Enhancing the Development and Implementation of an Online Dispute Resolution System for Low Value Civil Claims in England & Wales: Lessons from British Columbia.

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Abstract

Lord Briggs published the findings of his Civil Court Structure Review in 2015 and 2016. One of the core recommendations of this seminal report was the creation of the Online Solutions Court, an online dispute resolution system for low value civil claims based heavily on the Civil Resolution Tribunal in British Columbia. Lord Briggs's proposed structure was endorsed by the senior judiciary in 2017 and adopted as part of Her Majesty's Court and Tribunal Service's court reform programme. However, despite proposing, in essence, to transplant the Civil Resolution Tribunal model into the English civil justice system, the reports did not include a detailed analysis of how this could be carried out, taking account of any mitigations and divergences of approach which would need to be adopted. There remains no singular piece of research which has done so.

This thesis advances the initial foundation proposal put forward by Lord Briggs for the Online Solutions Court by conducting a comparative analysis of how the composite stages of the Civil Resolution Tribunal were embedded into the British Columbian civil justice system and how it is proposed that the corresponding stages of the Online Solutions Court will be embedded in England and Wales, taking into account the historic relationship between government funding and the civil justice systems in the comparator jurisdictions. The proposals put forward at the end of this study, if adopted, create a framework which will enhance the design, development and implementation of the Online Solutions Court in England and Wales. Adoption of the concluding recommendations will prevent the Online Solutions Court from simply becoming a digitised version of the current County Court procedure: something which has been repeatedly recognised as being too costly, too complex and too lengthy to provide adequate access to justice for unrepresented litigants in low value claims.

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ADR	Alternative Dispute Resolution
BC	British Columbia
BC MOJ	British Columbian Ministry of Justice
CDR	Consensual Dispute Resolution
CJRWG	Civil Justice Reform Working Group
CPR	Civil Procedure Rules
CRT	Civil Resolution Tribunal
ENE	Early Neutral Evaluation
HMCTS	Her Majesty's Courts and Tribunal Service
LASPO	Legal Aid, Sentencing and Punishment of Offenders Act 2012
MOJ	Ministry of Justice
ODR	Online Dispute Resolution
OSC	Online Solutions Court
TPT	Traffic Penalty Tribunal

Chapter One: Introduction to the Thesis

1.1 Purpose of the thesis

The purpose of this thesis is to enhance the current proposal for the Online Solutions Court (OSC) in England and Wales by conducting a comparative analysis between the design, development and implementation of the OSC and the Civil Resolution Tribunal (CRT) in the Canadian province of British Columbia, the system on which it is heavily based. The CRT has been operational since 2016, whereas the OSC is currently in the initial stages of its development, having initially been proposed by Lord Justice Briggs[1] and being currently implemented under the auspices of Her Majesty's Court and Tribunal Service's (HMCTS) court reform programme.[2]

This purpose of this thesis is not to assess whether the Online Solutions Court is the best solution to the procedural barriers which parties to low value civil claims have historically faced. It will not evaluate whether a better system exists, nor will it consider whether the Online Solutions Court represents the best balance between providing an accessible, simple and cost-effective process for parties with low value civil claims to access resolution and the value for money, efficiency-driven economic agenda which will be discussed in greater detail in chapters 2 and 3. The model for the Online Solutions Court has already been endorsed and the time for those conversations and debates has therefore passed. The objective of this thesis is to use comparable experiences in British Columbia to inform the debate about what and how changes can be made to the proposal for the OSC put forward by Lord Briggs. The resulting recommendations will enable the implementation of an enhanced version of the OSC for low value civil claim court users than the proposal which exists currently.

It is the position of this thesis that the development and implementation of the Online Solutions Court is at risk of failure for two reasons.

[1] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016)
[2] Ministry of Justice, 'Transforming Our Justice System' (*gov.uk,* 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 15th February 2021

1. To this point, there has been a failure to conduct a thorough analysis on how the CRT was embedded into the British Columbian civil justice system. This analysis is needed to assess how the CRT system can be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which need to be adopted to enhance the performance of the OSC for court users in England and Wales.

2. There will be insufficient investment provided by government in England and Wales to develop and implement the Online Solutions Court. This will lead to it becoming a digitised version of the current County Court procedure which has been repeatedly recognised as being too costly, too complex and too lengthy to provide adequate access to justice for unrepresented litigants in low value claims.

1.2 Background to the research

"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"[3]

The above statement was written in 1892. Civil procedure, and access to civil dispute resolution in England and Wales, has remained in 'crises for centuries. The combination 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 instituted'.[4] The St Aldwyn Committee in 1913 reported on delays in the Kings Bench

[3] T. Snow, 'The Reform of Legal Administration: An Unauthorised Programme' (1892) 8 Law Quarterly Review 129
[4] HL Deb 25 July 1911, vol 9, cc647-74

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 make recommendations which led to 'greater expedition or economy as practicable in the Courts of Law'[5] and the Peel Commission was given the remit of considering the Dispatch of Business at Common Law.[6] 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'.[7] The recommendations contained within the Civil Justice Review in 1988 were hailed as being a 'Revolution in the Courts',[8] and Lord Woolf in 1995 aimed to 'to try and change the whole culture, the ethos… in the field of civil litigation'.[9] 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 conclusion reached by the 1988 Heilbron / Hodge Report that 'litigation today is only for the rich'.[10]

The common themes that run through many of the well-considered reports listed above are these; the civil justice system in England and Wales is too complex to be accessed 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 from historical reports varied, one thing is evident from their conclusions; that those two problems could not, and still cannot, co-exist.

The motivation for carrying out this study has also been informed by the author's own ethnographic insights. Having worked in private, high-street practice as a solicitor and partner, the access to justice barriers faced by litigants in low value civil claims were particularly clear. Much of the advice given to disputants involved in such cases, no

[5] Cmd. No. 4265 at 3 (1933)
[6] Cmd. No. 5065 at 2 (1936)
[7] Cmd. 8878 (1954) at para 337
[8] 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
[9] Lord Woolf, Access to Justice Interim Report (Lord Chancellor's Department, 1995)
[10] H. Heilbron and H. Hodge, Civil Justice on Trial—A Case for Change, Joint Report of the Bar Council and Law Society (1993)

matter how strong or justifiable the case was in law, centred around the practicalities of bringing or defending an action, primarily focused on the question 'is it worth it?'. Anticipated legal fees and time to hearing often rendered litigants unable to economically justify pursuing or defending an action with professional assistance, however the complexities of the process concurrently prevented them from being able to take legal action themselves, or effectively defend an action taken against them. There is therefore a strong personal motivation for the author carrying out this particular study.

It is here that the Online Solutions Court and enhancing its development and implementation for the benefit of courts users disputing low value civil matters becomes so significant. In 2015, as part of his Interim Report[11] on the civil court structure in England & Wales, Lord Briggs argued for a complete overhaul of the process by which, amongst other areas, low value civil claims were issued and conducted. His proposal advocated for the establishment of an online court which would deal with such claims. 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.[12]

Lord Briggs's proposal was the implementation of a new online dispute resolution system to deal with basic civil claims worth less than £25,000.[13] Claims would be commenced by users using an online portal and involve three stages.

- Stage 1, advice and guidance would be offered to the prospective claimant after answering a series of diagnostic automated questions about their claim.[14]
- If stage 1 did not successfully facilitate settlement, parties move to stage 2, the conciliation stage, where parties would take part in facilitated consensual dispute resolution with the aid of a case officer.[15]
- Finally, Stage 3 would be a determination stage. This stage would be for cases which had not already settled in either Stage 1 or 2.[16]

[11] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) Part 6, page 75
[12] Ibid at para 6.9
[13] Ibid at para 4.12
[14] Ibid, at paras 6.108 and 6.109
[15] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 6.13
[16] Ibid at para 6.14

During the course of his research, Lord Briggs spent a considerable amount of time studying and learning about the operation of the Civil Resolution Tribunal in British Columbia and he drew heavily on this in his proposal for the OSC[17]. This is the primary reason for the adoption of British Columbia as the most appropriate comparator jurisdiction for the purposes of this research. As will be discussed in more detail in chapter 2, British Columbia had also historically suffered from similar issues of lengthy delays, high costs and high levels of complexity within its civil justice system. The CRT was a case study in public-centred civil justice redesign,[18] built around the needs and perceptions of court users, relying on advances in technology whilst at the same time retaining the human element of traditional dispute resolution processes. A more detailed exploration of the composite stages of both the CRT and the OSC is set out in chapter 3 of this research.

Lord Justice Briggs's proposals were adopted by the Ministry of Justice and recommended for implementation as part of Her Majesty's Courts and Tribunals Service (HMCTS) £1 billion court reform programme which was launched in 2016.[19] 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.'[20] It was to achieve this by automating and digitising the entire process of civil money claims, to include Stages 1, 2 and 3 of the Online Court, by 2020.[21] In 2019, it was announced that the completion deadline for the whole project would be extended to 2023. This followed reports from the National Audit Office and the Public Accounts Committee in 2018 and 2019. Those reports highlighted the delays to the programme, the over-ambitious scale of proposed reform and HMCTS's failure up 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'[22] although

[17] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) Part 6, page 75
[18] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2016-2017) 3 McGill J Disp Resol 113
[19] Ministry of Justice, 'Transforming Our Justice System' (*gov.uk,* 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf> accessed 15th February 2021
[20] Ibid at p4
[21] Ministry of Justice, 'Transforming Our Justice System' (*gov.uk,* 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
[22] 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

the press release was non-specific about which aspects this related to.[23] The initial National Audit Office report details the implementation stages for the reforms,[24] 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.

It is, however, important to bear in mind the size of the task which was to be achieved. Sir Ernest Ryder in March 2016 set this out as follows:

> 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 fit all; not one size for all.[25]

This is a useful quote, as it sets out the scale of the ambition of the reform programme. However, it does present a particular issue which requires exploration for the purposes of this thesis: that surrounding the use of the term 'justice'. This is used flexibly and widely across the academic literature which deals with reform to civil procedure, however 'justice' is a nebulous term. When Sir Ernest Ryder refers to the objective of the reform programme being to ensure that justice lies at the heart of the community, it is difficult to pinpoint exactly what this means. Indeed, the term 'justice' will be used repeatedly throughout this thesis and it is therefore important, at this early stage, to establish the meaning which will be attributed to the term here, with reference to the variety of ways in which wider jurisprudential literature has conceptualised it.

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[23] 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

[24] 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

[25] 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

Justice is an evolutionary concept and can be analysed and interpreted in many different ways. However, a reasonable place to start here is with the writings of Aristotle, who divided particular justice (i.e. justice which does not directly cause harm to others) into two strands: communicative and distributive.[26] Corrective justice centres around the rectification of injustice, or the idea that liability rectifies the injustice inflicted on one person by another.[27] Distributive justice involves the fair division and allocation of resources, social benefits and burdens among members of a community, i.e. that every person should have or have access to the same, or a proportionate, level of services in exchange for contributing to a proportionate amount of the common wealth.[28] In between both of these strands lies procedural justice, which is concerned with the means by which social groups (including governments, private institutions, and families) apply the requirements of distributive justice, through legislation, and apply corrective justice, through the use of adjudication to apply legal norms to particular cases.[29] This thesis is concerned principally with the procedures by which, or conditions under which, corrective justice is allocated.

In modern jurisprudence, legal justice therefore has two branches: substantive legal justice (which concerns the content of the law itself) and procedural legal justice (which enforces substantive legal justice.[30] Therefore, the existence of substantive legal justice depends on procedural legal justice. In this case, the enforcement of private law rights depend on the functionality of the civil justice system, or as Genn elucidated, 'it [the civil justice system] sustains social stability and promotes economic growth by providing public processes for peacefully resolving civil disputes, enforcing civil rights and for protecting private and personal rights'.[31] Decisions concerning substantive justice are therefore taken by judges in accordance with both substantive legal principles and the relevant procedural standards.

Procedural legal justice is separated into two further branches: procedural due process and substantive due process.[32] It is procedural due process with which this thesis is

[26] Aristotle, *Nicomachean Ethics,* V, 2-5
[27] Ernest J. Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) University of Toronto Law Journal 350
[28] S. Ratnapala, Jurisprudence (Cambridge University Press, 2017) 396
[29] Lawrence B. Solum, 'Procedural Justice' (2004) 78 S. Cal. L. Rev. 238
[30] S. Ratnapala, Jurisprudence (Cambridge University Press, 2017) 400
[31] H. Genn, *'Judging Civil Justice'* (Cambridge University Press, 2010)
[32] S. Ratnapala, Jurisprudence (Cambridge University Press, 2017) 402

most concerned: this requires that a person's rights and duties under law are determined according to fair procedures. As Ratnapala suggests, 'civil disputes *can* be resolved privately, however it is for the state to provide recourse to the courts for the ultimate adjudication and enforcement of rights. The entire body of law governing procedure and evidence in law is designed to ensure procedural justice.[33]

However, adapting this for modern civil justice systems is not so straight forward. As referred to earlier in this chapter, there are many dimensions which shape the way in which civil justice is dispensed. In A Theory of Justice, Rawls distinguishes between three general kinds of procedural justice: perfect procedural justice, imperfect procedural justice, and pure procedural justice. Perfect procedural justice, in this context, assumes that the sole aim of civil dispute resolution is a correct application of the substantive law to the facts, isolated from any other considerations. Imperfect procedural justice widens this slightly and contends that the aim of civil procedure is to strike a fair balance between the costs and benefits of the dispute resolution process and, if applicable, adjudication itself. Finally, pure procedural justice suggests that a just and correct outcome is simply a bi-product of any process which guarantees parties fair and equal participation.

This final point is one worthy of further explanation, and it feeds directly into the question which inevitably arises here of why it is so important for this study to attribute a meaning or an interpretation to the way in which the term justice is used in both the literature and throughout this thesis itself. The answer lies in the argument that an institution's legitimacy is dependent on the extent to which people feel they are being treated fairly by figures or bodies in authority.[34] Jenness and Calavita contend that 'people's perceptions of procedural justice are important contributors to their satisfaction with outcomes – independent of the substance of those outcomes – and in turn are a key component in the legitimacy accorded the relevant authorities'[35] This again reaffairms Hazel Genn's argument that civil courts publicly reaffirm norms and

[33] Ibid

[34] Tyler, T. R., & Lind, E. A. (1992). A Relational Model of Authority in Groups. Advances in Experimental Social Psychology, 25, 115-191 and Tyler, T. R., & Jackson, J. (2014). Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation, and Engagement. Psychology, Public Policy, and Law, 20(1), 78–95

[35] Jenness, V., and Calavita, K., (2018) 'It Depends on The Outcome': Prisoners, Grievances, and Perceptions of Justice. Law and Society Review 52(1): 41-72.

behavioural standards for private citizens, businesses and public bodies which highlights the importance of citizens having access to those bodies.[36]

The significance of procedural justice is also evident in the wider theoretical literature. Thibaut and Walker found that people's perceptions of procedural fairness, and thus institutional legitimacy, was dependent on both process control and decision control. Process control focuses on a person's opportunity to participate or be heard in the adjudication process, with decision control being centred around a person's control over the outcome itself.[37] They concluded that, to achieve procedural justice, decision control ought to be invested in an independent arbitrator and process control retained by the person themselves.[38] Tyler has since developed the latter by writing on the concept of participant 'voice', which contends that people care not only about whether or not they get what they want from a decision made by a judge or hearing officer, but also whether they are treated in ways that they understand to be fair and are allowed to tell their side of the story.[39] This will be developed further in chapter 6 when consideration is given more fully to the adjudication stage of the OSC, however it is important to mention at this stage to underline the way in which interpreting the meaning of the term 'justice' as meaning 'procedural justice' throughout this thesis is of key importance to it achieving its objectives.

It is therefore clear that there is no straight forward definition of justice, however it is also not sufficient to simply leave the word standing without an exploration of what it means to *this* thesis. Having explored the wider literature, it is clear that the definition which applies here falls under the broad umbrella of procedural justice: giving effect to the substantive law and providing procedural due process, allowing for meaningful participation and process control for parties and striking a reasonable balance between procedural system cost and accuracy of adjudication.

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[36] H. Genn, *'Judging Civil Justice'* (Cambridge University Press, 2010)

[37] Thibaut, J., & Walker, L. (1975). Procedural Justice: A Psychological Analysis. Hillsdale, NJ: Lawrence Erlbaum.

[38] Thibaut, J., & Walker, L. (1975). Procedural Justice: A Psychological Analysis. Hillsdale, NJ: Lawrence Erlbaum.

[39] MacCoun RJ. Voice, control and belonging: the double-edged sword of procedural justice. (2005) 1 *Annu. Rev. Law Soc. Sci.* 171–202

1.3 The research hypothesis

The hypothesis for this thesis has been developed from two sources.

The first source is that Lord Briggs's proposal for the OSC was based on the assumption that a simple transplantation of the Civil Resolution Tribunal from British Columbia to England and Wales would effectively address the ongoing concerns over high costs, high levels of complexity and long delays historically faced by claimants in low value civil claims. This thesis submits that it will not. Lord Briggs's reports were incomplete in that they did not include an analysis of (a) how the CRT was embedded into the British Columbian civil justice system and (b) how the CRT system could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales. This thesis will remedy this gap. The concluding recommendations will advance the initial foundation proposal for the OSC by making pragmatic and informed proposals which will enhance the performance of the OSC for court users in England and Wales.

The second source is the reports from the National Audit Office and the Public Accounts Committee in 2018 and 2019. Both raised concerns that the progress made by HMCTS with the court modernisation programme was behind schedule and, despite being within budget, had come at the cost of a reduced scope of services which will ultimately be delivered.[40] Evidence to support this is available from the quarterly updates on the court modernisation programme from HMCTS,[41] which show that very little has yet been done to develop or implement an ODR system for low value civil claims which aligns with Lord Briggs's proposals, save for simply creating an online version of the civil claims system which already exists. Lord Briggs made clear in his Final Report that a digital replication of the existing system would not be sufficient to deliver the fundamental reform to the resolution of low value civil claims which he believed was necessary.[42]

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[40] 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 and

[41] 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

[42] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at para 6.55

The hypothesis is therefore that the development and implementation of the Online Solutions Court is at risk of failure due to two things.

1. To this point, there has been a failure to conduct a comparative analysis on (a) how the CRT was embedded into the British Columbian civil justice system and (b) how the CRT system could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales.
2. That insufficient State investment in the foundations of the project will be provided to implement the Online Solutions Court. This will lead to it becoming largely a digitised version of the current County Court procedure which has been repeatedly recognised as being too costly, too complex and too lengthy to provide access to justice for unrepresented litigants in low value claims.

While drafting his Final Report, Lord Briggs visited Canada and spoke at length with the designers of the Civil Resolution Tribunal, Shannon Salter and Darin Thompson, and he stated that his final proposed structure for the Online Solutions Court replicated the structure and approach adopted by them.[43] This thesis will test this assertion and, where areas of divergence exist between the proposed model for the OSC and the existing model of the CRT, to establish whether there is any reason for this.

Where there is evidence that the Online Solutions Court is intended to be an exact replica of the Civil Resolution Tribunal, it is submitted that both Lord Briggs and HMCTS have made key assumptions which have over-simplified the complexities involved in transplanting an existing system from one jurisdiction and embedding it into another. The literature which sets out the proposals for the structure of the Online Solutions Court has failed to go beyond the superficial and address fundamental questions on how the development and implementation of that system can be enhanced to enable its operation in *this* jurisdiction for the benefit of low value civil court users. Both of these deficiencies can be addressed by conducting a thorough comparative analysis such as that presented by this study.

