant of all contemporary UK civil justice system issues confronting Government policy-makers, judges, and scholars alike. If one accepts the proposition that citizens’ individual and collective abilities to seek legal remedies where necessary is a human right, and a hallmark of any nation promoting the rule of law, access to justice rightly demands such concerted attention. The 1996 Woolf Report,¹ and the sweeping Civil Procedure Rules 1998 (CPR 1998) reforms that Woolf recommended then strongly promoted the notion (amongst other modernising ideas),² that the England and Wales (EW) civil justice system was far too costly, as litigation procedures remained within the ultimate control of the parties, and not the courts.

The pre-1996 Woolf Report era was arguably the antithesis of trial fairness when this amorphous concept is viewed from a perspective that blends equality of arms and access to justice concepts.³ Whilst equality of arms has attracted extensive European Court of Human Rights attention in recent years,⁴ this expression attracts a specialised meaning in this Online Civil Court (OCC) Background section. It refers to the fact that unless the civil

¹ Lord Harry Woolf, Access to Justice: Final Report (1996) [Online] Available: <<http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/final/index.htm>> [27 June 2020], ‘Summary’, pp. 1-10.

² Civil Procedure Rules 1998/3132, (CPR 1998), and related Practice Directions.

³ As the phrase is used in a similar criminal justice context, Laura Hoyano, ‘What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial’ [2014] *Crim. L.R.* 4, 5.

⁴ Elisa Toma, ‘The principle of equality of arms: Part of the fair trial right’ (2014) [Online] Available: <<http://internationallawreview.eu/fisiere/pdf/06-Elisa-Toma.pdf>> [24 June 2020].

procedure rules limit how the parties may permissibly conduct their case, the ever-present risk exists that a wealthy litigant can use procedural devices to delay, and ultimately defeat their opponent through costly interim procedural steps.⁵ By their nature, intricate rules and the legal expenses potentially incurred to navigate them also present often formidable EW access to justice barriers.⁶ In other words, the Woolf Report directed significant attention to a legal system shortcoming with broader negative societal consequences: civil litigation procedures had increasingly limited EW civil justice affordability to wealthy and well-resourced parties.⁷ As noted at various points in this thesis, the problems Lord Woolf identified in this area almost 25 years ago remain resistant to reform – an important OCC justification explored in greater detail in Chapters 2 and 3.⁸

For Woolf, and numerous subsequent EW commentators, civil justice reforms have remained an ongoing, and at times unsatisfying work in progress.⁹ Ahmed makes this point convincingly in his recent (2020) commentary, where he notes that Lord Woolf wanted judges to ‘take charge’ in all pre-trial matters.¹⁰ Lord Woolf was certain that when the Courts assumed all case management responsibilities, litigation is more likely to be conducted ‘with

⁵ A Scots example, Faculty of Advocates, ‘Parliament debate highlights equality of arms and access to counsel’ (2014) [Online] Available: <http://www.advocates.org.uk/news/news_20140522_debate.html> [24 June 2020].

⁶ Toma, 2.

⁷ Jonathan Wheeler, ‘Inequality of arms’ (2019) 169(7831) *N.L.J.* 7, 9.

⁸ Alexandra Allan ‘Case management, uncooperative litigant behaviour and indemnity costs amid "echoes of the bad old days": *Lejonvarn v Burgess* [2020] EWCA Civ 114 (Case Comment)’ (2020) 39(4) *C.J.Q.* 293, 304.

⁹ Masood Ahmed ‘The pre-action protocols are a significant procedural aspect of the English civil justice system but reform is required: *Jet2 Holidays Ltd v Hughes* [2019] EWCA Civ 1858’ (2020) 39(3) *C.J.Q.* 193, 202.

¹⁰ *Ibid.*

reasonable speed and... pursued through mechanisms other than the court process'.¹¹ This Lord Woolf attitude serves as the connecting link through all three Part 1 Chapters.

In recent years, successive Government cutbacks imposed on civil Legal Aid availability have prompted significant controversies.¹² Access to justice advocates have often persuasively argued that marginalised, or economically disadvantaged applicants have no meaningful justice avenues within the current CPR 1998 systems. At the same time, digital technologies are poised to alter how civil justice is potentially delivered to the public – should the Government leadership choose to seize the initiative accordingly.¹³

These factors contribute to the backdrop against which the OCC reforms are assessed in this nine Chapter critical, and comparative review. Often complex access to justice issues are readily distilled for Introduction purposes into a two-pronged objective, one premised on the notion that as a general proposition, OCC is an attractive civil justice initiative that should be pursued, and implemented within the current CPR 1998 framework: (1) why access to justice principles are better assured under an OCC system than is currently the EW civil justice system norm; (2) what specific OCC features

¹¹ Ibid.

¹² *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LAPSO 2012), as implemented through the *Civil Legal Aid (Merits Criteria) (Amendment) Regulations 2016* (Regulations 2016).

¹³ Transform Justice 'The holy grail of the digital court' (2017) [Online] Available: <<http://www.transformjustice.org.uk/the-holy-grail-of-the-digital-court/>> [23 June 2020].

must be included in these reforms. The historical Background presented below now provides this entire thesis with its essential foundation.

An England and Wales project emphasis

It is remarkable that in many sources cited across the current OCC scholarship (as further explored in the Chapter Two Literature Review), there is an arguably dangerous conflation of ‘UK’ and ‘EW’ civil justice issues – including access to justice. It is also recognised that if not properly qualified at the outset, the title phrase ‘Online Civil Court in the UK’ might only further such problems. It is essential to appreciate that in this work, the Part 1 EW research emphasis is also recognition that the Scots civil justice system is separately administered (Scottish Courts and Tribunals), with its own OCC initiatives.¹⁴ It is not doubted that the OCC and access to justice concepts central to any EW-specific consideration are also relevant to current Scots civil justice. To ensure greater analytical precision, EW OCC provides the Part 1 theoretical focus, with the British Columbia (Canada), and Netherlands OCC examples cited as the highlighted Chapter 6 and 7 comparative OCC jurisdictions.

OCC - Historical background

¹⁴ Scottish Courts & Tribunals ‘Welcome to Civil Online’ (2020) [Online] Available: <<https://www.scotcourts.gov.uk/taking-action/civil-online-gateway/welcome2>> [24 June 2020].

An Online Civil Court (OCC) working definition

It is worth noting at the outset, as made clear by Lord Reed in *Unison*, OCC can incorporate online alternative dispute resolution processes given that ADR is now part of the civil justice landscape, but those processes must also be coupled with the option of binding court adjudication where ADR is not successful and as a means of promoting fair ADR outcomes.

Although the OCC model is given extensive consideration in the following sections, it is useful to set out a brief OCC working definition. This umbrella term applies to any civil justice procedures whereby the disputing parties can access a digital technology-based system to obtain a final, binding, and enforceable dispute adjudication. ‘Adjudication’ is the keyword; unlike mediation, or other dispute settlement procedures where a neutral third party seeks to encourage or facilitate a party-driven resolution, an OCC decision has the force of law.

Access to justice – a working definition

The 1999 *Lightfoot* decision includes this evocative access to justice reference: a constitutional imperative based upon ‘... the need for objective and independent adjudication of disputes between man and man, and

between man and state'.¹⁵ In this important sense, access to justice contributes to fundamental societal equality, where every citizen is afforded the same fundamental right to bring a dispute before an impartial court for determination.¹⁶

The EW authorities suggest that access to justice has the following four elements. These are: (1) it is a fundamental constitutional right – this is confirmed in the *Unison* case, which embedded in law a constitutional right to access to justice, clearly pointing out that rights cannot be infringed by processes and that fee has to be proportionate.¹⁷ These constitutional rights are protected both under EW common law and European Convention on Human Rights 1950 (ECHR 1950) Article 6(1) fair trial guarantees;¹⁸ (2) access to justice rights are not absolute, and they are subject to reasonable State reflected in CPR 1998 rules concerning to fees, and costs, as well as available Legal Aid resources;¹⁹ (3) denial of access to justice rights claims will invariably require Courts to undertake a balancing exercise when determining whether a given access to justice restriction is lawful;²⁰ and (4), the right extends beyond merely giving prospective litigants mere court access, and it will often include assurance that individuals have the opportunity to access legal advice.²¹

¹⁵ *R. v Lord Chancellor Ex p. Lightfoot* [1999] 2 W.L.R. 1126 (CA(Civ)), 1135.

¹⁶ Mark Elliott, 'Lightfoot: tracing the of constitutional rights' (1998) 3(4) *J.R.* 217, 219.

¹⁷ *R (Unison) v Lord Chancellor* [2017] UKSC 51 (SC), [66]-[85].

¹⁸ European Convention on Human Rights 1950 (ECHR 1950) Article 6(1).

¹⁹ Law Society, 'Access to justice' (June 2020) [Online] Available: <<https://www.lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice>> [23 June 2020].

²⁰ *Children's Rights Alliance for England v Secretary of State for Justice* [2013] EWCA Civ 34; [2013] H.R.L.R. 17 (CA (Civ)), [22], [27].

²¹ *Home Department, Ex parte Leech* [1994] QB 198 (CA (Civ)), 210.

It is noted that the definition (3) ‘balancing exercise’ also engages the following further considerations that bear directly upon the OCC issues central to this research thesis. The first is that access to justice is not a guarantee that injustice will never occur.²² No matter how they are organised, the justice system is a human institution, where errors are made and they are not always perfectly or fairly resolved.²³ By extension, one might form the preliminary conclusion that an OCC system could be imposed on the current EW civil justice system, even if it had features that might appear unfair (such as prohibiting lawyers from being involved in some OCC proceedings), as discussed in Part 2.

Secondly, the equally preliminary observation is made that if OCC saves valuable State sources (a strong possibility, as also examined in Part 2), cost savings alone will be an important ‘balancing exercise’ factor. In other words, even an imperfect OCC that ensures better, lower-cost court access might be preferable to the current CPR 1998 system.²⁴ Access to justice and EW civil justice adversarial system features are now considered.

Lord Woolf and EW civil justice – the adversarial system

²² *KA v London Borough of Croydon* [2017] EWHC 1723 (Admin), [32].

²³ Karen Ashton and Simon Garlick, ‘Community care: update’ (2017) Nov *Legal Action* 18, 23.

²⁴ Elliott, 217, 219.

Almost 25 years after its initial publication, the Woolf Report provides this thesis with a well-defined commencement point. Although ‘access to justice’ has become a politicised concept in recent years (the Chapter Two Literature Review sources strongly confirm this assertion), Lord Woolf left no doubt in the minds of any reasonable readers that the EW justice system was no longer fit for purpose – if fair, cost-effective, dispute adjudication was truly a standard against which overall civil justice viability must be assessed.²⁵ In essence, Lord Woolf expresses scepticism that the adversarial system on which traditional EW civil justice is premised can support meaningful modern-day justice system transformation. As the later thesis Chapters additionally confirm, OCC is more collaborative in delivering justice when compared to conventional civil litigation.

The precise Woolf Report recommendations were largely incorporated into the CPR 1998 regime. Later refinements (notably the Lord Jackson costs/offer to settle Part 36 reforms) have fundamentally remade the EW civil justice landscape from when Lord Woolf initially embarked upon his mid-1990s reform investigation.²⁶ It is less important for these Background purposes to delve into precise CPR 1998 changes than it is to acquire a fuller

²⁵ Woolf, 2-12.

²⁶ See: (i) Lord Justice Rupert Jackson, *Civil Litigation Costs Review: Final Report* (2010) [Online] Available: <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>> [25 June 2020], 2, 5; (ii) Clare Mclvor, ‘The impact of the Jackson reforms on access to justice in personal injury litigation’ (2011) 30(4) *C.J.Q.* 411, 413.

appreciation of what Lord Woolf perceived as the chief access to justice culprit – the EW common law adversarial system.²⁷

Lord Woolf concluded that whilst adversarial justice was not necessarily conceptually flawed (the traditional European civil inquisitorial system is a useful comparator in this respect),²⁸ its then-current EW civil procedure rules iteration provided the litigants with a disproportionate amount of control over what is a public resource – the national courts. In the pre-CPR 1998 era, the litigants and their lawyers essentially controlled every aspect of the litigation process.²⁹ Once the claim and defence documents had been exchanged, documentary discovery, particulars, interim orders, examinations for discovery, and all other procedural issues were ruled upon by judges when required, but *how* a particular claim proceeded – and whether a case should occupy a Court’s time were issues that were essentially placed beyond the EW justice system’s control.³⁰

The often employed ‘judge as rules arbiter,’ a dispassionate rules interpreter and enforcer with a justice system role similar to that of a cricket umpire effectively summarises the problem that Lord Woolf identified in his 1996

²⁷ Of numerous sources, see Allen & Overy ‘The Impact of the Woolf Reforms in the U.K’ (2009) [Online] Available: <<http://www.allenoverly.com/publications/en-gb/Pages/The-Impact-of-the-Woolf-Reforms-in-the-U-K-.aspx>> [24 June 2020].

²⁸ Ashfords, ‘England: The Differences between an Adversarial and Inquisitorial Legal System’ (2018) [Online] Available: <<https://www.advoc.com/news/england-the-differences-between-an-adversarial-and-inquisitorial-legal-system>> [25 June 2020].

²⁹ Michael Zander, ‘The Woolf Report: forwards or backwards for the new Lord Chancellor?’ (1997) *CJQ* 208, 210.

³⁰ Gary Slapper and David Kelly, *The English Legal System* (18th edn Routledge, 2018), 249, 250.

Report.³¹ What Lord Woolf saw as the Holy Grail of all prospective EW civil justice / improved access to justice reforms is readily summarised. Expensive, time-consuming and public resource-draining litigation should be avoided wherever possible, but to achieve these laudable reform objectives, creating a less adversarial, and more cooperative civil justice system was now essential.³² The current CPR 1998 pre-litigation protocols (mandatory information exchanges as litigation pre-conditions), mandatory case management conferences, limits imposed on expert witness evidence, and pre-trial reviews were accompanied by the express CPR 1998 encouragement given to alternative dispute resolution (ADR).³³ As noted above, the Woolf model represented a significant departure from EW civil justice traditions – whether Woolf went far enough leads directly to the OCC model rationales developed below.

The fact that ADR mechanisms such as mediation, early neutral evaluation (ENE), and arbitration have become well-entrenched EW civil justice features is a powerful testament to Woolf and the general soundness of the CPR 1998 reform paths taken over the past 20 years.³⁴ Further, the CPR 1998 Part 36 costs rules have weaponised costs, where litigation parties are not only encouraged to engage in meaningful pre-trial settlement discussion – failure

³¹ W. Bradley Wendel, 'Adversarial System of Justice' (2013) in Hugh Lafollette, eds. *International Encyclopaedia of Ethics*, Vol. 1 (Wiley-Blackwell, 2013), 146.

³² Andrew Campbell-Tiech 'Woolf, the adversarial system and the concept of blame' (2002) *British Journal of Haematology* [Online] Available: <<https://onlinelibrary.wiley.com/doi/full/10.1046/j.1365-2141.2001.02733>> [24 June 2020].

³³ John McQuater, 'The future of Part 36: Part 6' (2013) 1 *J.P.I. Law* 52, 53.

³⁴ Masood Ahmed, 'The merits factor in assessing an unreasonable refusal of ADR: a critique and a proposal' (2016) 8 *J.B.L.* 646, 649.

to accept a reasonable offer may have negative costs consequences for reckless, stubborn, or poor litigation strategists post-trial.³⁵ Judges now exercise significantly greater discretion regarding when, and on what basis Part 36 costs orders can be made – a CPR 1998 feature that is entirely consistent with Lord Woolf’s core 1996 Report view that trials should be avoided wherever possible.³⁶ Judicial control and case management powers are now undoubted; Lord Woolf set in motion civil procedure reforms that will likely never be reversed.

However, as the Part 1 commentaries confirm, there is now an inescapable impression created by the EW civil justice system that consistently available access to justice remains illusory for EW society at large. Whilst the CPR 1998 framework is widely, if not universally accepted as one that significantly improved overall EW civil justice, there are still significant flaws that require immediate attention if access to justice objectives are to be achieved in actual practice.³⁷ Why OCC concepts have gained considerable traction in recent years is now given its own important historical context.

Briggs and OCC – important links to the Woolf reforms

If the Woolf reforms legacy is an (as yet) not fully attained, cost-effective, case management centred civil justice system where judges actively steer the

³⁵ *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 (CA (Civ Div)), as cited by *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288 (CA (Civ)).

³⁶ *Ibid.*

³⁷ Masood Ahmed, ‘A critical view of stage 1 of the online court (Editorial)’ (2017) 36(1) *C.J.Q.* 12

entire dispute resolution process, OCC holds a remarkable promise that Lord Woolf's goals might be attained through cutting edge digital technology. A partially, or fully automated litigation process, or at least one where only trials involve actual human interaction, where the same cost savings, and fairness guarantees are enforced is the model that EW OCC proponents argue must be implemented with all possible speed.³⁸

The first OCC reforms were proposed in the early 21st century, when it became apparent that digital technologies were making legal practice more automated.³⁹ It is also now accepted that the following OCC rationale has significant EW and international legal commentary support (a point further explored in Part 2 comparative jurisdiction examples: in some cases, OCC will '...achieve the economical and expeditious resolution of claims in a manner which is transparent and procedurally fair, in both high-volume, low-value disputes and in complex disputes'.⁴⁰ However, for these Part 1 historical background purposes, it is not sufficient to simply take such assertions at face value. Appreciating why OCC is potentially capable of delivering such outcomes (the following 'Research Questions and Sub-Questions' reinforce this thesis focus), requires the following brief review of how OCC concepts have evolved to the present day.

³⁸ Adrian Zuckerman 'Artificial intelligence - implications for the legal profession, adversarial process and rule of law' (2020) 136(Jul) *L.Q.R.* 427, 453.

³⁹ Richard Susskind and Daniel Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (1st edn OUP 2018), 82-83.

⁴⁰ Paula Cashman and Edward Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 *Macquarie L.J.* 39, 43, cited by Zuckerman, 428.

The 2016 Lord Justice Briggs, *Civil Courts Structure Review: Final Report*⁴¹ includes a review of different specific OCC approaches, one that also aligns with more recent OCC scholarship (Sela is a notable example, a commentary given further Chapter 2 Review attention).⁴² Throughout the first 20 years of the 21st century, OCC concepts have tended to coalesce around the following core concepts.

Since the initial online courts' conception, an OCC system will enable litigants to commence, or defend any proceedings permitted within OCC jurisdiction without resort to legal assistance.⁴³ Throughout the OCC evolution, the issue of whether lawyers should be barred from online dispute resolution has been regularly debated. In other words, does OCC technology that enables litigants to proceed without legal counsel also mean that lawyers should be excluded from OCC to promote the equality of arms concepts introduced above.⁴⁴ This question is given further attention in the Chapter 2 Literature Review.

OCC systems that have been devised to date are constructed using a digital platform powered by software that assists system users to define their claim (or defence) by choosing amongst options that are built into the platform

⁴¹ Michael Briggs (Lord Justice), *Civil Courts Structure Review: Final Report (Judiciary of England and Wales, 2016)*, 36-40.

⁴² Ayelet Sela, 'E-Nudging Justice: The Role of Digital Choice Architecture in Online Courts' (2019) *J. Disp. Resol.* 127.

⁴³ Zuckerman, 429.

⁴⁴ Robert Lankester, 'Implementing document automation: benefits and considerations for the knowledge professional' (2018) 18(2) *L.I.M.* 93, 97.

program.⁴⁵ The relevant technical literature describes these systems as based upon *symbolic Artificial Intelligence* ('symbolic AI', also known as 'expert systems'). Under a symbolic AI system, the user is led through the system by logical rules ('decision trees').⁴⁶ These system rules function as the user's instructions, where the answer given to one instruction will logically lead to the next choice the user must make within the system. For example, if the user is seeking to file a claim for £6000, the input response to the system question, 'What is your claim value?', (£6000), will take the user to the next question (such as 'Are you claiming interest on this £6000 claim?').⁴⁷ When these points are collectively assessed, there is an apparent academic consensus that OCC and AI are (at least to a significant degree) used interchangeably. By its nature, an OCC system will have AI components that make it more user-friendly, and faster than what can be accomplished through human manual system administration. It is difficult to conceive of an OCC system that did not include AI, or at least symbolic AI.⁴⁸

Throughout its admittedly short history (20 years is an extremely brief time period, when compared to the EW common law evolution that began in medieval times),⁴⁹ OCC systems have been predicated on deductive reasoning principles. Zuckerman describes this process as 'if X, then Y ...followed-

⁴⁵ Briggs, 36.

⁴⁶ Zuckerman, 430.

⁴⁷ See e.g. Jacob Turner, *Robot Rules* (Palgrave Macmillan, 2018), 18, 19.

⁴⁸ Geoffrey Vos, 'Digitalisation of the courts: Preparing for the brave new digital legal world' (2019) 24(2) *Cov. L.J.* 2, 7.

⁴⁹ Slapper and Kelly, 137, 142.

through "yes" or "no" answers to pre-programmed questions designed to arrive at a predetermined final output'.⁵⁰ In this system, the 'deterministic' OCC user decision-making process is one wherein theory, every step taken can be traced back to its original point.⁵¹ It is important to appreciate that unlike AI machine learning, where the system has intelligence to make choices (where AI means the system has an innate ability to learn),⁵² this decision tree approach means that how the OCC system is designed will determine how user claims or defences are eventually finalised.

This is an important philosophical point that has been a prominent OCC theme throughout its history. In addition to expressed concerns that online courts exclude lawyers, or otherwise limit individuals' ability to utilise legal assistance as they may desire), there are also feared AI 'takeover' of the adjudication process. Viewed from this perspective, OCC that is based on the symbolic AI is only the thin edge of a wedge that will eventually lead to all legal claims being decided by robots.⁵³ The point to be made is that symbolic AI is still in its rudimentary stages and does not yet threaten an AI takeover where robot judges decide cases.

