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Falling at the First Hurdle? A Critical Analysis of HMCTS's Implementation of Stage 1 of the Online Court

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Abstract

This article critically examines the progress which has been made to date by HMCTS in implementing Stage 1 of the Online Court. Initially proposed by Lord Briggs as part of the Civil Court Structure Review, Stage 1 was intended to act as a virtual triage system for low value and non-complex civil claims. Its premise was based around a court user completing a series of 'decision tree' questions, which would in turn allow the system to provide them with information about the relevant legal framework relating to their dispute and allow them to create a properly pleaded claim or defence for submission to court. This would all be done without the need for legal representation. This article discusses the role Stage 1 is designed to play within the Online Court and the historical policy factors which have combined to render the successful implementation of Stage 1 so critical to the future of access to civil justice and the public trust in accessibility of civil justice. It questions the progress HMCTS have made to date on its design and for comparative purposes discusses the stages involved in the development of the Solutions Explorer within the Civil Resolution Tribunal in British Columbia on which Stage 1 of the Online Court is heavily based. The article concludes by offering recommendations to HMCTS on how the design, development and implementation of Stage 1 can still be achieved successfully.

Keywords: Online Dispute Resolution, HMCTS Court Reform, Civil Justice System, Access to Justice.

Introduction

Legal process, however unglamorous, is the gateway through which the population enforce their legal rights. Its importance cannot be understated. Successive reports have determined that the current procedure relating to civil claims is too complex for an unrepresented litigant to navigate alone[1], yet consecutive government economic

[1] See specifically and most recently Lord Woolf*, 'Access to Justice Interim Report'* (Lord Chancellor's Department, 1995)*,* Lord Woolf*, 'Access to Justice: Final Report'* (Lord Chancellor's Department, 1996)*,* Sir Rupert Jackson*, 'Review of Civil Litigation Costs: Final Report'* (2010) and Lord Justice Briggs, '*Civil Courts Structure Review: Interim Report'* (Judiciary of England and Wales, 2015) and Lord Justice Briggs*, 'Civil Courts Structure Review: Final Report'* (Judiciary of England and Wales, 2016).

policies have made it clear that the state will not support the provision of free legal advice and assistance for civil claims through legal aid[2]. What therefore exists is an increasing gap filled by litigants who cannot afford legal representation in civil matters, but who cannot, for a variety of different reasons, use the system which is currently available to them. They do not have adequate access to civil justice[3].

Technology has been identified as the key to solving this conundrum. Perhaps most vocally, Richard Susskind has promoted technology-based dispute resolution systems since the 1990s[4], however recent years have seen two key developments which show how that vision could be realised in England & Wales. The first is the adoption of the model set out in Lord Briggs's seminal Final Report on Civil Court Structure by the Ministry of Justice as part of their court modernisation programme, serving as a statement of intent to create a cost-effective dispute resolution process which can be used without the assistance of a legal representative. The second is the introduction and growth of the Civil Resolution Tribunal in British Columbia, serving as real-world evidence of how online dispute resolution systems can work in resolving low value civil claims based on a narrow range of specific causes of action.

The subject of this article is Stage 1 of the model proposed by Lord Briggs, and more specifically the investment in and development of it. Part one will cover the Civil Court Structure Review and Stage 1 itself, what its purpose is and how it is intended to work. Part two will provide an overview of why the success of Stage 1 is so important to the future of universal access to civil justice. Part three will discuss the HMCTS Reform Programme, and progress with Stage 1 and, finally, part four will address the Civil Resolution Tribunal in British Columbia, on which Lord Briggs' Online Court is based, and discuss specifically the preparatory work on design which was carried out on the Solution Explorer before its launch. The article will conclude by offering recommendations on the steps HMCTS can take from here, to ensure that the system which is launched lives up to the possibilities offered by its design.

Part 1: The Civil Court Structure Review and Stage 1

In 2015, as part of his Interim Report[5] on the civil court structure in England & Wales, Lord Briggs argued for the need to establish an online court to comprehensively overhaul the process by which, amongst other areas, low value civil claims were issued and conducted. The aim was to enable unrepresented court users to not only access the system at minimal cost, but also to present their case effectively without needing to have an in-depth knowledge of the law or the rules governing civil procedure[6].

[2] See most recently the cuts to legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
[3] Lord Justice Briggs, '*Civil Courts Structure Review: Interim Report'* (2015) at Paras 3.38 to 3.45
[4] See most recently Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019)
[5] Lord Justice Briggs, '*Civil Courts Structure Review: Interim Report'* (2015) Part 6, page 75
[6] Ibid at para 6.9

Lord Briggs's proposal was the implementation of a new online system to deal with basic civil claims worth less than £25,000[7]. Claims would be commenced by users using an online portal and involve three stages. At Stage 1, advice and guidance would be offered to the prospective claimant after answering a series of diagnostic automated questions about their claim. The system would also prompt users to submit the evidence and documents they may require to prove their claim in an attempt to reduce issues of unrepresented litigants not submitting sufficient evidence; an issue identified and discussed extensively by Professor John Baldwin[8]. Lord Briggs added that this stage would likely need to be divided into at least 2 further stages; stage 0 and stage 0.5[9]. Stage 0 would explain to the user that adversarial litigation and judicial determination ought to be a last resort, only to be used when alternative methods of dispute resolution have failed[10]. Stage 0.5 would include a provision for both parties to identify whether there is a dispute that the Court needs to resolve[11].

Stage 2 would be the Conciliation Stage. Lord Briggs was clear that the term 'alternative dispute resolution' should not be used; this stage was to become part of the dispute resolution process, not an alternative to it. However, he was clear that the process would not be mandatory[12]. Finally, Stage 3 would be a determination stage. This stage would be for cases that have not already settled in either Stage 1 or 2[13]. The determination of the issues would be decided by a County Court Judge, despite the fact that case officers will have dealt with much of the case management throughout the dispute[14].

Whilst the model of the Online Court proposed here would undoubtedly radicalise the ease with which low value claims could be brought, defended and conducted by unrepresented litigants, much of stages 2 and 3 involve digitised or online versions of models which exist within the court service's civil dispute resolution arsenal already[15]. Enabling them to be fit for purpose in an Online Court is a test of technological development, one which Lord Briggs was confident could be easily overcome. As part of his Final Report, he was explicit in identifying the area of his proposal which, if successful, had the potential to change the access to justice landscape in the most significant way; Stage 1[16].

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[7] Ibid at para 4.12
[8] Professor John Baldwin, 'Select Committee on Constitutional Affairs Written Evidence' 2005 (https://publications.parliament.uk/pa/cm200506/cmselect/cmconst/519/519we07.htm accessed 21st February 2021)
[9] Lord Justice Briggs, *'Civil Courts Structure Review: Final Report'* (2016) at paras 6.108 and 6.109
[10] Ibid, at paras 6.108 and 6.109
[11] Ibid, at paras 6.108 and 6.109
[12] Lord Justice Briggs, '*Civil Courts Structure Review: Interim Report'* (2015) at para 6.13
[13] Ibid at para 6.14
[14] Ibid at para 6.20
[15] Lord Justice Briggs, *'Civil Courts Structure Review: Final Report'* (2016) at para 6.112. Lord Briggs talks about a sufficient model for Stage 2 of the Online Court already existing in the Small Claims Mediation service run by Northampton Bulk Centre.
[16] Lord Justice Briggs, *'Civil Courts Structure Review: Final Report'* (2016) at para 6.61 in which Lord Briggs states "*The main feature of the proposed Online Court which sets it apart from any process of digitisation along the above lines is its stage 1 interactive triage process. It is this which (if it works) would provide a quantum leap in the navigability of the civil courts by those without lawyers on a full*

Stage 1

Stage 1 of the Online Court is based around the development of an automated, fully online 'triage' system, initially suggested by Professor Richard Susskind in 2015[17] and similar in design to the Solution Explorer embedded within the Civil Resolution Tribunal in British Columbia. Lord Briggs recommended that this takes the form of an interactive computerised decision tree[18]. Its aim was to unify the current pre-action and issue stages[19], by asking the user a series of questions designed to assist them firstly with identifying whether they have a viable legal cause of action. The responses to those questions would be analysed by the system to establish the alleged facts, the likely legal cause of action and the available relevant evidence. Armed with knowledge of the legal framework within which their matter would be categorised, the user would then be asked to consider other appropriate means of resolution to see if legal action could be avoided. If not, the system would assist the user with creating and submitting relevant documents, such as the claim form and the particulars of claim, based around the diagnosis of their legal issue. Those documents, once approved, would then be sent to the proposed defendant who would be taken through a similar investigatory process to generate the equivalent of a defence[20].