[43] Ibid

The research, conclusions and recommendations of this thesis can be used to prevent the Online Solutions Court becoming one of the projects which falls into the National Audit Office's category of 'reduced scope of services which will ultimately be delivered,[44] so that the project does not simply lead to the creation of an online version of the system which is already in place. If this were to be the end result, it is posited that this would inevitably lead to the same issues of high cost to the user, excessive delay and high levels of system complexity which historically have repeated themselves in the arena of civil procedure, in turn undermining the legitimacy of the civil justice system.[45]

1.4 The Research Questions

Central to testing the hypothesis is the formulation of effective research questions which frame, focus, critique and ultimately resolve research goals.[46] The focus of this piece is on the enhancement of an ODR system for low value civil claims in England and Wales, and therefore it is important to explore the parameters of what is meant by a low value civil claim in the jurisdiction of England and Wales. This will include an analysis of the statistics relating to the numbers of low value civil claims which are issued each year, including the number of those cases which settle and the numbers which eventually reach trial. The purpose of this is to provide context to the relevance, scope and impact of the conclusions and recommendations which will be drawn from the main body of the thesis.

The overarching research question is:

> What lessons, if any, can be drawn from the design, development and implementation of the Civil Resolution Tribunal in British Columbia which will assist with enhancing the design, development and implementation of

[44] 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

[45] T.R. Tyler, 'Procedural justice, legitimacy and the effective rule of law.' (2013). 30 Crime and Justice 283

[46] F. Trede and J. Higgs, 'Writing Qualitative Research on Practice' 2009 Brill Vol 1 at 13

the Online Solutions Court in England and Wales for low value civil court users?

The thesis will approach the central research question by breaking it down into sub-questions. They are as follows:

1. **What problems existed in respect of civil justice within England and Wales and British Columbia that led to reforms in these jurisdictions?**

2. **How did government policy impact upon the subsequent reforms of the civil justice systems in the aforementioned jurisdictions?**

The first and second research sub-questions are of key importance for two reasons. The first reason is context. Where the development and implementation of a particular system is so heavily dependent on state funding, there is little value in providing recommendations to enhance the model of that system without giving due consideration to the wider factors which could influence progress in reality. The second reason, as will be explored in greater depth later in this chapter, is both the requirement of the modified version of the functional comparative method adopted by this thesis to acknowledging the social, political and economic factors which dictate policy in the comparator jurisdictions, and the macro-comparison as described by Zweigert and Kotz.[47] Macro-comparison involves drawing distinctions between the 'spirit and styles' of two or more different legal systems as a whole, focusing more on the general approaches rather than the rules relating to a specific legal problem. Conducting a micro-comparison (which involves looking at a singular, distinct legal problem and how that problem is treated across two or more jurisdictions) is unlikely to be comprehensive without some form of macro comparison being undertaken.[48] There is therefore a sound methodological justification for the inclusion of the first two research questions.

[47] K. Zweigert and H. Kötz, An introduction to Comparative Law (Oxford University Press 1998) 4
[48] K. Zweigert and H. Kötz, An introduction to Comparative Law (Oxford University Press 1998) 4

3. How does the development, implementation and structure of the Civil Resolution Tribunal compare with that of the Online Solutions Court?

The third research sub-question to be addressed is how an ODR system for low value claims in England and Wales is structured and envisaged to work, by comparison with that implemented in British Columbia. This research question will therefore seek to establish how the foundation proposal for the OSC was reached, and then concentrate on the elements of the proposal where analysis is lacking on (a) how the CRT system could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales and (b) how the Civil Resolution Tribunal was embedded into the British Columbian civil justice system.

This will be achieved by conducting a detailed exploration of the initial investigation and report of the Civil Justice Council's Online Dispute Resolution Advisory Group, in which they argue for a fundamental change to the underlying process and procedure to deliver services relating to low value civil claims over a simple digitised version of the same system[49] and the model proposed by Lord Justice Briggs in his Civil Court Structure Review, which was subsequently adopted by HMCTS as part of their court reform programme.[50] This will provide the benchmark against which to test the first part of the hypothesis.

In order to fully answer the third research question, a detailed examination will then be carried out on four distinct areas. The four areas map against the areas of key debate which flowed from the initial OSC proposal: the structure and content of each of the three stages of the OSC and the rules by which the OSC would be regulated.

The first area is the ways in which the comparator ODR systems use legal diagnostic systems at their first stages to assist low value civil claim court users, and what steps have been or are being taken to build those systems prior to implementation. The second area is how methods of consensual dispute resolution are formally embedded

[49] Civil Justice Council's Online Dispute Resolution Advisory Group, 'Online Dispute Resolution for Low Value Civil Claims' (2015) <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version.pdf> at paras 1.3 and 1.9. Accessed 15th February 2021

[50] 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

into the ODR systems of the comparator jurisdictions. The third area is how the process for formally adjudicating disputes in the ODR systems within the comparator jurisdictions works. The fourth area is whether there should be a new set of rules created for the Online Solutions Court in England and Wales which will take its regulation outside the scope of the current Civil Procedure Rules (CPR). This is of key importance to the way in which the OSC will function: remaining under the control of the CPR would lead to litigants encountering the same issues with complexity as they are widely regarded to do so now.[51]

1.5 Originality of the Study and Contribution to Knowledge

There is a growing body of scholarship in relation to ODR, its potential benefits and its risks when embedded or deployed as a functioning part of a civil justice system.[52] Analytical commentary also exists on the Civil Resolution Tribunal in British Columbia and on Lord Briggs's proposal for the Online Solutions Court in England and Wales.[53] However, despite the fact that one is heavily modelled on the other, no complete body of work has been produced which goes beyond the assumption that transplanting the British Columbian system into the English and Welsh civil justice system will lead to the same positive results which the CRT has reportedly had in British Columbia.[54] This thesis goes beyond that assumption and addresses fundamental questions on how the development and implementation of the Online Solutions Court can be enhanced to enable its operation for low value civil court users in *this* jurisdiction. This is the gap in existing scholarship which this thesis fills, and it is here that its originality and contribution to knowledge can be found.

This thesis will fill this lacuna in scholarship in three specific ways.

[51] For a further discussion of this, please see chapter 2 of this research.
[52] See, for example Sarah Rudolph Cole & Kristen M. Blankley, 'Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be' (2006) 38 U Tol L Rev 193, E. Katsh and J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001) and Alan Gaitenby, 'The Fourth Party Rises: Evolving Environments of Online Dispute Resolution' (2006) 38 U Tol L Rev 371
[53] M. Ahmed 'A Critical View of Stage 1 of the Online Court' (2017) 36(1) *Civil Justice Quarterly - Briggs Civil Courts Structure Review & Online Court Special Edition* 12-22.
[54] These are reported as part of the CRT's annual reports, available here:

1. That by conducting a comparative analysis of the procedural climates into which the respective ODR systems are or were being embedded, similarities and differences can be identified to establish whether the two systems are seeking to cure the same issues and, ultimately, achieve the same goal.

2. That by investigating the relationships which exist between the respective civil justice systems and the economic agendas of the governments which fund them, emerging trends can be used to identify whether there is any justification of the second part of this study's hypothesis and whether any lessons can be learned from any identifiable divergences of approach between the comparator jurisdictions.

3. That by conducting a comparative analysis of the composite stages of the OSC and their direct counterparts within the CRT, comparisons can be drawn to not only establish the extent of the similarities between the systems, but to also demonstrate whether there is any justification to adopt different approaches to the development or implementation of particular elements of the individual stages.

The analysis involved in these three elements will then be used to prove that the assumption that transplanting the CRT system into the English and Welsh civil justice system without any mitigations or divergences of approach is incorrect. It will address fundamental questions on how the development and implementation of the Online Solutions Court can be enhanced to enable its operation for low value civil court users in this jurisdiction. The thesis will show that significant modifications to the current model proposed for the OSC are necessary and, by conducting a comparative analysis of the relationships which exist between the respective civil justice systems and the economic agendas of the governments which fund them, it will demonstrate that there is substantial justification for a change of approach in how low value civil justice is funded and, crucially, who it is funded for.

The contribution of this study also goes beyond remedying the lacuna in academic scholarship. Adoption of the recommendations which this thesis will make will have significant practical impact if they are followed by HMCTS as part of their

implementation of the Online Solutions Court, thereby improving the way in which low value disputants can access the civil justice system. Unless the OSC model proposed by Lord Briggs is built upon, modified and refined to reflect the reality of the social and political climate into which it is being introduced, there is a significant risk that it will not improve the existing civil justice system to the extent which its potential may offer.

The research, conclusions and recommendations of this study will therefore make an original contribution to knowledge in the field of dispute resolution.

1.6 Establishing the Research Parameters

Defining 'Low Value Civil Claim' and Identifying the Scope of the Study

As with online dispute resolution, on account of this thesis focusing on low value civil claims there should be parameters set which define what those are in this context. This section will therefore cover how low value civil claims are defined and their relevance in the context of civil justice in England & Wales. In establishing this, the extent of the impact of the study more broadly should also emerge.

In his Interim Report, Lord Briggs opined that ODR should, eventually, be available for low complexity disputes with a financial value of up to £25,000. His rationale for this was based on the cost of representation being disproportionate to the value of the claim in cases where the value at risk was less than £25,000.[55] However, in recognition that this would perhaps be better regarded as the ultimate long-term goal as opposed to the short-term objective, Lord Briggs proposed that a temporary initial limit be imposed of £10,000, to bring this into line with the current small claims limit.[56] Indeed, the Civil Resolution Tribunal in British Columbia has a current upper financial limit of $5,000, so the principle of restricting the initial ODR system to a relatively low value at risk, at least initially, appears to be soundly based.

[55] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 6.37
[56] Ibid at para 6.39

In trying to assess the value of conducting a study such as this, and its potential impact, it is important to review the significance of low value civil claims in the overall context of the justice system.

The following is an analysis of the Civil Justice Quarterly Statistics. Every three months, HMCTS release a report which compares broad data from previous quarters with the data available from the quarter which has just come to an end. However, the reports do not break down the data far enough to make it useful. The paucity of data available will become a recurring theme throughout this thesis. For instance, no breakdown is available of money claim values, the number of low value claims which are defended or the number of low value claims which reach trial. This information is only available by filtering the raw data which is used to prepare this report. This is published separately across multiple excel spreadsheets, under the heading 'Civil Justice and Judicial Review Data'.[57] The categories of claim are as follows:

1. Specified money.
2. Unspecified money (personal injury).
3. Unspecified money (other).
4. Mortgage and landlord possession.
5. Return of goods.
6. Other non-money.

Specified money was selected as the only criterion relevant to this thesis. That category is broken down as follows:

1. Amount claimed £0 - £500.
2. Amount claimed £500 - £1,000.
3. Amount claimed £1,000 - £5,000.
4. Amount claimed £5,000 - £15,000.
5. Amount claimed £15,000 - £50,000.

[57] Gov.uk, 'Civil Justice Quarterly Statistics October to December 2020' (*gov.uk*, January 2021) <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2020> Accessed 15th April 2021

6. Amount claimed more than £50,000
7. Other / unknown

Categories 1-3 were selected, so that any claims above £5,000 were removed from scope. There is no explanation offered as to why the statistics are not broken down into small claims (£0 to £10,000), fast track (£10,000 - £25,000) and then sub-categories of multi-track (£25,000 and above). It is likely that this is due to the fact that the value boundaries for the three tracks changed on 1st April 2013.[58] Previously, those boundaries were small claims (£0 - £5,000), fast track (£5,000 - £15,000) and multi-track (£15,000 and above). It is likely that the statistical boundaries have not been updated to ensure that a valid and consistent comparison can be drawn across a number of years. Given there is not an option to obtain data on numbers of claims up to £10,000, the lower value of £5,000 has been selected for analytical purposes to avoid any claims in the fast track, where typically parties are more likely to be represented and which, as Lord Briggs recognised, added a layer of complexity into the target for the initial launch of the ODR system.

Table 1.1 below breaks down the number of specified money claims under £5,000 which were issued, defended and those that reached trial between 2009 and 2020. For reference, the number of defended claims and the number of hearings are both shown as a percentage of the total number of claims issued.

Table 1.1

Year	Number of Claims Issued	Number of Defences Filed (Percentages)	Number of Hearings Listed (Percentages)
2009	1093678	132894 (12%)	40757 (4%)
2010	811468	109767 (14%)	33719 (4%)
2011	873241	103013 (11%)	31780 (4%)
2012	794703	85976 (11%)	26614 (3%)

[58] Following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

2013	842419	88311 (10%)	26707 (3%)
2014	1012938	93841 (9%)	26780 (2%)
2015	1009707	95503 (9%)	27770 (2%)
2016	1274150	109810 (8%)	31387 (2%)
2017	1496984	123389 (8%)	35250 (2%)
2018	1514325	111042 (7%)	32489 (2%)
2019	1526349	137227 (9%)	33094 (2%)
2020	940259	101345 (10%)	5662 (1%)

Source: HMCTS Civil Court Case Progression Statistics 2009 – 2020.[59]

The figures demonstrate some important points. The first is that there are a significant number of specified money claims under £5,000 issued every year. The second is that a very low percentage of these are defended (between 7% and 14%) and the third is that an even lower percentage reach trial (between 1% and 4%). There is no data available which explains this exceptionally large attrition rate.

Data from the Civil Court User Survey 2015 showed that 80% of money claimants (it is not broken down any further than this) preferred not to go to court or viewed court as a last resort.[60] There is no further, more detailed, explanation for this. However, by linking this information with the findings of the reports into access to civil justice over the past twenty years, it is rational to assume that high costs, lengthy delays and high levels of complexity are at least in part responsible.[61] It could, of course, also be that some litigants are more willing to settle via means of alternative dispute resolution, which becomes significant as part of the discussion in chapter 5 of this thesis. The analysis above also highlights that the access to justice gap for low value civil claims does not just stop at claimants but extends by an alarming margin to defendants. There

[59] Gov.uk, 'Civil Justice Quarterly Statistics October to December 2020' (*gov.uk*, January 2021) <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2020> Accessed 15th April 2021

[60] Ministry of Justice 'Civil Court User Survey: Findings from a postal survey of individual claimants and profiling of business claimants' (*gov.uk,* July 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/472483/civil-court-user-survey.pdf> accessed 15th April 2021

[61] For a further discussion, see C. Hodges, *Delivering Dispute Resolution: A Holistic Review of Models in England and Wales* (Hart Publishing, 2019)

is a lack of defendant engagement with claims issued against them borne out by the figures in the table above, and therefore it is important to bear in mind that an ODR system is not just needed to assist unrepresented claimants with accessing civil justice, but that facilitating defendants' needs is also paramount.

The high numbers of specified money claims with a value at risk of under £5,000 issued on an annual basis strongly suggests that this would be an appropriate initial limit for the jurisdiction of the OSC. The number of claims issued every year in this category is sufficiently high for the OSC to have a swift impact on access to civil justice and, as Briggs acknowledged, disputes with lower values also tend to be less complex both legally and factually. This also brings this into line with the Civil Resolution Tribunal in British Columbia, which deals with small claims with a value up to $5,000. As Lord Briggs further pointed out, this is just a starting point. Successful roll out of ODR into a lower value group of claims can then act as a springboard to introduce it for higher value and more complex claims, but without the risk that the system does not serve those claims as well as it might do otherwise.

With regard to the impact and scope of the study, between 1st January 2009 and 31st December 2020, there were 13,190,221 specified money claims with a value of under £5000 issued in England and Wales: an average of 1,199,111 claims per year. These figures highlight the widespread usage of the civil justice system for low value claimants.

The figures also demonstrate the lack of defendant engagement. On average, 10.7% of the claims used as part of the analysis were defended, leaving 89.3% where it is likely that judgment in default was entered against the defendant. Whilst it could be that nearly 90% of low value civil claims are indefensible, this is highly unlikely. It points to a wider issue. It is therefore submitted that the reach and impact of the findings of this study could be underestimated due to the lack of statistical data available.

It is also necessary at this point to identify a further limitation on the scope of this study. This thesis is concerned with enhancing the development and implementation of the operation of the Online Solutions Court for low value civil court users. That necessarily means that this thesis will not address the well-publicised and widely acknowledged

challenges associated with digital exclusion.[62] This is in no way intended to underplay the significance of this issue within the context of online dispute resolution. It is merely a recognition that the scope of this thesis is not sufficiently wide to accommodate a full and comprehensive analysis of the problems associated with digital exclusion in the context of online dispute resolution, and the range of solutions to that problem. That, it is submitted, is a thesis of its own. This thesis is therefore necessarily limited to enhancing the development and implementation of the Online Solutions Court for those litigants who are not digitally excluded.

1.7 Research Methodology

This section sets out the proposed approach and the methods which are to be adopted to test the hypothesis.

To answer the research questions, set out earlier in this chapter, the methodology and methods selected must be justifiable in their suitability for the investigation at hand. Henn and others provide a concise explanation on the difference between 'method' and 'methodology'; 'method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole'.[63] The overarching research strategy of this thesis must therefore be identified, accompanied by an explanation of the methods which are going to be used to find a solution to the research problem.

The central purpose of this thesis is to enhance the development and implementation of the Online Solutions Court by considering how the Civil Resolution Tribunal was developed and implemented in British Columbia, whilst taking into account any mitigating strategies which need to be considered due to any differences in the wider civil justice landscapes. This means that the adoption of a comparative approach would be suitable as the research strategy, as it meets the needs of the research question. It is therefore important to investigate in what circumstances a comparative

[62] N. Byrom, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (Legal Education Foundation, 2019) < https://research.thelegaleducationfoundation.org/wp-content/uploads/2019/09/DigitalJusticeFINAL.pdf> Accessed 5th November 2020

[63] Matt Henn, Mark Weinstein and Nick Foard, 'A Critical Introduction to Social Research' (2nd edn, Sage 2006) 10.

approach is acceptable and, crucially, whether the approach will allow for the production of valid conclusions or not.

1.7.1 What is a comparative approach and why is it suitable for this study?

'You can observe a lot by watching' [64]

'Comparative research asks how different legal systems and different cultures have addressed problems that our law faces but in a different way, and with what degree of perceived success and failure'.[65] Collins elaborates on this, positing that 'the aim of comparative law should be to improve and understand one's own domestic legal system by analysing how foreign jurisdictions have dealt with the same problem'.[66] On the face of it therefore, a comparative approach is suitable to address the central research question posed by this thesis. It will recommend improvements to the development and implementation of the OSC in England and Wales by considering how British Columbia addressed the same challenge, therefore achieving the aim which Collins sets out.

Zweigert and Kötz and Kamba acknowledge that there is not a clear and widely accepted theoretical framework which serves comparative law. As Orucu states, the lack of framework means that the method needs to be 'dictated by the strategy of the comparative lawyer'.[67] This is elaborated upon by Cahillane and Schweppe who state 'This element of strategy is the core of the argument here: the method used by the researcher will be valid only in so far as it is organised and explained. In other words, the researcher in comparative law, while going through the different stages of the comparative analysis, has to set her own parameters of research within the theoretical framework… and has to justify the direction she chooses to give in regards her methodological choices. In short, the researcher has to master the art of justifying her

[64] Yogi Berra, *The Yogi Book* (Workman Publishing, 1998) at 95.

[65] Michael Salter and Julie Mason, Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (Pearson 2007) 31.

[66] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11:3 OJLS 398

[67] E. Orucu 'Developing Comparative Law' in E Orucu and D Nelken (Eds) Comparative Law: A Handbook' (Hart 2007) 48

choices and why and how she uses comparative law.'[68] Whilst this section explains the *justification* for using a comparative approach, it is the whole chapter which sets out the parameters of the research and, specifically, how the needs of the research questions are met in a valid and reliable way by adopting a modified version of the comparative approach proposed.

The key issue which is faced when undertaking a comparative approach is the extent to which the comparisons, and therefore the conclusions, are valid. There is no benchmark or standard method for either selecting an appropriate comparator or for conducting the research itself in the field of comparative law; Zweigert and Kötz argue that the aim of the research being to identify solutions to a legal problem is a valid reason for conducting comparative legal research.[69] In the case of this thesis, that is the aim. However, this is insufficient when it comes to justifying both the use of a comparative approach and why the risks which are inherent with it can be addressed by the methods which have been utilised.