Current evolved OCC concepts

⁵⁰ Zuckerman, 430, citing Turner, 19.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Gowlings, 'Emerging legal issues in an AI-driven world' (September 2019) [Online] Available: <<https://gowlingwlg.com/.../emerging-legal-issues-in-an-ai-driven-world>> [23 June 2020].

It is equally apparent that no matter how optimistically (AI – judicial system proponents), or pessimistically one may view these ongoing, continually evolving OCC technological developments, the current OCC system that provides this research thesis with its impetus is as promoted in the 2016 Briggs report.⁵⁴ This OCC variant is better understood as a distillation of available online court technologies, and thus an extension of the symbolic AI – decision tree concepts outlined above.

Briggs recommended the following three-part OCC system process (in what he described as the ‘Online Solutions Court’): (1) automated online ‘*triage stage*’, where unrepresented litigants would have the decision tree guiding them through the claim creation process (ensuring a standardised claim (including an ability to upload all-important supporting documents and evidence;⁵⁵ (2) once the claim and defence documents have been created, and exchanged between the parties, a designated case officer will oversee a *conciliation stage* (promoting the same early dispute resolution that has been central to all post-CPR 1998 EW case management;⁵⁶ and (3), the *determination stage*, where claims that are not resolved through (2) conciliation are referred to a judge, who will have the discretion to determine whether the dispute should be decided using a face-to-face, in-person trial procedures, a video/telephone/ hearing, or a solely documents-based ruling, as may be most appropriate in the particular case circumstances.⁵⁷ As the

⁵⁴ Briggs, 3-10.

⁵⁵ Ibid, 38.

⁵⁶ CPR 1998, Pre-Action Protocols.

⁵⁷ Ibid.

Part 2 comparative jurisdiction analysis also confirms, this process is generally aligned with all global OCC developments.

One might characterise these OCC evolutions as the natural, perhaps inevitable outcome of human innovation applied to a human problem – how to make access to justice, as defined in Background, a reality for more people than are currently able to secure it. There is merit in the (2020) Douglas view (echoing the positions recently expressed by Susskind, and others),⁵⁸ that the online Court’s future has arrived, but its benefits are not yet evenly distributed.⁵⁹ The parallels that are readily observed between justice system technological developments like OCC, and the innovation forces continually reshaping our broader society amply reinforce this Douglas observation.⁶⁰

If the OCC history is a reasonable guide, there is persuasive power in the proposition that online courts are an inevitability. For those that regard OCC as an affront to adversarial justice principles, a history-driven counterargument assists in appreciating the different Research Questions that are formulated in the next section. If EW online courts experience ongoing growth as consistent with steadily increased OCC user acceptance, Briggs, Susskind, and others advocating for immediate OCC adoption will be

⁵⁸ Susskind, 82, 83.

⁵⁹ Heather Douglas, ‘The Future Has Arrived — It’s Just Not Evenly Distributed Yet’ (March 2020) SLAW [Online] Available: < <http://www.slaw.ca/2020/03/20/the-future-of-our-courts-online-courts/> > [24 June 2020].

⁶⁰ See also Lola Akin Ojelabi and Mary Anne Noone ‘Jurisdictional perspectives on alternative dispute resolution and access to justice: introduction’ (2020) 16(2) *Int. J.L.C.* 103, 107.

proven right – the OCC test for implementation might ultimately be reduced to this simple user popularity – acceptance standard, when the history explained here is properly understood.⁶¹

Research Questions

As noted above, the ultimate aim of the thesis is to provide a definitive assessment concerning the extent to which the EW OCC model will likely improve overall access to civil justice. Further, this assessment is furthered by the guidance that may be gleaned by examining selected international examples and analysing existing EW OCC initiatives. The current British Columbia (Canada) Online Dispute Resolution regime,⁶² and the now-defunct Netherlands *Rechtwijzer* provide these comparative jurisdiction reference points.

The following two research questions frame the entire project:

1. To what extent will the EW OCC model ensure greater access to justice than is currently achieved in the EW civil justice system?

⁶¹ A point taken from reading Michael Cross, 'Innovators wanted for lawtech sandbox' (9 November 2020) *Law Society Gazette* [Online] Available: <<https://www.lawgazette.co.uk/practice/innovators-wanted-for-lawtech-sandbox/5106334.article>> [8 December 2020].

⁶² Small Claims BC 'Online Dispute Resolution' (2020) [Online] Available: <www.smallclaimsbc.ca/settlement-options/ODR> [6 December 2020].

2. What specific EW OCC guidance is provided by other national digital judicial systems?

Thesis Structure

The thesis is divided into four parts, with each Part organised into specific Chapters. Part 1 builds on the OCC Background set out above, where OCC opportunities and associated possible risks posed to improved access to justice are considered within the broader EW civil justice reform context. The accepted need to initiate, and (where possible) aggressively implement an OCC model is given detailed Chapter 2 attention through the Literature Review. The Part 1 focus shifts in Chapter 3 to consider digital justice system access to justice risks, and opportunities.

Part 2 moves from the Part 1 OCC – access to justice theoretical features, to determine how OCC can be effectively implemented in practice. Chapter 4 includes specific OCC adjudication features, where independent legal advice rights, conciliation and arbitration options are each included. Overall OCC cost-effectiveness and its anticipated positive impact on current EW civil access to justice are each supported in Chapter 5 with reference to the current literature and case law.

Part 3 is a further OCC – access to justice reform portal, where the Canadian and Dutch online civil justice initiatives are examined in Chapters 6 and 7. Areas where these comparative jurisdiction reform efforts have demonstrably

succeeded, or have fallen short each represents useful guidance for EW civil justice system reform architects. The overall OCC recommendations and conclusions are advanced in Part 4 Chapters (8 and 9).

Hypotheses

A two-part proposition provides this entire project with its focal point. The first part is a general endorsement of EW civil justice reform initiatives that commenced with Woolf, ongoing CPR 1998 evolutions that have impacted EW access to justice, as now reflected in Briggs and the current OCC model. True civil justice system access remains difficult to achieve, notwithstanding the considerable attention directed at these issues by policy-makers, scholars, and EW judges who have sought to use various CPR 1998 mechanisms (notably Pre-Action Protocols, and related CPR 1998 costs provisions) to promote access to justice objectives.⁶³ On these clear bases, any efforts that meaningfully contribute to better access are welcome.

The second proposition part is cautionary. OCC reforms alone will not necessarily resolve all EW access to justice concerns. As with any new system that disrupts entrenched concepts, a reasonable argument can be made that lawyers are the civil justice system stakeholders with potentially the most to lose if OCC models are implemented. It is likely that lawyers will either resist change, or seek OCC model revisions that preserve (at least to a degree)

⁶³ A continually evolving area; see David Capper 'Third party litigation funding in family law cases: *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam)' (2021) 40(1) *C.J.Q.* 1, 8.

OCC disputants' ability to retain legal counsel to assist in these online forums.⁶⁴ Neither part of this hypothesis is particularly controversial, but collectively these two parts contribute to an important law reform proposal: the OCC system must be specifically constructed to ensure – wherever possible – a user-friendly system where lawyers' involvement is minimal to system success (improved access to justice as defined in the project Background). The Covid-19 pandemic has tended to underscore why legal system flexibility and adaptability must be OCC hallmarks.⁶⁵

A brief note regarding why British Columbia (BC) and Dutch online dispute resolution models are the chosen comparative jurisdiction examples also assists in appreciating why EW civil justice reforms are laudable and needed. The Briggs Report cited these BC initiatives with approval, thus inviting a closer examination of why the BC approach might work in an EW OCC model context.⁶⁶ There is a superficial appeal in the notion that the Dutch efforts to build a robust online dispute resolution platform 'failed' because the *Rechtwijzer* system was discontinued in 2017.⁶⁷ On closer examination (a point further developed in Chapter 7), the Dutch approach was arguably overly ambitious (it was ultimately not cost-effective), but this administrative

⁶⁴ Ashton Butler, 'BC's Civil Resolution Tribunal: A Case for Expanding Online Dispute Resolution in Canada' (2017) *Sask.L.R.* [Online] Available: <<https://sasklawreview.ca/comment/bcs-civil-resolution-tribunal-a-case-for-expanding-online-dispute-resolution-in-canada.php>> [7 December 2020], 2-3.

⁶⁵ Joe Tomlinson 'Judicial review during the COVID-19 pandemic' (2020) Jan *P.L.*9, 19.

⁶⁶ See e.g. Roger Smith, 'Access to Justice & Online Dispute Resolution: Response to The Report On The Civil Courts Structure Review In England & Wales' (2016) [Online] Available: <<http://www.internationallegalaidgroup.org/index.php/articles/8-access-to-justice-online-dispute-resolution-response-to-the-report-on-the-civil-courts-structure-review-in-england-wales>> [7 December 2020].

⁶⁷ Armin Amirsolimani 'Let justice be done though the overheads fall: how online courts promote access to justice' (2020) 20(2) *L.I.M.* 101, 103.

(structural failing) does not detract from the underlying conceptual appeal of any system that promotes enhanced access to justice as a public good.⁶⁸

Many observers (including EW-based commentators like Smith) linked the Rechtwijzer system to 'failure'. It is suggested that a fairer, and ultimately more instructive Rechtwijzer characterisation is that this model was advanced for its time, and its policy developers struggled to match its conceptual strengths with practical implementation (especially in terms of providing a cost-effective system).⁶⁹

The research undertaken with respect to the Dutch and Canadian approaches considers a further, fundamental point, namely whether true justice achieved in an online sphere can be simultaneously transparent, robust, and swift.

This research aspect is complementary to the two research questions posed above.

Methodology

The methodology taken throughout this research will be entirely secondary; ethical considerations in respect of access to participants and study design are rendered irrelevant accordingly.⁷⁰ The methodology reflects a mixed doctrinal and socio-legal approach. It is essential to appreciate what core English legal system dispute resolution principles are recognised as

⁶⁸ Roger Smith 'Make haste slowly' (2017) 167(7758) *N.L.J.* 6, 7.

⁶⁹ *Ibid.*

⁷⁰ John Creswell and David Creswell, *Research design: Qualitative, quantitative, and mixed methods approaches* (5th edn, Sage, 2018), 75, 76.

constitutional imperatives (the rule of law, trial fairness, and the right to be heard as notable foundational system doctrines),⁷¹ and how these principles must necessarily be reflected in any online court system. Socio-legal research directions equally ensure that the project provides a detailed consideration of how the civil justice system can be made better and fairer for the society it is designed to serve, where access, cost and transparency are appropriate success benchmarks.⁷²

To achieve these mixed doctrines and socio-legal research objectives, peer-reviewed academic commentary, articles, official government reports, non-government institution studies, and high-level practitioner notes each must be considered. It must be remembered that when research is directed at online justice and its still-evolving technological features, there are clearly many useful research sources containing valuable opinions and insights that fall outside traditional legal scholarship boundaries.

A functional comparison⁷³ between the proposed English online court model, Canadian, and Netherlands online dispute resolution initiatives offers further support for determining what specific OCC model elements will likely succeed. The Part III law reform proposals draw directly from these important methodological points.

⁷¹ Thomas Bingham, *The Rule of Law* (Penguin 2010), 8-12.

⁷² Reza Banakar and Max Travers, eds. *Theory and Method in Socio-Legal Research* (Oxford: Hart, 2005), 3-11.

⁷³ M Siems, *Comparative Law* (Second Edition, Cambridge University Press 2018) Chapter 2, Part B.

PART I

The Need for Reform of the Civil Justice System: Opportunities and Risks with Digital Technology.

Chapter 2 Literature Overview: EW Civil Justice and technology-based access to justice reforms

Introduction

The following Literature Overview Review summarises recent scholarly developments in this still-evolving area. With the primary exceptions of Briggs (2016), Susskind (2018), and Turner (2018), the Review sources are ones not previously considered in Chapter One.⁷⁴ Applying Snyder's legal research and methodological guidance, the Review is divided into two sections. The Briggs, Susskind, and Turner works are collectively examined in section 1, with selected peer-reviewed EW OCC articles highlighted in section 2.

Briggs – an OCC commencement point

The Briggs Report has been given intensive scholarly scrutiny since its 2016 publication. It is noted that the 2016 report represents a culmination of

⁷⁴ Hannah Snyder, 'Literature review as a research methodology: An overview and guidelines' (2019) 104 *Journal of Business Research* 333, 339.

Briggs' work, one that commenced with his 2013 Chancery Modernisation Review: Provisional Report.⁷⁵ It is useful to consider the terms of reference that Briggs LJ was operating under for the 12 months during which his Report was assembled, and then published.⁷⁶ These terms are summarised as: (1) conducting a review of Chancery Division (High Court) current practices and procedures concerning a full Jackson Report (2010) implementation;⁷⁷ (2) determining whether Chancery Division management practices were best suited for Court user needs, and make appropriate reform recommendations if they were not; (3) consider whether the then-current Chancery Division allocation of judicial resources made the best use of available judicial skills and experience, and offer reform proposals accordingly; (4) assess how Legal Aid availability reductions has implications for Chancery Division business, with associated emphasis directed at self-represented litigants seeking to have their cases heard in this Court.⁷⁸

On their initial reading, it might appear that Briggs LJ had been given an unwieldy, even impossibly broad Review mandate. The four terms of reference span Jackson (2010) civil justice system costs reforms that were only two years old at the time Briggs LJ commenced work, to civil justice Legal Aid issues – difficult, and distinct civil justice policy matters that Briggs LJ was asked to resolve in a single Review. On closer consideration, it

⁷⁵ Michael Briggs (Lord Justice), *Chancery Modernisation Review: Provisional Report* (2013) Courts and Tribunals Judiciary [Online] Available: <<https://www.judiciary.uk/publications/chancery-modernisation-review>> [11 December 2020].

⁷⁶ Ibid.

⁷⁷ Jackson, Civil Litigation Costs Review: Final Report (2010).

⁷⁸ Briggs (2013) 'Terms of reference'.

becomes clearer that Briggs LJ was asked to provisionally explore four terms that each included a cost-benefit element. In essence, the Review ‘modernisation’ focus required Briggs LJ to identify and assess the different ways that the cost of EW civil justice system delivery could be made more efficient – a key conceptual linkage to the OCC measures central to this Chapter and this entire thesis.⁷⁹

Describing the 2013 Briggs Review recommendations as heralding a ‘fresh approach’ to civil justice reforms, Causton argues that the recommendations were drastically different from all the previous such reforms.⁸⁰ For Causton, the Briggs Review placed emphasis on an overall Chancery Division modernisation, with primary importance attached to how the Jackson reforms and CPR 1998 ‘overriding objective’ could be satisfied.⁸¹ It is clear from reading Causton, and other commentators who assessed what Briggs LJ published that this 2013 Review was properly aligned with what Jackson regarded as incomplete (or not fully embraced) EW civil justice efforts to give the original Woolf report (1996) objectives complete effect.⁸² When these commentaries are read in conjunction with the Briggs LJ review conclusions, there is a sense of anticipation that these Briggs LJ efforts were not only a logical extension of Lord Jackson’s important CPR 1998 Rule 1(1) qualification that all EW civil litigation must be conducted at proportionate

⁷⁹ Peter Causton, ‘A fresh approach’ (2013) 163(7580) *N.L.J.* 30, 31.

⁸⁰ *Ibid.*, 31.

⁸¹ *Ibid.*

⁸² Richard Langley, ‘No rest for the wicked’ (2013) 163(7586) *N.L.J.* 21, 22.

cost (relative to the claim issues and value at stake).⁸³ The 2013 Review recommendations – if given full CPR 1998 reform effect – would dramatically shift the entire EW civil justice system towards an early cost-effective settlement ethos. Where such settlements could not be achieved, innovations such as OCC would be relied upon to ensure the CPR 1998 overriding objective is strengthened.⁸⁴

In a 150-page report that directs attention to all four terms of reference as highlighted above, it is apparent that not every point Briggs LJ makes in his Review is directly, or even indirectly linked to the OCC issues central to the current research. However, two Review points require further elaboration here. The first is the key question Briggs LJ posed with respect to the ongoing Chancery Court workload, namely (as paraphrased here), the extent to which Court case management then-currently overseen by Masters, Registrars and District Judges should remain in its current state.⁸⁵ Briggs LJ does not directly recommend that online case management practices should be implemented to make Court case management more cost-effective, but his implication is arguably clear in this respect. Briggs LJ states that proportionality (the core Jackson (2010) point of emphasis) must be elevated to become “... an invariable and important consideration in every [Chancery Court] case management decision”.⁸⁶ It is a short logical leap to adopt online case management as a sound way to achieve this desired proportionality.

⁸³ CPR 1998 Rule 1(1), overriding objective.

⁸⁴ A point taken from reading Briggs LJ (2013), 26-28, [2.5]-[2.11].

⁸⁵ Ibid, 11, [1.45].

⁸⁶ Ibid, 65, [6.5].

The second Review point extracted here is aligned with the first. Briggs LJ notes (consistent with the Legal Aid reduction – unrepresented litigant Review terms of reference identified above), that individual Chancery Court litigants seek the ‘... speedy, proportionate and economical disposal of their cases’.⁸⁷ For Briggs LJ (and endorsed by the Causton and Langley commentaries cited above), these litigant objectives are more likely to be achieved when the system seeks to provide efficient access to justice when litigants appear in person. Briggs LJ logically suggests that when inefficiencies exist in providing justice access, the net result will be increased delay, greater costs and crucially, “... frustration for the professionally represented parties”.⁸⁸ It is suggested that whilst Briggs LJ does not expressly recommend that this ‘frustration’ could be alleviated through online Chancery Court case management, the notion that such innovations would make positive contributions to Court practice is clear.

The 2013 Review and its provisional nature

Although Briggs LJ does not employ the following precise words in his 2013 work, it is clear from its reading that the Review was conceived as the first step in a system where more law reforms are expected in the future: “... The report is provisional in every sense. Nothing is set in stone...”⁸⁹ For these

⁸⁷ Ibid, 92, [9.32].

⁸⁸ Ibid.

⁸⁹ Briggs 2013, 3.

reasons, the present Review properly focuses on the key 2016 Briggs Report recommendations. Two Report features are highlighted, ones that directly influence how effective OCC implementation can result in the EW civil justice system.⁹⁰

The first is how closely aligned the Briggs OCC concepts remain with CPR 1998 overriding objectives, where all cases must be dealt with ‘justly’.⁹¹ The Rules then specify what ‘justly’ means, where *so far as is practicable*, the involved litigation parties placed on an equal footing, the expense is saved, and all dispute resolution is ‘proportionate’ to claim value, overall case importance, its complexity, and the parties’ respective financial positions.⁹² These overriding objectives are a direct reflection of what Lord Woolf had identified as the core EW civil justice problems in his 1996 Report.⁹³ A clear, unbroken law reform line is thus traced from Woolf (1996), CPR (1998), Jackson (2011), Briggs (Chancery Modernisation, 2013), and Briggs Online (2016): a compelling consensus that EW civil justice must be restructured to ensure the overriding CPR Rule 1 objective are given priority in every procedural way.⁹⁴

⁹⁰ Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (2016), 3-11.

⁹¹ CPR 1998 Rule 1(1).

⁹² *Ibid*, Rule 1(1)(a)-(d).

⁹³ As also considered in Hoi-Yee Roper ‘Proposed Disclosure Pilot Scheme in the Business & Property Courts’ (January 2019) [Online] Available: <<https://www.lexisnexis.co.uk/blog/dispute-resolution/proposed-disclosure-pilot-scheme-in-the-business-property-courts>> [9 December 2020].

⁹⁴ Legal Futures, ‘Briggs urges barristers to embrace direct access’ (October 2016) [Online] Available: < <http://www.legalfutures.co.uk/latest-news/briggs-urges-barristers-embrace-direct-access>> [9 December 2020].

This fair and expeditious case treatment requirement is offset against a point also made in Chapter One: the notion that overall system resource availability is also a consideration. A justice system cannot guarantee justice perfection.⁹⁵ This remains a crucial OCC implementation factor irrespective of what EW form OCC might ultimately take. Recalling the two-part proposition introduced in Chapter 1, a more technologically advanced system – one which simultaneously increases access to justice - remains the overarching EW law reform objective advanced by OCC.⁹⁶

Briggs echoes these core CPR 1998 sentiments in two different ways in the 2016 Report. He asserted that modern information technology will provide the EW civil justice system with the means to IT to create for the first time a court which will enable civil disputes of modest value and complexity to be justly resolved without the incurring of the disproportionate cost of legal representation. Secondly, Briggs notes that his OCC recommendations are not premised on any ‘default assumption’ that the online court claims would require settlement at the trial stage. The case officer conciliation and management function explained in Chapter One is therefore a close approximation to the CPR 1998 case management judicial function.

A final point is made regarding the Briggs Report, one that is acknowledged as being as much subjective impression, as it is grounded in contemporary

⁹⁵ CPR 1998 Rule1(e).

⁹⁶ Eleanor De ‘Janus-faced justice? The role of legal technology in the provision of access to justice’ (2020) 19(1) *L.I.M.* 63, 65.

EW civil justice system realities. The Report terms of reference include (amongst other directions provided by the Master of the Rolls), that the Report would provide ‘...recommendations for structural change including, in particular, the structures by which the fruits of the Reform Programme may best be integrated into the present structure of the Civil Courts...’⁹⁷ It is apparent that the Report was not exploratory, in the sense that the EW civil justice system leadership was considering its options regarding what law reforms might be best. The Report terms of reference carry the clear message that there will be change, with Briggs setting out how such changes would be most effectively implemented. What remains somewhat surprising (given the relevant technology is available), is the speed of reform implementation. This observation assists in appreciating why the Susskind text is also crucial to this entire Review, and the related research.