Lord Briggs referred to this stage as '*knowledge engineering*'[21]. Whilst he borrowed this term from the Civil Resolution Tribunal, its use is widespread across literature focusing on the development of knowledge-based systems, such as that which forms the basis for Stage 1. Knowledge engineering is the process by which expert knowledge is acquired for the development of an expert system[22]. It was first used in 1980 by Feigenbaum to describe the transfer of information from a knowledge source to a knowledge-based system[23]. Knowledge engineering involves acquiring a body of

litigation retainer. Without it, the blank sheet (or blank screen) approach of the existing systems would leave the court as un-navigable as before"

[17] Civil Justice Council, *Online Dispute Resolution for Low Value Civil Claims* (February 2015) https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf Accessed 23rd February 2021.

[18] For a full example of how Lord Briggs envisaged Stage 1 would work, see Lord Justice Briggs, '*Civil Courts Structure Review: Interim Report'* (2015) at para 6.8

[19] Currently, under a variety of Pre-Action Protocols and the Practice Direction – Pre-Action Conduct, claimants are encouraged to write to the defendant with concise details of their claim, disclose any relevant documentation and attempt settlement through alternative means to litigation. Defendants are encouraged to respond within a reasonable time with confirmation of whether the claim is accepted and, if not, an explanation as to which facts and parts of the claim are disputed (with relevant evidence), whether they are making any counterclaim and, if so, details of that counterclaim.

[20] Sir Terence Etherton, Master of the Rolls. 'The Civil Court of the Future' (The Lord Slynn Memorial Lecture, 14th June 2017) at paragraph 20 onwards https://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf accessed 23rd February 2021

[21] Lord Justice Briggs*, 'Civil Courts Structure Review: Final Report'* (2016) at para 6.62

[22] B.R. Gaines & M. Shaw, 'Eliciting Knowledge and Transferring It Effectively to a Knowledge-Based System', *IEEE Transactions on Knowledge and Data Engineering,* Vol. 5, No. 1, 1993, p. 4

[23] E. Feigenbaum, 'Knowledge Engineering: The Applied Side of Artificial Intelligence', *Annals of the New YorkAcademy of Sciences,* Vol. 426, 1984, pp. 91-92. See also R. Studer, V.R. Benjamins, D.

knowledge from experts in a particular legal field and reducing and translating it into a computer model which is capable of achieving the problem-solving abilities of a domain expert[24].

Darin Thompson, one of the architects of the Civil Resolution Tribunal in British Columbia, describes the basic structural components of a knowledge-based expert system as being the knowledge base, the inference engine and the user interface[25]. This definition synergises with the model set out by Lord Briggs in the Final Report of the Civil Court Structure Review. Knowledge engineering fits into the first stage; developing the knowledge base to feed into the inference engine which in turn performs the system's reasoning[26]. As Thompson points out, *'skeleton'* systems just containing the inference engine and the user interface can be purchased relatively simply. "*The power resides in the specific knowledge of the problem domain."*[27].

Consideration must then be given to *how* such a knowledge base can be created. When knowledge-based systems were initially being developed in the early 1980s, the assumption was that the knowledge already existed and simply needed to be gathered up and inputted into a system[28]. However, this simplistic view has since developed into something more complex and, arguably, logical; that knowledge engineering is a modelling process. Viewing it this way goes some way to addressing one of the key challenges which face knowledge engineers; "*While the expert may consciously articulate some parts of his or her knowledge, he or she will not be aware of a significant part of this knowledge since it is hidden in his or her skills. This knowledge is not directly accessible but has to be built up and structured during the knowledge-acquisition phase."*[29]

Whilst the authors of that quote were not speaking specifically about the legal domain, it can easily be seen how this translates to a potential challenge in developing a knowledge-based system to be used for the purposes of dispute resolution. Legal experts utilise not only their knowledge of the law as it appears in statute, but also their past experiences, their knowledge of procedure, precedents and, perhaps most importantly, an appreciation of a client's desired outcomes to inform the initial advice that they give. This is not only a huge amount of information to process, but it is very difficult to adequately communicate every aspect of that decision-making process to an engineer who is not expected to have any understanding of that particular legal discipline. There will inevitably be parts of the actual cognitive process that the legal expert cycles through which they will

Fensel, Knowledge Engineering: Principles and Methods Data & Knowledge Engineering, Vol 25 (1998) pp.161-197

[24] Ibid at 162

[25] D. Thompson, 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution (2015) 2 IJODR 4

[26] Ibid

[27] E. Feigenbaum, 'Knowledge Engineering: The Applied Side of Artificial Intelligence', *Annals of the New York Academy of Sciences,* Vol. 426, 1984, p. 92

[28] R. Studer, V.R. Benjamins, D. Fensel, Knowledge Engineering: Principles and Methods Data & Knowledge Engineering, Vol 25 (1998) at 161

[29] Ibid at 162

be unable to communicate as those processes are subconscious. Furthermore, as the knowledge engineer is a human being who is translating the information from the expert, it stands to reason that *"the modeling process is dependent on the subjective interpretations of the knowledge engineer."*[30] It is for this reason that treating knowledge engineering as a modelling system as opposed to a simple transfer of knowledge from an expert into a system is much more appropriate. The model can be flexible and must, therefore, be revisable in every stage of the process to accommodate for the gaps in the knowledge communicated from the expert, for the potential misinterpretations of the knowledge engineer and for the 'human factor' involved when trying to create a system whose purpose is to interact directly with consumers who have encountered a legal problem.

The main point to take from the overview of the knowledge engineering segment of the process is that it is not simply a matter of interviewing subject area experts and creating a system overnight. The process is complex and presents significant challenges, many of which can only be adequately overcome with multiple reviews and trials to try and capture as many of the nuances and characteristics of the legal discipline and the users who seek resolution of disputes within that discipline as possible. Only then will the system stand a chance at being able to achieve the problem-solving abilities of a domain expert.

Lord Briggs proposed that the development of Stage 1 should involve four stages:

1. Deciding on the extent of the types of cases within the Online Court's jurisdiction, and involving designers who have a detailed and contemporary knowledge and understanding of the law relating to those areas;
2. Construction of the questions which form the decision tree;
3. Presentation of those questions in non-legal language;
4. Coding the above into a digital format, to allow for rigorous testing.