Khan-Freund argues that in order for a comparison to be valid, not only must it take into account the existing law in the subject jurisdiction, but also the socio-political factors which influenced the development of the law itself.[70] He goes on to state that the analysis itself must acknowledge the 'power structure' which has influenced and formed the law which is the subject of consideration[71] and that validity flows from the extent to which 'political differentiation can be used to determine how far a legal institution is transplantable'.[72] The key focus here is that the analysis must *acknowledge* the comparator jurisdiction's power structure and any relevant socio-political factors behind how the law developed; it does not require the systems or the socio-legal factors to be identical in order to draw a valid comparison. Whether a simple acknowledgement goes sufficiently far to addressing the needs of the research questions here is dealt with later in this section.

[68] L. Cahillane and J. Schweppe, Legal Research Methods: Principles and Practicalities (Clarus Press 2016) 42
[69] K. Zweigert and H. Kötz, An introduction to Comparative Law (Oxford University Press 1998) 33
[70] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1
[71] Ibid
[72] Ibid

The question therefore arises of how a comparative analysis such as that proposed here can demonstrate its validity. Zweigert and Kötz, in their seminal text on Comparative Law, introduced the concept of 'functionality'.[73] which is the principle that 'the only things which are comparable are those which fulfil the same function'.[74] As Kischel and Hammel explain, 'this [functional] approach is grounded on the understanding that legal institutions are not abstract concepts but, in the final analysis, tools to solve real interpersonal, social and economic problems'.[75] In other words, 'functional objects must be understood in light of their functional relation to society... institutions are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems.'[76] The idea behind functionalism therefore is to consider how legal problems are solved in practice by the mechanisms employed in different societies according to different legal systems. This thesis focuses on the way in which disputants with low value civil claims access the civil court system, and what their journey to potential adjudication looks like once they have entered the system. Functionalism is therefore being used by this thesis as a method to find similarities and converges, and dissimilarities and divergences in approaches to solving the particular problem of the *process* by which disputants access civil justice in practice.

That said, functionalism has been subjected to myriad criticisms by scholars, and the defence of its use here therefore requires an exploration of what these criticisms are and an explanation of how this thesis will methodologically overcome them. Even the authors of one of the seminal texts on Comparative Law acknowledged that it was not really a defined methodological framework[77]. However, this more flexible approach could be viewed as an opportunity as opposed to a potential pitfall when taking into consideration the needs of this thesis. In this instance, research questions one and two in particular call for the research framework employed to be a modified version of functionalism.

[73] K. Zweigert and H. Kötz, An introduction to Comparative Law (Oxford University Press 1998) at 34
[74] Ibid at 33
[75] U. Kischel and A Hammel, 'Comparative Law' (Oxford University Press 2019) 8
[76] Ibid
[77] Ibid at 33

The primary criticism of functionalism is that it is reductivist[78]; that it enables a problem to be presented and analysed too simplistically without full consideration of the myriad different social and cultural factors involved. This results in conclusions which are invalid because they are only based on a superficial direct comparison of the same thing. This is rejected by, amongst others, Cassirer who stated that functionalism makes generalisations possible without loss of specificity.[79] Similarly, functionalism has been criticised for making 'no room for culture'.[80] However, as Michaels points out, it is not the *degree* of attention to culture which is significant; it is the *type* of attention.[81] Functionalism looks to separate, for the most part, the law and society and culture but it does not seek to ignore it altogether. Functional comparative method simply isolates the consideration of culture from the law to a greater degree than, for example, a cultural comparatist would. Indeed, as Michaels elaborates, this assumption of a greater degree of separability does not make the value of a piece inferior but adds value to the debate by highlighting a different perspective.[82] This makes it a completely suitable methodology to employ when answering research question three in particular, as this demands a side by side comparison of two systems which are functionally equivalent, the OSC and the CRT, with an accompanying acknowledgment of the social and political landscapes into which the system is being introduced, or indeed already exists. Therefore, in the case of this thesis, a functional comparative method is not being employed to avoid discussion of the wider implications of societal attitudes and values or, in fact, to completely separate the law from those values; it is being used as a pragmatic tool to enable comparisons to be drawn between two systems which essentially serve or are intending to serve the same function. Indeed, it is important not to forget the benefits of a comparative approach to a study which is rooted in procedural reform such as this:

> 'Comparative jurisprudence and civil procedure, in particular, is working like a wonderful mirror: It opens your mind. The comparison increases your

[78] Mark Tushnet, 'The Possibilities of Comparative Constitutional Law', (1999) 108 Yale LJ 1225, 1265
[79] Ernst Cassirer, Substanzbegriff und Funktionsbegriff (1910)
[80] Michele Graziadei, 'The Functionalist Heritage',in Comparative Legal Studies: Traditions andTransitions, (eds.) Pierre Legrand and Roderick Munday (Cambridge University Press: Cambridge2003) pp.100–127
[81] R. Michaels, The Functional Method of Comparative Law in The Oxford Handbook of Comparative Law Mathias Reimann and Reinhard Zimmermann (Oxford University Press, 2006) at 364
[82] Ibid at 365

> knowledge and wisdom. And if you are lucky, it may help not just to improve your own national law but to find solutions for practical legal problems of transnational relations in our world of globalisation.'[83]

It has therefore been established that the same issue (the process by which litigants access an online dispute resolution service to seek resolution of low value civil disputes) is likely to occur in the same way across the two jurisdictions here and, therefore, that the online dispute resolution systems across the subject jurisdictions fulfil similar functions. That said, whilst the functional comparative method is clearly appropriate to answer research question three, this is not say that its limitations do not present potential problems. Zweigert and Kötz acknowledge that functionalism has its limits in that it sometimes can turns the interest of comparative law away from really important questions.[84] Those important questions in the context of this thesis are those surrounding the wider social, political and economic aspects associated with civil justice reform in the comparator jurisdictions, which go beyond a mere acknowledgment that they exist.

The wider questions therefore centre around what the function of the procedure or law or institution in question is, or what its social purpose is. Grossfeld phrases this question in the following way: '…what social function does the *rule* under study fulfil in its own social context?'[85] From a methodological standpoint, the question of who the low value dispute resolution process serves, or who does it function for, therefore arises. There are two major stakeholders here: court users and the state who funds the system. Both bring to the debate different objectives and this wider focus therefore means that a more diverse range of methodological considerations need to be taken into account. Research questions one and two here necessitate going beyond a merely functional approach, and lean towards using a modified functional comparative framework which comprises of a mixture of methodologies and methods.

[83] Taruffo, M. (2013). Processo civil comparado: Ensaios. (Translated by Daniel Mitidiero). São Paulo: Marcial Pons. in Comparative Procedural Law in the Contemporary World Aluisio Gonçalves de Castro Mendes Athens Journal of Law - Volume 6, Issue 2, April 2020, Pages 139-150
[84] K. Zweigert and H. Kötz, An introduction to Comparative Law (Oxford University Press 1998) 34
[85] Grossfeld, The Strength and Weakness of Comparative Law (1990) 9.

The research project therefore calls for a similar approach to that advocated by Husa: 'I support, what I call, a *moderate version of functionalism*. This is a tolerant position accepting the inborn limitations of functionalism in comparative law but considering it as a legitimate form of comparative law.'[86] This recognises the benefits of functional analysis whilst at the same time accommodating its limitations by modifying its strict application. The following sections outline the ways in which the core functionalist approach adopted by this thesis will be modified to fit the needs of the research questions.

1.7.2 Integrating a Socio-legal Approach

Socio-legal methodology seeks to answer questions using a wider range of contextual sources than simply legal instruments. It is grounded in what the law says and the primary and secondary source material which exists on that subject matter however it goes further by drawing from a significantly wider range of source material,[87] some of which is not purely legal.[88] This is to assist with achieving the goal of socio-legal methodology; to consider the law in context.

There is no standard definition of socio-legal methodology[89] however it is broadly accepted that socio-legal research exists to reflect that law does not operate in a vacuum and therefore, to be effective, a wider range of sources and considerations need to be taken into account.[90] This approach is driven by the need to analyse the 'law in action',[91] to identify gaps between the law on paper and the way in which that law is administered by officials responsible for overseeing its operation. The socio-legal approach involves and incorporates an examination of the social and cultural contexts in which a particular law operates and reaches its conclusions based on the consideration of a wide range of factors.

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[86] J. Husa, 'Farewell to Functionalism or Methodological Tolerance?', RabelsZ 2003, 419, 424–5.
[87] F. Cowney and A. Bradney, Teaching Legal System (1999), in M. Salter and J. Mason, Writing Law Dissertations (Pearson Longman 2007) 129 – 30
[88] Ibid
[89] Roger Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25(2) Journal of Law & Society 171-192
[90] M. Salter and J. Mason, Writing Law Dissertations (Pearson Longman 2007) at 133-134
[91] M. McConville and W. H. Chui, Research Methods for Law (2nd edn, Edinburgh University Press 2017) 20 – 21

This therefore means that this approach is suitable for the research conducted for the parts of the thesis which address research questions one and two. It allows for the thesis to identify the problems which existed in respect of civil justice within England and Wales and British Columbia that led to reforms in these jurisdictions, and how government policy has impacted upon the subsequent reforms of the civil justice systems in those jurisdictions, thus widening the scope of what the use of a strictly functional comparative method could achieve.

The Socio-Legal Studies Association define one of the strands of socio-legal research as '…theories developed in the middle-range that are 'grounded' in the findings of empirical research (and which in turn aim to prompt further empirical studies to test the validity of their theoretical claims)'.[92] The research conducted to answer the second and third research questions will adopt this approach, making use of data available through a variety of sources such as secondary legislation, government publications, reports and minutes of committee meeting, Hansard debates, empirical academic studies and reports of non-governmental bodies to take the primary source material which exists and place it into context by using and analysing additional material to evaluate how those laws, or in this case the procedure, operates in action. This in turn will, no doubt, lead to further research being needed to further test the strength of, and develop further, both the hypothesis and the recommendations which this thesis makes.

However, as is clear from the paragraph above, in order to achieve the proper utilisation of the socio-legal methodology for the purposes of this research, it is also necessary to engage in, to an extent, an element of doctrinal approach.

1.7.3 Integrating a Doctrinal Approach

Salter and Mason define doctrinal analysis as 'A research methodology that concentrates on seeking to provide a detailed and highly technical commentary upon, and systematic exposition of, the content of legal doctrine. This doctrine is interpreted

[92] M. Salter and J. Mason, *Writing Law Dissertations* (Pearson Longman 2007) 122

as if it were a separate, independent and coherent 'system of rules'.[93] The priority is to gather, organise and describe legal rules, and offer commentary upon the emergence and significance of the authoritative legal sources that these rules contain'.[94] Simply put, therefore, the doctrinal discipline is concerned with 'the formulation of doctrine through analysis of legal rules'.[95]

Doctrinal analysis is achieved by 'using as raw materials the work of the legal system itself; constitutional documents, primary and secondary legislation and recorded court judgments',[96] followed by the analysis of secondary sources such as legal commentaries and articles which offer views on the source material itself. This essentially means that the research project operates in something of a vacuum; bringing together the material studied and analysing it with specific focus on legislation, its application and the legal reasoning behind its application.

On the face of it, it is clear that exclusive use of a doctrinal methodology is not suitable for this thesis, primarily because the research questions cannot be adequately answered using a strict doctrinal approach. Confining the study to the parameters of conducting a critical analysis of the procedural law associated with an ODR system is insufficient to allow for the recommendations which this thesis will make. However, there are areas of this thesis where doctrinal analysis is used as a foundation to illustrate key points in answering research question three. For instance, in chapter 5, there is extensive engagement with and analysis of case law and associated commentary when considering the development of consensual dispute resolution in England and Wales, which is then used together with secondary empirical data to provide an evaluation of the extent to which methods of consensual dispute resolution are already normalised in this jurisdiction. This is an example of how doctrinal methodology is used by this thesis in conjunction with socio-legal methodology,

[93] M. Salter and J. Mason, *Writing Law Dissertations* (Pearson Longman 2007) 49

[94] M. Salter and J. Mason, *Writing Law Dissertations* (Pearson Longman 2007) 49

[95] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds), Advanced Research Methods in the Built Environment (Blackwell 2008) 29

[96] L. Cahillane and J. Schweppe, Legal Research Methods: Principles and Practicalities (Clarus Press 2016) 1 – 2

combining to enable the thesis to look beyond the strict limitations of functionalism whist retaining this as its core methodology.

1.7.4 Research Design

This leads naturally to the research design of the study. Zweigert and Kötz highlighted two approaches: macro-comparison and micro-comparison. Macro-comparison involves drawing distinctions between the 'spirit and styles' of two or more different legal systems as a whole, with focus being more on the general approaches rather than the rules relating to a specific legal problem, whereas micro-comparison involves focus on a particular distinct legal problem and how that problem is treated across two or more jurisdictions.[97] This study is focused on comparing how ODR systems for low value civil claims have been developed and implemented in other jurisdictions and the impact of the way in which that has been done, meaning that it fits much more comfortably into the micro-comparison category. However, as Zweigert and Kotz point out, it is rare to find an entirely micro-comparison is done without some element of a macro-comparison. In the case of this thesis, that macro-comparison comes with examining the economic and political factors which evidence suggests have influenced civil justice policy in the comparator jurisdictions. In so doing, the study therefore acknowledges these distinctions in the way that the functional comparative method demands but makes room for the wider analysis required by research questions one and two by incorporating a mixed-methods approach.

It is therefore posited that the aim and the purpose of this thesis is therefore appropriately served by using a modified version of the functional comparative method, employing an innovative, functional comparative framework which comprises of a mixed-methods approach between functionalism, doctrinal legal research and a socio-legal methodology.

1.8 The Comparator Selection Criteria for this Study and the Jurisdictional Parameters

[97] K. Zweigert and H. Kötz, An introduction to Comparative Law (Oxford University Press 1998) 4

With any comparative study, it is essential to identify comparators based on robust selection criteria.[98] ODR is available across the world in multiple guises; some which are linked to state dispute resolution services and others which are used by private companies, such as Ebay, to resolve disputes in the consumer arena.[99] Given the nature of this work, it is important to select the appropriate comparator(s) very carefully.

The Online Solutions Court will be an arm of the current state civil justice system, replacing the County Court as the destination for low value civil claims to be dealt with and adjudicated. The settlement, whether by negotiation or adjudication, will be legally binding on the parties to the dispute and will be capable of being enforced if one party fails to meet their obligations under its terms. This renders the use of a private dispute resolution service as a comparator for this piece unsuitable. Their operation and the purpose they serve is not comparable to that of an ODR model which forms part of a state civil justice system which 'supports social order and economic activity'[100] and is the 'substantive law, machinery and procedure for vindicating and defending civil claims'.[101]

Additionally, despite how technologically advanced private dispute resolution services may be, they are adjudicating disputes between parties located all over the world, as opposed to within one single jurisdiction. As Rule stated about the disputants who use the eBay dispute resolution platform, 'a single eBay purchase may involve a buyer in Australia, a seller in France, and a drop-shipper in China, all transacting on a US based website that refers to California law in its Terms and Conditions. This can lead to many possible points of confusion.[102] It would therefore be unsuitable and methodologically unsound for this study to rely on a system designed to deal with cross-jurisdictional disputes, naturally excluding private ODR systems.

[98] L. Cahillane and J. Schweppe, Legal Research Methods: Principles and Practicalities (Clarus Press 2016) 51
[99] For example, see Modria's ODR system embedded as the dispute resolution service for Ebay.
[100] H. Genn, *'Judging Civil Justice'* (Cambridge University Press, 2010)
[101] Jack IH Jacob. *The Fabric of English Civil Justice* (Sweet and Maxwell, 1987)
[102] C. Rule, 'Designing a Global Online Dispute Resolution System: Lessons Learned from eBay' (2017) 13 (2) University of St. Thomas Law Journal 354

Therefore, in order to ensure a valid and useful comparison for the purposes of this thesis, the comparator system must form part of a jurisdiction's formal civil justice system. For the same reason, the comparator ODR system must form an established part of the appropriate jurisdiction's civil justice system, as opposed to simply being a pilot. Pilot studies are ways of 'pre-testing or trying out'[103] a particular concept, policy or proposal. They are useful instruments to test how a system is likely to operate, where it could be improved and where it may fail to achieve its objectives.[104] However, the representative sample of users is generally small, pilots are only in place for a fixed and limited period of time and 'participants have already been exposed to an intervention and, therefore, may respond differently from those who have not previously experienced it'.[105] A pilot is therefore an unsuitable comparator, as they would be unable to provide an accurate representation of how a particular system was operating in the same conditions as the OSC will be: as a permanent established part of the civil justice system to resolve low value civil claims.

A further consideration when selecting the comparator ODR system, is that system's purpose. The Online Solutions Court is designed to assist unrepresented litigants with low value civil claims. Embedded at its heart is the principal that parties ought to be assisted to settle matters by facilitated alternative methods of dispute resolution prior to adjudication.[106] It would therefore not be suitable to use an ODR system which, for example, deals with minor criminal issues such as road traffic or parking offences, as the fundamental objectives it aims to achieve are very different.

Finally, for pragmatic reasons, the comparator ODR system needs to be established in an English-speaking jurisdiction. This is to ensure that there are no barriers to the identification of suitable data, and so that the data gathered and used for the purposes of forming conclusions is not at risk of misinterpretation or mistranslation, as it potentially would be if it were written in a language not spoken by the author.

[103] T.L. Baker, '*Doing Social research*' (2nd Edn., New York: McGraw-Hill Inc., 1994)
[104] E.R. Van Teijlingen and V. Hundley, 'The Importance of Pilot Studies' (2002) 16 Nurs Stand 40
[105] Ibid
[106] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) Part 6, page 75

It is therefore proposed that the selection criteria for this study will be comparator jurisdictions where:

1. the ODR system is established, not simply a pilot.
2. there is no language barrier to overcome in accessing the source material.
3. the ODR system deals with low value specified money civil claims.

In addition, ODR systems meeting the following criteria will be excluded from this study:

1. ODR systems used by private companies to resolve disputes between customers.
2. ODR systems used in non-English speaking jurisdictions.
3. ODR systems used to resolve legal matters other than low value civil claims.

In accordance with exclusion criteria (1), only ODR systems linked to state dispute resolution services need be included in the selection table below. The basis on which private ODR systems are being excluded from this study is that,

Table 1.2 below sets out the jurisdictions which have used or currently use ODR as part of their formal civil dispute resolution procedure. The selection criteria are applied to each jurisdiction accordingly.

Table 1.2

Jurisdiction	**ODR Established / Pilot**	**Identifiable Language Barrier**	**Deals with Low Value Specified Money Civil Claim**

Netherlands	Established, but now shut down[107].	Yes, source material in Dutch.	Yes, although primarily for divorce matters.
Victoria	Pilot, which took place in October 2018.	No	Yes, small civil claims under $10,000.[108]
New South Wales	Established.[109]	No.	Yes, but only in road traffic claims.[110]
Michigan	Established.	No.	No. The system is limited to traffic, parking and minor civil infractions, drivers licence suspensions and warrant reviews.[111]
Utah	Pilot study (ongoing).[112]	No.	Yes.[113]
British Columbia	Established.	No.	Yes, low value specified money civil claims up to $5,000.[114]

[107] R. Smith, 'Goodbye, Rechtwijzer, Hello Justice 42' (Law, Technology and Access to Justice, 31st March 2017) https://law-tech-a2j.org/advice/goodbye-rechtwijzer-hello-justice42/ Accessed 15th October 2021.
[108] VCAT, "About VCAT" accessed 15th October 2021
[109] Media Statement of NSW Attorney-General (Gabrielle Upton), 'Online court makes access to justice easier' (*justice.nsw,* 9th September 2015*)* < https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2015/Online-court-makes-access-to-justice-easier.aspx> accessed 12th March 2021
[110] Ibid
[111] Anna Stolley Persky, 'Michigan program allows people to resolve legal issues online' (ABA Journal, December 2016) < https://www.abajournal.com/magazine/article/home_court_advantage> accessed 15th October 2021.

