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London's litigators give Briggs a qualified welcome

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One of London's most respected groups of litigators makes a powerful case for change in the civil courts, including for commercial users.

While the Law Society and Bar Council might be more sceptical, **Lord Justice Briggs**' review of the structure of the civil courts in England and Wales, which seeks to improve the services and efficiency for all court users, won broad support from the London Solicitors Litigation Association (LSLA).

One of Briggs LJ's more controversial proposals, which incurred the opprobrium of both the major legal professional bodies, was for lower value claims to be settled by lawyer-free online courts.

The LSLA's immediate reaction, in January, was to praise the overall scope of the report, with**Francesca Kaye**, of **Russell-Cooke**, the (then) immediate past president of the LSLA calling it a "tour de force", noting that the judge had devoted an entire chapter to a SWOT (Strengths, Weaknesses, Opportunities and Threats) analysis of his proposals.

Kaye added that it was "reassuring that the interim report does not shy away from the challenges some of the proposed reforms present."

While welcoming the thrust of the report, the LSLA, which represents almost 2,000 litigators drawn from major City litigation practices and boutique litigation firms, suggested there were other ways of achieving the outcomes Briggs LJ desired.

The LSLA's response also argued there were risks in a lack of resources in the Ministry of Justice to deliver a substantial programme of reform successfully, with the required IT and infrastructure changes.

AN ONLINE COURT

Commenting in January, the LSLA noted the vision of the Online Court (OC) as possessing "a less adversarial system to be used for lower value claims" which would require "significant investment in IT". As "a new creation [it would] need dedicated resource focussed on the particular services of the OC and the needs of the users," many of whom would be litigants in person.

The LSLA remarked that: "There appears to be a will to make that investment, not least because of the perceived economic benefits (or cuts) that can be achieved elsewhere but IT projects in this area have a poor track record."

"Indeed, Briggs LJ had to resort to referring to the DVLA as an example of a successful government-sponsored IT project. It is hard to accept that such a system is supportive of the ability to design, build and run an online paperless court."

The LSLA's response, submitted end February, maintained that line, questioning the feasibility of such investment, suggesting instead there should be a pilot project with the value limit being set at GBP 10,000, the same as that for the small claims court.

"Our greatest concern, also identified as a concern in the Review, is the feasibility of building the necessary IT infrastructure, essential for the online court to work, on time, within budget and with the necessary functionality to enable it to be genuinely user friendly for the vast majority of likely users," said **Ed Crosse** of **Simmons & Simmons**, the LSLA committee member who co-ordinated the response to the Briggs consultation, subsequently elected as the Association's president in March.

"In the current climate of service and infrastructure cuts and increasing pressures on delivery of quality services at affordable prices, this represents a significant challenge," noted Crosse.

Alternatively, the LSLA suggested taking a closer look at the alternative of fixed or capped costs for litigation in the range between GBP 10,000 and GBP 25,000.

Pointing to the example of the Intellectual Property Enterprise Court (IPEC), the LSLA said IPEC had provided a good level of certainty on recoverable costs but with sufficient flexibility to address factual circumstances that call for exceptional treatment.

"Costs are assessed summarily immediately after the determination of liability and quantum, so there is no delay, cost or uncertainty arising from detailed assessment," argued Crosse.

UNIFIED CIVIL COURT

Perhaps the greatest support for the reforms proposed by Briggs LJ was for the creation of a unified civil court with the potential benefits for costs savings and flexibility that this could achieve.

The Association had set out its stall in January, arguing that the easing of the boundaries between the divisions in the Rolls Building and greater flexibility in the management of the civil court's workload already represented fundamental changes to the existing system.

Such comments echo constitutional concerns issued by the Bar Council, which warned of the potential dangers of an inquisitorial system being introduced by fiat in the OC, but the LSLA's approach was not to condemn change, but to direct its implementation pragmatically.

It noted, for example, that "the easing of the boundaries has already begun with the creation of the shorter and flexible trials pilot and the financial list both of which are projects that the LSLA support".

The first such case to transfer to the shorter trials scheme in the Chancery Division was allocated this February – that of *Family Mosaic Home Ownership v Peer Real Estate*.

One other case is also proceeding through the Commercial Court, while the financial list has seen the mammoth *Property Alliance Group* case, in which **Herbert Smith Freehills** is acting for the **Royal Bank of Scotland**, transferred to its domain.

Change, to the LSLA, and unification, allowed for administrative cost-saving with the potential for savings to be channelled back to where they are most needed, for example in appointing additional Lord Justices in the Court of Appeal, and allowing for the maximum flexibility to allocate judges with suitable experience and capacity to appropriate cases.

The LSLA was consistent in welcoming the digitalisation of the court system, saying that London's courts were "starting to look archaic against foreign systems that compete for international litigation", and calling the four year deadline set for a digital implementation programme as "hopefully realistic".

Implementing Briggs LJ's proposals would also require commercial litigators to buy into the reforms, the LSLA warned; the concerns of those involved in high value litigation on the allocation of judges with appropriate experience and seniority would need to be addressed in any unification.

"The potential benefits of a Unified Civil Court should not be dismissed lightly", said Crosse. "The risks are not insurmountable and the creation of the new Family Court sets a useful precedent. If this proposal does not proceed, then we believe a proactive relaxation of divisional boundaries between the various courts might help to increase efficiencies and reduce delays." Suggestion to unify enforcement processes would also be positive, it said.

CASE OFFICERS

Another of Briggs LJ's proposals was for the introduction of case officers, something cautiously welcomed by the Law Society but less so by the Bar. A similar caution was evident in the LSLA's response, saying that assistance with administrative and procedural work of judges was welcome, but it remained concerned about the availability of resources to recruit, train and supervise case officers properly.

The Law Society equated their level of experience as akin to three-year PQE qualified litigation lawyers as a minimum. Yet if the OC were to succeed, much would rest on such case officers, particularly if they were asked to conduct conciliation and mediation; and there was potential for their role to be misunderstood as being quasi-judicial.

RIGHTS AND ROUTES TO APPEAL

Unlike both professional bodies, the LSLA made a series of concrete proposals for reform of the Court of Appeal, much of which commercial lawyers will welcome.

Kaye flagged up this opportunity in January, saying the proposals had “significance for higher value commercial disputes”, in addressing “the delays that have been experienced in the Court of Appeal over the last few years”.

The LSLA robustly agreed with Briggs LJ that there was a pressing need to shorten the time is takes for appeals to be finally determined, noting the report was held against a backdrop of a 54% increase in work for the Court of Appeal in the past six years.

“If English litigation is to remain an attractive and competitive option for domestic and overseas litigants, then steps must be taken to increase the speed and efficiency of the appeal process,” said Crosse.

Any proposal to increase legal resources for the appeals office, for example by recruiting more lawyers, or judicial assistants to assist with preparation of documentation required at the permission stage was welcome.

Such a move would run hand-in-glove with the creation of cadre of case officers in assisting the first instance judiciary with their work; the appellate experience of judicial assistants, often drawn from major firms and the Bar, had been a positive one.

Having noted the possibility, in January, of the removal of the right to an oral hearing for permission to appeal after refusal on the papers and of more two judge panels, the LSLA was positive about future changes. An abrogation, or removal of the automatic right to an oral permission hearing could, with appropriate safeguards, result in a significant saving of appellate time, the LSLA said.

If such a move took place, then the LSLA welcomed greater encouragement of written responses to permission applications to ensure Lords Justices would have the benefit of both sides of the argument when considering a permission application on paper.

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