Susskind – the overarching OCC philosophy

It is suggested that where Briggs is the architect of a new EW online court structure, Richard and Daniel Susskind are intriguing father and son, new age civil justice system philosophers.⁹⁸ Taken to its logical conclusion, the Susskinds imagine a not so distant era where online Courts are the rule, and present day live hearing venues are exceptionally utilised.⁹⁹ The role of lawyers in this Susskind legal is also dramatically transformed in their

⁹⁷ Briggs, 2.

⁹⁸ Richard Susskind (2020) [Online] Available: <www.susskind.com> [24 June 2020].

⁹⁹ Ibid.

conception of the courts as they might exist as early as 2030. With the increasing importance attached to AI (as explained in Chapter 1), the Susskinds anticipate that the ways in which professional legal expertise is made available to the public will be transformed. Traditional one on one, lawyer-to-client legal advice will be supplanted by technology, where the legal profession will be eventually dismantled.¹⁰⁰ The Sela commentary noted above partially supplements this Susskind view.¹⁰¹ She accepts that OCC is part of the dispute resolution future, but she offers a crucial caveat: Civil justice policy-makers must not sacrifice litigant's ability to enjoy 'reflective participation and informed decision-making', in the name of making OCC systems easy to use. For Sela, keeping at least some complexity in the OCC access architecture means that individuals will be required to engage in the process – an intriguing notion that merits attention. In other words, making litigants think about how they proceed through the OCC framework will make them more savvy, knowledgeable legal services consumers.

Three extracts from their 2018 text are especially instructive in this Review context. The first is amplification of the legal profession transformation outlined above. The Susskinds advance the contention that many professionals (including lawyers) have failed to appreciate why there is a need for professional-client personal interactions at all. Professionals have essentially deluded themselves with the belief that one-to-one traditional

¹⁰⁰ Susskind and Susskind, (2018), 4.

¹⁰¹ Sela, 2019, 127, 133.

approaches have an ‘aura of indispensability’.¹⁰² These traditional views confuse the direct client contact with what the client actually wants – a ‘sharing [of] practical expertise’.¹⁰³ Where technologies provide better sharing opportunities, with less personal interaction, the interaction process should not be defended ‘for its own sake’.¹⁰⁴ This attractive, well-framed Susskind argument is also aligned with the earlier Woolf Report (1996) assertions that legal services were too expensive, and more cost-effective options should be pursued.

The Susskinds supplement this professional expertise and cost-effectiveness objective with their suggestion that all OCC designers must work from the perspective of what litigants want from the process. In their persuasive contention that litigants do not really embrace a legal system that includes courts, judges, or lawyers, the Susskinds set out a position that reflects a common human experience. A typical litigant does not want the legal problem they must now confront. Individuals involved in legal disputes ‘... want their disputes resolved with finality...Outcome thinking leads us to worry far less about perpetuating old processes and methods than whether reforms will bring about better results’.¹⁰⁵ The Susskinds thus urge an attractive breaking away from convention, where the Chapter 1 adversarial system is better understood as something that the legal profession holds as

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, 22.

essential – but not the individuals whose interests are most directly impacted – the disputing parties.

A final Susskind point connects OCC theory to the larger EW civil justice trends taking the 1996 Woolf Report as its origin. The Susskinds favour a further adversarial system dilution, if the end result is civil justice services that are delivered ‘more widely, more quickly, at a lower cost, in a less combative way, and in a form that is intelligible to lay users’.¹⁰⁶ For traditionalists, the fact that lawyers were the curators of legal knowledge is what gave legal services value. The Susskinds turn this entire theory on its head, with their endorsement of a legal knowledge-empowered public using technology platforms independent of traditional legal advisors.¹⁰⁷ It is noted that whilst the Susskind position has its detractors, it is equally apparent that a growing sentiment favours getting the OCC system fully implemented – the first step in Susskind’s progression to the transformed, digital technology legal world.¹⁰⁸

The Susskinds build on these 2018 views in a 2019 work that is fairly characterised as the culmination of a civil justice system philosophy framed by this question: Is a court, and its surrounding justice system a service or a place?¹⁰⁹ Susskind plainly supports the latter contention, one entirely aligned with the OCC model philosophy that in most disputes, justice is better

¹⁰⁶ Ibid.

¹⁰⁷ Emilie Hunter, ‘Book Review: Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*’ (2010) 10(4) *Human Rights Law Review* 797, 801.

¹⁰⁸ Roger Smith “Get online courts done” (2020) 170(7870) N.L.J. 7.

¹⁰⁹ Richard Susskind, *Online Courts and The Future of Justice* (OUP, 2019), 19.

served by judges working online.¹¹⁰ Amongst his many persuasive online justice rationales, Susskind points to significant case backlogs in fast-growing developing nations such as Brazil and India.¹¹¹ Although he does not employ the following phrasing, Susskind leaves a clear impression with his 2019 text that a failure to embrace online justice will result in widespread public dissatisfaction that would naturally spill over to reputationally damage all State institutions, not least further hinder access to justice.

When these cited Susskind works are collectively assessed, it is tempting to uncritically accept the careful, cogent Susskind OCC arguments made there. In recent months, a discernible counter-proposition has gained greater scholarly traction. De (2020) offers its arguably most compelling articulation.¹¹² In her detailed assessment, De does not contradict Susskind's argument on the future of the legal industry, so much as she expresses doubt that online justice motivations for States that have implemented them were any more than cost reduction exercises.¹¹³ De casts doubt on the Susskind cause and effect relationship claimed to exist between legal technology and more cost-effective increased legal access and participation. De argues that society's most vulnerable individual may experience a 'multiplicity of issues, of which homelessness, poverty, illiteracy and mental illness are often prominent'.¹¹⁴ These people may have the highest relative

¹¹⁰ Ibid.

¹¹¹ Ibid, 139.

¹¹² De, 63, 65.

¹¹³ Ibid.

¹¹⁴ Ibid.

individual legal service needs, and yet absent technology access, they may be amongst the least able to seek justice.¹¹⁵ The De position thus inspires the view that Susskind's perspective on the future of the legal industry is not the only way to understand whether the OCC model will provide better overall access to justice.

Expanding on the themes developed by Susskind, Turner predicts a global societal future where AI technologies extend beyond the OCC decision tree process explained in Chapter 1, and AI machines decide legal cases with little, if any human intervention.¹¹⁶ It is clear that the Briggs OCC model is not nearly so far advanced, but it is helpful to understand that by implementing OCC now using these current AI platforms, an irreversible path towards fully automated justice may be set.¹¹⁷

In an important sense, Briggs, Susskind, and Turner offer complementary visions of law and justice. From different perspectives, each expert either directly, or implicitly accepts the proposition that the civil justice system cannot stand still, or remain a technological outlier from the rest of the society the system is otherwise expected to serve. The following selected recent OCC scholarly examples are now considered with these section 1 points providing a collective reference point.

¹¹⁵ Ibid.

¹¹⁶ Turner, 4, 8.

¹¹⁷ Ibid.

Selected EW OCC articles

The following articles only span the three-year period (2017 – 2020) explained in the Review Introduction, but these selected authorities are presented in reverse chronological order to underscore the fact that even within this relatively brief time frame, the OCC reforms are a dynamic civil justice space.¹¹⁸ As Heaton observed in 2017 (as consistent with the 2018 Susskind position examined above), there is a decided appetite for EW justice system change, even if the law reform pathways have not been entirely cleared.¹¹⁹

The 2017 Cortes online mediation analysis is a further indication that EW civil justice system change is a foregone conclusion; its actual dimensions are what remain somewhat uncertain.¹²⁰ Cortes advocates for an expanded OCC scope, where the current, if informal ‘online mediator’ possibilities presented by OCC (providing the disputing parties with information, a neutral negotiating forum, and settlement offer potential) would be formalised.¹²¹ For Cortes, the OCC portal with mediation included reduces the risk of parties posturing, whilst building in incentives ‘.. to negotiate in good faith with the aim of achieving a mutually acceptable settlement on the quantum in dispute’.¹²² It is evident that this scholarly perspective has

¹¹⁸ Nicholas Heaton ‘In search of 21st-century courts’ (2017) 161(36) *S.J.* 32, 33.

¹¹⁹ *Ibid.*

¹²⁰ Pablo Cortés ‘Regulatory developments in mediation and in technology supported mediation schemes in the UK’ (2017) 23(8) *C.T.L.R.* 208, 212.

¹²¹ *Ibid.*, 209.

¹²² *Ibid.*, citing Ethan Katsh and Colin Rule, ‘What We Know and Need to Know about Online Dispute Resolution’ (2016) 67 *South Carolina Law Review* 329, 333.

entirely discounted the traditionalist adversarial positions identified in Chapter One – if cost-effective access to justice places lesser reliance on lawyers, such technology-driven developments must be encouraged.

It is interesting that Lord Jackson, a key EW civil justice reform advocate and designer, sounded a less optimistic law reform note in 2018.¹²³ He noted with some aspersion that as a judge charged with the responsibility of helping to build a better, more cost-effective EW system, it is a function of human nature that ‘... Lawyers generally do not like change and they particularly dislike anyone meddling with costs...’¹²⁴ Lord Jackson agrees that online dispute resolution (ODR), the close cousin of OCC, makes alternative dispute resolution even more attractive than it was when the CPR 1998 regime was enacted. Lord Jackson expresses certainty that if ADR was available at an early OCC stage, huge cost savings would be achieved for all parties.¹²⁵ The ground where Lord Jackson evidently chose not to tread in 2018 remains controversial, and it is summarised in this rhetorical question: why have the Briggs recommendations not been actively, and aggressively implemented? One suspects that the answer may lie in the Lord Jackson observation that ‘lawyers do not like change’.¹²⁶ The following Review sources tend to build on this sentiment.

¹²³ Rupert Jackson ‘Was it all worth it?’ (2018) 34(2) *P.N.* 61, 70.

¹²⁴ *Ibid.*, 62.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

It is precisely this point that Smith seizes upon in his insightful 2018 law reform analysis.¹²⁷ Smith expresses what is suggested as a wider spread frustration with the EW civil justice leadership for not (yet) having implemented the Briggs stage 1 'triage' system referenced in Chapter 1. If, as Smith persuasively contends, that this Briggs OCC element is uniformly accepted as vital to OCC success, the fact that Briggs stage 1 remains unimplemented is frustrating, and concerning. Inaction logically conveys the impression that there is inattention to why the Briggs reforms are important, or an unexplained reluctance to proceed as Briggs suggested.

Convergence factors

Anderson noted that no matter what pace of change might be observed in the EW civil justice system, ADR and ODR convergence within the courts, and its largely positive impacts on access to justice were inevitable, and irreversible.¹²⁸ Although Anderson does not employ the following exact phrasing, his meaning is made clear. The principal barrier to accessing the courts is almost always litigation costs. ODR systems (including OCC), are gaining traction because of the huge costs savings and convenience the average litigant will enjoy, where dispute resolution services have become profoundly democratised, where former barriers that made traditional civil

¹²⁷ Roger Smith 'Missing: stage one' (2018) 168(7810) *N.L.J.* 7, 8.

¹²⁸ Dorcas Quek Anderson 'The convergence of ADR and ODR within the courts: the impact on access to justice' (2019) 38(1) *C.J.Q.* 126, 143.

justice system access challenging for persons of modest means are now much reduced.¹²⁹

Prince offers a counterpoint to the overall optimism that Anderson expresses regarding how an EW OCC model will mean permanent, positive access to justice change.¹³⁰ She is one of the few EW commentators to express concerns that an OCC model has problems that must be overcome. Taking her academic lead from the Supreme Court *Unison* decision (cited in Chapter 1), Price agrees with the Lord Reed assertion that the EW courts are more than a service provided to its users, and that access to the courts has value beyond the disputing parties – open justice (the ability of the public to see and attend court hearings is a fundamental EW rule of law and societal element.¹³¹ If justice is must truly be seen, to be done, an OCC model must have ‘open justice’ access built in.¹³² Prince does not cast doubt on the EW law reform leadership bona fides, so much as she urges that ongoing, OCC model based reforms are an opportunity to radically remake legal processes to increase transparency, as oppose to simply making the EW courts more efficient.¹³³ This excellent point is given additional Part 2 consideration.

Commentary

¹²⁹ Ibid.

¹³⁰ Sue Prince "Fine words butter no parsnips": can the principle of open justice survive the introduction of an online court?' (2019) 38(1) *C.J.Q.* 111, 125.

¹³¹ Ibid.

¹³² Ibid; see also *R. v Sussex Justices Ex p. McCarthy* [1923] 11 WLUK 36 (CA).

¹³³ Ibid.

The various points that are identified and expanded upon in this Review invite the following brief independent commentary. It is clear that since the 1996 Woolf Report to the present day, access to justice, and removing any associated access barriers, have been an ongoing point of emphasis for the EW civil justice system leadership. It is noted that where the very extensive Woolf reforms became EW law (CPR 1998) within two years of Woolf's work being published, Briggs final report has now been available for four years – its OCC model remains largely incomplete. This is a seemingly odd circumstance, given that the Briggs report (with few exceptions) has been widely endorsed as one that provides EW justice with its 21st century blueprint. Further, where the CPR 1998 initiatives were essentially a redrafting of the entire civil procedure system, the OCC measures as envisaged by Briggs, and endorsed by so many other commentators are ones aimed at low value claims. One would logically assume that the OCC is a far more manageable law reform implementation process than was the CPR 1998 introduction – but four years has passed, and concerns will naturally persist that reforms remain on the horizon, and not the immediate Government agenda.

There is little doubt expressed in this Review that not only does OCC as articulated by Briggs hold out significant hope that EW access to justice will be significantly enhanced once the model is fully implemented. The Briggs approaches also signal the prospective beginning of an EW civil justice system where individual citizens are not intimidated, but empowered to seek out legal remedies where appropriate. Where the former common law

adversarial system was inherently difficult for all but legal experts to navigate, OCC is a profoundly democratising force. It is equally apparent that all of this commentary remains somewhat speculative until the model is fully implemented. One is left to wonder if there are not significant pressures placed on the EW civil justice leadership by the Law Society, or other professional interests' groups, to slow the speed of full transition to the OCC model, and lessen the blows that the EW legal professional will presumptively sustain when a fully AI-driven Court is available to the public.

The remaining Part 1 Chapters are thus presented with this additional point in place – the Briggs OCC model is undoubtedly attractive when viewed from an access to justice reform perspective, but there must be other factors at play contributing to delayed system uptake.

Civil Justice in the UK: A Need for Reform?

It was noted in the introduction to this work that the current reform of the HMCTS has been developed largely pursuant to the 2016 Joint Statement, and the content of this package will be evaluated in chapter 4. At this point however, it is important to outline the fact that these documents were not produced in isolation and indeed both the Briggs Interim and Final

Reports,¹³⁴ and the Joint Statement, may simply be viewed as the latest in a series of attempts to evaluate the key weaknesses of the civil justice system and promote mechanisms to address those weaknesses. Indeed, it is clear from JUSTICE that this is an ongoing process designed to ensure an effective civil justice system.¹³⁵ The question therefore, is whether any reform, although here of course this relates to the introduction of an OCC within the general package of reforms as discussed briefly in the introductory chapter, can be objectively justified, and why such reform is needed. As Gross LJ, in a speech to the London Common Law and Commercial Bar Association in 2019, was clear, the facilitating of civil justice should be considered a ‘public good’¹³⁶ such that any suggestions for reform must be assessed in terms of their ability to improve the ‘deliver[y]’¹³⁷ of that good and to promote access to the courts as a democratic ideal.¹³⁸ As one practitioner observes, the very purpose of the Briggs Review was to evaluate how the civil justice system could be improved in terms of ‘efficiency’¹³⁹ and thus the reforms, if they promote this goal, appear to fit within Gross LJ’s theoretical objectives underpinning any ostensible need for reform. A similar point is made by practitioners at the firm STA, who observe that the effectiveness of reforms should not be measured simply in respect of how well the reform itself is

¹³⁴ Briggs, 2016 3-11.

¹³⁵ -- ‘Civil Justice System’ (Updated 2020) JUSTICE available at <https://justice.org.uk/our-work/civil-justice-system/> accessed 6/5/2020.

¹³⁶ Gross LJ, ‘The Civil Justice System in a Time of Change’ (2019) LCABA Annual Lecture, Paragraph 9, available at <https://www.judiciary.uk/wp-content/uploads/2019/01/lcaba-lecture-jan-2019.pdf> accessed 6/5/2020.

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ D Newbury, ‘Overview: Briggs’ Review of the Civil Courts Structure’ (No Date Available) Kennedy’s Law accessed https://www.kennedyslaw.com/media/2383/kennedys_briggs-review-of-civil-courts-structure.pdf accessed 6/5/2020.

able to be implemented, but rather how well the reform is able to achieve the underlying ‘goal’¹⁴⁰ of the reform and thus achieve objective improvements to the system. Such points seem persuasive; reforming the civil justice system in the absence of an objectively justifiable underlying aim would simply be change for change’s sake and thus in assessing the progress towards the OCC, this work will ask not only how far the proposals appear capable of promoting access to justice in practice, but whether this is a desirable goal in terms of improving the civil justice system in respect of an objectively defined weakness.

The above highlights that it is clear that reforms must be *needed* in order to be effective, regardless of whether and how well the reforms are actually implemented in practice, and here therefore the work will briefly summarise the perceived problems with the civil justice system in the UK. The aim of this work is to evaluate the development of the OCC rather than to simply describe all the initiatives for reform of the civil justice system, and thus the point here is merely to show again that there is a need for reform, rather than tracing all the calls for reform which have been made. It seems prudent to begin with the Woolf Report,¹⁴¹ and whilst this was produced more than twenty years ago, it has often been hailed as the foundation for calls for

¹⁴⁰ --, ‘Lord Woolf’s Reforms and Civil Procedure Rules 1998’ (2019) STA Legal Notes available at <https://www.mondaq.com/uk/civil-law/705694/lord-woolf39s-reforms-and-civil-procedure-rules-1998> accessed 6/5/2020.

¹⁴¹ Lord Woolf, *Access to Justice – Final Report* (1996) available at <https://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm> accessed 7/5/2020.

reform of a system¹⁴² which Lord Woolf found to be overly costly, such that costs were often greater than the worth of the claim;¹⁴³ cumbersome and time-consuming;¹⁴⁴ failing to facilitate access to justice, particularly to members of low socioeconomic groups;¹⁴⁵ and unpredictable, such that there was a lack of transparency.¹⁴⁶ His Lordship therefore called for a package of reforms which would promote a system which would be ‘just’;¹⁴⁷ ‘fair’;¹⁴⁸ cost-effective;¹⁴⁹ fast;¹⁵⁰ easy to understand;¹⁵¹ appropriate for users;¹⁵² as predictable as possible;¹⁵³ and ‘effective’.¹⁵⁴ Indeed, even without in depth analysis, and this would be beyond the scope of this work, it seems clear that there was a direct link between the weaknesses found in the system and the objectives of the reform proposals, such that if the proposals were capable of meeting those objectives, they could be considered as a successful reform.

The reforms have underpinned legislative changes including the Access to Justice Act 1999, pursuant to developing an appropriate ‘track’¹⁵⁵ for cases to

¹⁴² M Zander QC, ‘More Harm Than Good? Professor Michael Zander QC Reflects on 10 Years of the Woolf Reform’ (2009) NLJ available at <https://www.newlawjournal.co.uk/content/zander-woolf> accessed 7/5/2020.

¹⁴³ Lord Woolf, *Access to Justice – Final Report* (1996), Section 1, Paragraph 2, available at <https://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm> accessed 7/5/2020.

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*, Section 1, Paragraph 1(a).

¹⁴⁸ *ibid.*, Section 1, Paragraph 1(b).

¹⁴⁹ *ibid.*, Section 1, Paragraph 1(c).

¹⁵⁰ *ibid.*, Section 1, Paragraph 1(d).

¹⁵¹ *ibid.*, Section 1, Paragraph 1(e).

¹⁵² *ibid.*, Section 1, Paragraph 1(f).

¹⁵³ *ibid.*, Section 1, Paragraph 1(g).

¹⁵⁴ *ibid.*, Section 1, Paragraph 1(h).

¹⁵⁵ Access to Justice Act 1999, Explanatory Notes, Paragraph 208.

thus ensure appropriate spending and case management;¹⁵⁶ and indeed through the introduction of the Civil Procedure Rules in 1999, which are now regularly updated.¹⁵⁷ As practitioners writing for Thomson Reuters have noted, and this point was also made above, the reforms directly incorporated the Woolf recommendations pursuant to reforming a civil justice system which was lacking in that it needed to ensure a 'cheaper, simpler, more predictable dispute resolution process for all litigants'.¹⁵⁸ Again, it is clear that the intention of changes to the system following Lord Woolf's recommendation have been in direct response to the problems identified with that system as being convoluted and prohibitively costly, such that achieving access to justice was difficult.¹⁵⁹ The implementation of reforms in this manner however may be seen as clear improvements to the system.

Indeed, more recently commentators have been clear that Lord Woolf's reforms have not only promoted the specific reforms above, but also something of a 'culture'¹⁶⁰ change whereby it is becoming accepted that justice can be achieved through ADR mechanisms rather than simply through litigation,¹⁶¹ thus promoting faster and more effective justice. There is

¹⁵⁶ *ibid.*

¹⁵⁷ Lord Dyson, 'The Application of Amendments to the Civil Procedure Rules' (2013) available at <https://www.judiciary.uk/announcements/18-the-application-of-the-amendments-to-the-civil-procedure-rules/> accessed 7/5/2020.

¹⁵⁸ M Bramley and A Gouge, 'Commercial Disputes: The Practical Impact of the Woolf Reforms' (1999) Thomson Reuters Practice Notes.

¹⁵⁹ --, 'Civil Procedure Rules – Will Lord Woolf's Imminent Civil Justice Reforms Signal a Whole New Ball Game for Litigators?' (1999) Law Society Gazette available at <https://www.lawgazette.co.uk/news/civil-procedure-rules-will-lord-woolfs-imminent-civil-justice-reforms-signal-a-whole-new-ball-game-for-litigators-/20873.article> accessed 7/5/2020.