[112] Victoria Hudgins, 'Small Claims Online Dispute Resolution Launches in Utah as Lawyers Ponder Disruption' (Law.com, 24 September 2018) < https://www.law.com/legaltechnews/2018/09/24/small-claims-online-dispute-resolution-launches-in-utah-as-lawyers-ponder-disruption/?slreturn=20220118065759> accessed 15th October 2021.
[113] Felicia Martinez, 'Pilot Program Brings Small Claims Court To Your Computer' (KSLTV, 25 October 2018) < https://ksltv.com/402449/online-dispute-resolution/> Accessed 15th October 2021.
[114] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 Windsor YB Access Justice 112, 122.

Applying the selection criteria to existing ODR systems, therefore, produces the following results:

1. Victoria and Utah are excluded as the ODR systems in those jurisdictions are or were pilots, and therefore do not meet selection criteria number 1.
2. The Netherlands is excluded as there is a language barrier to overcome in accessing the source material, and it therefore does not meet selection criteria number 2.
3. The ODR systems in New South Wales and Michigan do not deal with low value civil claims and therefore no not meet selection criteria 3.

The only jurisdiction which therefore meets all of the selection criteria is British Columbia. This is also appropriate because it is the jurisdiction which has established the ODR system on which the structure of the Online Solutions Court is heavily based. It is on this basis that it has been selected as the natural and appropriate comparator jurisdiction for this study.

1.8.1 Jurisdictional Parameters

Now that a suitable jurisdiction has been selected following application of the relevant criteria, the parameters of both the home and comparator jurisdictions must be investigated. Within this context, it is also important to consider the similarities and differences between the procedures and rules of civil procedure in each jurisdiction to establish the extent of any overlap. The higher the level of overlap, the more likely that any recommendations taken from the approach of the comparator jurisdiction to the development and implementation of ODR will be valid and appropriate for the home jurisdiction.

1.8.1.1 England & Wales

The United Kingdom is a unitary state, which means that central government, in this case Parliament, is supreme. England & Wales is a common law legal system. Despite some powers being decentralised and devolved to the National Assembly for Wales following the Government of Wales Act 1998, both countries share a single legal

jurisdiction[115] which is divided into criminal and civil law, with each of the two areas having their own courts and procedures. The procedural code governing the administration of civil justice in England and Wales is the Civil Procedure Rules 1998.

1.8.1.2 Canada

Canada's legal system is pluralist, or multi-layered. It is a mixture between the English Common Law System, having been a colony of the British Empire,[116] the French Civil Law System from Canada's time as part of the French Empire between 1535 and 1763 and Indigenous Legal Traditions.[117] In terms of structure, Canada is a federation with eleven parts;[118] the national Government of Canada and ten governments which preside over the provinces and territories of Canada.[119] All governments derive their authority from the Constitution of Canada,[120] which is the supreme law and outlines the system of government.

The rules relating to civil procedure are administered jurisdictionally, whether that jurisdiction be a province or a territory. British Columbia, the subject of this thesis, is a province and has a common law jurisdiction. Civil procedure in British Columbia is governed by the Supreme Court Civil Rules[121] under the Court Rules Act 1996 or, for lower value claims, the Small Claims Rules under the Court Rules Act 1996 and the Small Claims Act 1996.

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[115] HM Government, 'UK Government's Evidence to the Commission on Devolution in Wales, Part II: The Welsh Devolution Settlement' (2013) 63.

[116] Between 1763, following the Treaty of Paris, New France and (finally) 1982, which saw the Canada Act 1982 passed which finally ended the power of the British Parliament to amend the Canadian Constitution. The Constitution Act 1982 was also passed at the same time.

[117] Such Indigenous laws include Anishinaabe law, Haudenosaunee law, Inuit law, Mi'kmaw law, Nehiyaw law, Secwepemc law and Wet'suwet'en law

[118] Following the Constitution Act 1867 which created, inter alia, the federal system

[119] The ten federal governments are British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador. The three territories are Northwest Territories, Yukon and Nunavut.

[120] Constitution Act 1982

[121] British Columbia Supreme Court Civil Rules: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/168_2009_00 Accessed 8th October 2021

1.9 The structure of the thesis.

The thesis will focus on the key areas which align with the research questions. The areas are as follows:

1. The problems which existed in respect of civil justice within England and Wales and British Columbia that led to reforms in these jurisdictions.
2. The way in which government policy impacted upon the subsequent reforms of the civil justice systems in the aforementioned jurisdictions.
3. The ways in which the development, implementation and structure of the Civil Resolution Tribunal compares with that of the Online Solutions Court.

Chapter 2 will conduct a brief historical overview of the evolution of civil procedure in both comparator jurisdictions, with additional commentary being provided on the underlying economic and political factors which, evidence suggests, have influenced civil justice policy. The same will then be done in relation to British Columbia. This is to provide key context on the climate into which ODR systems are being or were introduced, to establish whether there are any differences in the respective governments' appetite for reform.

Chapter 3 will provide a synopsis of the initial proposal for the Online Solutions Court in England and Wales and how it was envisaged to work, how the system is to be structured and the position it is expected to adopt within the civil justice system. An overview of the Civil Resolution Tribunal will then be provided, to establish the extent to which the proposal for the English and Welsh system is indeed based on that in British Columbia.

The study will then undertake detailed comparisons of each of the proposed stages of the Online Solutions Court and their counterparts within the Civil Resolution Tribunal. Chapter 4 will carry out a detailed analysis of the steps taken by those who designed the Solution Explorer system which is embedded into phase 1 of the Civil Resolution Tribunal, and comparison will then be drawn with the steps which have been taken in England and Wales to develop the OSC's stage 1 to determine the extent of any overlap or divergence. Where areas of divergence exist, consideration will be given to whether any evidence exists to explain these. Where little or no progress has been made, recommendations will be made for a suitable and appropriate roadmap to implementation.

Chapter 5 will then move to focus on the role of consensual dispute resolution methods within stage 2 of the proposed Online Solutions Court for England and Wales and the Civil Resolution Tribunal in British Columbia. Consideration will be given to how it is proposed that alternative methods of dispute resolution (methods which divert parties away from the singular road towards adversarial trial towards a more consensual and party-led negotiated settlement process) are to be embedded into the formal dispute resolution framework for low value disputes in England and Wales. This will be followed by a discussion about the current place of ADR in the English civil justice system. The same will then be considered in relation to British Columbia, which will allow for a comprehensive analysis on whether court users in England and Wales find themselves in a similar position to those in British Columbia in relation to accepting the formal adoption of methods of ADR into the low value civil claim resolution process. This can then be used to formulate recommendations on how consensual dispute resolution can best be embedded in the OSC.

Chapter 6 will conduct a detailed exploration of the processes and formats for formally adjudicating disputes in the ODR systems within the comparator jurisdictions. This will be accompanied by an analysis of any steps which have already been taken by Her Majesty's Court and Tribunal Service towards hearings being in the format envisaged for the final stage of Online Solutions Court and establish whether there have been any issues experienced with this. Comparisons will then be drawn with the final stage of the Civil Resolution Tribunal to ascertain whether any lessons can be taken from their approach in order to enhance the development and implementation of stage 3 of the Online Solutions Court.

The thesis will then conclude by drawing together all of the evidence gathered to offer realistic and pragmatic recommendations and proposals for the enhancement of the development and implementation of the Online Solutions Court in England and Wales for low value civil court users.

1.10 Outcomes

It is predicted that the outcomes of this thesis will be as follows:

1. That a new set of rules, which removes the OSC from the scope of regulation by the CPR, should be created.
2. That insufficient progress towards building the knowledge engineered stage 1 of the OSC has been made.
3. That the introduction of compulsory ADR will be necessary to normalise its use and effect a genuine culture shift in the mindsets of court users.
4. That a continuous online dispute resolution model of adjudication, with judicial discretion to hold a full hearing embedded, ought to be adopted at stage 3.
5. That a change of approach to funding is necessary, away from the short-term, efficiency-based model which has dominated civil justice reform in the past and towards a long-term, strategic, investment-based funding framework for the future.

The final chapter will establish whether the evidence presented in this thesis support the predictions made here.

1.11 Conclusion

The aim of this chapter was to set out the purpose of the thesis, the research hypothesis, the research questions and the predicted outcomes, as well as to put forward a comprehensive justification of the ways in which the study proposes to test the hypothesis and answer the research questions. The remaining chapters of the thesis will collate and set out the research which will actually test the hypothesis and answer the research questions.

Chapter 2 – The Dominant Narratives in Civil Justice Reform

2.1 Introduction

Background and context are key to understanding the importance and significance of any study. The previous chapter highlighted Zweigert and Kotz's position that a micro-comparison alone was not possible without, at least, a degree of macro-comparison.[1] It also set out the importance of acknowledging the social, political and economic factors which dictate policy in the comparator jurisdictions. There is therefore a clear methodological justification for investigating both the problems inherent within the comparator jurisdictions' civil justice systems and the dominant narratives in civil justice reform.

It is also submitted that such a macro-comparison is necessary for two reasons other than methodological considerations. The first reason is that this comparison is necessary because of the research omitted in the Briggs reports: they did not conduct a macro-comparison between the civil justice systems of the two jurisdictions and therefore could not take the findings from such a comparison into consideration when formulating recommendations for the implementation of the Online Solutions Court. The second reason is that an investigation is needed to establish whether concern about the risk of substantial underinvestment set out in the hypothesis is justified. A comparison will be made to determine whether the development of the Civil Resolution Tribunal faced a similar threat from British Columbian economic policy as it relates to civil justice. The purpose of this chapter is therefore to fill these gaps in scholarship.

Civil procedure in England and Wales has undergone many reforms and reorganisations across centuries.[2] To identify and analyse each of them is far outside the scope of this thesis. From a strict procedural perspective therefore, the historical element of this section of the chapter will only cover from the 1990s onwards. This is appropriate because this is the decade in which the current procedural code which covers all civil claims in England and Wales, the Civil Procedure Rules (CPR), was introduced. This is relevant to the thesis as this is the foundation of the system which

[1] K. Zweigert and H. Kötz, *An introduction to Comparative Law* (Oxford University Press 1998) 4

[2] For a summary, see chapter 1 of this research

it is posited is not serving the interests of claimant and defendants who require resolution of low value civil claims sufficiently well, and it is the system which the Online Solutions Court is intended to replace for low value civil claims.[3]

In terms of procedural reforms in England and Wales, this chapter will cover Lord Woolf's Access to Justice reforms as far as they relate to low value civil claims. Whilst Lord Justice Jackson's costs reforms in 2009 are significant in the overall landscape of civil justice in England and Wales, they are not particularly relevant to this study as they predominantly dealt with reforming costs for higher value claims.[4] They will therefore not be considered in depth as part of this chapter.

It is important to note at this point that, as will become a recurring theme throughout this thesis, there is a paucity of available data from the time of Lord Woolf's reports which either supports or contradicts his views on the problems inherent in the civil justice system at the time. The same is true of the Canadian Bar Association Task Force Report reflecting the position of British Columbia. Where data or commentary is available, this has been included. However, the heavy reliance on the conclusions of Woolf's and the Task Force's reports does mean that the data does need to be treated, to a degree, with caution.

The political and economic issues which are relevant to this study, perhaps unsurprisingly, go back a great deal longer than the late 1990s. These concern both the approach of successive governments to funding the civil justice system for court users and the economic objectives which underpinned the way in which proposed reforms have historically been implemented. The way in which the OSC is being developed and implemented, and the way in which those agendas influenced the development of the CRT can then be analysed. From this, a clear picture should emerge of any links between the driving forces behind reform and the way that reform is being carried out in the comparator jurisdictions.

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[3] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 4.11 and Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at paras 1.28 and 1.32

[4] Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (2009) Lord Justice Jackson focused mainly on fast track and multi-track costs in his Review of Civil Litigation Costs, the Final Report for which can be found here: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf (Accessed 20th October 2020)

This chapter will approach the background to civil justice reform across the comparator jurisdictions thematically. The first part of the chapter will focus on the dominant agendas in reform to civil procedure in both England and Wales and Canada during the 1990s and early 2000s: identification of the inherent and continuing problems of costs, delay and complexity, and the introduction of active judicial case management to attempt to tackle them. Focus will then turn to the efficiency agendas pursued by the political parties of both jurisdictions, and their impact on civil procedural reform. Finally, an exploration will be conducted on whether either of the comparator jurisdictions have deviated from the efficiency agenda in the context of civil justice reform and how any deviation has affected the manner of reform carried out.

It should be noted that this section does not exhaustively cover and analyse all reform projects and reports, as this would be outside the scope of the thesis. However, it will explore the major responses from government (both regional and national in the case of Canada) to calls for reform to take place. Conclusions can then be drawn on the extent of respective governments' enthusiasm for fundamental change. Areas of overlap and divergence can then be identified and used to establish why the ODR frameworks exist as they do across the two jurisdictions, with a view to testing the first part of this study's research hypothesis and answering the first and second research questions.

Collectively, the analysis conducted in this chapter will directly answer the first and second research questions.

2.2 A Woolf at the Door: Costs, Delay, Complexity and Active Judicial Case Management

This section of the chapter will explore the fundamental issues which have historically been identified with the comparator jurisdictions' civil justice systems. This will allow for conclusions to be drawn on whether both British Columbia and England and Wales are using ODR systems to address similar issues and provide important context to test both elements of the research hypothesis.

2.2.1 England and Wales

In March 1994 the then Lord Chancellor, Lord MacKay, appointed the Right Honourable Lord Woolf Q.C. Master of the Rolls, to undertake an in-depth investigation into the civil justice system. Lord Woolf's terms of reference for the review were:

> '…to improve access to justice and reduce the cost of litigation; to reduce the complexity of the rules and modernise terminology; to remove unnecessary distinctions of practice and procedure.'[5]

Lord Woolf submitted the first instalment of his report to the Lord Chancellor in June 1995, outlining his view of the fundamental problems inherent within the civil justice system at the time. Those issues were high costs, undue complexity and lengthy delays.[6] This was not novel. Successive previous reports had reached the very same conclusion since the introduction of the Judicature Acts 1873 and 1875 and so Lord Woolf's conclusions were far from ground-breaking.

Woolf also had the benefit of a study of civil litigation costs carried out in 1996 by Dame Hazel Genn. Specifically on costs for low value claims, Genn had identified that 'amongst claims with a value of less than £12,500, about one third (31%) had costs between £10,000 and £20,000, with a further 9% having costs of more than £20,000. Thus, in 40% of the lowest value claims, the costs on one side alone were close to or exceeded the total value of the claim… when costs are expressed as a percentage of the value of the claim, median costs amongst the lowest value claims (under £12,500) consistently represent more than 100% of the claim value'.[7] This highlights the scale of the economic barriers facing claimants and defendants of low value civil claims at the time.

The important thing about the Genn study was that it was not based on anecdotal evidence alone; this was a statistical analysis based on figures gathered by the

[5] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995)
[6] Ibid Chapter 2, Paragraph 1
[7] H. Genn, 'The Pre-Woolf Litigation Landscape in the County Courts' (Unpublished) in Ministry of Justice, 'Research Summary 1.10: Monetary Claims in the County Courts 1996 – 2003' (2010) < https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/monetary-claims-courts.pdf> Accessed 12th May 2020

Supreme Court Taxing Office between 1990 and 1995 and it showed, amongst other things, that the cost of privately funding low value civil litigation was extremely high.

Woolf's conclusion was that this was largely because responsibility for management of cases lay with the parties or their representatives, there was no monitoring of delay and that as a result it was too easy for litigators to manipulate the system.[8] This was not the first time that this view had been expressed. In fact, Woolf based much of his criticism of party-controlled litigation in his Interim Report on the observations of Sir Jack Jacob in 1987, drawing particularly on his Hamlyn Lecture Series review; 'The Fabric of English Civil Justice'.[9] Jacob was highly critical of the adversarial and confrontational culture in civil litigation, and he argued that this stemmed from the court not having sufficient control.[10] Furthermore, there was no independent body monitoring the compliance of each party with their obligations and with no real enforcement of deadlines in place. Woolf advanced Jacob's point that the uncontrolled nature of the litigation process[11] had led to the worst excesses of parties going unchecked,[12] meaning that non-compliance was routine, and delay was excessive.[13]

Woolf submitted that there needed to be a 'culture change'.[14] He argued that whereas trial and judicial determination ought to always be the final format of adjudication, it should no longer be viewed as the singular mode of dispute resolution particularly for lower value claims. This, Woolf stated, necessitated a move away from the adversarial culture which was ingrained within civil litigation towards one which was more conciliatory in nature, focused on resolving disputes as early and cost-effectively as possible rather than building every element of the case towards an expensive, complex and confrontational trial.[15]

The delays caused by the adversarial nature of the system in turn increased costs beyond a level which was affordable to parties, particularly those with lower value

[8] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995) at 14

[9] Jack IH Jacob. *The Fabric of English Civil Justice* (London, Stevens and Sons, 1987)

[10] Ibid 13

[11] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995) at chapter 3, paragraph 5

[12] Ibid, chapter 3, paragraph 6

[13] Ibid

[14] Lord Woolf, 'Access to Justice Final Report' (Lord Chancellor's Department, 1996) at paras 38 and 39

[15] Ibid

claims, who then had no option other than to represent themselves.[16] However, when parties needed to represent themselves, they were presented with a system which was too complex for them to do so effectively.[17] In his Interim Report, Woolf argued that 'the complexity of the present procedure for conducting litigation impedes access to the courts and imposes an unnecessary burden on the parties',[18] that there were 'too many ways of doing the same or similar things'[19] and that the procedural code was overrun with 'the use of specialist terms and an over-elaborate style of language'.[20] This was supported by the results of a 1995 National Consumer Council's study,[21] which found that 74% of 1,019 litigants who had experienced civil disputes over the past three years stated that they believed the system to be too complex to use without some form of representation.

These factors combined became a catalyst for the extent of the reforms which Lord Woolf was to propose. Those proposals marked the beginning of the most fundamental set of reforms to the civil justice system since the Judicature Acts 1973 and 1875.

The resulting legislation from the Woolf Reports led to the creation of the Civil Procedure Rules, the code by which all civil litigation is now conducted, which came into force on 26th April 1999.[22] This abolished the two sets of rules[23] governing the civil justice system, replacing them with one unified set of rules which encapsulated the same level of guidance as experienced previously as far as possible, only written in more accessible language. This new code essentially switched control of civil litigation from the parties and their representatives to the court.