Lord Briggs also stressed the importance of Stage 1 in the development of the new Online Court[31]:

Triage software will therefore be developed to help unaided litigants to present their versions of the case effectively, intelligibly and coherently, by winnowing the relevant from the irrelevant, all in a format uniform for claimants and defendants. This is expected to improve upon the current state of affairs, in which self-represented litigants have to turn a blank sheet of paper into particulars of claim, an adversarial process which LIPs tend not to perform with distinction"

Reference to the 'blank page' approach of the existing system requires further explanation for context purposes. To commence a claim, currently Part 7 claimants[32] are required to complete an N1 form, or its online equivalent. In that form they are

[30] Ibid at 163
[31] Lord Justice Briggs, *'Civil Courts Structure Review: Final Report'* (2016) at para 6.61
[32] CPR 7.

asked to provide brief details of the claim, and then given space on which to enter the particulars of that claim. This relies heavily on the assumption that claimants can identify their legal cause of action and desired remedy, present those in written form, and identify what evidence they could need to prove it. Stage 1 was envisaged by Lord Briggs as being an online helping hand; allowing claimants to be guided by the questions to a point where their claim was properly pleaded, with evidence, to enable the claim to be managed effectively to the next stage.

The Final Report was very clear about how the success of the project could be undermined by poor management, with identifiable risks being any delay in developing Stage 1, underfunding, poor procurement and not allowing sufficient time for rigorous testing before implementation[33]. Lord Briggs also underlined the importance of developing and trialling the knowledge engineered decision tree before anything else, as not only did it represent the most potentially impactful part of the reforms, but it would also be the most complex, challenging and time consuming to design[34].

Lord Briggs's report was endorsed by the Senior Judiciary in January 2017[35] and his vision was to be implemented as part of HM Courts and Tribunals Service's Court Reform Programme. Before considering the steps regarding implementation which have been taken to date however, it is important to explore the reasons behind which a functioning and successful Stage 1 is so important to access to civil justice in England & Wales.

Part 2: Why is Stage 1 so important? Historical Barriers to Litigants

"Every now and again some forlorn and law-wrecked suitors cry aloud about the cost, the delay, the bewildering confusion of our legal system… Civil litigation is in a state of crisis"[36]

The above statement was written in 1892. It illustrates neatly that the answer to the question which opens this section is by no means sufficiently simplistic to condense into this short piece. Civil procedure, and access to civil dispute resolution, has remained in 'crisis' almost in perpetuity. The triumvirate of high costs, long delays and high levels of complexity have been identified repeatedly by reformers as the key problems faced by litigants as they seek to access the civil justice system.

Historically, many attempts have been made to overhaul and improve the operation of the civil justice system. In 1908, the County Courts Committee led by Lord Gorell was appointed due to the county courts being "*too crowded, and that the effect has been to crowd out the small people for whose sake the County Courts were originally*

[33] Lord Justice Briggs, *'Civil Courts Structure Review: Final Report'* (2016) at para 6.55
[34] Ibid at para 6.63
[35] Lord Chief Justice, Lord Thomas of Cwmgiedd and The Master of the Rolls, Sir Terence Etherton Joint Statement, 6th January 2017 https://www.judiciary.uk/announcements/civil-courts-structure-review-joint-statement-from-the-lord-chief-justice-and-the-master-of-the-rolls/ Accessed 1st March 2021
[36] T. Snow, 'The Reform of Legal Administration: An Unauthorised Programme' 8 (1892) Law Quarterly Review 129, 129

instituted"[37]. The St Aldwyn Committee in 1913 reported on delays in the Kings Bench Division, and the Swift Committee considered and made recommendations to tackle delay in the county courts in 1922. In 1932, the Hanworth Committee was set up to achieve *"greater expedition or economy is practicable in the Courts of Law"*[38] and the Peel Commission was given the remit of considering the Dispatch of Business at Common Law[39]. The conclusions of the Hanworth Committee criticised the Rules of the Supreme Court (one of the predecessors of the Civil Procedure Rules) for being too complex, at the time running to 3800 pages.

In 1954, the Evershed Committee was appointed with the purpose of *"eliminating extravagances and securing economy in the conduct of litigation"*[40]. The recommendations contained within the Civil Justice Review in 1988 were hailed as being a *'Revolution in the Courts"*[41]*,* and Lord Woolf in 1995 aimed to *"to try and change the whole culture, the ethos… in the field of civil litigation"*[42]. Lord Woolf was forthright in his opinion that high costs and long delays had led to a system in which the average person with a good claim, would be less likely to pursue it through the courts as they could not afford it; an advancement of the comment made by the Heilbron / Hodge Report that *"litigation today is only for the rich"*[43]*.*

The common themes that run through many of the well-considered reports listed above are these; the civil justice system is too complex to access by a lay person without legal representation and too costly for an increasing number of lay people to pay a legal representative to assist them. Whilst the proposed solutions across historical reports varied, one thing is evident from their conclusions; that those two problems could not, and still cannot, co-exist. Either one or the other needed to be solved. The remainder of this segment is therefore divided into two sections; the first concerns cost of accessing the system and the availability of legal assistance and representation for those who do not have the means to instruct a legal representative privately and the second covers the challenges presented to an unrepresented litigant by the complexity of the current system.

Legal aid[44] was introduced, like many of the welfare provisions in England and Wales, as part of the post-second world war reforms of the Attlee Labour Government. The Legal Aid and Advice Act 1949 received Royal Assent on 30th July 1949 and entitled citizens to legal assistance and representation provided they passed a means and merits test. Civil matters were, in fact, the first type of legal matters to be funded from 1950; criminal matters followed in 1952[45]. That provision was to be funded as part of

[37] HL Deb 25 July 1911, vol 9, cc647-74
[38] Cmd. No. 4265 at 3 (1933)
[39] Cmd. No. 5065 at 2 (1936)
[40] Cmd. 8878 (1954) at para 337
[41] H. Heilbron and H. Hodge*, Civil Justice on Trial—A Case for Change, Joint Report of the Bar Council and Law Society* (1993) *and* J. Plotnikoff*, 'The Quiet Revolution: English Civil Court Reform and the Introduction of Case Management (1988)* 13 Just Sys J 202
[42] *Lord Woolf, Access to Justice Interim Report (Lord Chancellor's Department, 1995)*
[43] H. Heilbron and H. Hodge*, Civil Justice on Trial—A Case for Change, Joint Report of the Bar Council and Law Society* (1993)
[44] First introduced Legal Aid and Advice Act 1949
[45] Legal Aid and Advice Act 1949

the annual budget, approved by Parliament, and if that budget was to be exceeded then the expectation was that a surplus grant would be provided. In 1973, legal aid expanded with the introduction of the 'green form' advice and assistance scheme. However, at the same time civil legal aid had also hit considerable difficulties. Firstly, the cost to the taxpayer had increased substantially; "*in 1950 the cost of the civil legal aid scheme in England and Wales to the taxpayer was about half a million pounds. It is now £44½ million"*[46], however the percentage of the population eligible for civil legal aid in 1973 had correspondingly fallen to 40%[47]. The Labour government in 1979 therefore proposed a significant increase in the limit after which a person ceased to be eligible for legal aid from a disposable income of £850 to a limit of £1,500.00. The limit a person ceased to be eligible for contributory legal aid was also increased from a disposable income of £2,400 to £3,600, with that contribution correspondingly decreasing from a third to a quarter. The rationale behind this was relatively simple; "*It is no use being eligible for legal aid if one cannot afford to pay the contribution."*[48] These changes were predicted to increase eligibility for legal aid, advice and assistance to "…*at least 70 per cent of households with two parents and two children"* with *"well over 30 per cent receiving it for free"*[49]*.* Indeed, that came to be true, with 79% of households in England & Wales becoming eligible for legal aid by 1980[50].

Whilst this undoubtedly allowed for greater access to civil legal aid, advice, assistance and representation, the concern which emerged was that of the rising cost to the State. Figures produced as part of the Research Paper which provided background to the Access to Justice Bill in 1999 charted the extent of the funding increase in real terms; £261 million in 1978 (of which £77 million was civil legal aid) to £579 million in 1986 (of which £162 million was civil legal aid) to £1.5 billion in 1998 (of which £634 million was civil legal aid)[51].