¹⁶⁰ SI Strong, 'Defining the Litigation Default' (2018) 37(4) CJK 463-483, 465.

¹⁶¹ *ibid.*

considerable evidence that, as Peysner explains, much of the reforms have indeed served to improve the civil justice system, albeit not in relation to reducing costs, and this point will be returned to below.¹⁶² One of the key difficulties however, and this point is made by Roberts, is that despite this apparent restructuring of the civil justice system, again with a view to improving access to justice for users and indeed ensuring that the system is cost-effective both for the public purse and for those who enter the system, the Woolf Report did not introduce mechanisms through which settlement could be achieved more cheaply or indeed without necessarily requiring lawyers.¹⁶³ It has briefly been noted that the move towards the OCC does seem to envisage a different role for lawyers in some cases, and this will be discussed later in the work.

Returning however to how successful the Woolf Reforms have been, an assessment of the impact of the reforms on reducing costs in the system found in 2009 that, although they focused on specific case types rather than 'general trends',¹⁶⁴ whilst the impact of the Woolf reforms was a reduction in delay in some cases, other delays increased as a result of those reforms, such that they cannot be considered to have been successful in all respects.¹⁶⁵ What this might seem to suggest therefore is that

¹⁶² J Peysner, 'England and Wales: Woolf for Slow Learners' Chapter 9 in C Hodges, S Vogenauer and M Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing 2010) 316.

¹⁶³ S Roberts, 'Settlement as Civil Justice' (2000) 63(5) MLR 739-747, 740-741.

¹⁶⁴ P Fenn, N Rickman and D Vencappa, *The Impact of Woolf Reforms of Cost and Delay* (2009) CRIS Discussion Paper Series 2009:1, 34, available at <https://www.nottingham.ac.uk/business/businesscentres/gcbfi/documents/cris-reports/cris-paper-2009-1.pdf> accessed 7/5/2020.

¹⁶⁵ *ibid* 33.

notwithstanding the reforms being directed towards weaknesses in the system and implemented pursuant to addressing these, they still cannot be considered to be completely effective. Similarly, a report produced by the Law Society and the Civil Justice Council, only a few years after the reforms were introduced, and it conducted research into a number of areas, found that whilst 'there [was] much that [was] positive'¹⁶⁶ following the introduction of the Woolf recommendations, there remained issues for consideration as part of a 'continuing process to improve the landscape of civil litigation'.¹⁶⁷ Whilst an in-depth assessment of the merits of such points is beyond the scope of the work here, what is again clear is that despite being the apparent foundation of the move towards reforming the civil justice system to create something more streamlined, with better access for users, and which operates more cost-effectively, the Woolf Report does not appear to have been able to achieve that in its entirety. Thus, any ongoing reform package must be able to do this if it is to be considered effective. It is recognised that this is a superficial analysis, as the point was not to evaluate the report comprehensively: it is sufficient to note that there seems to be a key need for reform but not one that was adequately dealt with by the recommendations in the Woolf Report. This, it is argued, highlights that in order for the reforms in respect of the OCC to be considered effective, what is needed is first to show that they are directed towards objectively identified weaknesses in the system, and indeed outlining these is the aim of this

¹⁶⁶ T Goriely, R Moorhead and P Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (2002) The Law Society and the Civil Justice Council Research Study 43, 385, available at <https://orca.cf.ac.uk/44483/1/557.pdf> accessed 7/5/2020.

¹⁶⁷ *ibid.*

chapter, and second to show that they are not only drafted pursuant to mitigating these weaknesses but are capable of doing this in practice.

A number of reports followed the Woolf Review, and this is hardly surprising in light of the comments above that the recommendations should be considered as simply beginning the process of ongoing reform and indeed cannot be viewed as entirely successful, including the Jackson Review.¹⁶⁸ The review was initiated by Sir Anthony Clarke, the Master of the Rolls at the time,¹⁶⁹ pursuant to mitigating the enormous costs, noted by Peysner above, associated with the justice system.¹⁷⁰ Indeed, Lord Jackson was clear that although his reforms were developed in the context of ‘build[ing]’¹⁷¹ upon the Woolf Recommendations, and thus seeming again to be targeted at addressing weaknesses in the system, they were required because of the continued ‘disproportionate cost’¹⁷² associated with the civil justice system, and which had the result of limiting access to justice for many users.¹⁷³ This seems again to reflect the comments earlier in the section that reforms should only be imposed in response to a specific problem, such that the Jackson recommendations took place in the context of a continued attempt to try to improve the civil justice system. It is not necessary here to consider the content of the Jackson reforms in detail; again, it is sufficient to note

¹⁶⁸ R Jackson, *Review of Civil Litigation Costs: Final Report* (2009).

¹⁶⁹ --, ‘Review of Civil Litigation Costs’ (2017) available at <https://www.judiciary.uk/publications/review-of-civil-litigation-costs/> accessed 7/5/2020.

¹⁷⁰ --, ‘The Jackson Legacy’ (2018) NLJ available at <https://www.newlawjournal.co.uk/summaries/the-jackson-legacy> accessed 7/5/2020.

¹⁷¹ R Jackson, *Review of Civil Litigation Costs: Final Report* (2009), Paragraph 6.2.

¹⁷² *ibid*, Foreword.

¹⁷³ *ibid*.

that effectiveness must be measured against the need to improve access to justice and the ability of the reforms to achieve this in practice.

More relevant here however is the Briggs Interim Report. This review was initiated by the Lord Chief Justice and the Master of the Rolls, pursuant to improving the continued failure of the civil justice system to ensure fair access to justice for all users,¹⁷⁴ and indeed the proposals within are now inherent to the overall package of reforms¹⁷⁵ to the HMCTS, and which include the OCC, currently being developed. This is clear for example from Lord Thomas, the Lord Chief Justice, who, following the publication of Lord Briggs' final report, said that whilst there was already an impetus for a movement towards some of the recommendations including an online court, Lord Briggs' recommendations for reform to improve access to justice based on the continued problem in this regard since the Woolf report, and again specifically in terms of the OCC, have now become 'integral'¹⁷⁶ to that reform package. The foundation for the court in the Briggs Interim Report was noted in the introduction to the work and will be discussed in more detail in Part II of this thesis. Here, it is simply sufficient to note that the Briggs recommendations emphasised the ongoing need to reform the civil justice system in the way both Lord Jackson and Lord Woolf envisaged in the earlier reform packages, and thus it is evident that not only is there a clear and

¹⁷⁴ J Rozenberg, 'The Briggs Report' (2020) available at <https://long-reads.thelegaleducationfoundation.org/the-briggs-report/> accessed 7/5/2020.

¹⁷⁵ --, 'Civil Courts Structure Review (CCSR): Final Report Published 2016' (2016) available at <https://www.judiciary.uk/civil-courts-structure-review/civil-courts-structure-review-ccsr-final-report-published/> accessed 7/5/2020.

¹⁷⁶ *ibid*, citing Lord Thomas.

objective need to reform the civil justice system, but that the reforms suggested have been targeted at improving the system in the manner the assessments have identified as being necessary. Whether the latest initiatives here, and for the purposes of this thesis, the focus is on the OCC, will be effective is an altogether different question and one which will be assessed throughout the work. It is simply clear that in order to be effective, the OCC must deliver improved access to justice in a cost-effective, transparent and predictable system, and thus offer a direct improvement to the current operation of the civil justice system.

As briefly noted, these aims are incorporated into the overall package of reforms for the HMCTS, as is clear from the work of the 2019 House of Commons Justice Committee, who said that not only did Lord Briggs recommend the development of an OCC,¹⁷⁷ but that this has now become part of one of the 3 sections of the reform package, although the compliance part is now suspended.¹⁷⁸ The summer 2019 report update states that the current package operates with a view to delivering what it describes as ‘small, incremental changes that bring benefits to users faster and with less risk’¹⁷⁹ and this, it is submitted, makes it explicit again that reform is an ongoing programme targeted towards identified issues within the civil

¹⁷⁷ House of Commons Justice Committee, *Courts and Tribunals Reform* (2019) Second Report of Session 2019, Paragraph 4, available at <https://publications.parliament.uk/pa/cm201919/cmselect/cmjust/190/190.pdf> accessed 7/5/2020.

¹⁷⁸ *ibid* Paragraph 5.

¹⁷⁹ HMCTS, *Reform Update Summer 2019*, 5, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806959/HMCTS_Reform_Update_Summer_19.pdf accessed 7/5/2020.

justice system. The package, although detailed consideration is not the focus of this work, again takes place in the context of these ongoing reforms, and whilst one might be inclined to consider, as was briefly noted above, that the fact that change is still needed more than 20 years after the Woolf report might suggest that the recommendations in the various reports have been limited in terms of their success, the reform framework can be briefly surmised. Here, the 2019 update notes that the reforms aim to deliver accessible, cost-effective and indeed ‘efficient’¹⁸⁰ justice through the incorporation of digital technology, and thus move towards streamlining services through reducing physical document requirements and developing online courts and services. This move towards efficiency again seems directly targeted to identified weaknesses in the system, and delivery is organised across three phases, through establishing test versions;¹⁸¹ beginning to make these available to the public in some areas;¹⁸² and in the third stage in which progress is now being made, ‘scaling up’¹⁸³ accessibility to provide an ‘end-to-end’¹⁸⁴ service. The impetus and justification for achieving the type of reforms discussed throughout this chapter digitally, will be outlined in the following chapter, before Part II of the work considers the development of the online court as part of these reforms, and indeed pursuant to achieving the objectives again as discussed throughout this chapter.

¹⁸⁰ *ibid*, 3.

¹⁸¹ *ibid*.

¹⁸² *ibid*.

¹⁸³ *ibid*.

¹⁸⁴ *ibid*.

Summary

It is clear that there is an objective need for reform in order to improve the civil justice system, which has been identified as cumbersome; lacking transparency and certainty, and providing only limited access to cost-effective justice. In order for reforms to the system, and the development of an OCC will be considered as one reform in the context of the HMCTS package in Part II of this work, to be effective, they will need to be measured against not only how well they link to mitigating these problems but how far the reforms are capable of doing this in practice. The standards of cost-effectiveness, transparency in predictability and fairness, and access to justice, developed in order to mitigate the problems above, will therefore be key in measuring the success of the OCC, and will as such form the basis for assessing the court later in the work. One might consider the reforms made to date, although they have not been assessed in any detail, to have had limited success in this regard, largely because reforms are still needed some 20 years later, although it must be noted that such an argument might have limited application in the digital context due to the vastly different technological landscape in place today¹⁸⁵ compared to when the various reports referred to throughout this chapter were produced.

¹⁸⁵ --, 'The 20 Biggest Advances in Tech Over the Last Twenty Years' (2020) The Foundation for Economic Education, <https://fee.org/articles/the-20-biggest-advances-in-tech-over-the-last-20-years/> accessed 7/5/2020.

Chapter 3 - Digital Justice Systems: Risks and Opportunities

Introduction

Again, this chapter will proceed as outlined in the introductory chapter, evaluating the respective benefits and difficulties with including digital technology in reforms to the civil justice system.

How Far Should Digital Technology Be Inherent to the Civil Justice System?

Risks and Opportunities

It was noted at the end of the previous chapter that the 2019 update on the progress towards the HMCTS reform package highlighted the importance of incorporating digital technology into the civil justice system with a view to meeting the reform objectives, again as outlined throughout that chapter. The discussion here aims to evaluate the rationale for this and consider whether, in general terms rather than relating directly to the development of an OCC, the incorporation of digital systems into the civil justice reform programme can be supported as being a mechanism capable of meeting the objectives of reform. The starting point here is to refer to the work of Acland-Hood; the Chief Executive of the HMCTS produces an ongoing blog post series together with other professionals, delineating the reform process and indeed the rationale for decision making within that process. Within this

blog, she outlines her view on the ‘importance’¹⁸⁶ of incorporating digital change into the reform package, asserting that moving towards digital systems should not be considered as an ‘end in [itself]’,¹⁸⁷ but rather that digitalisation will enable access to justice and improve the efficiency of the civil justice system as a whole.¹⁸⁸ At first glance therefore, the move towards digitalisation appears to be directly linked to the reform objectives discussed in the previous chapter, and as such seems supportable: digitalising the civil justice system is not an underlying objective of the reform proposals for its own sake, but rather is a mechanism through which it is considered that those objectives can be realised.

Acland-Hood goes on to give a number of examples of the benefits of digitalisation including reducing the type of physical waste¹⁸⁹ discussed in the introduction to this work, but, and this is perhaps more relevant to this thesis, she also focuses on the ease of access to online court hearings,¹⁹⁰ and indeed online submission of forms in a way which reduces the potential for errors and thus costs.¹⁹¹ Again, this would seem to be directly linked to the reform objectives in terms of promoting access to justice and reducing the costs associated with cumbersome procedures. It is true that the Chief Executive recognises that online hearing of some cases will not always be

¹⁸⁶ S Acland-Hood, ‘Shaping Change Around Users Increases Efficiency Too’ (2018) Inside HMCTS Blog available at <https://insidehmcts.blog.gov.uk/2018/05/14/shaping-change-around-users-increases-efficiency-too/> accessed 7/5/2020.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

appropriate to promote access to justice,¹⁹² such that she does not seem to be arguing that digitalisation will create a utopian civil justice system, and in this regard, she asserts that there needs to be a balance undertaken between facilitating ease of access through digitalisation and ensuring that justice is still achievable.¹⁹³ Again, at first glance, this seems to show recognition of the fact that digitalisation is not itself an objective but rather a means through which the reform objectives may sometimes be met.

The problem however, it is submitted, is that in addition to generally citing only the ostensible benefits of digitalisation, and again these do seem to link directly to the aims of the reform programme as discussed in the previous chapter, Acland-Hood fails to delineate exactly *how* such a balance should be achieved or indeed in *what ways* digitalisation may undermine or promote the facilitating of justice. Indeed, nowhere throughout the blog series as a whole, and given that the aim is to justify the approach to reforms and provide updates on progress, this seems problematic, does there seem to be evidence of *how* digitalisation can be seen to achieve the objectives of the reform programme nor indeed how the balance discussed above may be facilitated. There is just a series of assertions that it *will*. Here for example, Anbil states that digitalisation can facilitate ‘better and smarter’¹⁹⁴ working; and Acland-Hood herself states that digitalisation will minimise delay and

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ B Anbil, ‘Digital Architecture at the Core of Reform’ (2018) Inside HMCTS Blog available at <https://insidehmcts.blog.gov.uk/2018/08/21/digital-architecture-at-the-core-of-reform/> accessed 7/5/2020.

facilitate greater access.¹⁹⁵ It is trite to say that digitalisation will facilitate the aims of the reform package. Absent an without analysis of exactly how this is likely to be the case, one must, it is argued, approach the commentators' words with some caution. That is not to say that the assertions in the HMCTS blog are wrong, and indeed it will be shown below that Acland-Hood's words above appear meritorious, but simply that more justification is needed in order to support the arguments.

It seems almost axiomatic that not requiring people to attend physically in all cases might sometimes improve access, and it is true that the Chief Executive does recognise that the move towards digitalisation, particularly in respect of the OCC, will require an assessment of what works and what does not.¹⁹⁶ However, without a clear basis for how the processes will be considered to be effective and indeed what it is about them which renders them suitable to achieve the objectives of the reform programme, evaluating the usefulness of digitalisation seems impossible, at least from the HMCTS documents alone.

Here, it is useful to consider the work of those assessing the move towards digitalisation, asking what benefits this may bring and how any challenges in doing this must be overcome in order for the reforms, and this will include

¹⁹⁵S Acland-Hood, 'Susan Acland-Hood Sets Out Priorities for the Next Phase of Courts and Tribunals Reform' (2017) Inside HMCTS Blog available at <https://insidehmcts.blog.gov.uk/2017/10/26/susan-acland-hood-sets-out-our-priorities-for-the-next-phase-of-courts-and-tribunals-reform/> accessed 7/5/2020.

¹⁹⁶S Acland-Hood, 'How do We Work Out When to Stick and When to Twist?' (2019) Inside HMCTS Blog available at <https://insidehmcts.blog.gov.uk/2019/02/28/how-do-we-work-out-when-to-stick-and-when-to-twist/> accessed 7/5/2020.

the development of the OCC, to be considered effective. Master of the Rolls, Sir Geoffrey Vos, is spearheading a change in attitudes towards technology in the justice system. In his speech at the ISDA Virtual Annual Legal Forum, Sir Geoffrey Vos highlighted that technology will allow applicants to exercise their legal rights 'expeditiously and economically'¹⁹⁷, two key objectives which have driven technological advancements in the justice system. Given the scepticism with which digital reforms are viewed by some in the legal sphere, Sir Geoffrey Vos' public support of legal technology will gradually translate into substantive actions to implement a technologically advanced legal system.

Sir Geoffrey Vos also argues that a technologically advanced justice system is no longer just an option. Citing the example of several consumer-facing industries such as energy suppliers who have seamlessly pivoted to conduct their transactions with customers online, Sir Geoffrey convincingly states that the future generation will not engage with the paper-based and court-centric justice system which is not balanced with an alternative mechanism to resolve their cases expeditiously and cost-effectively through technology¹⁹⁸. The transparency, expediency and better engagement with the justice system will naturally lead to an improved access to justice¹⁹⁹

¹⁹⁷ GV Vos, 'ISDA Virtual Annual Legal Forum Technological challenges for English law and jurisdiction' (*Courts and Tribunals Judiciary* , 10 March 2021) <<https://www.judiciary.uk/wp-content/uploads/2021/03/20210309-MR-speech-ISDAs-Virtual-Annual-Legal-Forum-10-3-21-1.pdf>> accessed 29 April 2021

¹⁹⁸ GV Vos, 'Speech by the Master of the Rolls: Reliable data and technology – the direction of travel for Civil Justice' (*Courts and Tribunals Judiciary* , 28 January 2021) <<https://www.judiciary.uk/wp-content/uploads/2021/01/20200128-MR-to-Law-Society-Lawtech-data-technology-economic-effect.pdf>> accessed 29 April 2021

¹⁹⁹ *ibid*

Often ignored in the discussions on using technology to resolve cases are the economic benefits to be had. Sir Geoffrey Vos highlights the example of fostering an efficient debt recovery system through technology, which will allow debt claims to be resolved quickly, leading to fewer insolvencies in time-sensitive circumstances²⁰⁰. This will not only benefit the individual and SME applicants but also contribute to a thriving economy. The fast processing of cases will also have the additional benefit of being able to collect and analyse a vast amount of data relating to the cases and applicants²⁰¹, which is more complicated to do in a paper-based court-centric system. A large accumulation of data will act as a stepping-stone to creating a sophisticated AI-based dispute resolution system online through the use of machine learning in the future. However, in order to improve access to justice through technological reforms such as the £1 billion reform in contention, Dr Natalie Byrom argues that a robust strategy would need to be adopted and implemented around data collection and sharing²⁰². This would allow for analysis of cases from start to finish, which in turn would aid the designers and researchers in determining the key indicators which need to be tweaked in order to meet the reform objective of increasing access to justice.

²⁰⁰ *ibid*

²⁰¹ *ibid*

²⁰² NB Byrom, 'Digital Justice: HMCTS data strategy and delivering access to justice' (*Government Assets Publishing Service*, October 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF> accessed 29 April 2021

Townend, an academic specialising in media and information law at the University of Sussex, has been clear that it is important to draw a distinction between moving towards digitalisation in a way that supports the theoretical objectives of the reform programme, again as discussed throughout this work so far, and moving towards the digitalisation of processes just because that is the aim of the package, ostensibly justified by the underlying objectives.²⁰³ Indeed, she goes further here and submits that there has been little guidance on how the success of digitalisation should be measured, and instead shows something of a blind commitment to digitalisation justified simply by its apparent ability to promote the aims of the reform package.²⁰⁴ This, it is argued, seems to confirm the argument above: the issue is not necessarily that digitalisation, either of processes, or indeed through the move to an online hearing system, *cannot* meet the objectives of the reform package and thus be considered unsuccessful, but rather that merely asserting that digitalisation is beneficial in this regard and then considering how far there has been digitalisation as a measure of success, is not enough.

This is a crucially important point that echoes those made in the Chapter Two Literature Review, particularly those linked to the contrasting positions adopted by Susskind (2018 and 2019), versus De's more circumspect view that online courts may not necessarily prove more cost-effective in the long run. In essence, Townend appear to accept the proposition that whilst

²⁰³ J Townend, 'Lost Voices in the Process of Courts Digitisation' (2019) Reform available at <https://reform.uk/the-reformer/lost-voices-process-courts-digitisation> accessed 7/5/2020.

²⁰⁴ *ibid.*

greater justice system cost-effective service delivery is *one* legitimate way in which to measure OCC model reform success, it is not the exclusive success measure.

Similarly, Lexis Nexis researchers have suggested that digitalisation difficulties are not limited to practical problems when introducing the reforms,²⁰⁵ but should be considered to include evaluation of whether digitalisation will ‘successfully ease the burden on the UK judicial system’.²⁰⁶ Again, these points align with the arguments not only above but also in the previous chapter that this is the essence of how digitalisation should be assessed in respect of the reforms package, although of course it does not necessarily add anything helpful in terms of how such an assessment might be made. The researchers do go on, however, to submit that digitalisation, whilst it may involve initial costs in respect of development,²⁰⁷ may serve to reduce costs in the long-term due to automated processes, and that access to justice might be improved by enabling users to be ‘pro-active’²⁰⁸ in terms of managing their case progress, and accessing services in a ‘tailor made’²⁰⁹ way. The researchers make some comments in terms of the negative effect on practitioners,²¹⁰ but evaluation of these is beyond the scope of the discussion here. Rather, it is simply noted that the document seems to

²⁰⁵ --, ‘Digitisation of the Courts – Bad News for Advocates: A Review of the Digitalisation of the Courts and the Impact of Technology for Practitioners?’ (No Date Available) available at <https://www.lexisnexis.co.uk/research-and-reports/bar/digitisation-of-the-courts-bad-news-for-advocates.html> accessed 7/5/2020.