A complete detailed explanation and analysis of every reform Lord Woolf proposed is outside the scope of this study, however for low value claims and litigants specifically, this meant a new, simplified code of procedure, a heavier focus on encouraging parties to use alternative forms of dispute resolution, particularly at the pre-action stage (this

[16] Ibid
[17] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995) chapter 3 paragraph 44
[18] Ibid
[19] Ibid chapter 26 paragraph 6
[20] Ibid
[21] National Consumer Council and the BBC Law in Action Programme 'Seeking Civil Justice: A Survey of People's Needs and Experiences, London' (National Consumer Council, 1995)
[22] Following the Civil Procedure Act 1997
[23] Rules of the Supreme Court 1965 and the County Court Rules 1981

is considered in greater depth in chapter 4 of this thesis) a simplification of originating forms, a significantly higher level of judicial involvement in guiding a litigant through the process and, if the recommendations were to be followed, an increased level of state funded legal assistance.[24]

For low value claims, Lord Woolf proposed that a new small claims track was introduced with the previous small claims limit of £3,000 being increased to £5,000. This built on the original small claims procedure which was introduced following the Administration of Justice Act 1973. Its purpose was to allow '…private individuals without legal experience … to have their case heard in an informal atmosphere, in private, and without the risk of having to pay the legal costs of their opponent should they lose--the objective being that the system should be cheap, quick and easy to use for the average person.'[25] Judges played a more interventionist and inquisitorial role in small claims litigation, the rules of evidence and procedure were much more relaxed and there was minimal risk of an adverse order for costs unless conduct was so manifestly unreasonable as to justify it. Those were the incentives built into the small claims procedure to encourage litigants to represent themselves there. Its benefits were described by the Registrar of West London County Court as follows:

> … the hearing takes place … generally in private, without the formalities associated with a trial … The purpose of arbitration is to enable people to have small disputes resolved in an informal atmosphere, avoiding as far as possible the strict rules of procedure usually associated with court proceedings. This does not mean that rules are not observed because the object of all court procedure is to protect the interests of each party to an action and to ensure that the case is tried fairly. Nevertheless, the formalities are kept to a minimum and you should have no difficulty in handling your own case.[26]

A 1993 National Audit Office[27] study on users of the small claims procedure also found that that, out of the 1084 unrepresented litigants surveyed, '87 per cent of plaintiffs

[24] Lord Woolf, 'Access to Justice Final Report' (Lord Chancellor's Department, 1996)
[25] George Appleby. 'The Growth of litigants in person in English civil proceedings' (1997) 16 C.J.Q. 127
[26] Michael Birks: 'Small Claims in the County Court, How to Sue and Defend Actions without a Solicitor' (Lord Chancellor's Department, 1973) p.3
[27] National Audit Office, 'Handling Small Claims in the County Courts' (HMSO, 1996) (https://www.nao.org.uk/pubsarchive/wp-content/uploads/sites/14/2018/11/Handling-Small-Claims-in-the-County-Courts.pdf) Accessed 19th November 2020

and 64 per cent of defendants felt that they would be able to represent themselves again'.[28] Whilst it represents a small sample, this does show that the small claims procedure was a model which seemed to be working to some extent.

In recognition of this, Lord Woolf took the existing small claims model and injected an additional layer into it: active judicial case management. He saw active judicial case management as the key to reducing delays in small claims, as well as assisting unrepresented litigants with presenting their cases more effectively. He stated as follows in his Interim Report:

> The role of the judge in small claims is not only that of an adjudicator. It is a key safeguard of the rights of both parties. In most cases, the judge is effectively a substitute for a legal representative. His duty is to ascertain the main matters at issue, to elicit the evidence, to reach a view on the facts of the matter and to give a decision. In some cases, he may encourage the parties to settle. In doing so he should ensure that both parties have presented the evidence and called the witnesses germane to their case and that he has identified and considered any issue of law which is pertinent to the case in hand. He must also hold the ring and ensure that each party has a fair chance to present his own case and to challenge that of his opponent.[29]

There are parts of Woolf's description of the role of the judge here which are more like that of a facilitator with powers to adjudicate, as opposed to an arbitrator in an adversarial trial. This, coupled with the heavy focus on judicial encouragement for parties to explore alternative forms of dispute resolution, began the process of attempting to reframe the culture in low value civil litigation. However, there is a tension here. Whilst there is clear focus on encouraging parties towards settlement and allowing the judicial role to become more inquisitorial, ultimately the focus of proceedings is still on the trial itself. Reference to 'presenting their own case' and 'challenging that of his opponent' show that, even with Woolf's recognition of the need to change the adversarial culture, trial as the singular mode of dispute resolution was still very much embedded in the newly drafted procedural landscape.

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[28] Ibid at para 7
[29] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995) p.108.

Tension was also evident in the new overriding objective.[30] This was designed to be the guiding principle by which all parties involved in conducting civil litigation in England and Wales were to be guided. The judiciary were bound to further it and parties were required to assist the court with advancing it. It was designed to be the basis of the conduct of all post-reform civil litigation. The original full text of the original overriding objective was found at CPR 1.1, and read:

'(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly"[31]

(2) Dealing with a case justly includes, so far as is practicable—

(a)ensuring that the parties are on an equal footing.

(b)saving expense.

(c)dealing with the case in ways which are proportionate—

(i)to the amount of money involved.

(ii)to the importance of the case.

(iii)to the complexity of the issues; and

(iv)to the financial position of each party.

(d)ensuring that it is dealt with expeditiously and fairly; and

(e)allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.'

The tension which exists is as follows. If CPR 1.1 (1) is isolated, 'cases to be dealt with justly' would suggest the existence of a process through which the citizens of a jurisdiction can gain access to a fair and just result in a civil dispute. This was a restatement of Jacob's views; "…the supremacy of procedure is the practical way of asserting the primacy of the law, the practical way of securing the rule of law, for the law is ultimately to be found and applied in the decisions of the courts in actual cases.[32] However, the inclusion of (2) changes the focus of this somewhat. This states that

[30] CPR 1.1
[31] CPR 1.1
[32] Jack IH Jacob. The Fabric of English Civil Justice (London, Stevens and Sons, 1987) at 66

'justly' is to be defined, for the purposes of interpreting the rules, with reference to expediency, proportionality and cost-saving. By qualifying the term 'justly' in this way, Lord Woolf was, for the first time, explicitly and formally recognising that the administration of civil justice was subject to the economic policy position of government, the availability and access to funding and the use and availability of court resources.

This explicit recognition of the emerging narrative in civil justice reform was accompanied by reference to the need to reform the legal aid system to *support* the reforms,[33] and a plea to government to ensure that litigants of modest means were unaffected by the court fee review which was being carried out concurrently.[34] It is submitted that this is where Woolf could have perhaps gone further, stating that previous attempts to reform the civil justice system (notably the proposals laid out in the Civil Justice Review in 1988) had been hampered by repeated failures by government to invest money where it was needed[35], either through provision of legal aid or investment in structural reform which would enable effective implementation of proposals. This is where one of the limitations of Woolf's Interim and Final Reports is most obvious; the reports do not make a proper attempt to analyse *why* previous attempts at reform had either not worked or had not been implemented altogether. Doing so would have potentially strengthened Woolf's argument for greater and more targeted government investment to support access to civil justice in the newly reformed landscape.

However, it is perhaps for the same reason that Lord Woolf's proposals for reform were so impressive. They were borne from two key assumptions on Woolf's part, reached on the basis of very little empirical evidence but very astute judgment.

The first was that Woolf recognised that meaningful improvement in access to justice could not be achieved without wholesale and fundamental reform of the civil justice process. Even without carrying out detailed research into the reasons why previous

[33] Lord Woolf, Access to Justice Interim Report (Lord Chancellor's Department, 1995) at 124
[34] Ibid
[35] J. Sorabji, 'The Online Solutions Court: A Multi-Door Courthouse for the 21st Century' (2017) 36(1) CJQ 51

proposals had failed to either materialise or be as effective as hoped, Lord Woolf tacitly acknowledged that at least part of the problem was that previous reforms had sought to tinker with sections of an existing system which was fundamentally unfit for purpose. Genn supports this, stating that 'the experience in England prior to the fundamental review conducted by the Woolf Inquiry 1994-1996 was of the limited impact of piecemeal changes to civil justice'.[36]

The second key assumption that Woolf made was that the dominant narrative in civil justice reform (if it had not become so already) was very shortly going to become the extent to which systems could be streamlined and made more efficient with the sole purpose of saving costs to the state. This is therefore an appropriate point to consider the impact of the Civil Procedure Rules on delay, complexity and costs in English and Welsh civil justice.

2.2.1.1 Assessing the procedural landscape: did the Civil Procedure Rules have an impact on low value civil litigants?

As required by the comparative method,[37] the purpose of this section has been to provide an overview of the civil justice system as it was at the time the proposal to embed online dispute resolution was first put forward. Lord Woolf's reforms were the foundation for the current system relating to low value civil claims and it is therefore important to conduct an evaluation of the available data and on their impact. This will allow conclusions to be drawn on whether the CPR reduced or removed any of the barriers faced by low value civil litigants. This will then contextualise the current issues with the civil justice system in England and Wales which the OSC is required to solve. It will also enable comparisons to be drawn with British Columbia to see whether similar problems with access to the civil justice system existed at the time at which their ODR system was first introduced. This will, in turn, address the first research question.

[36] H. Genn, 'Solving Civil Justice Problems. What Might Be Best' (Scottish Consumer Council Seminar on Civil Justice, 19th January 2005) at page 5
[37] Zweigert & Kötz, Introduction to Comparative Law (3rd Edn, OUP 1998) 34

In terms of delay, table 2.2 below sets out the average time between issue and trial for small claims between 2000 and 2020.[38]

Table 2.2

Year	Quarter	Small claim trials	
		Number[1,2]	Average time between issue & trial (weeks)[3]
2000		55,836	29.0
2001		58,333	28.0
2002		55,719	31.0
2003		51,046	26.3
2004		46,604	27.1
2005		47,667	27.0
2006		46,860	27.6
2007		53,248	28.7
2008		46,519	29.6
2009		46,963	30.5
2010		42,786	30.8
2011		36,719	29.8
2012		32,457	29.9
2013		29,577	30.0
2014		32,893	31.4
2015		34,658	31.6
2016		35,434	31.3
2017		40,540	31.4
2018		41,309	34.2
2019		47,047	37.2
2020	(p)	34,094	45.3

The evidence shows that initially, following the introduction of the CPR, the average time between issue and trial remained fairly steady, with similar numbers of claims being issued. This demonstrates that there was not the immediate impact which was hoped for. However, by 2019, the average waiting time was 37.2 weeks between issue

[38] Gov.uk, 'Civil Justice Quarterly Statistics October to December 2020' (*gov.uk*, January 2021) <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2020> Accessed 15th April 2021

and trial, up from 29 weeks in 2000. This was in spite of the number of matters proceeding to trial decreasing from 55,836 to 47,037 over the same time period.

There is no available data which fully explains the reason behind this and therefore any conclusions are, by necessity, only based on supposition. However, it is interesting that this did coincide with a substantial reduction in the size of the court estate, which is discussed in greater detail below. This could certainly go some way to explaining the increase in waiting times, with less available space to conduct physical hearings.

This explanation is supported by considering the years when the sharpest increase in waiting times took place, 2018 and 2019. Those years correspond with when the majority of county court closures took place. However, the reduction in physical provision cannot explain the fact that average waiting times remained largely static (around 30 weeks) despite the significant drop in numbers of small claims trials between 2009 (55,836) at its lowest point in 2013 (29,577). This represents a 47% reduction in the number of trials, yet the average waiting time for trial increased from 29 weeks to 30 weeks over the same time period. What can be concluded with some certainty from the figures is that the CPR did not do anything, even initially, to deal with the issue of delay in low value civil claims.

Regarding complexity, much of the commentary points to the Civil Procedure Rules having ultimately failed to improve matters. Peter Thompson QC was forthright in his criticism of the Woolf reforms, stating '…the struggling litigant must either follow his instinct, or make a humble journey to the local county court and seek help from one of the counter staff. In this respect the Woolf Reforms have made no difference. The aims of simplification … of procedures were admirable but they have not been achieved'.[39] He went on to comment on the volume of the CPR, 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%

[39] Peter Thomson QC, 'Woolf's Litigants' 159 N.L.J. 293-294

increase'.[40] 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.[41]

This is particularly problematic as, even though the small claims track does provide a less formal environment in which to litigate, low value claims are still governed by the CPR: the same set of complex rules as multi-track claims involving multiple parties instructing experienced lawyers to represent them. It is acknowledged that fewer of the rules are likely to apply to small claims litigants, but that is not the point. Complexity was supposed to be reduced for litigants in person, those who are more likely to be involved in small claims litigation, yet what emerged was a set of rules taking up over 7000 pages. This remains the system which is in place today.

In terms of costs, as with so much of the data available on the civil justice system, 'we do not have substantial empirical evidence of what the effect of the CPR has been on litigation costs. What exists supports the strong anecdotal evidence that costs have increased'.[42] Much of the research lays blame at the door of front loading of costs through increased case management, with Judge Michael Cook arguing that it had been spectacularly unsuccessful in achieving its aims of bringing control, certainly and transparency[43] and a district judge interviewed for the Peysner / Seneviratne research study concluding that they had seen no change in the cost of litigation.[44] Indeed, Dame Hazel Genn, the author of the only empirical report upon which Lord Woolf relied when assessing the problems inherent within the civil justice system back in 1995 argued in

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[40] Ibid

[41] 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

[42] John Peysner, 'Predictability and Budgeting ' (2004) 23(2) Civil Justice Quarterly 15

[43] Michael J Cook, *Cook on Costs* (Lexis Nexis Butterworths, November 2007)

[44] John Peysner and Mary Seneviratne, 'The Management of Civil Cases: the courts and the post-Woolf landscape' (DCA Research Series, 2005) 8 and 35

2012 that the CPR had failed in their objectives, that complexity had remained the same and that costs had risen.[45]

Further evidence on the views of court users is available in the Legal Services Board and Law Society's joint publication 'Legal Needs of Individuals in England & Wales: Technical Report 2019 / 20'.[46] Collecting data from 28,663 participants, who were 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 of self-efficacy. 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.[47] The perceptions of inaccessibility and high levels of cost and complexity are therefore not confined to anecdotal evidence from the profession but are also prevalent in the views of court users as well.

This data does, again, need to be treated with some caution for the purposes of this study as it was not gathered from small claims litigants exclusively. However, it is still useful in that it provides some insight into how court users were finding their experience with the civil procedure rules at the time. All litigation in England and Wales is regulated by the same procedural code and therefore, no matter what the value of the claim, the same basic issues of procedural complexity are likely to be encountered. The evidence shows low levels of confidence from court users in engaging with the civil justice system, that delays in the county court have increased over a twenty-year

[45] H. Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2013) 24 Yale Journal of Law & the Humanities 401

[46] YouGov plc, Legal Services Board and The Law Society, 'Legal needs of Individuals in England and Wales. Technical Report 2019 / 20' (2019)

[47] Ibid at pages 23-25

period, and anecdotal evidence suggests that the cost burden faced by litigants now is higher than it was before the CPR were introduced.

This therefore addresses the first part of the first research question, relating to England and Wales. In the 1990s, high costs, long delays, high levels of complexity caused, in part, by an ingrained adversarial culture were the specific problems identified with the civil justice system in England and Wales. Active judicial case management and a redrafted set of rules were the principal solutions proposed to solve those issues.

The evidence presented suggests that, despite those measures, those issues and barriers still exist for litigants in low value civil claims, and they have arguably become worse. As the Personal Support Unit summarised, "…the legal system was designed by legal actors, for legal actors[48] and despite Lord Woolf's extensive reforms, evidence suggests that this remains the case. This is supported by statistics showing the increasing time it takes for a small claim to reach trial, the sheer volume of the CPR as they are now drafted and the results of the Law Society and Legal Services Board's survey of court users. By introducing active case management, Lord Woolf attempted to bring the cost and delay involved in civil proceedings under the control of the judiciary. Underlying this was an expectation that more judicial involvement would lead to a less adversarial culture in civil litigation however, despite this, all litigation was still to be case managed on the assumption that it would reach trial. Alternative methods of dispute resolution were to be encouraged, but attitudinally all parties were thinking about an adversarial trial from the point at which a claim entered the system. The evidence therefore does not suggest that the 'culture change' which Lord Woolf identified as key to the success of the reforms was achieved. These are the issues which the Online Solutions Court in England and Wales needs to address.

Where Woolf's Interim and Final Reports broke with the mould of previous reform was their frank and formal recognition that the administration of civil justice was beholden to the cost-saving agendas of government. Consideration will be given to the wider political and economic influences on civil justice in England and Wales later in this chapter. This will address the first part of the second research question, surrounding the political and economic agendas of government as far as they relate to the development and reform of the civil justice system in England and Wales, as well as

[48] Ibid at paras 5.27-5.36.

giving context to the second part of the research hypothesis. However, at this point it is necessary to explore the position in British Columbia.

2.2.2 Canada

In order to ensure that the research presented in respect of the civil justice system in British Columbia is valid in relation to the comparison drawn with England and Wales, this section will adopt a very similar structure to the previous section of this chapter. This section will therefore begin with a review and analysis of the Canadian Bar Association's Systems of Civil Justice Task Force Report, published in 1996. Prepared and released at almost the same time as Lord Woolf's Interim Report, the Task Force Report identified the issues which were seen as inherent in civil justice across Canada and made a total of 53 recommendations to be adopted across each of the provinces to address the 'access to [civil] justice crisis'.[49] Consideration will then be given to how these recommendations were implemented in British Columbia, and the extent to which civil access to justice was perceived to have been affected following their implementation.

2.2.2.1 Reform in the 1990s: Costs, Delay and Complexity

In 1995, the Systems of Civil Justice Task Force was created by the Canadian Bar Association with the aim of 'inquiring into the state of the civil justice system on a national basis and to develop strategies and mechanisms to facilitate modernization of the justice system so that it is better able to meet the current and future needs of Canadians'.[50] Its secondary objective was to ensure that the Canadian civil justice system was reformed to become more 'efficient, accessible, accountable, fair and able to deliver timely results in a cost-efficient manner'.[51]

[49] Canadian Bar Association. 'Report of the Canadian Bar Association Task Force on Systems of Civil Justice.' (Ottawa: The Association, 1996).
[50] Canadian Bar Association. 'Report of the Canadian Bar Association Task Force on Systems of Civil Justice.' (Ottawa: The Association, 1996) at Foreword
[51] Ibid at III

Whilst civil justice is dealt with individually by the relevant province or territory within Canada, the Task Force report considered how reform could be best conducted to improve the civil justice system across all jurisdictions. It reported its findings and recommendations in August 1996, with their remit, which was national in scope, being to draft a series of proposals for all provinces and territories with a view to creating a nationally consistent set of reforms to the civil justice system.

Following their eighteen-month long investigation, the Task Force Report concluded that there were three issues which were common across jurisdictions and which needed to be addressed as a matter of urgency: the speed with which disputes are resolved in the civil courts; the affordability of dispute resolution in the civil courts; and public understanding of the work of the courts and the system as a whole. Or, put another way, costs, delay and complexity.[52]

> Our investigation also revealed weaknesses in the civil justice system that should be addressed, to varying degrees, across the country. Debate about reform of the civil justice system has tended to focus on problems of costs, delay and access. These problems are most prevalent in the more highly populated regions of the country; some of them exist in virtually all regions. Viewed broadly, the mandate of the Task Force primarily concerns access to the civil justice system; delays and high costs can be seen as impeding access. To this might be added the issue of the complexity of the system and our laws.[53]

Before considering at length the findings of the Task Force, some caveats do need to be made. The first caveat is that whilst British Columbia was one of the jurisdictions which was the subject of the Task Force's investigation, the conclusions and recommendations pertain to every jurisdiction, and it is therefore not possible to definitively state that they are all specifically relevant to British Columbia. The second

[52] See also Roderick A. McDonald 'Access to Justice and Law Reform No. 2' 19 Windsor YB 317 in which the then President of the Law Commission of Canada discusses his experience within the civil justice system and concludes, inter alia, that the triumvirate of issues (costs, delay and complexity) identified by the Task Force were a very accurate reflection of the issues facing litigants in civil justice in Canada.
[53] Ibid at 11

caveat concerns the lack of data, which was available to inform, or indeed support, their conclusions. The Task Force make direct reference to this in their report, stating that the lack of statistical data in the existing system surrounding its efficiencies and deficiencies was in urgent need of rectification.[54] For the purposes of this study, as with the Woolf reports, the lack of sources which confirm or contradict the Task Force's research does need to be taken into consideration when attaching weight to the information. However, it is the only data available which provides insight into the state of civil justice in British Columbia at the time.