The result was a dramatic scaling back of civil legal aid provision throughout the decades which followed. In 1995 Lord MacKay, the Lord Chancellor at the time, drafted and introduced a Green Paper in 1995 entitled *"Legal Aid: Targeting Need"*[52]*.* This effectively proposed the end to a system which responded to demand and funded any surplus without question and replaced it with a fixed budget for civil legal aid which was not to be exceeded. The proposals were brought into force by the Access to Justice Act 1999. Roger Smith, Director of the Legal Action Group, summarised the position with the ensuing White Paper as follows:

"The White Paper is certainly radical in the sense of promising root and branch reform of legal aid. It is, however, hardly radical in the sense of progressive. Its underlying principles are, indeed, highly political and central to the concerns of the current government. The extent to which these might be altered by a Labour government

[46] HL Deb 08 February 1979 vol 398 cc893-924
[47] Access to Justice HL Bill (1998-99) 67
[48] HL Deb 08 February 1979 vol 398 cc893-924
[49] Ibid
[50] Research Paper 99/33 on Access to Justice HL Bill (1998-99) 67, P8.
[51] Ibid
[52] Lord Chancellor's Department, *Legal Aid - Targeting Need: the future of publicly funded help in solving legal problems and disputes in England and Wales* 1995 (May 1995)

which won the election next year is hard to judge. Probably little. This looks like a sight of the future. If so, it is not quite clear that it will work. There certainly seems little here that will extend access to justice to the poor"[53].

Following the introduction of the Access to Justice Act 1999, the percentage of the population entitled to legal aid had fallen to 41%[54], and by 2007 it stood at 29%[55]. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 brought with it a further series of cuts to civil legal aid designed to reduce the cost of the legal aid system by a further £350 million[56] and, when brought into force, removed from scope nearly 70% of cases previously covered. This in turn had an impact on the numbers of litigants appearing before the court in person, as concluded by the Justice Committee[57] after their wide-ranging investigation into the impact to the post-2012 changes to civil legal aid. Not only was the increase in numbers of unrepresented litigants noted, but the Justice Committee were also clear about the difficulties which the court process presented to them:

"Our witnesses agreed that there has been a rise in the number of litigants in person following the removal of means-tested legal aid from family and other areas of law, although the exact numbers are difficult to ascertain. We believe, however, that it is of more significance that the rise in litigants in person constitutes at least some people who struggle to effectively present their cases, whether due to inarticulacy, poor education, lack of confidence, learning difficulties or other barriers to successful engagement with the court process. It is vital that the difficulties of such self-represented litigants are at the forefront of the minds of Ministers when developing and implementing measures to assist litigants in person"[58].

At the same time as the availability of free or low-cost legal assistance and representation was going down, the cost of commencing a claim was going up. In January 1997, a substantial rise in the cost of issuing a claim was introduced, designed to further support the objective of successive governments to render the courts self-financing[59]. Further increases were imposed from 9th March 2015[60], with court fees for recovery of sums between £5000 and £15,000 increased by 81%, for claims of £50,000 by 410% and for claims of £300,000 by 581%[61]. The 'enhanced court fees' were justified by the Ministry of Justice on the basis that wealthier litigants could pay

[53] Roger Smith 'Legal Aid on an Ebbing Tide' (1996) 23 Journal of Law and Society 570
[54] Sir Henry Brooke 'The History of Legal Aid 1945 – 2010' (2017) < https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf> Accessed 3rd March 2021
[55] Ibid
[56] House of Lords Constitution Committee, *Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill*, 21st Report of Session 2010-12, HL Paper 222, para. 3
[57] House of Common's Justice Committee *'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* (March 2015) at 36 <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf> Accessed 1st March 2021
[58] Ibid
[59] HL Deb 16th December 1996, vol 576, column WA106 <https://hansard.parliament.uk/Lords/1996-12-16/debates/161a027a-cd04-4078-a613-66ed417242c9/JudicialCostsAndCourtFees> Accessed 5th March 2021
[60] Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015
[61] Ibid

more in court fees, which in turn would subsidise the civil justice system in the same way as the State had done previously[62]. Despite opposition in consultation, the government felt that there was a strong justification for pursuing such a course of action[63].

In addition to increases in court fees, there has also been a corresponding decrease in physical provision. As part of government strategy to reduce the Ministry of Justice budget by a further £265 million by 2024, between 2015 and 2019 HMCTS closed 127 courts and tribunals, with a further 77 to be closed by 2026[64]. Staff numbers have also dramatically reduced, going from 19,704 Full Time Equivalents in 2011 / 12[65] to 16,100 Full Time Equivalents by 2018 / 19[66] with an intended further reduction of 5000 by 2024[67]. All of this has been and is being done in reliance on there being an operational online provision to replace what has gone before by 2024. The strategy was summarised as follows:

'In 2016, HM Courts & Tribunals Service (HMCTS) set up a portfolio of change programmes to introduce new technology and working practices to modernise and upgrade the justice system. By 2024, it expects to employ 5,000 fewer staff, reduce the number of cases held in physical courtrooms, and reduce annual spending by £244 million. Savings will come from lower administrative and judicial costs, fewer physical hearings and running a smaller estate. HMCTS expects the reformed system to work better for all those involved, use court time more proportionately and make processes more accessible to users'[68].

Whilst there is no empirical evidence available which identifies the true extent of the impact the cuts to Ministry of Justice budgets, civil legal aid and the increase in court fees have had, figures from the charitable organisation the Personal Support Unit (now Support Through Court) show a dramatic increase in the numbers of court users seeking assistance from them, from 21,508 in 2013/14[69] to 65,456 in 2018 / 19[70]. This

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[62] Ministry of Justice *'Enhanced Court Fees: The Government Response to Part 2 of the Consultation on Reform of Court Fees and Further Proposals for Consultation'* (2015) <https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/results/enhanced-fees-consultation-response.pdf> Accessed 12th March 2021

[63] Ibid at para 45

[64] National Audit Office *'Transforming Courts and Tribunals – A Progress Update'* (2019) <https://www.nao.org.uk/wp-content/uploads/2019/09/Transforming-Courts-and-Tribunals.pdf> Accessed 12th March 2021

[65] HM Courts and Tribunal Service, Annual Report and Accounts 2014-15 (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/433948/hmcts-annual-report-accounts-2014-15.pdf> Accessed 13th March 2021

[66] Ibid

[67] National Audit Office *'Early progress in transforming courts and tribunals'* (2018) < https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progess-in-transforming-courts-and-tribunals.pdf> Accessed 12th March 2021

[68] Ibid

[69] The Personal Support Unit '*Annual Report for the year ended 31st March 2014'* (2014) <https://www.supportthroughcourt.org/media/1057/psu-annual-report-2013-14.pdf> Accessed 14th April 2021

[70] The Personal Support Unit '*Report and Financial Statements for the year ended 31st March 2018'* (2018) <https://www.supportthroughcourt.org/media/1888/psu-annual-report-2018.pdf> Accessed 14th April 2021

represents a 304% increase. More granular data is unavailable, but it would be difficult to conclude that at least a significant proportion of such a sharp rise is due to anything other than the financial barriers placed in front of litigants following successive reductions in the State's contribution to unmet legal need across the spectrum.

The evidence available therefore demonstrates the extent and severity of the financially related barriers faced by an unrepresented litigant approaching the civil court system. However, this only explains a portion of why an effective Stage 1 is of such paramount importance. To return to the point at the beginning of this section, it was universally agreed by reformers that the civil justice system had to either be easy enough to navigate by a litigant in person, or sufficient provision needed to be available to enable a litigant to access legal assistance. As it is clear that provision for the latter is unlikely to be increased, the status in respect of the former now falls to be considered.