²⁰⁶ *ibid.*

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*

²¹⁰ *ibid.*

suggest that despite the lack of communication from the HMCTS, digitalisation does offer an opportunity to achieve the goals of the reform package.

Further support here may be taken from the work of JUSTICE. They state that although the Joint Statement was clear that the HMCTS reforms would be undertaken with a view to ‘combining [the] respected traditions [within the justice system] with the enabling power of technology’²¹¹ and indeed it has been shown that the HMCTS reform programme has emphasised the use of technology in the reform process, this must be pursued in line with an understanding that the use of digital technology may be accompanied by some negative outcomes.²¹² The organisation highlights that although there are ‘opportunities’²¹³ associated with moving towards a digital justice system, there are also a number of potential ‘pitfalls’²¹⁴ which must be overcome if the digital revolution of the system is to ensure an effective reform programme. In this regard, the publication points to²¹⁵ the 2018 JUSTICE report on Preventing Digital Exclusion,²¹⁶ which evaluated not only the ways in which digitalisation may provide opportunities to achieve the reform

²¹¹ The Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, *Transforming Our Justice System* (2015), 3, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf accessed 6/5/2020.

²¹² --, ‘Preventing Digital Exclusion from Online Justice’ (No Date Available) available at <https://justice.org.uk/our-work/assisted-digital/> accessed 8/5/2020.

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018) available at <https://justice.org.uk/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf> accessed 8/5/2020.

objectives, but also the problems which may arise in this context and how these can be mitigated.²¹⁷

The report will be considered shortly. However, firstly it is observed that JUSTICE is clear that the report has been advocated by Lord Briggs in respect of how far its recommendations, not only in respect of the OCC, but also in terms of the inclusion of digital technology in the civil justice system in a more general sense, may lead to digitalisation being used in a manner that creates benefits and a move towards achieving the objectives of reform.²¹⁸ Of course, an endorsement by Lord Briggs alone is not tantamount to justification for the use of digital technology to ensure an improved civil justice system. However, it is argued that given that his Lordship has repeatedly been clear that digital justice will ensure improvements to the system,²¹⁹ but only insofar as the design of the new system ‘address[es] challenges’²²⁰ associated with digital justice, including not only accessibility but also security, his approval of the report must be taken as support for the way in which the negatives of digital justice can be overcome pursuant to meeting the underlying objectives of the reform programme.

²¹⁷ *ibid*, *passim*.

²¹⁸ --, ‘Preventing Digital Exclusion from Online Justice’ (No Date Available) available at <https://justice.org.uk/our-work/assisted-digital/> accessed 8/5/2020.

²¹⁹ R West, D Newberry and M Stockdale, ‘Online Courts: A Report on the First International Online Courts Forum’ (2019) Kennedy’s Law available at <https://www.kennedyslaw.com/thought-leadership/article/online-courts-a-report-on-the-first-international-online-courts-forum> accessed 8/5/2020.

²²⁰ *ibid*.

Moving on to the report itself, the research outlines apprehension from some sources that notwithstanding the fact that technology might serve to streamline the civil justice system in some respects, some initiatives, notably the development of the OCC, might ‘exacerbate existing barriers to justice’,²²¹ notably in respect of ensuring that people are able to *use* the technology available, or indeed to *access* that technology particularly in the cases of people in low or disenfranchised socioeconomic groups.²²² The report did not suggest that this was sufficient to move away from including digital technology, or indeed from progressing towards the development of an OCC to meet the reform objectives, but rather asserted that these potential issues must be taken into consideration during the planning and implementation stages.²²³ It is true that one of the documents produced by Acland-Hood, mentioned in the introductory chapter, did recognise the need to ‘listen’²²⁴ to concerns in respect of the use of technology, and indeed to communicate these to the public,²²⁵ and this may suggest some departure from the assertions earlier in the chapter that the HMCTS has been slow to recognise the potential issues with the use of digital technology in the reform process. However, it is submitted that Acland-Hood still fails to highlight exactly what those issues comprise, and thus the 2018 report appears to be much more useful in this respect than the CEO’s comments,

²²¹ JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018), Executive Summary, available at <https://justice.org.uk/wp-content/uploads/2018/06/Preventing-Digital-Exclusion-from-Online-Justice.pdf> accessed 8/5/2020.

²²² *ibid.*

²²³ *ibid.*

²²⁴ S Acland-Hood, ‘We’re Changing for a Purpose – and Listening Too’ (2018) Inside HMCTS Blog available at <https://insidehmcts.blog.gov.uk/2017/09/19/were-changing-for-a-purpose-and-listening-too/> accessed 6/5/2020.

²²⁵ *ibid.*

which simply refer to how far the HMCTS has answered questions in terms of whether reform had been ‘executed’²²⁶ appropriately.

In this regard, it is also prudent to consider the work of Thomas and Tomlinson, who recognise that the intention behind digitalisation, and they refer specifically here to the development of the OCC,²²⁷ is to improve access to justice.²²⁸ In this regard, *this* author highlights the direct link between this and the objectives underpinning the need for reform, but notes, and this is clear in Thomas and Tomlinson’s work,²²⁹ that there is the potential for digital justice to have exclusionary effects and thus undermine the purpose of reform, and indeed to reduce the effectiveness of the justice reached.²³⁰ Therefore, in a similar way to the JUSTICE report, the commentators show a clear understanding of the potential issues which may arise as a result of digital technology and in this way these views should again be considered preferable to the HMCTS documents above which seem to recognise that issues may arise most notably in terms of delivery of the new system rather than *because* of mechanisms within that system. This notwithstanding, Thomas and Tomlinson do recognise further issues which might arise, although these appear to be questions of uncertainty of operation rather than necessarily issues that relate specifically to the use of digital technology in the justice reform. The authors for example point to questions

²²⁶ *ibid.*

²²⁷ R Thomas and J Tomlinson, ‘Remodelling Social Security Appeals (Again): The Advent of Online Tribunals’ (2018) 25(2) JSSL 84-101, 84.

²²⁸ *ibid.*

²²⁹ *ibid.*

²³⁰ *ibid* 85.

surrounding how it will be ensured that the online system is fair;²³¹ how questions of fairness will determine which cases are appropriate for online consideration;²³² and the extent to which ‘open justice’²³³ can be achieved in a meaningful way through an online forum, particularly in terms of public access. This issue of open justice will be considered in more detail in Part II of this thesis. Here however, *this* author does not disagree that these questions may arise through the development of an OCC as part of a reform package centred on digitalisation. However, it is submitted that these matters are not necessarily related to the use of digitalisation *per se*, but rather may result as a question of design in a new type of system. Issues with access to digital technology and the resulting impact on access to justice as a goal seem more inherent to digitalisation itself, and are therefore argued to be more problematic than these types of issues which, it is submitted, are more related to the way in which any system is designed.

This does not mean of course that the issues with using digital technology to meet the reform objectives are problematic in a way that cannot be mitigated. Indeed, as the press summary accompanying the JUSTICE report was clear, there is the potential with the use of digital technology to not only mitigate the potential ways in which the civil justice system is failing and thus meet the reform objectives in an effective way, but also that technology

²³¹ *ibid* 97.

²³² *ibid* 98.

²³³ *ibid* 98-99.

may be used to mitigate the very difficulties which arise from its usage.²³⁴ Thus, the summary notes, being aware that accessibility may be undermined through the incorporation of technology into the civil justice system in that many users will not have the digital skills necessary to use the new mechanisms, may support the use of technology to develop skills in such users,²³⁵ for example through developing assistance programmes, and these will be discussed later, in Part II. Given the observations earlier in this thesis that advances in digital technology have been rapid over the past few years, such initiatives may have benefits beyond ensuring that the reforms to the system are achieved, ensuring that members of the public are able to access such technology in a variety of contexts. This benefit however may be merely incidental and it is argued that by recognising the apparent negatives of the use of technology, notwithstanding its clear opportunities for developing the civil justice system, the design of initiatives should be able to make the best use of the opportunities without experiencing the associated negatives. This certainly appears to be a step away from what was earlier described as being a blind commitment to the use of technology by the HMCTS, and may instead go some way to meeting the concerns of researchers who have suggested that digital technology can only be used effectively if its impact is

²³⁴ --, 'Preventing Digital Exclusion: Press Summary' (2018) available at <https://justice.org.uk/wp-content/uploads/2019/07/Preventing-digital-exclusion-press-summary.pdf> accessed 8/5/2020.

²³⁵ *ibid.*

assessed comprehensively,²³⁶ and that it is ‘just’²³⁷ in that everyone can access the system when it is delivered in a digital way.²³⁸

It is argued that the 2018 report, taken together with the summary, highlights that ensuring that digital technology is used effectively does not simply involve extolling the virtues of digital technology pursuant to the reform objectives, but recognising and setting out a plan for how the negatives, and these arise mainly in terms of accessibility, are able to be dealt with. It is argued therefore that an assessment of the developing OCC in this context must consider not only the benefits that digital technology is able to offer in achieving the reform objectives, but how the potential negatives, most notably in terms of access for the approximately 10% of UK adults who do not have online skills,²³⁹ can be mitigated.

Incidentally, it may be that given that there has been extensive consideration in the report of the opportunities and ‘pitfalls’²⁴⁰ with digitalisation as a mechanism for achieving effective civil justice reform pursuant to the objectives highlighted in the previous chapter, then this might mitigate the apparent failure of the HMCTS to do this in its ongoing publications relating to the reform process. Such potential issues here include those referred to

²³⁶ Reform, *Delivering Digital Courts* (2019), 11, available at <https://reform.uk/sites/default/files/2019-06/Delivering%20Digital%20Courts%20-%20Corrected.pdf> accessed 8/5/2020.

²³⁷ *ibid* 3.

²³⁸ *ibid*.

²³⁹ *ibid* 14.

²⁴⁰ --, ‘Preventing Digital Exclusion from Online Justice’ (No Date Available) available at <https://justice.org.uk/our-work/assisted-digital/> accessed 8/5/2020.

by Tomlinson and Karemba, who, in consideration of the impact of digital reform in the immigration appeals system, highlight that there could be cost implications as a result of accessing digital resources for litigants who do not have this ability at home;²⁴¹ ‘mistakes’²⁴² which could occur within the justice process online that have not been experienced through traditional forms of justice;²⁴³ and indeed difficulties in managing evidence and making complicated decisions through ‘online forums’.²⁴⁴ Again, it is argued that these types of difficulties seem to go beyond the type of design issues which appear to be the focus of the HMCTS listening programme considered above, but relate specifically to the very use of digital technology itself. These problems may be able to be mitigated, and indeed Tomlinson, writing with Thomas in the article cited earlier, recognises that this may be done through technology support in terms of assisting users with technology,²⁴⁵ and indeed through using ‘data’²⁴⁶ to evaluate whether decision making is ‘accurate’²⁴⁷ and thus to support changes to the system to ensure that the reform objectives are met.

Once again therefore, it does seem clear that so long as the difficulties associated with digital justice are recognised, it is feasible that these may be mitigated not only through system design but also through the use of digital

²⁴¹ J Tomlinson and B Karemba, ‘Tribunal Justice, Brexit and Digitalisation: Immigration Appeals in the First Tier Tribunal’ (2019) 33(1) JIANL 47-65, 64.

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *ibid.*

²⁴⁵ R Thomas and J Tomlinson, ‘Remodelling Social Security Appeals (Again): The Advent of Online Tribunals’ (2018) 25(2) JSSL 84-101, 91 and 97.

²⁴⁶ *ibid.* 98.

²⁴⁷ *ibid.*

tools themselves. It remains the case however, it is argued, that a failure to elucidate these considerations to the public in the blog as a forum for communication is problematic, but this may be theoretical rather than a real issue in practice if the conclusions of the JUSTICE report, and indeed those referred to by the commentators throughout this section, are incorporated into the final design for the new system. It seems from an update on the impact of the report produced in 2019 that this has in fact been the case: the update is clear that HMCTS have *engaged*²⁴⁸ with the researchers in order to ensure that the problems with using digital technology as part of the reform package are able to be overcome.²⁴⁹ An assessment of the use of digital technology within the reform package as a whole is not the aim of the discussion here, and the operation of the new system will be considered later in the work. Rather, it is simply argued that whilst there are a number of clearly identifiable benefits to using digital technology in implementing the objectives of reform of the civil justice system, the driving factor behind ensuring that these are implemented successfully is designing the system with positive steps to minimise the risks associated with digital technology, rather than just exercising a blind commitment to digitalisation as seems to be the case throughout the HMCTS blog.

²⁴⁸ --, 'One Year Update: Preventing Digital Exclusion from Online Justice' (2019) available at <https://justice.org.uk/one-year-update-preventing-digital-exclusion-from-online-justice/> accessed 8/5/2020.

²⁴⁹ *ibid.*

AI in the context of OCC and its scope for future reforms

The discussion above has concerned digital processes and a move towards the online conducting of cases and the preliminary aspects of cases, such as the submitting of documents. It is necessary to note that using digital technology in the reform of the civil justice system, including in relation to the OCC, may involve the use of AI. The purpose of focusing on AI in the context of this Thesis is to imagine and extrapolate how AI may fit into the justice system reform in the future, and how that would increase access to justice. In this regard for example, researchers for Reform have argued that whilst there may be evidence that AI may streamline court processes, and thus it would seem go some way towards being capable of meeting the reform objectives identified in the previous chapter, there remains a question of how far justice can be achieved if AI ‘replace[s] human judges’.²⁵⁰ Even before this point however, the researchers note the potential for AI to be able to make the justice process more effective in terms of ‘predict[ing] what the outcome of litigation would be’²⁵¹ and therefore determining which cases move to early settlement, and indeed in terms of ‘scan[ning]’²⁵² large numbers of documents much more quickly, such that the costs of the system could be reduced. However, the report also goes on to recognise that because AI can be used not only in the preparation of cases but also in the decision making related to those cases, questions arise in respect of the

²⁵⁰ Reform, *Delivering Digital Courts* (2019), 14, available at <https://reform.uk/sites/default/files/2019-06/Delivering%20Digital%20Courts%20-%20Corrected.pdf> accessed 8/5/2020.

²⁵¹ *ibid* 12.

²⁵² *ibid* 8.

need for a human as opposed to artificial judge.²⁵³ It points here to the balance between a need for accurate and unbiased decision making,²⁵⁴ which AI might be programmed to provide, and the ‘empathetic ability’²⁵⁵ to take into account the circumstances of the parties to a case and to assess how appropriate it is for matters wider than the particular facts to be taken into account.²⁵⁶

It is true of course, as Wu points out, that there has been criticism of the judicial system in respect of how far such empathy is able to be delivered in a way that is appropriate, and indeed arguments that some judges are ‘out of touch with the public’.²⁵⁷ However, it is difficult to accept Wu’s assertions that programming AI in a ‘holistic’²⁵⁸ way will necessarily allow for empathetic decision making in a way that judges may be unable to do. Programming *might* allow for ‘robust’²⁵⁹ decision making in that there will not be room for judicial bias. However, given that it is axiomatic that this will be delivered without the human element of decision making, it is argued that what is needed is more rigorous analysis of the need for such human elements, together with the benefits AI may offer in some areas of the civil justice system and how this might be balanced in terms of considerations of ensuring that justice is achieved fairly, transparently and appropriately.

²⁵³ *ibid* 12.

²⁵⁴ *ibid* 12-13.

²⁵⁵ *ibid* 13.

²⁵⁶ *ibid*.

²⁵⁷ J Wu, ‘AI Goes to Court: The Growing Landscape of AI for Access to Justice’ (2019) available at <https://medium.com/legal-design-and-innovation/ai-goes-to-court-the-growing-landscape-of-ai-for-access-to-justice-3f58aca4306f> accessed 11/5/2020.

²⁵⁸ *ibid*.

²⁵⁹ *ibid*.

Delacroix, a professor of Law and Ethics at the University of Birmingham has been clear that what such an assessment will require is examination of the ethics of using AI in a context where the complexities of decision making and the human issues which arise simply ‘cannot be addressed by an algorithm, no matter how much empathy’²⁶⁰ the relevant AI might be able to present. This, it is argued, is persuasive in that it goes further than simply considering the issue as a binary one between the benefits and negatives of human compared to artificial decision making, but instead looks at the role of AI in a complex system with numerous issues in which accuracy, empathy and openness are all relevant factors.²⁶¹ One is therefore inclined to accept the assertions of Siboe, writing recently for the Oxford Human Rights Hub, who makes clear that whilst AI certainly has the potential to promote access to justice by mitigating the length of time taken for processes, predicting case outcomes and indeed making decisions in a traceable and thus transparent way, it can only be considered ‘as good as the programming that goes into it’.²⁶² This seems to reflect the assertions made above that notwithstanding the potential benefits of AI, what is needed is an evaluation of how justice is achieved through decision making, and it is therefore argued that the problems here seem related to design and the capabilities of programmers, and the outcome of any assessment of how far the human

²⁶⁰ S Delacroix, ‘How Could AI Impact the Justice System?’ (2018) Thomson Reuters Legal Insight Europe available at <https://blogs.thomsonreuters.com/legal-uk/2018/11/30/how-could-ai-impact-the-justice-system/> accessed 11/5/2020.

²⁶¹ *ibid.*

²⁶² N Siboe, ‘Use of Artificial Intelligence by the Judiciary in the Face of Covid-19’ (2020) Oxford Human Rights Hub available at <http://ohrh.law.ox.ac.uk/use-of-artificial-intelligence-by-the-judiciary-in-the-face-of-covid-19/> accessed 11/5/2020.

element is truly necessary to achieve justice in decision making within the civil system.

A specific point concerning whether an AI system that ensures appropriate empathy is built in will also necessarily avoid creating systemic bias in AI decision-making, is a final OCC reform issue inviting attention here. It is important to reconsider a core fear expressed by AI opponents in these civil justice reform contexts – machines are dispassionate and impersonal, and thus ill-suited to making final decisions regarding what are ultimately human legal disputes, often involving moral and ethics consideration. A commonplace dispute example underscores this position. X and Y are neighbours in a residential community. X has an easement (3 feet wide) that runs along the X – Y property boundary. The easement permits X access to the side of his house for repair and maintenance purposes. X recently installed a drainpipe from his roof, and rainwater now runs from X's property to Y. After a major rainstorm, water gushed from the drainpipe, flooded Y's adjacent flower garden, and washed away Y's extensive borders and gravel pathway. X readjusted the pipe after this storm, but X refuses to compensate Y for this damage and related loss of amenity.²⁶³

For the AI opponents, the notion that a machine could properly decide this case is problematic. By their nature, neighbour and related property disputes are intensely personal. The way that Y might value their loss of amenity is

²⁶³ A legal principle derived from *Rylands v Fletcher* [1868] UKHL 1 (HL) authorities.

arguably difficult to capture in an AI decision-making algorithm – the central contention expressed by Delacroix (cited above).²⁶⁴ It is acknowledged that even for AI – OCC proponents, this issue must be resolved, with two reasons motivating this position: (1) overall system effectiveness (objectively reasonable AI-based decision-making); combined with (2), the need to inspire broader public and civil justice system user confidence that AI-based decision-making is to be welcomed, and not feared.²⁶⁵ The rhetorical question prompted by this X -Y neighbour dispute frames the empathy – bias point developed here: how can the machine distinguish between making an empathetic response to both sides, and yet avoid bias? Two recent AI-related EW civil justice system developments shed further light concerning how this provocative issue might be resolved in a future OCC platform, as now considered.

The Council of Europe (through its *European Commission for the Efficiency of Justice* (CEPEJ)) has recently published a report that seeks to ensure robust AI decision-making quality control is maintained across any OCC-based civil justice platform.²⁶⁶ CEPEJ notes that two areas are vital for civil justice – AI technology intersections at this time, each carrying ‘strong ethics implications’ that must be resolved before any AI decision-making elements are integrated into current justice systems: (1) ‘algorithmic justice’, the CEPEJ

²⁶⁴ Delacroix, ‘How Could AI Impact the Justice System?’ (2018)

²⁶⁵ Wu, ‘AI Goes to Court: The Growing Landscape of AI for Access to Justice’ (2019).

²⁶⁶ European Commission for the Efficiency of Justice (CEPEJ), ‘Possible introduction of a mechanism for certifying artificial intelligence tools and services in the sphere of justice and the judiciary’ (December 2020) [Online] Available: <<https://www.coe.int/en/web/portal/-/cepej-artificial-intelligence-and-cyberjustice-at-the-heart-of-discussions>> [22 January 2021].

synonym used to describe ‘online dispute resolution’ – defined as a legal solution to a problem obtained through digital means; (2) AI as a possible tool that enhances judicial decision-making (better overall judicial analysis).²⁶⁷ How the CEPEJ believes that these two points can be best resolved for the broader EU civil justice system – AI dynamic is less important to this Chapter conclusion than the possible EW law reform direction that it inspires. Any AI decision-making component can be rigorously tested using actual human judge-decided cases. In this way, objective evidence will be available to assess whether the AI system is sufficiently empathetic (in the ways empathy is understood in the above Chapter sections). At the same time, the AI process could be examined for bias weaknesses – in the X-Y dispute context, an AI bias favouring protecting roof from rainwater accumulation would constitute bias that might undermine decision-making quality.

A way in which this AI decision-making testing can be furthered is by inputting thousands of previously decided cases into databases that AI relies upon when specific disputes like X versus Y are assessed. In December 2020 British and Ireland Legal Information Institute (BAILII) granted Oxford University law and justice system academics access to its extensive legal judgments database (estimated at over 400,000, and continually expanding as new cases are decided and then inputted into BAILII virtually every day).²⁶⁸

²⁶⁷ Ibid.