In their report, the Task Force dealt first of all with delay. The primary point of concern here was the complete lack of comparable data across Canadian courts which was available for analysis.[55] This data deficit formed the basis of several of the Task Force's recommendations. In the absence of empirical data, they therefore relied heavily on the views of professionals working in the legal system to reach conclusions about the extent of the problem, much in the same way that Lord Woolf did in England and Wales as part of the Interim Report he was preparing at almost the same time when faced with the same problem. Those professionals reported that, on average, simple low value cases were taking approximately two years to move from issue to trial when, in fact, they ought to be being disposed of in one year.[56] The Task Force concluded that this was primarily due to backlogs across the civil courts across jurisdictions, and that this was one of the major drivers of high litigation costs experienced across the country.[57] They put this down to the lack of time standards against which to measure the progress of a case.[58]

Interestingly, this is very similar in both content and language to the conclusions drawn by Lord Woolf in England and Wales, and this laid the groundwork for one of the Task Force's core recommendations; the introduction of active judicial case management across the Canadian civil justice system.[59] This will be discussed in greater depth

[54] Canadian Bar Association. 'Report of the Canadian Bar Association Task Force on Systems of Civil Justice.' (Ottawa: The Association, 1996)
[55] Ibid at 12.
[56] Ibid at 13
[57] Ibid
[58] Ibid at 14
[59] Ibid, recommendation 9 at 39

below, but the significant level of overlap on the issue of delay, its cause and the proposed solution between the comparator jurisdictions is worthy of note at this point.

What the Task Force's report seems to ignore however is the link between delays and the percentage of claims which did not reach trial. Earlier in the report it was reported that 95% to 97% of cases commenced across the Canadian civil justice system did not proceed to trial due to almost all of these cases being either settled or abandoned.[60] The conclusion that the report draws from this is that it was reflective of the fact that clients and lawyers were reasonable and willing to settle disputes voluntarily, without the need for court-imposed solutions.[61] Whilst this may be true, there is no evidence offered to support this supposition, and it is submitted that it would have been reasonable to also consider that the high percentages were also, at least in part, due to the reported high levels of both delay and cost.

It would also perhaps have been reasonable to pose the question as to why simple claims were taking double the time they should be to get to trial when only two percent of those issued reached that stage in the first place. However, this omission is perhaps explainable by the fact that the evidence being used here was almost exclusively anecdotal (it was only the opinion of actors within the legal system that cases should be taking half the time to come to trial that they were) and, due to the multiple jurisdictions from which this evidence was generated, this was simply not solid enough to be used to generate generalised criticisms applicable to all provinces and territories.

On costs, the Task Force once again pointed to the lack of available comparative empirical data to assist them with their conclusions.[62] As a result, they relied heavily on lawyers' views gathered as part of the Ontario Civil Justice Review[63] to draw broad thematic verdicts on the experience of litigants seeking to engage with the civil justice system. Their central concerns focused on low value claims, with the Task Force commenting that the direct financial costs, on a proportional basis, were particularly

[60] Ibid at 11. For a discussion on how the delays in the criminal justice system were causing delays in the administration of civil justice, see R. Lee Akazaki, 'Unconscionable Delay in Civil Justice: Is it also Unconstitutional' (2007) 32 Advoc. Q 277
[61] Ibid 1
[62] Ibid at 112
[63] Ibid at 112 – 113

high for claims involving a low value at risk, and that this, coupled with the funding cutbacks of state-supported progammes, effectively denied access to the civil justice system for those litigants.[64]

This is interesting for the purposes of this study for two reasons. The first is the similarity with Lord Woolf's comments about the disproportionately high costs experienced by litigants of low value claims and the exclusionary impact this was having on those litigants from enforcing their rights through the civil courts, and the second is the direct reference to the defunding of state-run civil legal aid. This will be covered in greater depth later in the chapter when consideration is lent to Canadian political and economic agendas, however it is worth pointing out here one of the few pieces of empirical evidence which was buried in the Task Force's report; that only nine to ten percent of the publicly funded costs of the administration of justice across Canada was allocated to the civil justice system.[65] This aligns with what was happening in England and Wales at the end of the 1990s, when state funding was reducing with the aim of rendering the civil justice system self-financing.

The section of the Task Force's report which deals with complexity, or 'understanding', is perhaps unsurprisingly more detailed given the ability of the group to consider the rules relating to civil procedure across various jurisdictions.[66] The report stated that between the various rules, practice directions and the substantive law itself, many areas of the civil justice system were nearly impossible to understand for a lay litigant.[67] The report broke this down further into two areas: linguistic and procedural complexity. They argued that rules needed to be drafted using simpler language, that litigants needed to understand the purpose of documents and how they are used in the context of litigation and that the procedure ought to be understandable and

[64] Ibid at 16. See also Erik S. Knutson 'The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada' (2010) 36 Queen's LJ 113 and Noel Semple 'The Cost of Seeking Civil Justice in Canada (2015) 93 Can. B. Rev 639

[65] Ibid at 16

[66] For more background, also see Canadian Bar Association Task Force Report, 'Reading the Legal World: Literacy and Justice in Canada' (Ottawa, Canadian Bar Association, 1992); and M. E. Manley-Casimir, W.E.M. Cassidy and S. de Castell. 'Legal Literacy: Towards a Working Definition, a report submitted to the Canadian Law Information Council' (Ottawa, 1986)

[67] Canadian Bar Association, "Report of the Canadian Bar Association Task Force on Systems of Civil Justice" (Ottawa: The Association, 1996), 17

transparent to court users who are ‘untrained in law’.[68] Community group members also rated their personal level of information about the system as `poor' and agreed that civil court procedures were difficult to understand.[69]

This once again demonstrates a sizeable overlap with the issues relating to complexity facing litigants in England and Wales identified by Lord Woolf. Reference to procedures being too difficult to understand, language used in the procedural rules being too complex and terminology used being too obscure demonstrate identical issues being faced by civil litigants across both comparator jurisdictions in the 1990s.

It is also intriguing that, despite the difference in constitution, not only did the problems manifest themselves in the same areas but also that the conclusions of both Lord Woolf’s and the Task Force’s reports pointed to very similar issues in the construction of the respective civil justice systems and the attitude of the actors who played their part within it, including their views on what could explain the lack of effective reform to that point:

> As with many systems, the civil justice system is subject to the inertia of operating `the way we have always done things', even in the face of clear evidence of unwanted effects such as delay, costs and lack of understanding. One facet of this inertia is reluctance to admit to being part of the problem. Some lawyers, judges and administrators resist change and adhere steadfastly to traditional and time-consuming procedures and attitudes. The desire to preserve the status quo creates barriers to substantial change in many aspects of the system.[70]

This section of the Task Force’s report makes an identical point to Lord Woolf when he highlighted the issues caused by the embedded adversarial system within English civil justice and the unwillingness of those who practise within it to recognise that they

[68] This was, in fact, supported by a quotation from H. Heilbron and H. Hodge, ‘Civil Justice on Trial—A Case for Change, Joint Report of the Bar Council and Law Society’ (1993) at 4, which described civil procedure as ‘unnecessarily technical, inflexible, rule-ridden, formalistic, and often incomprehensible to the ordinary litigant.’
[69] Canadian Bar Association, “Report of the Canadian Bar Association Task Force on Systems of Civil Justice” (Ottawa: The Association, 1996), 17
[70] Ibid at 18

must change with the system to enable any meaningful development in access to civil justice, particularly for litigants in low value claims.

Now that an analysis has been conducted on the issues faced by jurisdictional civil justice systems identified in the Task Force's report, their proposed solutions must be considered to establish the extent to which the responses of the comparator jurisdictions to the same problems were analogous.

The Task Force report made a total of 53 recommendations, broadly under the following headings:

(1) Creating a multi-option civil justice system (providing users with the early option to divert to alternative dispute resolution and settlement processes).
(2) Introducing active case management and caseflow management by the court.
(3) Increasing jurisdiction of small claims courts.
(4) Reforming the appeal system through the introduction of active case management.
(5) Improving public understanding of the civil justice system.
(6) Managing the Courts of the Twenty-First Century through the use of advancing information technology systems.

It is important to note that this did not promote a wholesale replacement of the systems which were in existence up to that point in the same way that Lord Woolf's report purported to. The Task Force recommended '…progressive evolution rather than a radical departure from the existing system.'[71] That said, certain recommendations were also much bolder than those which Lord Woolf put forward. The creation of a multi-option civil justice system was one of those recommendations. This originated from a proposal first put forward by Professor Frank E.A. Sander in the USA in April 1976[72] for what he referred to as the 'multi-door courthouse'.

[71] Ibid at 27
[72] Frank E.A. Sander, 'Varieties of Dispute Processing' (National Conference on the Causes of Dissatisfaction with the Administration of Justice, 7th – 9th April 1976), reprinted in Sander, 'Varieties of Dispute Processing', (1976) 70 F.R.D. 111

The concept revolved around the repositioning of the court as a dispute resolution centre as opposed to being a singular road towards an adversarial trial. Embedded into this new vision of a court would be a variety of options made available to a court user for the resolution of a civil dispute such as mediation, arbitration and early neutral evaluation, and that these options would be presented as part of the court process as opposed to an alternative to it.

The model proposed by the Task Force is almost identical to this. Under the proposal, a party would issue proceedings, and, upon receipt of a defence, the claim file would be passed to a Court Intake Officer who would review the steps taken by the parties towards settlement to that point. The Court Intake Officer would then either make a referral to mediation, arbitration or early neutral evaluation or the matter would proceed to active judicial case management and be allocated to one of three tracks; expedited, standard or complex.[73]

The Task Force made clear that this was not to diminish the usefulness of trials but was a reflection that court users would benefit from a wider range of earlier opportunities to settle their dispute without the need to proceed to formal judicial determination. They also recognised that, in order to be successful, it would involve redefining the modern role of the civil court system away from that of a singular road to trial: the same conclusion which Lord Woolf had reached in England and Wales. Although the Task Force do not expressly state this in their report, it is submitted that this was to address potential concerns that court users would perceive being directed towards alternative methods of dispute resolution to trial as some sort of second-rate justice.[74] By integrating ADR options into the court system, and thus validating their role and benefits as part of a modern justice system, the Task Force were trying to

[73] A comprehensive diagram demonstrating how this new proposed structure was to operate is available at Canadian Bar Association, "Report of the Canadian Bar Association Task Force on Systems of Civil Justice" (Ottawa: The Association, 1996) 25

[74] For further discussion on this point, see particularly E Lind and T Tyler, *The Social Psychology of Procedural Justice* (1988, Springer Patricia A. Ebener, William L. F. Felstiner,. Deborah R. Hensler, Judith Resnik, Tom *R. Tyler. 'The Perception of Justice' (*The Institute for Civil Justice*, 1989)* on perceived justice building legitimacy of process in court users, Jacqueline M. Nolan-Haley (1996), 'Court Mediation and the Search for Justice through Law' 74 Wash. U. L. Q. 47 and H. Genn, *Judging civil justice. Hamlyn Lectures, Cambridge*. (Cambridge University Press 2008). This perspective views it as a form of second-class justice: 'mediation without the credible threat of judicial determination is the sound of one hand clapping'

address this concern as directly as they could. They said this of their model for a multi-option civil justice system:

> Multi-option civil justice, centred on court facilities but not focused on trials, requires modifications to the structure of the dispute resolution process. Traditionally, the litigation process can be seen as a series of procedural steps that direct a case, unless it is settled earlier, in a straight path toward trial. The importance of the prospect of a trial cannot be underestimated as a tool that focuses the attention of the parties on settlement. In many situations, it is the fact of a trial, and its certainty if settlement is not reached, that drives settlement. This is why so many cases have been settled on the courthouse steps- that is, on the eve of trial…. We do not wish to be understood, however, as diminishing the importance of the trial alternative or its central role in the dispute resolution process. Settlement discussions and the processes that create a climate in which settlement negotiations can occur are informed by the prospect of a trial. It is for this reason that we refer to trials throughout this Report as a valued but last resort in dispute resolution.[75]

Whilst detailed consideration of the integration of ADR into the actual court process itself will not be undertaken until chapter 5 of this thesis, it is worth noting that this represents a clear divergence from Lord Woolf's approach to addressing this culture change. The Interim and Final reports made repeated reference to the benefits of ADR and its usefulness in assisting parties with achieving early settlement and thus relieving parties of the double burden of high costs and long delays, however Woolf made it very clear that referral to ADR was to be encouraged by the court and that the judiciary could use their new case management powers to further that agenda. Those alternative methods would not become a formal part of the court system and the design of the civil justice system under the CPR would still be driven by preparation for trial from the earliest stages of a claim being issued.

[75] Canadian Bar Association, "Report of the Canadian Bar Association Task Force on Systems of Civil Justice" (Ottawa: The Association, 1996) at 31

The Task Force sought to normalise the use of consensual methods of dispute resolution by integrating them into the court system once a claim had been issued. Indeed, for low value claims, it recommended specifically that non-binding dispute resolution processes be embedded into the small claims process;[76] a recommendation which was implemented in British Columbia in 1998.[77] Chapter 4 will explore whether there is any evidence that this divergence of approach at this key time for reform left the comparator jurisdictions in different places attitudinally at the time of integration of ODR models into the low value civil claims procedure.

Areas where there are substantial levels of crossover between the Task Force's recommendations for reform and those of Lord Woolf are the expansion of the small claims' regime (although British Columbia were commended for having raised the financial limit of their small claims jurisdiction to $10,000 already) and the introduction of active judicial case management. Like Lord Woolf, the Task Force believed that judicial economy and the speed with which civil cases could be concluded would be materially assisted by moving control away from parties and lawyers and towards the courts and the judiciary.

They also recommended the creation of a multi-track system (they proposed a standard case track, a fast track and a complex case track) so that courts could provide specifically tailored directions which were proportionate to the value and complexity of the dispute in question.[78] This is almost identical in nature to Lord Woolf's proposals for the creation of a small claims, fast and multi-track and his suggestion concerning the wording of the new overriding objective of the Civil Procedure Rules. What this emphasises is a strong correlation between both the problems which were identified within each of the comparator systems and the proposals which were put forward to solve them. The civil justice systems in Canada and England and Wales were, at this point, in a very similar place.

[76] See also E. D. Schmidt, Associate Chief Judge, Provincial Court of British Columbia, A Model for Economic Small and Medium Litigation in Provincial Court (25 September 1995).
[77] Under Rule 7.2 Supreme Court Rules
[78] Canadian Bar Association, "Report of the Canadian Bar Association Task Force on Systems of Civil Justice" (Ottawa: The Association, 1996) at 38

In contrast to in England and Wales, where the Woolf reforms were implemented in one sweeping movement,[79] British Columbia implemented the recommendations of the Task Force on a piecemeal basis. Active judicial case management was introduced in 1998[80] and the financial jurisdiction of the small claims court had been increased to $10,000 in 1991. Furthermore, the Task Force's recognition of the potential of the small claims jurisdiction to simplify the level of complexity in the system resulted in the separation of the rules of court; the Small Claims Act 1996 introduced the Small Claims Court Rules, and the Supreme Court Act 1996 introduced the Supreme Court Rules.

This is an interesting point of divergence. In England and Wales, small claims very much remained under the auspices of the CPR, a large set of rules designed to cover all possible procedural eventualities in claims of all sizes. This was despite the recognition that the positives of the small claims' regime were its commitment to less formal and more inquisitorial modes of operation, with its primary purpose being to serve those parties who were unrepresented. In British Columbia, this was recognised by the creation of a new set of rules specifically to govern small claims: litigants did not need to consider the more complex Supreme Court Rules to advance their claim. The Small Claims Court Rules were (and are) deliberately drafted in a similar fashion to that of a 'frequently asked questions' section of a website, such as 'what are a defendant's options?'[81] and 'how does a defendant reply?'.[82] All sections of the rules contain reference to any form which either party to a claim is required to complete. This enabled the rules governing small claims to be isolated from the rules for more complex cases, promoting the more litigant in person friendly approach which was recognised by the Task Force report.[83]

However, where British Columbia undertook arguably the most effective work was widening the range of settlement options embedded into the small claims system. Multi-option civil justice for low value claims was implemented in 1996 by introduction

[79] Through the Civil Procedure Act 1997
[80] Under Small Claims Rules, Rule 7 for low value claims and Supreme Court Rules, Rules 35, 60E, 66 and 68 for higher value claims.
[81] Small Claims Rules, Rule 20
[82] Ibid at Rule 21
[83] Canadian Bar Association, "Report of the Canadian Bar Association Task Force on Systems of Civil Justice" (Ottawa: The Association, 1996) at 24

of the Court Mediation Program[84] and furthered in 2003 by the 'notice to mediate' scheme.[85] The scheme introduced the option for one party to serve another with a notice to mediate. Once that notice had been served, the other party was *obliged* to attend a mediation with their opponent. If that party still refused, the requesting party could file an Allegation of Default notice with the court, at which point the court could formally order the parties to mediate. These schemes embedded mediation into the early stages of the Provincial (small claims) Court, in addition to the existing mandatory Settlement Conferences,[86] informal twenty to thirty minutes meetings between the parties to small claims, facilitated by a judge who would assist the parties in reaching a satisfactory resolution to the claim. This was, for all intents and purposes, mandatory judicial early neutral evaluation within the small claims' jurisdiction in British Columbia. Further discussion of this will take place in chapter 5 of this thesis.

These changes therefore resulted in there being three options for dispute resolution embedded into the British Columbian system for low value civil claims: mediation, early neutral evaluation and trial. It was therefore, by this point, a multi-option civil justice system, thereby achieving the objective set out by the Task Force. However, this does need to be placed in the context of the overall agenda. First of all, the evidential basis for diverting court users to alternative dispute resolution mechanisms to increase and enhance access to justice was virtually non-existent. The Task Force's report makes repeated reference to the need for empirical data to form the basis for progress,[87] however it proceeded to make 53 recommendations based almost exclusively on anecdotal evidence derived from members of the profession across various jurisdictions.

It is submitted that, in fact, the underpinning agenda was the same as that in England and Wales in the late 1990s and early 2000s i.e., that judicial economy and the speed with which cases could be disposed of (however that was achieved) was the primary objective.

[84] Ibid at Rule 7.2
[85] Ibid at Rule 7.3
[86] Ibid at Rule 7
[87] Canadian Bar Association, "Report of the Canadian Bar Association Task Force on Systems of Civil Justice" (Ottawa: The Association, 1996) at 12, 13, 15, 16, 19, 54, 59, 60, 61 and 75

The clear difference between the way in which Canada and British Columbia handled this shift in focus was the extent to which they committed to it. Both jurisdictions adopted and embedded active judicial case management principles into their civil justice systems, as well as recognising and relying on the informality and potential for swifter resolution of disputes facilitated by the small claims court. However, whereas British Columbia created a separate set of rules for small claims, the small claims regime in England and Wales was brought under the purview of the CPR. British Columbia introduced a specific procedural step where litigants would be given mandatory early neutral evaluation or be ordered to mediate, whereas in England and Wales the assumption that a claim, once issued, would continue on its adversarial journey towards trial remained a fundamental element of the small claims process. ADR would be encouraged but, ultimately, would not become a formal part of the low value dispute resolution process. British Columbia demonstrated boldness, where England and Wales did not commit fully to forcing a change in the culture which both jurisdictions recognised was necessary to achieve a fundamental improvement in access to justice in low value civil claims.

2.3 The Rise of Proportionality and the Efficiency Agendas

As set out in the introductory chapter to this thesis, without an understanding of the funding climate surrounding civil justice reform, it is very difficult to make meaningful recommendations for the development and implementation of the OSC. This section discusses the second thematic agenda which dominated civil justice reform in England and Wales and Canada following the introduction of active judicial case management: the development of the concept of proportionality and the explicit drive from government towards operational efficiency.