Concurrent to the introduction of the cuts to civil legal aid contained in the Access to Justice Act 1999, the Civil Procedure Rules 1999 were also brought into force. Lord Woolf was clear in both his Interim and Final Reports that the new procedural code needed to be decipherable by a lay litigant, both in language and in procedural complexity[71]. He therefore recommended that the previous two bodies of procedural rules, the Rules of the Supreme Court and the County Court Rules be merged into one unified procedural code, and that the language of the rules be simplified. Further, court forms were redrafted and introduced to assist unrepresented litigants with, amongst other things, commencing their claim.

The difficulty was, however, that the scale of the task was too much for one set of reforms. In relation to the procedural complexity of the rules, Peter Thompson QC stated that *"… in 1998, before the new rules came into force, the rules of procedure took up 391 pages... Lord Woolf's aim was to unify the procedure for all civil courts so that all proceedings would follow the same pattern. This has not happened.... we now have three sets of rules which, together with practice directions and protocols, cover 2,301 pages... a 550% increase"*[72]. Further criticism was levelled by the Judicial Working Group on Litigants in Person, who commented:

"In fact, ten years or so on, the two volumes and supplements to Civil Procedure ('the White Book') now account for nearly 7,000 pages. In practice, the sheer breadth, use of technical terms, need to cross-refer, and supplementation by a host of Practice Directions, Practice Guides, protocols and court forms, present a picture of complexity that can be daunting for lawyers. It is a substantial challenge for any litigant in person"[73].

In terms of language, terminology was simplified with the replacement of words such as writ, issue and service. On the N1 claim form specifically, Lord Woolf was confident

[71] Lord Woolf, *'Access to Justice Interim Report* (1995), and Lord Woolf, *Access to Justice: Final Report* (1996)
[72] Peter Thompson QC 'Woolf's Litigants' 159 N.L.J. 293-294
[73] Judiciary of England and Wales, *'The Judicial Working Group on Litigants in Person: Report'* (2013) <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/lip_2013.pdf> Accessed 10th April 2021

in its success, stating, *"...this will make it easier for all litigants, not just litigants in person"*[74]. Ian Magee, the then chief executive of the Court Service said that*"…we hope the civil justice reforms will make courts easier to use. The replacement of legal and Latin terms with plain English phrases is part and parcel of that process. Many current terms are confusing and difficult to understand for people who do not use courts regularly and we hope the new phrases will help people follow proceedings more easily"*[75]. However, academic studies carried out since the introduction of the CPR showed that there was still some way to go:

"Even though the Woolf reform of 1999 (initiated by the Conservative government) might be construed as a publicity stunt from the New Labour government which aimed at showing its will to make justice easier to access for lay people, our study (which is the first one carried out post-Woolf on the linguistic aspect of the reform since its implementation) tends to show that at least from a language approach, this purpose was partly reached although there is still room for improvement"[76].

The availability of empirical data showing the challenges which unrepresented litigants face when commencing their engagement with the civil court system is very limited indeed, with much of the commentary in the Interim and Final Reports of the Civil Courts Structure Review which led Lord Briggs to conclude that "*the single, most pervasive and intractable weakness of our civil courts is that they simply do not provide reasonable access to justice for any but the most wealthy individual*[77]*"* being anecdotal. However, perhaps the best and shortest summary of the reasons behind the barriers associated with the complexity of the current civil justice system is that "…*the legal system was designed by legal actors, for legal actors*[78]. Whilst that was perhaps sustainable when it was possible for litigants to engage those legal actors affordably via legal aid, this is no longer the case. More wholesale change is required, with a system designed around the needs of its intended users; litigants who are either unrepresented or who only have access to limited legal advice.

Whilst this section is by no means a fully comprehensive summary of the difficulties faced by prospective civil litigants, it does serve to illustrate how government economic policy and previous civil justice reform have been pursued in isolation of each other. However, all of this would be simply of historical interest if it could be shown that public trust in accessing the civil justice system was high. Very little empirical evidence exists from historic studies on the perception of the public on the civil justice system[79], at least by comparison to those focused on the criminal justice system[80]. Additionally,

[74] Lord Woolf, *Access to Justice: Final Report* (1996) at Chapter 17 Paragraph 9
[75] Robert Verkaik, *'Centuries of obscure legal jargon abolished'* The Independent, 22nd April 1999 <https://www.independent.co.uk/news/centuries-of-obscure-legal-jargon-abolished-1088834.html> accessed 30th November 2020
[76] Géraldine Gadbin-George, 'The Woolf reform of civil procedure: a possible end to legalese?' (2010) LSP Journal, Vol.1, No.2
[77] Lord Justice Briggs, '*Civil Courts Structure Review: Interim Report'* (2015) at para 5.23
[78] Ibid at paras 5.27-5.36.
[79] Ministry of Justice: 'Just satisfaction? What drives public and participant satisfaction with courts and tribunals?' (2008) at p17
[80] Ministry of Justice, 'Explaining attitudes towards the justice system in the UK and Europe' (2008)

from the surveys that have been carried out, it is difficult to draw accurate conclusions due to the lack of consistency in methodologies and methods used to carry out those research projects themselves[81].

That said, the most recent and perhaps most useful study to consider when looking specifically at England & Wales is the Legal Services Board and Law Society's joint publication *'Legal Needs of Individuals in England & Wales: Technical Report 2019 / 20'*[82]*.* Collecting data from 28,663 participants, asked about a total of 34 civil legal issues, this sought amongst other things to specifically establish a view of participants' perceptions of the civil justice system. The results were separated into three categories; legal confidence (that the participant could achieve a fair and positive outcome without assistance), legal self-efficacy (that the user could generally handle the situation in a legal context) and accessibility of justice (the degree to which the participant felt the civil justice system was accessible). On legal confidence, 36% did not feel confident, 53% had medium confidence and 11% had a high degree of confidence. On self- efficacy, 36% did not believe they could handle a difficult situation in a legal context, 47% had medium levels of self-efficacy and 17% believed they had high levels. Finally, on accessibility of justice, 23% believed civil justice was easily accessible, 59% had medium levels of accessibility and 18% did not believe that civil justice was accessible at all[83].

What these statistics do show is that there is significant room for improvement. The importance of trust in the civil justice system is significant for society in that it *"…matters for trust in government, by providing citizens with recourse mechanisms to protect their rights and access to other public services such as education or health. In turn, access to and satisfaction with these services are important contributors to trust in government more broadly"*[84]*.* It is the view of this author that Stage 1 has an important role to play in the future, to increase users' legal confidence and legal self-efficacy, and to promote and increase perceptions of accessibility to civil justice.

This leads to the answer to the opening question of this section; Stage 1 is so important because it is *necessary.* The options which are available to preserve proper access to civil justice have dwindled. It is clear that the State is committed to reducing the civil legal aid budget. It is similarly clear that front line budgetary cuts are likely to continue until the system is self-funding, however this cannot be achieved by simply increasing court fees to levels which are unaffordable. That is the antithesis of universal access to justice. A simplification of the existing procedure and terminology is not able to go sufficiently far to plug the access to justice gap and, finally, there is evidence to suggest a genuine perception of lack of accessibility to civil justice amongst potential court users in England & Wales. The only feasible and workable solution is the creation and implementation of a Stage 1 process which enables both lay claimants and

[81] Pascoe Pleasance, Nigel J Balmer, Rebecca L. Sandefur, '*Paths to Justice. A Past, Present and Future Roadmap'* (2013)
[82] YouGov plc, Legal Services Board and The Law Society, *'Legal needs of Individuals in England and Wales. Technical Report 2019 / 20'* (2019)
[83] Ibid at pages 23-25
[84] OECD Public Governance Reviews, *'Trust and Public Policy. How Better Governance Can Help Rebuild Public Trust'* (OECD) at Ch 8, p141

defendants to identify their cause of action and, if necessary, plead it effectively at the same time as being both cost-efficient to access and cost-efficient to run. This was Lord Briggs's vision; that the power of technology would be used to re-write a new, and perhaps more permanent, solution to the decades' old access to civil justice problem. However, in order to succeed with this, investment of both time and money is needed. This therefore leads to consideration of the HMCTS Reform Programme, and what has been done so far to bring Stage 1 into reality.