²⁶⁸ Michael Cross, ‘BAILII grants access to judgments for mass AI analysis’ (December 2020) *Law Society Gazette* [Online] Available: <

The Oxford research initiative is designed to "unlock new research insights into English case law", whereby AI predictive ability will be bolstered by the additional knowledge acquired from these EW, Scots, and Irish precedents.²⁶⁹

This Cross article notes that BAILII had previously resisted such research requests, on the basis that it was wrong for BAILII to indirectly encourage the development of AI systems that could predict case outcomes on a judge-by-judge basis.²⁷⁰ For example, in a 'live' hearing setting, if X knew that Judge Z was inclined to rule on property dispute cases in a specific way, it might seek to avoid having Z hear its case. However, this specific BAILII – Oxford research initiative has potentially positive implications for AI decision-making, and achieving a workable balance between machine empathy and bias reduction. The more cases that machine-based systems can draw upon when processing specific dispute data, the fairer the ultimate civil justice decision will be – especially where CEPEJ-styled quality controls are implemented.

Summary

It appears that there is a commitment to working towards digitalisation of the civil justice system, and that this is supported pursuant to achieving access to justice within a streamlined, cost-effective service which operates clearly. This seems directly tied to the theoretical objectives highlighted in

²⁶⁹ Ibid.

²⁷⁰ Ibid.

the previous chapter as underpinning any successful reform programme in the context of the UK system. However, one should be careful in supporting any digitalisation *whatsoever*, and it has been argued that the HMCTS communication does not make it sufficiently clear how digital processes should be measured in terms of success. This, it is argued, can be mitigated by the research done in the 2018 JUSTICE report and it is submitted that in order to be effective in terms of the objectives underpinning reform as discussed in chapter 2, the move towards digitalisation must secure a balance between realising the benefits it can achieve and avoiding the potential difficulties which may arise. In this context, whilst digitalisation can promote access to justice and reduced costs, it may conversely increase difficulties with access and costs in some respects. Technology itself might be useful in mitigating some of these issues through access programmes and indeed through careful design of the system, but these issues are not limited to design and are instead fundamentally linked to digitalisation as a process. There must therefore, it is argued, be clear processes in place which not only consider the potential issues which might undermine achieving reform objectives digitally, but that is also sufficient to mitigate those issues, and the same points can be made in respect of AI. The AI decision-making quality, empathy and bias points developed above also contribute to how reforms can be best advanced in this area.

PART II

How the Online Civil Court will operate in practice

Chapter 4 - The Online System: Adjudication and ADR; Processes, Conciliation and Legal Advice; Transparency.

Introduction

The Chapter aim is to commence an assessment of recent OCC developments and their effectiveness in the light of the Part 2 conclusions.

Adjudication and ADR; Processes, Conciliation and Legal Advice; and Some Comments on Transparency

There has been progress towards the developing of the online money service, and indeed on the divorce and probate platforms. It might therefore seem that there has been development of the OCC and that this can now be assessed in respect of how far the progress is able to be considered as an effective reform initiative against the standard developed in chapter 2 whilst taking into account the potential issues within digitalisation as discussed in chapter 3. The civil money claims service was not an entirely new initiative but rather was launched in 2018 as an alternative to the pre-existing money claim online service, with a view to enabling individuals to begin and manage money disputes, with a value of up to £10,000, online.²⁷¹ It intends to operate to reduce the number of persons needing to use the small claims

²⁷¹ M Frisby, *The Online Civil Money Claims Project* (2019) HMCTS, 6, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785324/Civil_reform_event_11_March_2019.pdf accessed 12/5/2020.

court and instead allow disputes to be resolved in an online forum and without the adversarial nature of such claims.²⁷² The service operates by allowing users to submit a claim, respond to a claim, and achieve a settlement in respect of that claim, in much faster times than the typical small claims process.²⁷³ In this regard then, one might be inclined to initially accept the assertions of practitioners at Walker Morris, who suggest that the service might properly be considered as a ‘first step’²⁷⁴ towards the OCC in that it is an online forum for the swift settlement of disputes.

However, the difficulty is that, as Holmes observes, such developments appear to be focused on ‘developing digital services enabling users to initiate and manage cases online, rather than the “pure” vision of the online court as a three tier service’.²⁷⁵ In this regard, it is necessary first to return again to the Briggs Interim Report: Briggs LJ highlighted that an OCC would mitigate the weaknesses in the civil justice system as discussed in chapter 1 by creating something which is ‘no mere digitisation of an existing court’,²⁷⁶ but rather an entirely new initiative.²⁷⁷ If the reforms made thus far then, are the type of digital services that Holmes describes rather than being

²⁷² *ibid.*

²⁷³ HM Government Guidance, *HMCTS Reform – Civil* (2019) available at <https://www.gov.uk/guidance/hmcts-reform-update-civil> accessed 11/5/2020.

²⁷⁴ J Coley, ‘HMCTS Online Civil Claims Service’ (2018) Walker Morris available at <https://www.walkermorris.co.uk/publications/hmcts-online-civil-claims-service/> accessed 12/5/2020.

²⁷⁵ N Holmes, ‘The Online Court and the Digitisation of Justice’ (2019) available at <https://www.infolaw.co.uk/newsletter/2019/06/online-court-digitisation-justice/> accessed 11/5/2020.

²⁷⁶ Briggs LJ, *Civil Courts Structure Review: Interim Report* (2015), 6.3, available at <https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf> accessed 6/5/2020.

²⁷⁷ *ibid.*

something novel, then it is axiomatic that they do not meet the aims of the OCC as a direct response to the problems with the civil justice system as discussed earlier in the work. Digitisation might, as Ahmed observes, mitigate some problems with the existing system,²⁷⁸ but given that digitalisation has been argued only to be capable of being effective where it is used to promote reform objectives rather than for its own sake, unless there is a move away from the current system, these cost reductions cannot alone be taken to be successful.

Briefly, it should be noted that the discussion in chapter 3 suggested that AI may ultimately be used to replace the role of judges in this respect, and indeed suggested that more research will be needed in order to evaluate how far this will enable access to transparent justice. There is nothing to suggest that this is the aim of the final stage of the money claims online service, although in any event, it is submitted that even if the use of AI in this respect would constitute a lack of transparency, it has already been shown that the third stage would seem to take this approach anyway, such that any lack of transparency associated with AI decision making would merely be an extension of an existing problem, rather than one associated with technology alone.

There are clearly then a number of benefits to the online money claims system; however, this is not the same as them constituting progress towards

²⁷⁸ M Ahmed, 'A Critical View of Stage 1 of the Online Court' (2017) 36(1) CJQ 12-22, 14.

the online court as envisaged in the Briggs report, notwithstanding the fact that it is clear from the above that the money claims online service does seem to follow the type of steps envisaged in the Briggs report. As shown earlier, Briggs LJ envisaged a 3-step model beginning with the uploading of documents and early settlement;²⁷⁹ moving on to conciliation;²⁸⁰ with judge involvement only included in the final stage where the prior two have been unsuccessful.²⁸¹ This appears to be directly reflected in the money service; the problem is that this does not really appear to create anything novel in the way that the Briggs report suggested was needed. The process may seek to prevent digital exclusion, use ADR effectively and indeed be transparent in providing support to users, but the system is merely moving existing services online. As Susskind observes, by using technology to simply improve the nature of the existing system rather than really reforming the very foundation of that system and developing an online court in the way Briggs suggests, improved access to justice will not be able to be achieved.²⁸² The move towards such services may serve to increase access to justice by removing a physical need to attend courts, as long as the potential for digital exclusion is addressed and it seems that it has been, but without a move away from traditional systems,²⁸³ it remains difficult to see how the problems with closing courts and thus reducing access can be mitigated. This is clear

²⁷⁹ Briggs LJ, *Civil Courts Structure Review: Interim Report* (2015), 6.7, available at <https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf> accessed 6/5/2020.

²⁸⁰ *ibid.*

²⁸¹ *ibid.*

²⁸² R West, D Newberry and M Stockdale, 'Online Courts: A Report on the First International Online Courts Forum' (2018) Kennedy's Law citing Professor Richard Susskind, available at <https://www.kennedylaw.com/thought-leadership/article/online-courts-a-report-on-the-first-international-online-courts-forum> accessed 11/5/2020.

²⁸³ *ibid.*

from the Interim Report which stated that what is needed is ‘something entirely new’²⁸⁴ rather than simply moving existing processes online. If there is to be a large reduction in physical courts this must, it is argued, be accompanied by extensive online courts, not merely online processes in respect of some services. The online money claims service might have reduced the delay associated with the judicial system from 13.7 to 5.2 weeks when online services are used,²⁸⁵ but again this is hardly a comprehensive measure, particularly since it, as discussed above, operates ‘without third party involvement’²⁸⁶ rather than being a court system as such, at least until the very last stage, which only cases which have not already been resolved will reach. Similarly, the probate and divorce systems, whilst they might have 100,000 users,²⁸⁷ and it is possible that by accessing the status of their cases online, individuals can have meaningful access to the justice system by managing their cases,²⁸⁸ are simply digital management systems, rather than being a move towards the online court *per se*. Digital services would appear to have been employed in a way which does reduce the delay associated with the system and give individuals the control over the own cases, however this is hardly access to justice but rather access to management of the process by which justice is achieved. The Chapter One access to justice working

²⁸⁴ Briggs LJ, *Civil Courts Structure Review: Interim Report* (2015), 6.3, available at <https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf> accessed 6/5/2020.

²⁸⁵ HM Government Guidance, *HMCTS Reform – Civil* (2019) available at <https://www.gov.uk/guidance/hmcts-reform-update-civil> accessed 11/5/2020.

²⁸⁶ *ibid.*

²⁸⁷ HM Government Guidance, *HMCTS Reform Programme: Reform Update* (2019) available at <https://www.gov.uk/guidance/hmcts-reform-programme-reform-update> accessed 11/5/2020.

²⁸⁸ HM Government Guidance, *HMCTS Online Services for Legal Professionals* (2020) available at <https://www.gov.uk/guidance/hmcts-online-services-for-legal-professionals> accessed 11/5/2020.

definition reinforces this point: civil justice procedures enabling disputing parties' access to digital technology-based systems that provide 'final, binding and enforceable dispute adjudication'.²⁸⁹

In any event, even if these measures can be considered successful, it is argued that it is problematic to consider them as steps towards the development of an online court. What the National Audit Office describes as being 'civil, family and tribunal services',²⁹⁰ are really just processing 'services'²⁹¹ and whilst there is a move towards some video link tribunal services being introduced online,²⁹² this is again not really anything novel, but rather the moving of existing services online, and thus the extent to which the reform objectives have been met must be considered limited. However, it has been shown that in some ways the system will be able to meet the reform objectives as discussed in chapter 2, subject to the considerations about digital technology in chapter 3. Lord Briggs was clear that the key issue with the civil justice system was its failure to ensure access to justice,²⁹³ and that the drivers behind this were the 'culture'²⁹⁴ inherent within the civil justice system; the large costs associated with it,²⁹⁵ and indeed the delay in the process.²⁹⁶ It appears that procedural delays have

²⁸⁹ Legg (2016)

²⁹⁰ National Audit Office, *HM Courts and Tribunals Service: Transforming Courts and Tribunals - A Progress Update* (2019), 5, available at <https://www.nao.org.uk/wp-content/uploads/2019/09/Transforming-Courts-and-Tribunals.pdf> accessed 11/5/2020.

²⁹¹ *ibid* 15.

²⁹² *ibid* 13.

²⁹³ Briggs LJ, *Civil Courts Structure Review: Interim Report* (2015), 5.23, available at <https://www.judiciary.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf> accessed 6/5/2020.

²⁹⁴ *ibid* 5.24.

²⁹⁵ *ibid*.

²⁹⁶ *ibid* 5.25.

been reduced through the use of technology and thus one might consider that, notwithstanding the fact that there is no currently operative OCC, the reforms have been effective to an extent. The difficulty however is that given that Briggs LJ emphasised the ‘culture’²⁹⁷ as being one of the main problems, it is difficult again to accept that simply moving services online will ever be able to mitigate this problem. In order for online justice to be effective, there must be the type of new court system which Briggs LJ envisaged in his concept of the OCC, not merely a commitment to the framework of steps he envisaged. It is true of course that given that Briggs LJ did suggest that there was a need for this novel element and then went on to describe the 3 steps in a way which seem to just involve moving services online, it might be that the real problem with the reforms is not just that they do not create something novel, but rather that the Briggs reforms do not really envisage this despite claiming that they do. Nonetheless, it is argued that whilst there is evidence that the new system has reduced delays, promoted access to justice in terms of encouraging usage, although that access cannot really be considered to be to the courts *per se*, but rather to settlement mechanisms, this cannot be considered to be progress towards establishing an online court system. There are clear improvements in the senses described above but the lack of transparency with the last stage, together with the focus on settlement rather than justice means it cannot be considered really as being a justice system, but rather a dispute resolution forum which reduces the need to access that system.

²⁹⁷ *ibid* 5.24.

Summary

There has been some progress towards developing online services in the context of the civil justice system. These have primarily involved the creation of online services in the divorce, probate and money dispute areas and these have been considered largely successful by users and developers. These developments aside, it is also clear that the Covid-19 pandemic has resulted in faster progress being made towards digitalisation, and whilst this has been motivated by a need to ensure safety of court users and staff rather than being underpinned by the reform objectives, it does seem clear that there has been consideration about how digitalisation can promote access to justice which is open and transparent and thus mitigate some of the concerns with digitalisation earlier in the work. Arguments from some sources that this has not been taken into account in the recent initiatives because of the urgent context in which they have been developed cannot be supported.

This notwithstanding, the overall progress towards the online court must be viewed with some caution. It is true that the reforms have been in line with the Briggs report in terms of the three steps involved in the court system, but the reality is that the initiatives are simply digitalisation of existing services, rather than the development of something novel in the way Briggs LJ envisaged. Perhaps this is something of a problem inherent in the reform objectives as it is true that the progress has followed these objectives, but

again it does not seem that a truly new court has been created. The progress has resulted in open justice to an extent and the ability of users to manage their own cases with recognition of the fact that digitalisation may exclude users, and assistance schemes have been created. This must therefore be considered an effective reform in this sense although there do seem to be problems inherent with removing lawyers from the process and thus not ensuring that individuals are represented in a way that promotes effective access to justice. It is clear that all OCC reforms are fairly characterised as a work in progress.

However, it is argued that the 3 stages themselves are problematic as they focus on the use of ADR, through mediation and settlement rather than access to court. In practice, settlement might be the aim of parties but promoting settlement throughout without access to impartial legal services cannot really be considered as access to justice and, in any event, the lack of transparency which seems to be associated with the final stage entirely undermines the reform objectives. If the point of removing legal representation is to change the culture of the system and encourage parties to settle their own disputes in a forum which promotes access by being understandable, then it hardly seems compatible with this to have a final stage which does not even necessarily require a hearing. There might be judicial involvement at this stage, but this is hardly the same as there being a hearing in an online court, and one would as such support the arguments of Smith that there needs to be greater judicial involvement in the process in

this regard,²⁹⁸ particularly since legal advisors are permitted to make determinations under stage 2. There is some evidence in terms of the possible benefits of incorporation of AI into the process, and again it seems that this has been done in a way which meets the benefits of digitalisation in the previous chapter, and indeed the reform objectives, without introducing its own problems. However, the reforms initiated to date have the demonstrable benefits outlined above, but whether justice is effectively and transparently delivered through an online court remains contentious for the reasons highlighted throughout this Chapter.

²⁹⁸ R Smith, 'Online Courts in England and Wales: Six Proposals to See Off a Gathering Storm' (2018) available at <https://law-tech-a2j.org/odr/online-courts-in-england-and-wales-six-proposals-to-see-of-a-gathering-storm/> accessed 12/5/2020.

Chapter 5 – Funding and Cost-Effectiveness; and Conclusions About the Court.

Introduction

This Chapter shifts the thesis emphasis away from the combined dispute resolution – OCC adjudication utility that has attracted significant Chapter 1 to 4 critical attention. The following Chapter sub-sections are primarily concerned with what OCC promoters consistently cite as a key online dispute resolution benefit – greater cost-effectiveness than is realisable in traditional, physical court models.

Funding and Cost-Effectiveness

It was argued in the previous chapter that the creation of the money claims service and indeed the divorce and probate mechanisms have resulted in a considerable reduction in delay in the resolution of disputes, and one might as such be inclined to consider that this would be accompanied by a reduction in costs. Booth has suggested that much of the cost involved in the civil justice system can be considered to ‘have flowed from numerous other failings in the system’,²⁹⁹ and goes on to highlight that delay, particularly in the early stages of a dispute, has the effect of increasing costs

²⁹⁹ E Booth, *The Cost of Civil Justice: Time for Review or Revolution?* (2008), New Law Journal and Lexis Nexis, 3, available at https://www.newlawjournal.co.uk/docs/default-source/article_files/the_cost_of_civil_justice_elsa_booth_4.pdf?sfvrsn=a3e0640a_2 accessed 12/5/2020.

for all parties.³⁰⁰ Indeed, Booth goes further here and submits that this might be a deliberate tactic,³⁰¹ and it is submitted that by encouraging parties to settle in the early stages, in the manner discussed in the previous chapter, this might indeed serve to mitigate costs in this regard. A similar point may be found in a speech given by Lord Dyson at the Law Society Magna Carta Event in 2015; his Lordship highlighted that ‘delay can unquestionably frustrate the achievement of justice’³⁰² and that in this regard, the problem was not only in relation to the costs associated with delay, but also in terms of the usefulness of any resolution.³⁰³ Thus, his Lordship was clear, where justice is delayed, any judgment may no longer be relevant for the parties, and evidence needed to reach a correct decision, particularly where that evidence relies on the memories of the parties, may be lacking.³⁰⁴ This appears only axiomatic, and it is not therefore necessary to consider the extent to which these arguments have merit. Rather, it is simply argued that due to the fact that the initiatives in respect of the online money claims service, discussed in the previous chapter, have reduced the delay associated with the resolution process, there will be more effective justice achieved and a lower cost to that justice. As one practitioner has noted, albeit in relation to ADR and early resolution systems in general rather than relating to the online money claims service, the settling of cases can reduce costs

³⁰⁰ *ibid* 6.

³⁰¹ *ibid*.

³⁰² Lord Dyson, ‘Delay too Often Defeats Justice: Speech’ (2015) The Law Society Magna Carta Event, 7, available at <https://www.judiciary.uk/wp-content/uploads/2015/04/law-society-magna-carta-lecture.pdf> accessed 12/5/2020.

³⁰³ *ibid* 8.

³⁰⁴ *ibid*.

significantly.³⁰⁵ Again therefore, despite the problems with the development of the service as discussed in the previous chapter, it would seem only logical to argue that a reduction in delays and a focus on settlement would reduce the costs associated with the civil justice system and thus make it more effective in this regard.

The above notwithstanding however, it does not seem that the developing reforms and the movement to online systems have mitigated costs in this way, at least not to the extent that the discussion might suggest. Susskind may be correct that access to justice is negatively impacted due to the fact that it 'costs too much and takes too long to pursue civil cases'³⁰⁶ but it does not necessarily follow that he is also correct that an online system will solve this problem, particularly in relation to cost. Writing elsewhere, Susskind points out that the civil justice system is too costly and 'inaccessible'³⁰⁷ to most people; again it has been shown throughout this work that this is indeed true and that the reforms discussed in the previous chapter, although they cannot really be considered as movement towards a proper online justice system, do go some way towards achieving better access for some people. The issue however, is that the mere fact that there are these problems in the system cannot alone support moving the system online or mean that moving the system online will reduce costs. Again, this point is

³⁰⁵ --, 'Alternative Dispute Resolution' (No Date Available) available at <https://www.moneyclaimsuk.co.uk/alternative-dispute-resolution-adr.aspx> accessed 12/5/2020.

³⁰⁶ R Susskind, 'My Case for Online Courts' (2019) Legal Cheek available at <https://www.legalcheek.com/2019/12/richard-susskind-my-case-for-online-courts/> accessed 12/5/2020.

³⁰⁷ R Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 27.

made despite the assertions earlier in the chapter that it would seem axiomatic that reducing the delays associated with the civil justice system and promoting easier access will reduce cost.

In this regard, it is prudent to begin by observing that the HMCTS reform programme will, it is estimated, cost something in the region of £1 billion.³⁰⁸ It must be noted that this cost encompasses all the reforms across the civil sector as a whole, not just the development of the court but also in terms of the criminal sector, and indeed in relation to general services and projects which apply across the whole court system.³⁰⁹ It is true that a distinction should be drawn between an initial cost in developing online systems and a potential lowering of costs overall and the assessment of the costs of the reform so far does not include such an estimate. Thus, the mere fact that there has been a large amount of spending on the reform package has little bearing on whether it will be able to reduce costs, here through the creation of the online court, in the long term, and thus be an effective reform in the manner envisaged in Part I of this work. What is clear however, is that there have been concerns raised about whether the costs can be justified, particularly where they have related to closing courts and reducing staffing numbers,³¹⁰ such that if the online systems cannot be considered to be

³⁰⁸ HM Government Guidance, *HMCTS Reform Programme Projects Explained* (2018) available at <https://www.gov.uk/guidance/hmcts-reform-programme-projects-explained> accessed 13/5/2020.

³⁰⁹ *ibid.*

³¹⁰ PM (Anon), 'Court Reform and Open Justice: Responses to the Public Accounts Committee's Transforming Courts and Tribunals Enquiry' (2018) available at <http://www.transparencyproject.org.uk/court-reform-and-open-justice-responses-to-the-public-accounts-committees-transforming-courts-and-tribunals-inquiry/> accessed 13/5/2020.

effective court processes, and it has been argued in the previous chapter that they cannot despite having had some initial success, then costs of access will increase as users have to travel to access buildings which remain open. Further evidence here can be found in research undertaken by the National Audit Office, which has argued that notwithstanding the extensive spending on the reform package, the positive impact of the HMCTS reforms is ‘likely to be smaller than expected and will take longer to achieve’.³¹¹ Indeed, this author would add that given the arguments earlier in this chapter that there is a correlation between increased delays and increased costs, it would seem that spending on the project is only likely to increase without there necessarily being a positive benefit in line with the benchmark for successful reforms developed in Part I of this work.