2.3.1 England and Wales

This section provides a summary of the political and economic climate as it relates to civil justice in England and Wales, more specifically the reductions in state funding for civil justice which followed the Woolf reforms driven by successive governments' austerity agendas since 2010. The intention is to establish whether the concerns raised in the second part of the hypothesis are well founded: that there is precedent

for government pursuing a cost-saving agenda despite it running contrary to the stated objectives of civil justice reform.

Concurrent to the Woolf reports being published, and perhaps most significantly to low value civil claimants, in January 1997 a substantial rise in the cost of issuing a claim was introduced.[88] This was with the explicit governmental objective to render the civil courts self-financing.[89] During the Parliamentary debate on the Civil Procedure Bill, the paradoxical nature of this was highlighted, with Paul Boateng commenting that …the Government have gone against both the spirit and the letter of Lord Woolf's report because they have failed to address the issue of cost. Despite all advice and warnings to the contrary, they have engaged in an insistent drive to make the courts self-financing. The Bill will not pave the way for the reforms that we all seek in civil justice because the court fees system prices justice beyond the reach of the ordinary citizen.[90]

This was therefore a step far beyond *reducing* government funding of the civil justice system, it showed an intention to eliminate it altogether by increasing the financial contributions of those who needed to access the civil justice system at any level. It also demonstrated a deliberate departure from what Lord Woolf was attempting to achieve through his reforms. Woolf, it must be remembered, specifically warned against fees being increased to the point where it materially impacted litigants of modest means.[91]

The Government imposed this fee increase by statutory instrument.[92] Concern was raised at the time about the unilateral nature of the fee increase and the lack of Parliamentary scrutiny of the rationale.[93] Despite this, fees were increased anyway. This is evidence of government policy coming into direct conflict with the stated objectives of civil justice reform, in this case to achieve a cheaper, simpler, more predictable dispute resolution process for all litigants, and ultimately overriding it.

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[88] HL Deb 27 January 1997 vol 577 col 957-9 <https://api.parliament.uk/historic-hansard/lords/1997/jan/27/civil-court-fees> Accessed 5th March 2021
[89] 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
[90] HC Deb 30th January 1997, Col 547
[91] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995) at 124
[92] The County Court Fees (Amendment) Order 1996
[93] HC Deb 30th January 1997, Col 547

Further cuts were imposed by government to civil justice throughout the 2000s, notably in relation to legal aid. It should be noted that, whilst civil legal aid was never available for small claims litigation, its treatment does give important context on government policy regarding how the dominant narrative in funding civil justice has evolved.

Following the introduction of the Access to Justice Act 1999, the percentage of the population entitled to legal aid fell to 41%[94], and by 2007 it stood at 29%.[95] This was the lowest percentage of eligibility since civil legal aid was first introduced. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) 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.[96] This removed from scope nearly 70% of cases previously covered and in turn had an impact on the numbers of litigants appearing before the court in person as concluded by the Justice Committee[97] after their wide-ranging investigation into the impact to the post-2012 changes to civil legal aid. It was very clear by this point that any weaknesses in the system's ability to provide access to civil justice to unrepresented parties would not be masked by an increase in the provision of free legal advice, assistance and representation.

LASPO also brought with it a notable revision to the CPR which demonstrates the chasm which had appeared between the aims and objectives of reformers and the aims and objectives of those who are responsible for funding those reforms: the redrafting of the overriding objective. The revised text read as follows:

'CPR 1.1

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly **and at proportionate cost**.'[98]

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[94] 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

[95] Ibid

[96] House of Lords Constitution Committee, 'Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Bill' (HL222) para. 3

[97] House of Commons Justice Committee 'Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (HC311) at 36 <https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf> Accessed 1st March 2021

[98] CPR 1.1

The remaining and unchanged factors are:

(a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with cases in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and to the parties' financial position; (d) ensuring that it is dealt with expeditiously and fairly; (e) allotting to it an appropriate share of the court's resources;

The impact of this was to essentially override the principle that necessity in civil proceedings would always prevail over proportionality laid out in Lownds v Home Office.[99] The new rules made clear that both of these principles were to be given equal consideration.[100] Therefore, post-2013, 'just' was no longer defined by *reference* to proportionality as one of several factors to be taken into consideration, they were presented as equal objectives.

On the face of it, the consideration of proportionality would have been no problem if this were focused on the amount of process required to resolve a dispute being proportionate to its value, complexity and importance, i.e., that the principle was pursued in the interests of the user. This is how Lord Justice Jackson viewed the elevation of the term 'proportionality'.[101] However, there was a clear divergence on how it was viewed in government. In their paper 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system',[102] the Ministry of Justice set out on whose behalf it believed proportionality should be achieved, stating that:

> 'We believe a successful civil justice system must be driven by a desire to achieve a high standard of justice at proportionate cost to both the parties involved, and the taxpayer'[103]

This statement formally and explicitly elevates the status of the taxpayer to one of the primary stakeholders in civil justice reform, bringing them into line with the parties to a dispute themselves, as well as demonstrating how different the interpretation of the term 'proportionality' was for the government as opposed to the reformers. It demonstrates that, by the late 2000s and into the 2010s, no longer were the interests of the parties to litigation to be prioritised over the cost to the state; both are to be

[99] [2002] EWCA Civ 365
[100] Although case law has developed to suggest that emphasis is currently being placed on procedure, to include *Durrant v Chief Constable Of Avon & Somerset Constabulary*, [2014] 2 All ER 757, *Thevarajah v Riordan* [2014] EWHC 725 (Ch), *MA Lloyd & Sons Ltd v PPC International Ltd* [2014] EWHC 41 (QB), *Groake v Fontaine* [2014] All ER (D) 186 (May)
[101] Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (2009) at p30, para 3.2 in which he reaffirms the definition given to proportionality by Woolf: 'Procedures and cost should be proportionate to the nature of the issues involved.'
[102] Ministry of Justice 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales: The Government Response.' (HMSO, February 2012)
[103] Ibid at 6

given equal consideration. The very clear message from those with the control over the implementation of civil justice reform was that the court user's interest would not be pursued in isolation of the cost; that any development would be centred on the needs of users *and* the cost to the taxpayer in equal measure, rejecting the position of mutual exclusivity that the legal aid system promoted.

Pursuit of the efficiency agenda continued throughout the 2010s. Further increases to court fees were imposed from 9th March 2015,[104] 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%.[105] The 'enhanced court fees' were justified by the Ministry of Justice on the basis that wealthier litigants could pay more in court fees, which in turn would subsidise the civil justice system in the same way as the state had done previously.[106]

Discretion to increase fees by such a margin was provided under section 180 of the Anti-social Behaviour, Crime and Policing Act 2014, which allows the Lord Chancellor to prescribe fees above the cost of providing the court service to litigants.[107] That was the power which Chris Grayling, the then Lord Chancellor, exercised to justify the increase. In Parliament, the proposals were met with significant opposition, with Lord Pannick commenting that '…is it [the increase] a fair, reasonable or proportionate exercise of that power? Plainly not. For litigants to have to pay such substantial sums in advance of bringing a legal claim will inevitably, in practice, deny access to the court for many traders, small businesses and people suing for personal injuries.'[108] He went on to state that the Order ought to be amended to read '…but that this House regrets that the draft order unfairly and inappropriately increases fees for civil proceedings above costs and so damages access to justice'.[109]

There was similar opposition from the legal profession, with the firm Kingsley Napier on behalf of, inter alia, the Law Society and the Bar Council writing to the Lord

[104] Civil Proceedings and Family Proceedings Fees (Amendment) Order 2015
[105] Ibid
[106] 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' (HMSO, 2015) <https://consult.justice.gov.uk/digital-communications/court-fees-proposals-for-reform/results/enhanced-fees-consultation-response.pdf> Accessed 12th March 2021
[107] Section 180 Anti-social Behaviour, Crime and Policing Act 2014
[108] HL Deb 4 Mar 2015, Col 310
[109] Ibid

Chancellor threatening Judicial Review of the Order on the basis that the statutory right under s180 did not alter the fundamental legal duty under section 92 of the Courts Act 2003 to 'have regard to the principle that access to the courts must not be denied'.[110] They argued that the increased proposed fees fell outside the scope of the section 180 enabling provision and that therefore the Lord Chancellor was not statutorily entitled to impose them.

The government attempted to get around the section 92 principle by including the protection of access to justice in the stated objectives of the impact assessment on enhanced fees.[111] These were '(a) to protect access to justice by ensuring that the courts and tribunals are adequately resourced and (b) to reduce the overall taxpayer subsidy for HMCTS'.[112] This, it is submitted, is grossly misleading. To suggest that the primary purpose of proposing the measures was to *protect* access to justice is simply not the case, particularly when the impact assessment itself is examined. This states '…it has been assumed that fee changes will not affect court case volumes. Sensitivity analysis considers a 'low' 2 per cent reduction in case volumes compared to the baseline, a 'medium' 5 per cent reduction, and a 'high' 10 per cent reduction. It has been assumed that there are no detrimental impacts on court case outcomes nor on access to justice from any increase in court fees. It has been assumed that there will be no impacts on the legal services used to pursue or defend claims.'[113]

There was no basis for these assumptions. Lord Thomas was particularly critical of their generalised nature, commenting that the impact assessment '…makes some very sweeping and, in our view, unduly complacent assumptions about the likely effect on the volume of court claims issued and access to justice of the proposed fee increases…the research evidence base for these proposals is far too insubstantial for reforms and increases of this level'.[114] As is becoming increasingly evident in this thesis, this would be an appropriate general criticism of the attitude towards data collection and evidence-led reform within the MOJ and wider government.

[110] Ibid
[111] Ministry of Justice, 'Impact Assessment MOJ 222: Enhanced Fees (Ministry of Justice, 2015) <,https://www.legislation.gov.uk/ukia/2015/44/pdfs/ukia_20150044_en.pdf> Accessed 12th March 2021
[112] Ibid
[113] Ibid
[114] HL Deb Wednesday 4th March 2015 Vol 760 Col 311

The government's response was that the proposed fees would not lead to difficulties in some people accessing the courts,[115] on the basis that the two consultations which they undertook had not shown this. However, the extent of those consultations was 18 telephone questionnaires with litigants in the first round, and 31 in the second round.[116] Lord Beecham was scathing in his view of the reliability of this data, commenting that the consultations '…purported to constitute research into the proposals and which are reflected in what passes for the impact assessment'.[117]

In spite of the level and force of objection and the fact that the evidence base justifying the contention that there would be no material impact on access to justice was virtually non-existent, the government imposed the Order in any event. It is submitted that this adds to the weight of the evidence supporting the risk outlined in the second part of the hypothesis: that cost-saving and efficiency measures have repeatedly been pursued in isolation of the ostensible objectives of civil justice reform. As Lord Brown stated: '…it is bad enough that the courts should be required to be self-financing at all. The justice system properly exists for the benefit of society and the economy as a whole.'[118] The evidence suggests that this view is certainly not shared by those who are responsible for funding the civil justice system and, more concerningly for this thesis, the development and implementation of the Online Solutions Court.

Increases to court fees were not the only efficiency measures being put into place at the time. There was also 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,[119] with a further 77 to be closed by 2026.[120] Staff numbers were also dramatically reduced, from 19,704 Full Time Equivalents in 2011 / 12[121] to 16,100 Full Time Equivalents by 2018

[115] Ibid at Col 312
[116] Ibid at Col 313
[117] Ibid at Col 312
[118] Ibid at Col 314
[119] House of Commons Justice Committee, 'Court and Tribunal Reforms, 2nd Report of Session 2019', (HC190)
[120] 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
[121] HM Courts and Tribunal Service, 'Annual Report and Accounts 2014-15' (*gov.uk,* 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

/ 19[122] with an intended further reduction of 5000 staff by 2024.[123] The aim was to render the civil justice system 'more efficient'[124] and 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.[125]

The speed at which such a high volume of the court estate was reduced was alarming. No strategic rationale was put forward by HMCTS which explained how courts were selected for closure and how this fitted into the overall court reform programme. Bambos Charalambous, MP for Enfield, Southgate was particularly critical, stating that '…the closure of 258 courts over the past nine years has been nothing less than shambolic. It is not part of any master plan but is rather a slavish knee-jerk response to the Treasury's demands for more cuts from the Ministry of Justice.'[126] The justification for imposing such a high volume of closures and cuts in such a short space of time was that the Briggs reports for civil courts had been published and set the wheels towards digitalisation of the court service into motion.[127]

However, as Robert Neil put forward, '…these [reports] were well-founded principles and they had good judicial input into their design. The problem is that there is concern

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

[124] HM Courts and Tribunal Service, 'Annual Report and Accounts 2014-15' (*gov.uk,* 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
[125] Ibid
[126] HC Deb Thursday 20th June 2019 Vol 662 Col 415
[127] Ibid at Col 418

that the outworking of that programme places more emphasis than it should on costs and savings rather than on improving services for parties to the hearing and the court user'.[128] Reductions and savings should work in tandem with reform being implemented, as opposed to the disjointed approach adopted here where cuts have been made without any identifiable alternative being put in place.

The evidence produced here demonstrates a clear pattern which has developed since the 1990s. Government agendas and objectives for civil justice reform have not aligned and, when placed into direct competition with one another, efficiency measures have usurped investment in provision at every juncture no matter how weak or non-existent the evidential base and no matter how forceful and justified the objections. The narrative surrounding policy in civil justice evolved and has remained focused on two things since the 2000s: cost saving and efficiency. The cuts to legal aid, front line court staff and court buildings demonstrate a clear policy in England and Wales where cutting costs and budgets are prioritised above the interests of all other participants in civil justice.

There has, very recently, been some suggestion by Lord Burnett, the Lord Chief Justice, that this policy may be reversed in favour of a more user-focused approach. He stated that 'court modernization is "user-centred" in design and default… in organising the way in which our courts operate we should put the needs of court users at the heart of our thinking and remember that high value disputes form only a tiny proportion of the cases we deal with.'[129] However, it is difficult to view this with much optimism when the evidence is so strongly supportive of the hypothesis that a major risk to the development and implementation of the Online Solutions Court is that insufficient investment in the foundations of the project will be provided by government, leading to the Online Solutions Court becoming largely a digitised version of the current County Court procedure.

In his Eighteenth Implementation Lecture,[130] Dyson MR stated that '…we have limited resources. Demand for those resources outstrips that limit. We have to cut our cloth

[128] Ibid
[129] I. Burnett, 'The Cutting Edge of Digital Reform' (First International Forum on Online Courts London, 4 December 2018.) Available at https://www.judiciary.uk/wp-content/uploads/2018/12/speech-lcj-online-court.pdf Accessed 14th October 2021
[130] Lord Dyson, 'The Application of the Amendments to the Civil Procedure Rules, 18th Lecture in the Implementation Programme' (District Judges' Annual Seminar, 22nd March 2013)

accordingly… the achievement of justice means something different now'.[131] The use of 'justice' is interesting here, specifically where Dyson's definition of the term fits in the wider spectrum of interpretations discussed at length in chapter 1. This suggests a much heavier emphasis on the procedural system cost, potentially at the expense of meaningful participation and accuracy of adjudication which, this thesis argues, equally ought to underpin procedural justice principles thus giving legitimacy to the civil justice system in the eyes of its users. This offers key insight into the order of procedural justice priorities from the perspective of the reformers, and frames the context of how the term 'access to justice', so often used in reform rhetoric, was actually being interpreted at the commencement of the reform programme.

This was the climate of the civil justice system at the time that Lord Briggs commenced his Civil Court Structure Review.

2.3.2 Proportionality and Efficiency Agendas in Canada

The Civil Justice Reform Working Group was established by the Law Society of British Columbia in November 2004 to 'explore fundamental change to the BC civil justice process'[132] with a specific focus on increasing accessibility, proportionality, fairness, public confidence, efficiency and justice within British Columbia's Supreme Court. The Group's report, Effective and Affordable Civil Justice, was released in November 2006 and resulted in the redrafting of the Supreme Court Civil Rules, the equivalent procedural code to the CPR in British Columbia.

To enable a valid comparative analysis to take place, a brief evaluation will now be carried out on the available data and literature relating to the impact that the reforms were regarded to have had in relation to low value civil claims following the implementation of the Task Force's key recommendations. It will be accompanied by a summary of the key governmental agendas which have emerged in British Columbia since the implementation of the Task Force reforms and analysis will be carried out on

[131] Ibid at 27.

[132] BC Ministry of Justice and Attorney General, Effective and Affordable Civil Justice - Report of the Civil Justice Reform Working Group to the Justice Review Task Force' (2006) <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf> Accessed 1st October 2021

how such agendas have impacted on the delivery and landscape of the provincial civil justice system.

In November 2004, the Civil Justice Reform Working Group (CJRWG) was set up by the Law Society of British Columbia 'to explore fundamental change to the BC civil justice process from the time a legal problem develops through the entire Supreme Court litigation process'.[133] Whilst this did not specifically relate to low value civil claims, there are sections of this report which are of key importance when assessing the emerging political agendas which were beginning to impact on the delivery of civil justice in British Columbia.

The mandate of the CJRWG was further clarified in the report by its focus on 'methods by which accessibility, proportionality, fairness, public confidence, efficiency and justice can be increased'.[134] There are two words of interest here: efficiency and proportionality. Across the report, the word 'efficiency' is used a total of seventeen times[135] in the context of almost every area focused upon by the working group. This showed a clear shift in emphasis away from the focus on active judicial case management towards the building of a more streamlined, efficient system, the unspoken narrative being that a more efficient system is a cheaper system for those who administer and fund it.

The report also makes specific recommendations to formally introduce the principle of proportionality into the newly drafted Supreme Court Rules, with the report in fact making specific reference to its inclusion in Lord Woolf's overriding objective as justification for its inception. With this in mind the third recommendation of the CJRWG was for the complete rewriting of the Supreme Court Rules to '…create an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality'.[136] This, the report argued, would build on the piecemeal introduction of the allocation tracks which reflected that the needs of all cases were different, and matters of lower value, complexity and importance and ought naturally

[133] Ministry of Justice and Attorney General, "Effective and Affordable Civil Justice - Report of the Civil Justice Reform Working Group to the Justice Review Task Force" (*gov.uk* 2006) at 50-51 <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/cjrwg_report_11_06.pdf > Accessed 12th October 2021
[134] Ibid at 50
[135] Ibid at pages 30, 35, 36, 57, 51, 52, 110, 111, 112, 113, 114, 116.
[136] Ibid at vi

to be treated differently procedurally to those on the other end of the spectrum.[137] In turn, 'incorporating this principle will help make our civil justice system more timely, efficient, fair and affordable'.[138] This suggests that the underlying rationale was efficiency, despite appearing to be on the basis of securing a more cost-effective system for litigants.

It is also worth noting that, despite the criticism levelled by the Task Force report at the lack of available data to inform reform and the fact that the introduction of a better system of data collection in civil justice systems was one of its recommendations, this was still not in place by the time the CJRWG was conducting its work. This again points to a recurring problem, which is that the conclusions drawn, and recommendations put forward by the CJRWG remain unverifiable with alternative sources of evidence.