Part 3: HMCTS Reform Programme

Her Majesty's Courts and Tribunals Service (HMCTS) is an Executive Agency of the Ministry of Justice (MoJ) and responsible for administration of courts and tribunals. Its £1 billion court reform programme was launched in 2016[85]. Its objective was ambitious:

"Our overall aim is clear: a courts and tribunal system that is just, and proportionate and accessible to everyone – a system that will continue to lead and inspire the world"[86].

This ambition was elaborated upon by the senior tribunals judge Sir Ernest Ryder in March 2016:

"Citizens, whether litigants or not, are not supplicants coming to the high hand of judgment. They are rights bearers. And our justice system should be capable of ensuring that as such they are able to access those rights in an appropriate setting. Justice, and access to it, should lie at the heart of the community… Do not get me wrong – this is not about local buildings or the court and tribunal estate – that would be an entirely superficial and simplistic way of characterising access to justice. This is about recognising the way that we live in a digital society and responding accordingly … This will be a justice system where many sizes fits all; not one size for all"[87].

Initially, the programme aimed to automate and digitise the entire process of civil money claims, to include Stages 1, 2 and 3 of the Online Court, by 2020[88]. In 2019, it was announced that the completion deadline for the whole project would be extended to 2023, following reports from the National Audit Office and the Public Accounts

[85] Ministry of Justice, *'Transforming Our Justice System'* (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 15th February 2021
[86] Ibid at p4
[87] Sir Ernest Ryder, *'The Modernisation of Access to Justice in Times of Austerity'* <https://www.judiciary.uk/wp-content/uploads/2016/03/20160303-ryder-lecture2.pdf> accessed 15th February 2021
[88] Ministry of Justice, *'Transforming Our Justice System'* (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 15th February 2021 at p11

Committee in 2018 and 2019. Those reports highlighted the delays to the programme, the over-ambitious scale of proposed reform and HMCTS's failure to that point to take account of the experience of those using the courts. The additional delay was to allow time to *"reorder aspects of the programme*[89]*"* although the press release was non-specific about which aspects this related to[90]. The initial National Audit Office report details the implementation stages for the reforms[91], separating them out into three interim stages between 2016 and 2020, with an end date for rolling out design principles and embedding mechanisms for continuous improvement between 2020 and 2022. Interim stage 1, due to take place between 2016 and mid 2017 was for *"testing service design principles and implementing the underpinning infrastructure required for the future operating model."*[92] This seems the obvious place for Stage 1 to be developed and trialled, however there was no mention of it throughout the report. Similarly, there is no mention of the project in the HMCTS update bulletin[93], most recently updated on 4th June 2019. Reform of the civil claims process was mentioned more generally[94] however it is surprising that a project of the scale of Stage 1 was not specified.

Detail of where in the process the Stage 1 project was due to fit is available, however. In the papers of their May 2017 meeting, the Civil Procedure Rules Committee set out their intended 3-year release plan for the Online Court, specifically in connection with money claims. The stages referred to were as follows:

- *Release 1: Issue and Response for single-to-single users*
- *Release 2: Issue and Response for multi-party and represented parties*
- *Release 3: User notifications and enhanced A1 and A2 functionality*
- *Release 4: Integrated mediation/conciliation and case officers*
- *Release 5: Box work, applications and hearing preparation*
- *Release 6: Online Dispute Resolution*
- *Release 7: Hearings*
- *Release 8: Decision Trees*
- *Release 9: Part 8*
- *Release 10: Bulk users and warrants*

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[89] HM Courts and Tribunal Service, 'Additional Year to Deliver Ambitious Court Reform (2019) <https://www.gov.uk/government/news/additional-year-to-deliver-ambitious-court-reforms> accessed 15th February 2021

[90] HM Courts and Tribunals Service, 'Reform Update Summer 2019' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806959/HMCTS_Reform_Update_Summer_19.pdf> accessed 15th February 2021

[91] National Audit Office *'Early progress in transforming courts and tribunals*' (2018) < https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progess-in-transforming-courts-and-tribunals.pdf> Accessed 12th March 2021 at p25

[92] Ibid at p25

[93] https://www.gov.uk/guidance/hmcts-reform-programme-projects-explained Accessed 21st April 2021

[94] National Audit Office *'Early progress in transforming courts and tribunals*' (2018) < https://www.nao.org.uk/wp-content/uploads/2018/05/Early-progess-in-transforming-courts-and-tribunals.pdf> Accessed 12th March 2021 at p24

- *Release 11: Pre-issue (stage 0), costs, Infant settlement, etc*[95]*.*

As part of Release 1, the Online Civil Money Claim Pilot[96] was tested internally between 2016 and 2018 and released to the public in March 2018[97]. Users were asked to give brief details of their claim in an open text box, then directed to insert a timeline of events, with the ability to select a date from a drop-down menu and complete a separate box adjacent to the date for the corresponding significant event, and to finally list any evidence they had (although this was optional). The trial completed in November 2019[98]. Whilst it was an important first step, it is still quite a significant distance from the knowledge engineered series of questions which Lord Briggs envisaged. It simply added in an opportunity for the user to provide a more structured timeline and drew their attention to the need to consider the available evidence, neither of which meet the design objectives for Stage 1. There were no diagnostic questions, no signposting and no assistance with creation of formal claim documentation. It was arguably a simple digitisation of the paper issue process which, in defence of its developers, was all Release 1 required it to be.

The problem is not that Release 1 was a reasonably basic technological advance, it is that nearly 18 months on no further progress has been made. Since the pilot came to an end, HMCTS have referred to decision trees being developed[99] in conjunction with members of the judiciary however have provided no detail on how this is progressing or when a system designed around knowledge engineered questions will be piloted. This is a matter of significant concern.

Currently, money claims can be made online however the system now only offers the option to input details of the claim, essentially an electronic version of the N1 claim form. This is the equivalent of the *'blank screen'* approach which Lord Briggs warned against in 2016. It was set out in the Civil Procedure Rule Committee pages[100] that all 11 Releases were to be complete over the three years which followed their meeting in May 2017. Yet, there has been no further information released concerning the development of decision trees or when they could be piloted. This suggests that the programme is significantly behind schedule, which raises questions over whether

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[95] Civil Procedure Rules Committee (2017) Item 10: Pilot for Digital Procedure, *Minutes of Civil Procedure Rules Committee Meeting 5th May 2017*, Meeting Room 1, Queens Building, 2nd Floor Mezzanine, RCJ

[96] 51R PD 2.1 and see HM Courts and Tribunals Service, 'Online Civil Money Claims and Civil Enforcement' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785324/Civil_reform_event_11_March_2019.pdf> accessed 12th March 2021

[97] HM Courts and Tribunals Service, 'HMCTS Reform Update – Civil' (2019) <https://www.gov.uk/guidance/hmcts-reform-update-civil> accessed 12th March 2021

[98] HM Courts and Tribunals Service, 'Reform Update Summer 2019' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806959/HMCTS_Reform_Update_Summer_19.pdf> accessed 15th February 2021

[99] HM Courts and Tribunals Service, 'Online Civil Money Claims and Civil Enforcement' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785324/Civil_reform_event_11_March_2019.pdf> accessed 12th March 2021

[100] Civil Procedure Rules Committee (2017) Item 10: Pilot for Digital Procedure, *Minutes of Civil Procedure Rules Committee Meeting 5th May 2017*, Meeting Room 1, Queens Building, 2nd Floor Mezzanine, RCJ

there is sufficient time to properly develop and test a complex diagnostic Stage 1 system between now and 2023, when the modernisation programme is due to be complete.