This seems to be clear from the conclusions drawn by the House of Commons Public Accounts Committee who, in their assessment of the progress of the reform, have found that the package has suffered increasing costs with decreasing benefits.³¹² Indeed, the House of Commons Select Committee has elsewhere expressed doubt that the reforms will be able to achieve their aims at all³¹³ and if this is true, and it has been shown

³¹¹ National Audit Office, ‘Early Progress in Transforming Courts and Tribunals’ (2018) available at <https://www.nao.org.uk/report/early-progress-in-transforming-courts-and-tribunals/> accessed 13/5/2020.

³¹² House of Commons Public Accounts Committee, ‘Transforming Courts and Tribunals Inquiry’ (2018) available at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2017/transforming-courts-tribunals-17-19/> accessed 13/5/2020.

³¹³ House of Commons Select Committee, ‘Little Confidence Sweeping Courts Reforms Can be Delivered’ (2018) available at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/news-parliament-2017/transforming-courts-tribunals-report-published-17-19/> accessed 13/5/2020.

throughout this work that whilst there have been some benefits to the creation of online services these can hardly be considered to be online *courts*, then there is nothing to justify the increasing costs associated with the project as a whole. It may be true, as Ahmed observes, that where parties are able to use the online services, user costs will be reduced, not only in terms of not having to physically access courts but also because of the removal of the necessity of the Pre-Action Protocols, those being replaced by stage 1 as considered in the previous chapter.³¹⁴ However, given that it has been shown that costs are likely to increase overall and that, in any event, the new online processes cannot really be considered to be *courts* as that word is conventionally understood in the current CPR 1998 civil justice framework, it is difficult to accept that this provides a substantial cost benefit. It is necessary here to distinguish between the costs associated with the system itself, and the costs to users, but it is argued that a system which has undertaken an expensive reform programme and yet has not developed an overall effective court, but has experienced increased costs due to closing buildings, cannot be considered as good value for public money, *and* that increased travel costs for users will only increase the cost of using the service. Of course, it is true that there may be some reduction in user costs for the many persons who are able to use the online services, although it has been argued that these cannot in reality be considered to be courts, but given that these apply only in limited circumstances, it again does not seem that this can be considered as an effective overall reduction in costs.

³¹⁴ M Ahmed, 'A Critical View of Stage 1 of the Online Court' (2017) 36(1) CJK 12-22, *passim*.

Conclusions in Respect of the Court and Chapter Summary

The points developed above support the following conclusions, one that will be further qualified when the later Canadian and Netherlands OCC examples are considered. Firstly, it has been argued that online systems appear more user friendly and reduces delays such that there might be considered greater access to justice in this respect. However, it has also been argued that the initiatives thus far have simply been a movement of existing services online, with a step away from access to the justice system and towards self-management, such that this cannot really be considered to provide access to justice. There are problems here with the type of legal representation which is available and indeed in terms of the opaque nature of stage 3 of the process. In terms of guidance from the international experience then, it is argued that what is needed are mechanisms which combine a positive user experience with transparent and effective access to justice.

Secondly, despite a clear argument that decreased delays should lead to decreased costs, it seems that the reforms thus far have not been able to demonstrate the type of reduction in costs, either for the user or for the public purse, which it has been shown earlier in the work would have constituted an effective reform. There is evidence that costs remain high and that the benefits of the online system are likely to be limited. Again therefore, what is needed is a demonstration from the international experience that it is possible to reform the HMCTS in a manner which

achieves the objectives in chapter 2, incorporating technology as envisaged in chapter 3, without the cost issues as discussed in this chapter.

PART III

**The International Experience - A Canada (British Columbia) - Netherlands
Comparison**

Chapter 6 – Context and Comparison with British Columbia

Introduction

As noted in the thesis introduction, the British Columbia online justice system was cited with approval by Briggs LJ in his 2016 final Report. The extent to which its features might be usefully incorporated into an EW OCC model is the vital link created between the claimed OCC model benefits, and the overall thesis' law reform recommendations made.

A brief note regarding the Canadian constitutional structure, as it effects the administration of civil justice, assists in appreciating how the British Columbia justice system must be understood. Like the UK and its subnational jurisdictions (EW, Northern Ireland and Scotland), British Columbia is one of 10 provinces and three territories that each have exclusive jurisdiction over the administration of their justice systems.³¹⁵ All but Quebec are part of the larger Anglo-American common law tradition, thus the general British Columbia legal system approach to contract, tort, and the common law – equity distinctions will be largely familiar to an EW practitioner or academic.³¹⁶ However, it is a significant conceptual error to assume that British Columbia online justice is the Canadian example. Other provinces will not necessarily emulate what British Columbia does; the following analysis thus treats British Columbian online initiatives on their

³¹⁵ Constitution Act 1991 (Can); British North America Act 1867, ss.91, 92.

³¹⁶ Civil Resolution Tribunal Act 2012 (BC).

own merits.³¹⁷ Essentially, other provinces may not have exactly identical system to that of BC but nevertheless have the power to decide the scope and content of any online processes in their jurisdictions.

Rationale for the Comparators

The main introduction to the work observed that British Columbia and the Netherlands have been chosen for the basis of assessing the international experience due to the fact that British Columbia was the ‘first’³¹⁸ jurisdiction to move towards an online court system and the Netherlands, whilst its initiative in this regard has been abandoned, did have in place an online dispute settlement mechanism. Building on this, albeit detailed discussion is not necessary, it is observed that the aim in both cases was to develop systems to be used in ‘very specific forms’³¹⁹ of cases rather than applying across the justice system as a whole. It is interesting to observe that some commentators have sought to distinguish the HMCTS reform programme from these initiatives on the basis that the UK approach will go much further;³²⁰ the argument here appears to be that although the current

³¹⁷ See also Maxime Hanriot, ‘Online Dispute Resolution (ODR) as a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes’ (2015-2016) 2 *McGill J Dispute Resolution* 1, 2.

³¹⁸ L Tickle, ‘Online Justice: Why Courts Should Explore Emerging Digital Possibilities’ (2017) the Guardian available at <https://www.theguardian.com/public-leaders-network/2017/jan/16/online-justice-courts-explore-digital-possibilities> accessed 6/5/2020.

³¹⁹ PM (Anon), ‘Court Reform and Open Justice: Responses to the Public Accounts Committee’s Transforming Courts and Tribunals Enquiry’ (2018) available at <http://www.transparencyproject.org.uk/court-reform-and-open-justice-responses-to-the-public-accounts-committees-transforming-courts-and-tribunals-inquiry/> accessed 13/5/2020.

³²⁰ *ibid.*

initiatives, and these have been assessed throughout the work, have been limited to money disputes and some case management in divorce and probate cases, these may serve as blueprints for further developments in other areas, as such going far beyond the international experience.³²¹ In theory, this seems a reasonable argument, although it will be shown that in respect of British Columbia, the reforms are not as limited as might be suggested: if the UK schemes thus far are considered successful, there is nothing preventing them being rolled out more widely.

The difficulty however is that it has been shown throughout the work that they do not appear successful in terms of either costs or creating an online court with transparent and open access to justice, despite some user satisfaction, such that extending their application would not appear to be a positive step. As such, it is submitted that rather than the international experience being used to offer useful guidance in terms of how the UK system can go further than those experiences but do so successfully, it will be prudent to look at the respective successes and failures in the international context in order to ascertain whether they offer anything for improving the current position in the UK, as considered at the end of the previous chapter. Indeed, given that the British Columbia system and that in the Netherlands 'share[d] the same software developer'³²² and thus have commonalities at least in terms of delivery using the technology, assessing

³²¹ *ibid.*

³²² V McCloud, 'The Online Court - Suing in Cyberspace - How the Online Court Challenges Us to Raise Our Legal and Technological Game so as to Ensure Access to Justice' (2017) 36(1) CJK 34-50, 39.

the reasons for the *complete* failure of one and not the other may offer further guidance for the UK in this respect.

The British Columbia position

The online court in British Columbia, the Civil Resolution Tribunal, has been operational since 2017³²³ and currently deals with Strata Property and Societies and Co-Operative Association disputes up to any claim value;³²⁴ and motor vehicle injury and small claims disputes up to \$50,000 and \$5,000 respectively.³²⁵ The aim of the platform is to ensure that the justice system within the jurisdiction is, as practitioners at DLA Piper observe, ‘accessible, speedy, economical, informal and flexible’,³²⁶ with a reduction in the use of lawyers,³²⁷ and indeed this would seem directly comparable to the aims of the reforms in the UK, such that any successes in British Columbia might be useful in mitigating the issues highlighted with the UK system throughout the work. The system has a similar process to the UK system, seeking to facilitate settlement before moving towards an imposed decision if this

³²³ K Bake-Paterson and Y Urquhart, ‘Jurisdictional Expansion of BC’s Civil Resolution Tribunal to Societies: A New Avenue of Dispute Resolution’ (2019) DLA Piper Publications available at

<https://www.dlapiper.com/en/canada/insights/publications/2019/07/jurisdictional-expansion-of-bcs-civil-resolution-tribunal-to-societies/> accessed 13/5/2020.

³²⁴ The Civil Resolution Tribunal (2020), available at <https://civilresolutionbc.ca/> accessed 13/5/2020.

³²⁵ *ibid.*

³²⁶ K Bake-Paterson and Y Urquhart, ‘Jurisdictional Expansion of BC’s Civil Resolution Tribunal to Societies: A New Avenue of Dispute Resolution’ (2019) DLA Piper Publications available at

<https://www.dlapiper.com/en/canada/insights/publications/2019/07/jurisdictional-expansion-of-bcs-civil-resolution-tribunal-to-societies/> accessed 13/5/2020.

³²⁷ *ibid.*

cannot be done.³²⁸ As this has been assessed in relation to the UK system and is broadly similar, further consideration will not be undertaken here.

However, it is useful to consider the original British Columbia policy documents that its civil justice administration leadership relied upon when devising the mechanisms that ultimately became the Civil Resolution Tribunal (CTS) system. The CTS evolution bears a strong similarity to its EW counterpart in the following way. The earlier thesis Chapters set out how EW civil justice reforms that culminated in the 2016 Briggs LJ final report moved from its 1996 Woolf Report commencement point, through the initial, sweeping CPR 1998 framework reforms, to the Jackson (2010) costs review, to the provisional 2013 Briggs LJ review, to the 2016 publication. Similarly, the CTS ideas originated with a detailed, if highly conceptual 2006 British Columbia Justice Reform Working Group report.³²⁹ The Working Group effectively laid the CTS groundwork in three ways; each remains instructive guidance for EW civil justice system policymakers today. These are: (1) devising an effective pre-actions system (a similar approach to that sanctioned under CPR 1998 pre-action protocols and overall early case management); (2) better, more rigorous dispute prevention and planning; (3) creating a system that better assists individuals to resolve their own legal

³²⁸ --, 'Get a CRT Decision' (Updated 2020) available at <https://civilresolutionbc.ca/tribunal-process/tribunal-decision-process/#how-will-the-crt-decide-my-dispute> accessed 13/5/2020.

³²⁹ British Columbia Justice Reform Working Group, *Effective and Affordable Civil Justice* (2006) [Online] Available: < https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf#:~:text=EFFEKTIVE%20AND%20AFFORDABLE%20CIVIL%20JUSTICE%20v%20Executive%20Summary:,mandate%20includes%20all%20types%20of%20non-family%20civil%20matters > [22 January 2021], BC Working Group.

problems (thus reducing, and perhaps eliminating legal counsel or other such practitioners from what would become CTS).³³⁰

It is noted that whilst the Briggs reviews drew apparent and significant inspiration from the CTS model as one that EW civil justice – OCC based reforms could emulate, this 2006 Working Group reform approach reflects a strong British Columbia – EW justice system principles cross-pollination effect. In other words, the Briggs LJ respect for what a CTS model might achieve for better EW civil justice, brings the EW case law that the Working Group cited, with approval. In particular, the Working Group endorsed the overarching costs – proportionality approach expressed by the House of Lords in *Three Rivers District Council v Bank of England* (2001) as key guidance for any future British Columbia civil justice reforms.³³¹ The Working Group expressed approval for the Lord Hobhouse view that proportionality represented an important judicial philosophy shift from those that previously dominated EW administration of civil justice. The old rule that gave the former (pre-1998) EW procedures their essential thrust was now perceived as a detriment to cost benefit driven proportionality: “... Unless a party’s conduct [was] abusive or vexatious”, the party was generally entitled to have their “... day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pre-trial procedures”.³³² In this key respect,

³³⁰ Ibid, 2-7.

³³¹ *Three Rivers District Council v Bank of England*, [2001] 2 All E.R. 513 (HL), [153].

³³² Ibid.

the Briggs LJ endorsement of CTS is (in effect) promoting a British Columbia law reform with its own EW roots.

The Working Group also made a head-on approach to dealing with the well-known and frequently expressed criticism that any dispute resolution system that minimises (or perhaps eliminates) professional legal representative involvement might undermine the rule of law.³³³ The Working Group (consistent with the earlier (1996) Woolf view, and aligned with Jackson (2010), and Briggs (2013, and 2016)), places its faith in a commitment to a settlement system as one preserving the rule of law.³³⁴ A key Working Group contention made in this respect provide a direct link between this 2006 Report, the 2016 Briggs recommendations, and the CTS as implemented in 2017: the rule of law derives its primary protection from the civil justice system's ability to maintain access to the courts (with the corollary point made that such systems must be affordable or it will no longer be accessible).³³⁵ Every individual may choose to "... forego settlement and proceed to adjudication".³³⁶

It is interesting to note that this 2006 Working Group expression has undergone its own evolution when both the CTS and EW civil justice reform directions are carefully considered. It is not doubted that the Working Group sincerely believed that that anyone who was involved in a dispute that they

³³³ Working Group, 73, Appendix F.

³³⁴ *Ibid.*

³³⁵ *Ibid.*, footnote 131.

³³⁶ *Ibid.*

wished to take forward to adjudication was at liberty to take this step. However, the CTS is also grounded in the expectation that disputes will usually be settled at the case management stage. There is the additional, albeit implicit expectation that CTS facilitators will encourage settlement wherever possible. In these respects, the fact that facilitators might use strongly worded encouragement otherwise bordering on ‘pressure’ is not discouraged, if one reads the entire CTS approach with care.³³⁷ One may argue that access to justice is not achieved when the CTS is oriented to what might appear as an unhealthy ‘settle at all costs’ mentality. However, any criticisms expressed in this CTS respect are arguably dwarfed by its overall sound conceptual foundation, and attention paid to ensuring that unrepresented persons can navigate across its procedural spaces.

The eventual CTS reform directions

It is true that in 2019, the British Columbia system was extended to cover a greater number of claim types,³³⁸ and this might suggest that the system goes beyond being limited in the manner discussed in the introduction to this work, particularly since further developments ‘are coming’³³⁹ in 2021. It remains true however that the online court in British Columbia is not a

³³⁷ A point taken from reading Shannon Salter and Darin Thompson, ‘Public-Centred Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal’ (2017) 3 *McGill Journal of Dispute Resolution* 130, 134.

³³⁸ M Cross, ‘Canada Shows Way to Online Claims Future’ (2018) *The Law Society Gazette* available at <https://www.lawgazette.co.uk/practice/canada-shows-way-to-online-claims-future/5068554.article> accessed 13/5/2020.

³³⁹ *The Civil Resolution Tribunal* (2020), available at <https://civilresolutionbc.ca/> accessed 13/5/2020.

comprehensive system, but rather one which relates only to designated areas. This is clear for example from the fact that s.130(1) of the Civil Resolution Amendment Act 2018,³⁴⁰ provides that even where the dispute relates to a matter falling under a societies dispute and thus under the jurisdiction of the online court, where the matter is one which might be an issue for the Supreme Court, the court will not have jurisdiction.³⁴¹ It is not necessary within this discussion to evaluate exactly how this section operates in practice; rather, it is sufficient to note that despite the expansion in the online court's remit, and thus a potential suggestion that a successful online court could go beyond the apparently limited jurisdiction as described above, there are clear restrictions on the court's operation, such that it cannot be considered as a comprehensive initiative in terms of incorporating digital technology to meet the aims of the reform package. Indeed, as a separate point, assessing when the online court has jurisdiction might be somewhat confusing and include its own costs, although discussion of this is beyond the scope of the work.

The problem *here*, it is argued, is whether by developing a tiered justice system, and this point might apply in the UK in addition to British Columbia, there will be the potential for a difference in user experience: if online initiatives can be developed successfully, this might suggest that those with disputes falling within those areas might have greater access to the justice system than those who must continue to rely on the traditional services.

³⁴⁰ British Columbia Civil Resolution Amendment Act 2018, s.130(1).

³⁴¹ *ibid.*

Indeed, if this is the case then the converse might also be true: a lack of success in the development of an online system might create a situation where there are difficulties in accessing justice where the type of dispute covered by the online system arises.

In this regard, albeit not referring to the British Columbia system specifically, Smith has argued that by limiting development to some areas and not developing these completely successfully, there is a danger that by using technology, particularly given the difficulties in access for some people, parts of the system 'will decline into a neglected ghetto'.³⁴² Indeed, given the comments earlier in the chapter that it already does not seem feasible that the current UK system will be able to be extended into something successful on a wider scale and that instead there has been limited success in one area, this would seem correct. It is submitted that the fact that similar initiatives abroad have been unable to expand completely, the recent expansions aside, might suggest that a better approach would be to focus on developing something successful in one area rather than seeking to achieve a fully digitalised court service. Bake-Paterson and Urquhart might be correct that by extending the online service, there will be positive 'implications'³⁴³ for those whose disputes fall under the new jurisdiction, but it is argued that

³⁴² R Smith, 'Civil Courts Reform: Learning From Abroad' (2016) *The Law Society Gazette* available at <https://www.lawgazette.co.uk/commentary-and-opinion/civil-courts-reform-learning-from-abroad/5053458.article> accessed 13/5/2020.

³⁴³ K Bake-Paterson and Y Urquhart, 'Jurisdictional Expansion of BC's Civil Resolution Tribunal to Societies: A New Avenue of Dispute Resolution' (2019) DLA Piper Publications available at <https://www.dlapiper.com/en/canada/insights/publications/2019/07/jurisdictional-expansion-of-bcs-civil-resolution-tribunal-to-societies/> accessed 13/5/2020.

unless the system as a whole can be considered to improve access to justice in a user friendly and transparent way, then all that it creates is a series of different processes for different types of dispute. This author would add again that given the potential complexities which might arise, for example under s.130(1) above, this can hardly be considered to be a streamlined and efficient service.

A further point here might be made in terms of access to justice from the perspective of the user; this has been discussed throughout the work in terms of ensuring that those who need to use online services both have the technological skills to do so or are able to physically access the appropriate technology. In this regard, research suggests that digital literacy in Canada as a whole is limited.³⁴⁴ Thus, the ‘basic idea’³⁴⁵ behind the British Columbia system might be to improve access to justice in the same way as the UK system, but unless there are mechanisms in place to ensure that people can use the system, it is argued that this aim is unlikely to be met, such that rather than offering any guidance for the UK system, the British Columbian system simply experiences the same problems. Therefore, in this regard, one might be inclined to consider that expanding the British Columbia system would be problematic unless there are access mechanisms in place. Here, Professor Genn observes that the British Columbia platform, she suggests,

³⁴⁴ T Hadziristic, *The State of Digital Literacy in Canada: A Literature Review* (2017) Working Paper - Brookings Institute, 5, available at https://brookfieldinstitute.ca/wp-content/uploads/BrookfieldInstitute_State-of-Digital-Literacy-in-Canada_Literature_WorkingPaper.pdf accessed 13/5/2020.

³⁴⁵ --, ‘BC Civil Resolution Tribunal Assumes Responsibility for Deciding Society Claims’ (2019) Fasken available at <https://www.fasken.com/en/knowledge/2019/07/van-bc-civil-resolution-tribunal-assumes-responsibility-for-deciding-society-claims/> accessed 13/5/2020.

‘would be entirely out of reach of the kinds of people that my students deal with in our free legal advice clinic in a doctor’s surgery in East London’:³⁴⁶ it does not take difficulties with accessing technology into account. The professor is clear that this was not something that was disregarded as an issue in the design of the British Columbia system, but rather something which could not be addressed effectively within a ‘limited’³⁴⁷ budget. Given that it has been shown that access to the online forums in the UK has been recognised as an issue with technology, it would seem that this is likely to be an issue in any creation of an online court and is not something which is limited to design. It is true that, and again this was discussed earlier in the work, there have been attempts within the UK both to recognise the problem with access to justice and the need for systems which either aid people with limited technology skills to access platforms, or provide physical access where those people do not have access at home. However, this is not likely to be something which is resolvable once and for all and, in any event, certainly not something about which guidance appears to be forthcoming from British Columbia. As such, it is submitted that whilst the British Columbia experience does not appear to offer much guidance in terms of improving access to justice where there are issues with technological literacy or physical access, it does at least highlight that this is something which will need to be addressed on an ongoing basis.

³⁴⁶ DH Genn, *Online Courts and the Future of Justice: Speech* (2017) Gray’s Inn Birkenhead Lecture, 8, available at https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_haz_el_genn_final_version.pdf accessed 13/5/2020.

³⁴⁷ *ibid* footnote 39.