Commenting upon the future of civil justice under the HMCTS Court Modernisation Programme, and with particular reference to why reform needed to go beyond simple digitisation of existing systems, Sir Terence Etherton stated as follows in 2017:

"The starting point is the purpose of our civil courts. It might reasonably be assumed that the straightforward digitisation of court processes under the HMCTS reform programme would have no impact on this [access to justice] *issue. The transformation of court administration and processes from being paper-based to electronic ones could reasonably be seen as no different to the electrification of the railways. The trains continued to run to the same destinations. All that changed was the way in which they were powered"*[101].

If the current pace of development continues, it is difficult to see how this metaphor will not simply turn into a startlingly accurate prediction. Of course, there are still two years before the modernisation programme is due to be completed, which gives rise to the question of whether the time remaining before full implementation is sufficient to design, develop and test Stage 1. The answer lies in the final part of this article, which considers the development of the system on which the Online Court is heavily based; the Civil Resolution Tribunal in British Columbia. This will illustrate why shortage of time to develop the Online Court is such a key concern.

Part 4: The Civil Resolution Tribunal in British Columbia

The Civil Resolution Tribunal (CRT) is Canada's first online tribunal, introduced on 13th July 2016 to deal with strata property disputes[102]. From June 2017 the CRT expanded to deal with small claims disputes of around $5,000.00[103]. The CRT is mandatory in British Columbia for property disputes, small claim values worth up to $5000, society and co-operative association disputes and motor vehicle accidents valued up to $50,000. An important distinction between the CRT and the Online Court is that it stands outside the formal court structure, however is part of the public justice system with the power to make enforceable orders[104].

The CRT is accessible by users 24 hours a day and seven days a week and can also be used from both computers and mobile devices as well as providing services

[101] Sir Terence Etherton, Master of the Rolls. 'The Civil Court of the Future' (The Lord Slynn Memorial Lecture, 14th June 2017) at paragraph 20 onwards https://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf accessed 23rd February 2021

[102] The Civil Resolution Tribunal, *'The Civil Resolution Tribunal and Strata Disputes'* (2017) < https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal#overview> Accessed 18th March 2021

[103] Roger Smith, 'Take Note of Canada's First Online Court' (2017) 167 NLJ 7751, p7

[104] Civil Resolution Tribunal Act 2012, Part 6 (ss57 – 60)

available by phone.[105] Shannon Salter, Chair of the CRT, referred to it as an *'access to justice project'*, building a justice system around people's lives[106]. The CRT process starts by using a Solution Explorer, which diagnoses what type of dispute the user has and offers free legal information to help parties resolve disputes outside of the Court Process[107]. This is the equivalent to Lord Briggs's Stage 1. If the parties cannot resolve their dispute after this, negotiations will take place before an online facilitator[108]. Finally, if neither of the first two stages have been successful, a CRT Member will then review the dispute and make a decision on behalf of the parties. This can then be enshrined into a Court Order[109]. The parallels between the model for the Online Court proposed by Lord Briggs can be clearly seen.

The design of the CRT and the Solution Explorer is human centred. Data gathering and publication is at the heart of the CRT's strategy to improve the usability of its service. Each year it produces an Annual Report[110] which details, amongst other things, the numbers of users, the number of active disputes and the number of disputes which have been resolved by the service.

Since its first year of operation to date, there has been 839% increase in the number of users[111]. In 2016-17, the Solution Explorer was used 5,505 times, increasing to 54,680 times by 2019/20[112]. and the number of active disputes within the CRT increased from 262 in March 2017 to 1,551 by March 2020[113]. Similar positive evidence is available when considering the data relating to numbers of claims being settled annually. Between 2017 to 2020, 2172 Strata disputes were settled, with just 49 of those disputes being resolved in 2017 compared to 848 disputes being resolved in 2020[114].

In terms of cost to the user, both financially and in terms of time, despite the growth in the number of disputes being dealt with by the CRT it has maintained the response

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[105] The Civil Resolution Tribunal, *'The Civil Resolution Tribunal and Strata Disputes'* (2017) < https://www2.gov.bc.ca/gov/content/housing-tenancy/strata-housing/resolving-disputes/the-civil-resolution-tribunal#overview> Accessed 18th March 2021

[106] Society for Computers and Law, *'Can Online Dispute Resolution Humanize the Justice System?'* (Shannon Salter, 2018) <https://www.scl.org/podcasts/10363-webinar-the-inaugural-scl-sir-brian-neill-lecture-can-online-dispute-resolution-humanize-the-justice-system-by-shannon-salter> Accessed 18th March 2021

[107] Robert Lapper QC, 'Access to Justice in Canada – The First On-line Court' (*commonwealthlawyers.com*, 15 April 2020) < https://www.commonwealthlawyers.com/cla/access-to-justice-in-canada-the-first-on-line-court/> Accessed 25th February 2021

[108] Ibid

[109] Ibid

[110] Civil Resolution Tribunal, 'Presentations and Media' (*civilresolutionbc.ca*) < https://civilresolutionbc.ca/about-the-crt/presentations/> Accessed 25th February 2021

[111] Civil Resolution Tribunal, *'2019-20 Annual Report'* (March 2018) < https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdf> accessed 25th February 2021 and Civil Resolution Tribunal, *'2016-17 Annual Report'* (March 2018) < https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2016-2017.pdf> accessed 25th February 2021

[112] Ibid

[113] Ibid

[114] Ibid

fee of $25[115] and has retained the $25 discount for applications filed online, essentially rendering issue free[116]. From the most recent annual report, the median time for disputes to be resolved for all types of disputes was just 45 days[117]. Broken down to matter type, this mixes the median net time of 108 days for resolution for complex Strata disputes, and just 42 days for Small Claims matters[118].

Feedback on user experience is gathered, published and actioned. From 2017, the CRT committed to reviewing their body of rules every 6 months taking into account feedback and suggestions[119]. On 1st January 2020 the CRT updated their rules following feedback gathered, creating a Code of Conduct for Parties, Representatives and Helpers and introducing a new rule covering what is taken into account by the Tribunal when a party requests that the matter be placed on hold[120]. Participants are asked to take part in an anonymous survey, with the results published each month[121].

The design of the Solution Explorer involved lengthy consultation with lawyers in British Columbia to firstly create the relevant legal information. Knowledge engineers employed by the CRT, and law students[122], gathered information from lawyers regarding the most common issues which were arising across their client base, taking details of the type of questions they would have asked those clients in an interview and the advice they would have offered to them. That information was then converted into language aimed at 'Grade 6' reading level[123]. The initial process was outlined as follows:

"We started by testing conceptual designs of intake forms and processes with community advocates, who serve clients with various barriers, and then began testing them with individuals with real disputes. This feedback has allowed us to frontload changes and refinements at an early (inexpensive) development stage."[124]

Darin Thompson, who was the chief legal architect for the Solution Explorer, set out in detail the steps that needed to be taken when creating the content. First, orientation of both the knowledge engineers and the subject matter experts. Second, domain