Summary

The British Columbia system appears broadly comparable to that in the UK. It has been argued that whilst there have been moves to expand the British Columbia system and this might appear to undermine some of the arguments earlier in the chapter that the system applies only in some areas, such a point cannot be supported. The online service applies only in specific areas and indeed there appears to be some operational confusion in terms of the coverage of the court's jurisdiction. Issues with access appear to be similar to the UK and indeed perhaps more extensive, given the gradual growth of the court's remit: this cannot be considered to be meaningful access to justice, notwithstanding the fact that the court appears to have had success in that it continues to be extended. As such, it does not seem that the British Columbia system is able to offer any sort of useful guidance to the UK. Although it has not been possible to conduct a cost-based analysis or assessment of delay, and this has been due to the lack of availability of literature, it is argued that if justice cannot be achieved through the new system and access is a problem which has not been able to be resolved due to budgetary constraints as discussed above, then it does not seem that the system can be considered to be cost-effective because it fails to achieve substantial access to justice.

Chapter 7 - Comparison with the Rechtwijzer

The Position in the Netherlands

As outlined both in the previous chapter and in the introduction, the Rechtwijzer has been now disbanded; this was an online dispute resolution platform initiated in 2007.³⁴⁸ It should be noted that thus far this work has argued that the Canadian position represented the foremost international online court, and thus the development of the Rechtwijzer a decade before the British Columbian court became operational, would seem to disprove this point. However, it must be noted that the Rechtwijzer was merely a dispute resolution system and not one which formed part of the civil justice system, but rather operated alongside it.³⁴⁹

The key driver for the Netherlands system failure was its lack of cost-effectiveness. Its government promoters failed to address its implementation and operational costs. This particular ‘failure’ does not necessarily cast meaningful doubt on OCC concepts at large. Instead, these outcomes are equally consistent with a sound civil justice system reform initiative that suffered from poor planning and implementation strategies.³⁵⁰ Further, as

³⁴⁸ R Smith, ‘After the Rechtwijzer Energizer’ (2017) available at <https://lawyerwatch.blog/2017/03/31/after-the-rechtwijzer-energizer/> accessed 14/5/2020.

³⁴⁹ R Smith, ‘Online Dispute Resolution and Access to Justice’ (2018) <https://law-tech-a2j.org/odr/online-dispute-resolution-odr-and-access-to-justice/> accessed 14/5/2020.

³⁵⁰ Ibid; see also John Sorabji ‘The online solutions court - a multi-door courthouse for the 21st century’ (2017) 36(1) *C.J.Q.* 86, 108 re FN 83.

Sorabji succinctly observes, it may be time to move away from the traditional court nomenclature – what were called ‘courts’ pre-OCC are now perhaps better understood as ‘online dispute resolution platforms’.³⁵¹ It is equally suggested that this Sorabji expression remains reasonably well-aligned with the Chapter 1 access to justice working definition.

This point reinforces the Smith contention that the Rechtwijzer provided the blueprint for all further attempts to achieve an effective OCC.³⁵² It is noted that the British Columbia and Dutch systems operate using the same technology, but this is not the same as a move to digitalise the civil justice system itself. As such, it is submitted that whilst the Dutch system may potentially offer some guidance for the UK in terms of its use of technology, and indeed one would suggest that the mere fact that the country did develop a mechanism for using digitalisation to resolve disputes might have achieved some form of justice between warring parties, it is axiomatic that it cannot be useful in suggesting a way to reform the civil justice system. In this regard, it is observed that, and again this point is made by Smith, the Rechtwijzer was disbanded largely due to the disproportionate costs associated with its maintenance, and the failure to secure investment in its development.³⁵³ One must therefore ask the reason for this, in order to determine whether this might offer any guidance for the UK position.

³⁵¹ Ibid.

³⁵² R Smith, ‘The Rise and Fall (and Potential Resurgence of) the Rechtwijzer’ (2017) available at <http://legalvoice.org.uk/decline-fall-potential-resurgence-rechtwijzer/> accessed 14/5/2020.

³⁵³ R Smith, ‘After the Rechtwijzer Energizer’ (2017) available at <https://lawyerwatch.blog/2017/03/31/after-the-rechtwijzer-energizer/> accessed 14/5/2020.

In order to do this, the starting point is briefly to consider the operation of the system. The Rechtwijzer operated by undertaking a free of charge assessment of the relevant case, before drafting an agreement to be submitted for ‘approval’³⁵⁴ from a lawyer, which would then be ‘forwarded’³⁵⁵ for court approval. One might consider the approach to be vastly different to that in the UK as it was simply a digital process through which parties could resolve their disputes rather than, again, an attempt to create an online digital justice system. There are suggestions that might be made (as based on the OCC criticisms cited above), that an online court does not function as a ‘true court’ given that OCC is such a radical departure from traditional court structures.³⁵⁶ This ‘true court’ characterisation is a dangerous one, as it suggests that OCC lacks legitimacy. One may argue that so long as the relevant CPR 1998 rules and any accompanying OCC practice directions confirm OCC decisions are binding and enforceable in the same manner as any other court order or judgment, the OCC is a legitimate civil justice system component.³⁵⁷

Therefore, whilst comparing the UK position to the format of the Rechtwijzer does not seem a fair comparison, it is submitted that this is too simplistic an analysis and that indeed the Rechtwijzer has greater similarities to the UK

³⁵⁴ R Smith, ‘The Rechtwijzer Rides Again’ (2017) available at <https://law-tech-a2j.org/odr/the-rechtwijzer-rides-again/> accessed 14/5/2020.

³⁵⁵ Ibid.

³⁵⁶ A point taken from reading Pablo Cortés ‘The civil money claims online: the flagship project of court digitalisation in England and Wales’ (2019) 25(8) *C.T.L.R.* 207, 212

³⁵⁷ Ibid; see also CPR Practice Direction 70 (enforcement).

position than it might first appear. Given that the Dutch system has failed, one might be drawn towards a conclusion that the same is likely in the UK.

However, what must be noted is that the Dutch system did not fail due to user dissatisfaction, or indeed through any difficulties in the model.³⁵⁸ In 2017, the model was relaunched in the form of Justice.42,³⁵⁹ an online platform which offered the same services albeit only in respect of divorce, a much smaller remit than the original Rechtwijzer, which covered a variety of dispute types.³⁶⁰ Justice.42 has been hailed as a service which enables users to be shown the most appropriate option for resolving their problems, and thus has been able to offer a cost-effective solution to parties before they engage in legal advice.³⁶¹ Justice.42 is a model that appears equipped to deliver what its Rechtwijzer predecessor could not achieve operationally, and thus Justice.42 appears destined to continue at the OCC developments forefront.

What this shows therefore, it is argued, is that even if the UK platform is not considered a court in the traditional sense (a point that is strongly disputed in Chapter 2), this does not mean that it will not have user satisfaction or be considered beneficial for the resolving of disputes in an efficient fashion. Indeed, this might be particularly the case given that it was argued earlier in

³⁵⁸ Smith 2017.

³⁵⁹ *ibid.*

³⁶⁰ *ibid.*

³⁶¹ --, 'Justice.42 Declared One of the Winners in the Start-Up in Residence Programme' (No Date Available) available at <http://www.si2fund.com/justice42-wins-startupinresidence/> accessed 14/5/2020.

the work that there has been considerable user satisfaction with the UK system, although it has not been cost-effective or developed the type of swift and transparent online justice which is needed as a reform programme. The use of AI in the first stage of the UK system might be broadly compared with the 'diagnostic'³⁶² element of Justice.42, in enabling parties to see the most effective solution to the problems. The issue, in respect of the UK system at least, is that again notwithstanding this apparently useful option and despite the satisfaction of users, the system has been shown not to be considered an online court. Given that this was identified as being necessary to meet the reform objectives, the mere fact that the system does have some positives will not be enough to show that it is an efficient or indeed cost-effective initiative.

As noted above, the Rechtwijzer failed due to an inability to raise funds to secure its operation; one might consider this surprising due to the fact that it did experience user 'satisfaction'.³⁶³ However, again as noted above, the Rechtwijzer operated as an alternative to the civil justice system rather than as part of it, and thus it seems only logical that securing investment, particularly from the government,³⁶⁴ was likely to be difficult. It has been argued throughout this work that the cost of developing online systems is high, and that the UK reforms have not been cost-effective, and it is

³⁶² *ibid.*

³⁶³ R Smith, 'The Rechtwijzer Rises from the Ashes: An Interview with Laura Kistemaker of Justice.42' (2020) available at <https://law-tech-a2j.org/odr/the-rechtwijzer-rises-from-the-ashes-an-interview-with-laura-kistemaker-of-justice42/> accessed 14/5/2020.

³⁶⁴ R Smith, 'After the Rechtwijzer Energizer' (2017) available at <https://lawyerwatch.blog/2017/03/31/after-the-rechtwijzer-energizer/> accessed 14/5/2020.

suggested that it seems unlikely that governments would be willing to invest funds in a project which would simply be an alternative to an already existing system. The Rechtwijzer for example only attracted 1% of divorcing parties, and this might suggest an unviable project for government investment; of course, the converse point might be made that the project was only able to attract such low numbers because of a lack of investment, and that its user satisfaction might have in fact suggested it was a viable investment project. Nonetheless the system did fail and given that it was a dispute resolution platform which was not part of the civil justice reforms, it seems axiomatic that the UK system could not fail in the same way, such that little guidance can be taken from the Netherlands, in this respect at least. As it has been shown that the Rechtwijzer users did experience satisfaction and indeed it has been submitted throughout this work that digitalisation can help to achieve swift, efficient and indeed transparent access to justice *if* carefully designed, one might consider the failure of the Rechtwijzer to be a product of its placement. There is a clear usefulness of digitalisation, and perhaps the system should be applauded, as demonstrating the potential for technology to be used in this way.³⁶⁵

Summary

³⁶⁵ R Smith, 'Goodbye Rechtwijzer, Hello Justice.42' (2017) available at <https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/> accessed 14/5/2020.

The Rechtwijzer, as a platform outside the civil justice system, which failed due to a lack of investment, does not seem to offer any useful guidance for the development of the UK system. However, it does show the benefit of digitalisation in resolving disputes, and this should give comfort to UK developers disheartened by the lack of progress which has been argued to exist in relation to the online court. The Rechtwijzer and its replacement, Justice.42, have experienced high user satisfaction, and although this is not part of a court *per se*, parallels can be drawn with the UK system. This might not be so surprising given that it has been submitted throughout this thesis that neither is the UK system really a court. Perhaps, it is argued, the guidance that the Rechtwijzer can really offer is that digitalisation has the potential to work to resolve disputes if utilised effectively within a reform programme. Given that the intentions of the UK reform programme are to develop a novel online court which offers swift, efficient and transparent access to justice which is cost-effective, this cannot be considered to have been achieved.

PART IV

Recommendations and Conclusions

Chapter 8 - The Future of the Court: Recommendations

Introduction

Again, the chapter proceeds as outlined in the main introduction, aiming to make recommendations to improve the UK system.

The Future of the Court: Recommendations for Progress

It has been shown throughout this work that whilst there has been some progress towards moving services online and that this can be supported as a potentially satisfactory use of technology to improve access to swift, efficient, transparent and cost-effective justice, this has not been done in a way to achieve justice as described above. The system which has been created cannot in reality be considered to be a court, but rather the digitalisation of services, and whilst this might have some benefits, it is neither truly creating an online civil justice system nor indeed creating a system which is cost-effective, transparent or can be considered to provide access to justice, so much as access to a form of dispute resolution. It must be asked therefore, how these problems might be addressed such that the UK system can meet its reform objectives. In this regard, the starting point is to observe that it has been shown that there is user satisfaction with the UK system, and thus it is submitted that this should be maintained; there has been greater access to the new system than under the old small claims

process (still in operation) and therefore in order to develop an effective court, the aspects with which some users are satisfied should be maintained.

Similarly, it has been shown that there have been steps taken to mitigate difficulties with access; this is important because it has been shown that digitalisation is not a panacea but rather is simply a potential tool for improving the civil justice system, but one which itself has inherent problems. These steps should be maintained although it would be beneficial if further research was undertaken into how far these initiatives have been able to ensure user access, not just for those with limited technology skills but who would otherwise be able to access digital services, but also for members of society who, regardless of their skills, would not be able to access expensive technology. It is important to ensure that improving access to justice for some does not come at the expense of the most vulnerable members of society, who, it is submitted, might already struggle to access justice. This point appears to have been made in relation to the British Columbia system whereby it has been shown that not enough has been done to ensure that digital exclusion is not an issue, and that this risks further disenfranchising already very vulnerable members of society. Ensuring digital access seems to be a particular problem during the Covid-19 pandemic, as ensuring that assistance programmes and face-to-face support mechanisms are in place will not be possible, and it is submitted that going forward, it is important that such programmes are re-initiated and done so in a manner which takes into account the progress which has been made

towards digitalisation during the pandemic, again with a view to securing digital access for all.

Returning to what should be maintained in the digital court, it is prudent to begin by noting that the aims of the reform package seem laudable. There is considerable evidence that the civil justice system is slow, expensive, opaque and does not ensure access to justice for many. Indeed, it is submitted that given, as shown in Part I, that there have been many reform initiatives to deal with these problems and many still remain after 20 years, an effective solution is yet to be found. There is also, and this was noted above and does not as such require detailed repetition, evidence that digitalisation may help to achieve these reform objectives, as long as this is done in a way which mitigates digital exclusion and is itself cost-effective. AI may be useful in this regard, again subject to design, and this will be discussed below. It does seem that the basic design of the new system does secure user satisfaction and given that ease of use, again with support for the vulnerable, would seem to be a key driver behind securing access, this should be maintained. It has been shown that difficulties with the current system are problematic not just practically but also in terms of the system being opaque, and thus the management of one's own case should be maintained, both to secure satisfaction and to enable the user to feel that the system is both transparent and within their control. The divorce and probate systems, and indeed the first stage of the civil money claims service would appear to do this; the user is able to upload documents, and the use of AI to suggest the most appropriate means of settlement may not only be a

cost-effective use of technology but provide users with the tools to manage their own case. The problem, however, is that the system is skewed towards resolution and thus appears as lip service towards self-ownership and access: it is therefore suggested that greater recognition of any user's wish to go to court should be incorporated into the system, rather than the dispute simply promoting settlement. This might also serve to mitigate the key issue which is that the system is not a civil justice system or court as such, but rather simply moves dispute resolution online. The removal of the CPR Pre-Action Protocols might simplify the process and make it more cost-effective, but without the system overall being reformed to be effective, this might be immaterial.

It is possible that by moving towards a focus on settlement, the needs of users might be met: it seems only logical to consider that individuals want to settle their disputes rather than necessarily to go to court. However, it is argued that by focusing only on settlement, this cannot meet the needs of all users or in reality be considered a court system, which given that the point of the reform is to create an online civil justice system, must therefore be considered problematic. The second stage of the process might look more like the civil justice system, or indeed a court, in that it introduces legal representation; legal advisors are appointed. Again though, whilst the independence of the advisors is not in doubt, the aim is still to move towards settlement. This does not really appear to be a transparent move towards justice, but rather pushing users in a particular direction. This is especially so given that the advisors can make directions in some cases. It is

suggested therefore that the remit to promote settlement is lessened so that advisors can respond to users' concerns, taking into account the outcome of stage 1, to enable a just solution to be reached.

The final step is a judge-made decision. The problem is that a hearing is not always needed, and this must be considered as opaque justice; this should be changed so that a hearing is always needed. Further, because the steps are framed, and it is true that they follow Briggs LJ's suggestions, towards settlement, the final step appears as something of a punishment where users have failed to reach settlement in the way prompted by the system, and again this cannot be necessarily be considered as effective access to justice. In other words, it is advocated that rather than advancing a system where the overarching focus is towards settlement throughout the process in the absence of a judge, the applicants should be offered a balanced system whereby, depending on the nature of the case, both judges and settlement mechanisms are equally available as options. Rather, the system seems to provide access to *dispute resolution* with some disgruntled recognition that a judge might be needed if the parties cannot achieve this successfully. That is not to say that the ADR mechanisms used throughout the process will not be beneficial in many cases, but simply that creating an online dispute resolution system which only allows access to a judge if the system fails to do what it was designed to do, cannot be considered as optimal access to justice. It is therefore suggested that whilst the step system might be maintained as an organised way to move through the process, the focus on

settlement throughout and the opaque nature of the third stage need to be reformulated. Not enough research appears to have been done to show whether replacing the human judge with an AI mechanism would further undermine the ability of the third stage to be transparent, but concerns have been raised about the possibility of AI being used in this way. It is submitted here, and again, it is difficult to justify this without further research being done into the benefits of human decision-making, that at least the programming within an AI mechanism could demonstrate how decisions were made, and that this might be preferable in some cases if parties are to be denied access to a hearing in the final stage.

The online court does not yet exist; it must therefore be constructed along the lines suggested above. It is true that there has been progress towards reform during the Covid-19 pandemic, and the fact that this has been able to be done so quickly when the HMCTS reform package as a whole has been criticised for being so slow suggests further issues with the reforms, but again if this progress is simply integrated into the current money claims service, it is difficult to see that this is progress towards an online court as such. Briggs LJ's reforms seem confusing in that they recommend something which is novel and yet in reality are just three steps towards moving the current system online; perhaps then, in implementing the recommendations as suggested above, the foundation for the court requires re-assessing and Briggs LJ's recommendations reconsidering, at least in terms of the content of the three steps. This, it is recommended, might serve to address concerns that the reforms and the progress towards the development of the ostensible

online court have been disproportionately expensive but with little benefit: if a more cost-effective reform package which really creates an online court and which does not effectively penalise parties who cannot settle can be found, then this might create a swift, transparent and cost-effective system.

It has been noted above, that the British Columbia system does not really seem to offer any guidance for the development of the UK system beyond highlighting similar problems in terms of access; perhaps, further examination of the system might be beneficial however, in order to look at *where* exclusion is an issue and thus highlight how this might be addressed. This notwithstanding, it has been noted that one of the ways in which the UK system has had some success is by taking into account the need to include all citizens, and thus this might not be necessary. The Dutch system demonstrates that whilst creating a dispute resolution platform which is not itself part of the justice system will not be effective, using digital technology to achieve resolutions for parties is capable of being, and this might be heartening for reformers of the UK system going forward. Indeed, this author would add here that the very fact that the Dutch system has been shown to have failed precisely because it operated as a dispute resolution service outside of the civil justice system rather than as a *court* within the system, might offer some guidance in terms of the potential pitfalls with creating something which is only a digital service, and give greater support to the recommendations made throughout this chapter.

Summary

The UK system must be reformed such that it is more like an actual court, rather than a digitalisation of some services; Briggs' LJ recommendations might require re-evaluation in this respect. Reforms should be made to remove the focus on settlement with opaque judge-made justice almost as a punishment where settlement has not been reached, and the digital support services should be reconsidered to ensure that they remain effective in light of the rapid development towards digitalisation as a result of the Covid-19 pandemic. The Canadian experience offers some caution here in terms of supporting excluded persons, and the Dutch experience, whilst it might warn against having a non-court type of digital service, does highlight the benefits of digital technology for securing user satisfaction in dispute resolution.

Chapter 9 – Final Conclusions

Limitations and Suggestions for Further Work

Briefly, it is prudent to consider whether the conclusions reached, and these will be discussed below, although they have been considered to some extent in chapter 8, are limited in any way and whether any additional research might strengthen the outcome of this thesis. As a starting point, it is noted that the thesis did not conduct an extensive analysis of the implementation of reports including the Woolf Report, the Jackson Report or indeed the Briggs Report beyond the Online Court. Whilst such analysis has been conducted extensively elsewhere, and indeed direct consideration was not necessary for the arguments developed in this work, it might be useful to consider the current progress as a continuation of those reforms, and thus it may be that analysis of all the reforms together in one document would be beneficial. Further research might also be useful into the potential for replacing human judges with AI, and the implications of this. However, in order for an effective legal analysis within the context of reforming the civil justice system to be undertaken, more scientific research would be needed here first. It has not been possible to consider the cost-effectiveness of the Canadian system within this work, due to a lack of available literature through which links could be made to the UK system. Whilst the costs of the UK system have still been considered, and indeed guidance from the Rechtwijzer has been taken in this regard, so that this cannot be considered as a limitation as such, this still might be useful for completeness.

Final Conclusions

Throughout this work, detailed summaries have been provided and chapter 8 presented a number of conclusions with a view to supporting the recommendations made for reform. As such, to present those conclusions again in detail here would be repetition and not thus necessary. However, for the sake of completeness, and to draw all the points together, a few concluding remarks will be made. Firstly, it is clear that reform of the UK civil justice system is needed, notwithstanding the fact that there have been a number of attempts to do this over the past two decades; the system is expensive, slow, opaque, and does not promote access to justice for all users. Indeed, it does seem that digitalisation may be a driver behind more effective reform, and one might consider that current attempts will be more likely to be successful than those following earlier reports. That is not to say that those reforms have had no success whatsoever, but it is clear that they have not been able to successfully update the civil justice system. In terms of the progress towards developing the online court as part of the HMCTS reform package, it has been argued that whilst these have had some success, this has not been in creating a court as such, but simply provided an online service. These moves should of course be applauded as using technology to provide greater access, and indeed it does seem that there have been attempts to mitigate digital exclusion. However, the Briggs recommendations seem problematic in that they promote something which is at once novel, *and* simply encouraging services to be moved online. It has

been suggested that change needs to be made here, and it is submitted that unless the recommendations made in chapter 8 are implemented to ensure that the online system is more of a court, then the change to the opaque culture inherent in the system may never be realised. The system remains expensive, and there is opaqueness in the system, particularly in the third stage. The focus on settlement throughout cannot be supported in terms of securing access to justice, and recommendations to change this have been made. The international experience does show that digitalisation can be useful, and highlights the importance of inclusion, something which the UK seems to have dealt with. The Covid-19 pandemic has shown that swift reform is possible and it is hoped that such momentum is maintained, although in line with the recommendations made in this work to secure an effective online civil justice system which makes appropriate use of technology and AI in order to create swift, efficient, cost-effective and transparent access to justice.

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