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[115] Civil Resolution Tribunal, *'2019-20 Annual Report'* (March 2018) < https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdf> accessed 25th February 2021, p2
[116] Ibid
[117] Ibid at p7
[118] Ibid at p25
[119] Civil Resolution Tribunal, 'New CRT Rules' (civilresolutionbc.ca, 17 May 2017) < https://civilresolutionbc.ca/new-crt-rules/> accessed 26th February 2021
[120] Civil Resolution Tribunal, 'New CRT Rules Effective January 1, 2020' (*civilresolutionbc.ca,* December 2019) < https://civilresolutionbc.ca/new-crt-rules-effective-january-1-2020/> accessed 26th February 2021
[121] Civil Resolution Tribunal, 'Participant Satisfaction Survey – November 2020' (civilresolution.bc.ca) < https://civilresolutionbc.ca/participant-satisfaction-survey-november-2020/> accessed 26th February 2021
[122] Civil Resolution Tribunal, 'The Solution Explorer is Growing!' (*civilresolutionbc.ca,* January 2018) <https://civilresolutionbc.ca/solution-explorer-growing/> accessed 26th February 2021
[123] Bill Henderson, 'Is Access to Justice a Design Problem?' (legalevolution.org, 23rd June 2019) <https://www.legalevolution.org/2019/06/is-access-to-justice-a-design-problem-099/> accessed 26th February 2021
[124] Shannon Salter and Darin Thompson, '*Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal*', (2016) Vol 3 McGill Journal of Dispute Resolution 113

investigation, which involve surveys and focus groups to establish how both experts and non-experts engage with the subject matter in hand. Third, precision scope determination, which is the step necessary to provide a working definition of what areas will be covered by the knowledge base. Fourth, random content generation, where subject matter experts are asked to talk about common problems within the knowledge base, enabling the knowledge engineer to create a mind map of the problems, then group them together into categories to be used in the fifth step; the creation of prototype decision tree branches which can be tested by the participants. This can then be used to inform the conversion of the knowledge bases to questions and answers which will eventually form part of the system itself. Each stage was subject to multiple revisions following testing[125].

In British Columbia, the Civil Resolution Tribunal Act 2012 was assented on 31st May 2012. The system did not formally launch until 13th July 2016 for strata disputes, with small claims being added on 1st June 2017[126]. This evidences the amount of time it took to even get the system off the ground. Even then, despite overall satisfaction levels being generally high[127], there is still room for improvement, with the CRT User Experience Study conducted over 9 months of 2019 revealing common themes of users being frustrated and requiring more help[128].

The key point to note here is the extent to which the CRT development model followed the principles of constructing the foundations of a knowledge-based system which were outlined earlier in this article, in particular the steps which were taken to mitigate against the risk of subconscious elements of an expert's knowledge process being overlooked, the subjective interpretation of the information by the knowledge engineers themselves and the failing to take into account the nuances of the legal discipline and the characteristics of the users who seek resolution of disputes within that discipline.

From the statistics and data published on a monthly and annual basis, the CRT seems to be operating effectively and to the reasonable satisfaction of users. Given the similarity between Stage One and the Solution Explorer, it seems obvious to adopt a similar strategy. It is also important to remember that not only do the steps above need to be taken but scheduling and availability variables need to be taken into consideration. Given the final Stage 1 system is intended to cover a range of legal matters, different experts and non-experts need to be engaged to ensure that the

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[125] Darin Thompson, 'Initiating the Content Creation Process' (*Law Actually with Darin Thompson)* <http://darinthompson.ca/knowledge-engineering/knowledge-engineering-start-to-finish/getting-started/> accessed 26th February 2021

[126] Civil Resolution Tribunal, 'Claims under $5,000 coming to the CRT on June 1st 2017, (*civilresolutionbc.ca,* 18th April 2017) <https://civilresolutionbc.ca/small-claims-5000-coming-crt-june-1-2017/#:~:text=On%20June%201%2C%202017%2C%20the,resolved%20through%20the%20online%20tribunal> accessed 26th February 2021

[127] See for example, and most recently: Civil Resolution Tribunal, 'Participant Satisfaction Survey – March 2021' (*civilresolutionbc.ca,* 13th April 2021) < https://civilresolutionbc.ca/participant-satisfaction-survey-march-2021/> accessed 28th April 2021

[128] CRT User Experience Study, 'Civil Revolution: User Experiences of British Columbia's Online Civil Resolution Tribunal' (*civilresolution.trubox.ca*, 5th June 2020) <https://civilresolution.trubox.ca/2020/06/05/lsa-conference-presentation/ > accessed 26th February 2021

information which is fed into the knowledge base is as comprehensive and thorough as possible. A pilot will then need to be extensively trialled both privately and then publicly, as the small claims element of the CRT was in April and May 2017 in beta format [129].

Conclusions and Recommendations

The quote from 1892 which opened Part 2 of this article is worthy of repetition. "*Civil litigation is in a state of crisis"*[130]*.* Considering successive cuts to civil legal aid and frontline court provision and increases to consumer costs through the rise in court fees, it is difficult to see how this does not also apply in 2021. The numbers of litigants seeking to represent themselves is increasing, with much of the anecdotal evidence suggesting that the progress and presentation of their cases is hindered by a lack of both familiarity with the process and basic understanding of the framework of the relevant law. Both issues are entirely understandable for court users with no legal background when faced with a system designed for use by legal representatives. The data available also says nothing about the number of potential litigants who are deterred from utilising the civil justice system before they even commence proceedings. To bridge this access to justice gap, it is therefore incumbent upon HMCTS to provide users with a viable alternative enabling them to understand their cases and what is needed to present them effectively without needing to rely exclusively on the engagement of legal advisors. Such provision is urgent.

That said, it is also clear that the HMCTS court modernisation programme is behind schedule. A programme which was due to complete by 2020 upon its launch is now targeted for full roll-out by the end of 2023. It is submitted that a further extension is both inevitable and necessary. To design a system based on a real-world blueprint, it seems eminently sensible to mirror the approach to development of the designers of that system; in this case the Civil Resolution Tribunal. It is now necessary for HMCTS to acknowledge that the development of Stage 1 is off track and reset the timetable accordingly.

However, this should be done with conditions. A comprehensive review of progress made to date must be conducted and published, with a more realistic revised timetable generated containing granular targets to be met specifically for the content creation[131] stages. Proper boundaries must be agreed in relation to the areas of law which Stage 1 will deal with, in the same way as they are for the CRT. Without such steps, Stage 1 risks being a good idea destined to leave only a huge amount of unfulfilled potential as its legacy.

It would be fair to comment that the urgency of taking positive steps to address the access to civil justice gap and the need for delaying the implementation of Stage 1 are

[129] Civil Resolution Tribunal, 'Try the Solution Explorer for Small Claims' (*civilresolutionbc.ca,* 18th April 2017) <https://civilresolutionbc.ca/try-solution-explorer-small-claims/> accessed 26th February 2021

[130] T. Snow, 'The Reform of Legal Administration: An Unauthorised Programme' 8 (1892) Law Quarterly Review 129, 129

[131] Darin Thompson, 'Initiating the Content Creation Process' (*Law Actually with Darin Thompson)* <http://darinthompson.ca/knowledge-engineering/knowledge-engineering-start-to-finish/getting-started/> accessed 26th February 2021

incompatible as arguments. To an extent, this is true. However, it is submitted that a delayed but functional and operational diagnostic system which assists litigants of low value and low complexity claims is better than either a rushed and ineffective version which loses the confidence of its users from launch or, at worst, a simple digitisation of the existing 'blank page' process. Trust in the system is paramount.

Lord Briggs was clear in what he perceived to be the risks to the success of Stage 1 in his Final Report; poor management; delay of developing Stage 1, underfunding, poor procurement and lack of time available for rigorous testing before implementation[132]. From the evidence available it would appear these warnings have not been properly heeded. However, it is not too late. Acknowledgement of the reality of the situation, followed by a clear review and restatement of the targets and timetables involved in creating Stage 1 could still lead to a successful launch; one which would genuinely improve access to civil justice for court users in England & Wales.

[132] Lord Justice Briggs, *'Civil Courts Structure Review: Final Report'* (Judiciary of England and Wales, 2016)