Concurrent to this, there was also a major reduction in provincial funding of the legal aid system in British Columbia, with particular focus on civil legal aid. In 1997, the New Democratic Party completely froze funding to the Legal Services Society, requiring it to eliminate a deficit of $18 million dollars inside four years.[139] Whilst this was reduced to $6.6 million by 2002, the legal aid budget was cut by a further 40% in response to the continued austerity policy imposed by the Liberal Party.[140]

In 2010, in response to such severe cuts to legal aid, the Public Commission on Legal Aid was launched in order to seek views from the public about the future of Legal Aid in British Columbia.[141] The report concluded that the system was '…failing to meet even the most basic needs of British Columbians'[142] and made nine key recommendations for reform. Those proposals included calling on the state to increase long-term stable funding for legal aid as well as expanding financial eligibility.[143] At this

[137] Ibid at 32
[138] Ibid
[139] For more information see Legislative Assembly Debate 27th March 1997, vol 3, no 6 at 2163 (https://www.leg.bc.ca/content/Hansard/36th2nd/19970327pm1-Hansard-v3n6.htm) and British Columbia Financial and Economic Review, 58th Edition 1998 <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/government-finances/financial-economic-review/financial-economic-review-1998.pdf> Accessed 15th November 2021
[140] Jamie McLaren, 'Roads to Revival: An External Review of Legal Aid Service Delivery in British Columbia' (2019) at 20
[141] Ibid at 18
[142] Ibid at 7
[143] Ibid at 20

point, spending per capita on legal aid in British Columbia was the equivalent of £8.[144] In England and Wales, it was £38.[145]

However, despite the low level of funding which was being directed towards legal aid at that time and the heavy criticism levelled at the state of legal aid funding by the report, almost all of the key recommendations by the Public Commission were ignored including those calling for an increase in funding.[146] This serves as good evidence of the extent of the resistance to increasing the financial provision available to increase access to justice through free assistance in British Columbia, which again very much aligns with England and Wales.

Whilst legal aid funding was never available for low value civil claims in British Columbia, this does not render this information irrelevant in the context of this thesis for two reasons.

The first reason is that there is a clear correlation between government austerity policy, evidenced by the successive reductions in provincial government funding for legal aid, and the efficiency agenda which began to be promoted as part of the CJRWG report, shifting focus away from addressing issues of high cost, long delays and high levels of complexity for court users towards the creation of a cheaper and more efficient system for the benefit of those who funded it.

The second reason is that it is evident that any deficiencies caused by the way in which the civil justice system operated in British Columbia were not going to be addressed by the provincial government funding access to legal representation. In both of these regards, British Columbia was in an almost identical situation to England and Wales in the 2000s. Austerity measures caused a change in direction and narrative in civil justice, with a clear indication that any access to justice issues were not going to be solved by the injection of government support and funding for legal assistance. Consideration must now be given to how the narrative evolved in both England and Wales and British Columbia.

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[144] Law Society, 'Oral evidence to the Public Bill Committee' (12 July 2011) <https://publications.parliament.uk/pa/cm201011/cmpublic/legalaid/memo/la96.htm> Accessed 12th November 2021

[145] Ibid

[146] Jamie McLaren, 'Roads to Revival: An External Review of Legal Aid Service Delivery in British Columbia' (2019) at 20

2.4 The point of divergence: Efficiency vs Public-Centred Civil Justice

It has been established that the procedural, economic and political climates as they related to civil justice in both comparator jurisdictions had a high degree of similarity during the 1990s and into the 2000s. This section covers the period which follows, where a notable divergence of approach occurred between the two jurisdictions.

Consideration will initially be given to the development of the narrative in England and Wales, analysing the first steps that were taken towards online dispute resolution and the way in which this transition was approached by the MOJ and HMCTS. Focus will then turn to the 2013 report of the Canadian Action Committee in Access to Justice in Civil and Family Matters and the steps which British Columbia took to meet the Justice Development Goals set by this report.[147] This approach should then conclude the research which enables the first research question to be answered. Conclusions can be drawn on whether any similarities exist between the issues of high costs, complexity and delay identified as inherent with the civil justice system in England and Wales and those experienced in British Columbia. This will enable a better understanding of the climates into which ODR systems are being introduced across the comparator jurisdictions, as well as allowing conclusions to be drawn which address the first research question in full.

From this, it will be possible to identify the actual and realistic appetite for change amongst those responsible for funding and implementing it and, crucially, the *type* of change for which that appetite exists. Meaningful conclusions can then be drawn on the degree to which the dominant narratives and objectives of civil justice reform in England and Wales and British Columbia coincide or diverge. Conclusions can then be drawn on the extent of any alignment or divergence between the dominant reform agendas across the two jurisdictions which will, in turn, enable the second research question to be addressed in full. Those conclusions can then be taken into account when proposals for enhancing the development and implementation of the OSC for

[147] Canadian Forum on Civil Justice, 'Into the Future: Confirming our Common Vision' (Into the Future Conference, 2006) < https://cfcj-fcjc.org/sites/default/files/docs/2006/commonvision-en.pdf> Accessed 1st October 2021

low value civil court users in England and Wales are put forward as part of the final chapter of this study.

2.4.1 England and Wales

To provide context to this section, it is worthwhile briefly returning to a small section of Lord Woolf's Interim Report. He stated that he saw information technology having a role to play in case management, the administration of the courts, the conduct of litigation and access to justice, where a litigant needs information and advice.[148] Lord Woolf's view was that the court should find ways to support litigants in person, not view them as a problem[149] and it was with this in mind that he put forward proposals for the creation of 'kiosks'.[150] Lord Woolf's vision was that kiosks would initially contain a computer equipped with a programme designed to assist unrepresented litigants with filling in and printing claim forms and defences. Court users would find these at their local courts.[151]

Woolf then went on to set out how he envisaged the technology could be developed further; in that it could '…guide litigants through the possible range of remedies, the criteria for choice of the appropriate dispute resolution system, the setting out of key facts, the necessary form filling and the requirements of the procedure for documents, expert or other evidence'.[152] This sounds significantly like a very early (and undeveloped) proposal for the use of technology and ODR in the civil justice system. This, Lord Woolf argued, coupled with an effective technology-based case management system would enable judicial time to be more usefully directed away from administration and, with litigants in person being guided through the initial stages by an accessible computer-based system, would lead to a reduction in delay, expense

[148] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995) at p.23 para. 18 'Information technology (computers and telecommunications) will play a significant role in supporting the proposed package of reforms. Case management, the administration of the Courts and the conduct of litigation itself can and should be assisted by a variety of new technologies. New technologies will also enable the Courts to respond better to litigants' needs for information and advice.'
[149] Ibid
[150] Lord Woolf, 'Access to Justice Final Report' (Lord Chancellor's Department, 1996) at chap 21 para 9
[151] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995) at page 23 para 18
[152] Lynn Henderson, 'Lord Woolf and Information Technology' (1996) 5 Info & Comm Tech L 45

(to both court users and the state) and complexity, thus tackling the three major issues he identified from the outset.

Alongside this, he called for significant investment to be made in upgrading the IT provision in the courts,[153] commenting that 'sensible investment in appropriate technology, infrastructure and strategy is fundamental to the future of our civil justice system. IT will not only assist with streamlining and improving our existing systems and processes; it is likely to be a catalyst, in due course, for radical change as well'.[154] It was perhaps with this in mind that HMCS (as it was then) took some initial, tentative steps towards the creation of an online money claims system.

The Money Claims Online (MCOL) service was launched in February 2002.[155] It was not a 'new' system in the strict sense of the word; it simply digitised the existing claims process and enabled litigants to file, issue, serve and respond to fixed money claims up to £100,000 online.[156] Once those initial stages were complete, the claim then reverted to being dealt with on paper absorbed as part of the standard claims process. In 2011, HMCTS conducted and published a survey which was made available to users of MCOL at the conclusion of their matter. Relevant sections of the survey are reproduced below.

[153] Lord Woolf, 'Access to Justice Interim Report' (Lord Chancellor's Department, 1995) at p.23
[154] Lord Woolf, 'Access to Justice Final Report' (Lord Chancellor's Department, 1996) at chapter 21
[155] HM Courts and Tribunal Service, 'Welcome to Money Claim Online' (*gov.uk)* <https://www.moneyclaim.gov.uk> Accessed 12th May 2020
[156] See also CPR PD7E which is written specifically for claims made through the Money Claims Online system

3. Which of the following best identifies you or whomever you represented when you used Money Claim Online (MCOL)? Create Chart Download

	Response Percent	Response Count
Individual	62.5%	2,075
Local Authority	0.6%	19
Private company	33.1%	1,100
Other (please specify) Show Responses	3.9%	128
	answered question	3,322
	skipped question	3

2. Did you use Money Claim Online (MCOL) as a solicitor representing a client? Create Chart Download

	Response Percent	Response Count
No	97.2%	3,230
Yes	2.8%	92
	answered question	3,322
	skipped question	3

11. Please rate how easy or difficult you found the following parts of the online service: Create Chart Download

	Very easy	Fairly easy	Neither easy nor difficult	Fairly difficult	Very difficult	Not applicable	Rating Average	Response Count
Registration	66.0% (1,861)	24.4% (689)	4.6% (130)	3.1% (86)	1.3% (38)	0.5% (14)	1.48	2,818
Issuing a claim	55.1% (1,552)	31.4% (886)	5.5% (156)	5.0% (140)	2.9% (83)	0.0% (1)	1.69	2,818
Monitoring claim progress	35.5% (999)	20.5% (578)	8.1% (227)	2.5% (71)	0.9% (26)	32.5% (917)	1.71	2,818
Paying the fee	74.6% (2,102)	19.5% (550)	2.2% (63)	1.0% (29)	1.7% (49)	0.9% (25)	1.34	2,818
						answered question		2,818
						skipped question		507

18. If the need arises in the future, would you use the online service again?	Create Chart	Download
	Response Percent	Response Count
I would use it again	92.7%	2,876
I would avoid it	0.8%	24
Do not know	6.5%	203
Please add any comments (max 100 characters) Show Responses		159
answered question		3,103
skipped question		222

Source: HMCTS Survey on MCOL Users, 2011

As can be seen, 97.2% of the 3,322 respondents were unrepresented, with 95.6% of the same number of respondents either being individuals or private companies. The survey also revealed that levels of satisfaction were relatively high, with 92.7% of 3,103 respondents indicating that they would use the service again. However, the data does need to be treated with a little caution. By this stage, MCOL was dealing with around 180,000 claims annually,[157] and specifically 137,462 in 2011.[158] The number of participants therefore represents only 2% of MCOL users in the relevant 12-month period and so cannot be taken as wholly representative of court user's views at the time.

This was followed by a qualitative study carried out on behalf of HMCTS on user experiences of making and defending money claims.[159] The study found that participants were generally happy with how quickly and easily the online claim form could be submitted,[160] but criticism was made of the fact that the system reverted to being paper based after the defence stage; participants questioned why the whole process could not be conducted online.[161] What the data from these studies shows is that there was appetite, on behalf of both HMCTS and court users, for the further development of an online money claims system. That one area of dissatisfaction was

[157] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015), para 2.28.
[158] Letter from Ministry of Justice to David Sixsmith responding to author's request for information under Freedom of Information Act 2000, 26th November 2021
[159] GFK on behalf of HMCTS, 'Money Claims: Research Summary. A qualitative insight study for HM Courts and Tribunals Service exploring views and experiences of submitting and defending money claims' (September 2013)
[160] Ibid at p7
[161] Ibid at p 11

that the process was not all online is a reasonable indicator of this. However, it needs to be remembered that up until March 2018, when MCOL was replaced with the Civil Money Claims Service,[162] the system only performed a limited online function which in every sense was an exact replica of the paper-based system. At no point during its lifespan was there an attempt to move towards computer-based 'kiosks', as suggested by Lord Woolf, nor towards anything which even resembled an interactive system able to assist unrepresented litigants with completing a form or pleading or defending a claim.

It must also be borne in mind at this point how this evidence relates to the second part of the hypothesis of this thesis: that insufficient investment in the foundations of the project will be provided by government to implement the OSC, leading to it becoming largely a digitised version of the current County Court procedure. Online Civil Money Claims is exactly that. This is indicative of the pattern which the evidence shows has repeated itself throughout the past twenty years of civil justice reform; that the dominant agenda and narrative in England and Wales is cost saving and efficiency of process in favour of the state as opposed to for litigants. Changes have been implemented where they are low cost and require little in the way of upfront investment of time and money, however when significant investment is needed from government to further an agenda or reform for which the dominant purpose is the improvement of access to civil justice, it is badly lacking.

The current state of civil justice is summed up by the force of Lord Briggs's critique in his Interim Report. It is impossible to condense without in some way diminishing its eloquence or the strength of its argument. The following is therefore a full reproduction of Lord Briggs's damning summary of the extent to which the civil justice system provided access to justice for litigants and the reasons why.

> 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 individuals, for that tiny minority still in receipt of Legal Aid, for those (mainly with personal injury claims) able to obtain no win no fee agreements with their lawyers ("CFAs"), for the few who obtain free advice

[162] HM Courts and Tribunals Service 'Civil Money Claims: Beta' (*gov.uk,* 21st March 2018) <https://www.gov.uk/service-standard-reports/civil-money-claims-beta> Accessed 13th October 2021

> and representation, and for substantial business entities… The civil courts are, by their procedure, their culture and the complexity of the law which they administer, places designed by lawyers for use by lawyers. Despite all the efforts made over the last fifteen years, the cost of legal representation in the civil courts, coupled with the risk of liability for a successful opponent's costs, still make the conduct through professional representation of small and medium-sized civil cases, other than for personal injuries on CFAs, disproportionately expensive and therefore unaffordable, measured against value at risk. Those who choose, or are forced, to litigate in person suffer crippling disadvantages by comparison with represented opponents which none of the present efforts to alleviate do more in reality than palliate. Many others simply choose not to litigate at all for the vindication of their civil rights.[163]

Now that an exploration of the political and economic factors influencing the development and implementation of reform to civil justice in England and Wales has been undertaken, the same questions must now be posed in relation to Canada and, more specifically, British Columbia.

2.4.2 Canada

Ten years on from the Task Force report, the Canadian Forum on Civil Justice, the Canadian Bar Association, the Association of Canadian Court Administrators and the Canadian Institute for the Administration of Justice (together the Canadian Forum on Civil Justice) joined together to sponsor a conference with the express purpose of assessing the impact of the Task Force's reforms.[164] They concluded that, whilst the findings of the Civil Justice Task Force had been widely accepted, the issues surrounding high costs, lengthy delays and high levels of complexity remained.[165]

[163] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at 51, paras 5.24 and 5.25
[164] Canadian Forum on Civil Justice, 'Into the Future: Confirming our Common Vision' (Into the Future Conference, 2006)<https://cfcj-fcjc.org/sites/default/files/docs/2006/commonvision-en.pdf > Accessed 11th November 2021
[165] Ibid at 1

The conclusions drawn by the report are supported by the statistics in British Columbia. Whilst there is no empirical evidence base to draw upon on the points of costs and complexity, statistics are available to show the ongoing issue with delays in small claims. Table 2.3 below sets out the average time taken from date of issue to date of settlement conference to a half day trial for a small claim in British Columbia between 2005 and 2013.

Table 2.3

Date	**Time from Issue to Settlement Conference (months)**	**Time from Issue to Half Day Small Claims Trial (months)**
June 2005	5	10.3
June 2008	4	8.3
June 2009	3.8	8.1
March 2010	5	11.4
September 2010	6.2	12.4
March 2011	5	10.8
September 2011	4.2	10.3
March 2012	6.2	11.6
September 2012	5	10.4
March 2013	3.8	9.6
September 2013	4.2	9.8

Data Source: Provincial Court of British Columbia Court Reports[166]

When considering this data, it is important to remember that the national benchmark for low value small claims proceeding to settlement hearing from issue was, at all

[166] Provincial Court British Columbia 'Time to Trial: Update September 30 2011', (*provincialcourt.bc)* https://www.provincialcourt.bc.ca/downloads/pdf/Time%20to%20Trial%20-%20Update%20September%202011.pdf at 7 (Accessed 6th December 2021) and Provincial Court British Columbia, 'Time to Trial Update September 2013' (*provincialcourt.bc,*2013) https://www.provincialcourt.bc.ca/downloads/pdf/Time%20to%20Trial%20-%20Update%20(as%20at%20September%2030%202013).pdf at 15 (Accessed 6th December 2021)

times, two months, and to trial, four months. British Columbia was therefore consistently behind the national average, thus supporting the conclusions that the Task Force reforms had done little to address the core issue of delay. This may explain why, by 2010, 90% of parties in small claims represented themselves in small claims matters.[167]

The group put the lack of significant progress down to four separate explanations, however again this must be treated with caution given the lack of empirical data which informed these conclusions. The first explanation is that the adversarial mindset of actors involved in the civil justice system was more deeply embedded and would take longer to change than was perhaps assumed by the Task Force, the second explanation is that court rules had grown in both complexity and length significantly over the previous two decades, the third explanation is that reform had not been 'sufficiently fundamental' and had been '…limited to tinkering with existing formats or making minor modifications to long established procedures' and, finally, the fourth explanation is that resource and funding limitations had made meaningful reform almost impossible.[168]

There is a notable change of direction in the language here, advocating for fundamental reform as opposed to progressive, incremental reform which was promoted by the Task Force report. This was supported in British Columbia, with the CJRWG concluding that the civil justice at that point was:

> …too expensive, too complex and too slow. These are the words used by many members of the public and litigants of all types in British Columbia to describe our present civil justice system. While our present system has many excellent features, maintaining the status quo is not an option; fundamental change is necessary.[169]

[167] BC Judges Compensation Commission, 'Final Report of the 2010 British Columbia Judges Compensation Commission' (2010) at 19
[168] Ibid at 4
[169] BC Ministry of Justice and Attorney General, Effective and Affordable Civil Justice - Report of the Civil Justice Reform Working Group to the Justice Review Task Force' (2006) at vii

It also, interestingly, brought civil justice reform policy into line with Lord Woolf's rationale behind his proposals to completely replace the 'old' civil justice system with a new regime under the Civil Procedure Rules. However, despite the divergence in approaches, it was still the conclusion in Canada in 2006[170] and in England and Wales in 2009[171] that high cost, lengthy delay and high levels of complexity were still inherent in the respective civil justice systems. It was perhaps with this in mind that the Canadian Forum on Civil Justice put forward an alternative reason why these issues had persisted; that prior reform had not been designed or taken into consideration principles of 'public centred justice'.[172]

To support this, the Forum relied on a 2002 report which involved an empirical study of 300 litigants on their experiences with the civil justice system[173] which, amongst other things, found that litigants 'turn to the civil justice system for assistance in the resolution of their disputes, not necessarily to go to court'.[174] They used this as part of their evidential base for supporting the progression of the multi-option civil justice system originally proposed by the Task Force and, as has already been established, was already some way into implementation in British Columbia. The sample of litigants involved in the survey was very low indeed, which does need to be taken into consideration when assessing the extent to which it can be considered representative of the views of litigants more broadly at the time. However, the Forum also recognised that new procedures, new structures and a new legal culture would need to be created and adopted to effect real 'public centred' change which went beyond that which resulted from the Task Force reforms.

> In considering reforms, we will inevitably need to ask ourselves whether we have the best structures in place. If we were to begin to design the system now, what would it look like? Should dispute resolution alternatives fall

[170] Canadian Forum on Civil Justice, 'Into the Future: Confirming our Common Vision' (Into the Future Conference, 2006)
[171] Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Report' (2009), Foreword
Canadian Forum on Civil Justice, 'Into the Future: Confirming our Common Vision' (Into the Future Conference, 2006) at 5
[173] Diana Lowe, 'What does the public really want from their lawyers and from the justice system?' (News & Views on Civil Justice Reform, 2006) http://cfcj-fcjc.org/sites/default/files/docs/2006/newsviews09-en.pdf (Accessed 6th December 2021) at pages 14 and 15
[174] Ibid at 15

> within the court structure or are they better in the private realm? Should we consider specialized courts in order to best serve the needs of our litigants? These are real questions which are being asked by the users of our courts, and which the system needs to listen and respond to with the public interest at the forefront.[175]

This turning point is of key significance. The tone and content of the report went far beyond simply pointing to the dearth of empirical data from court users or advocating in favour of additional reduction of provision to force the evolution into a more efficient system, but suggested a completely fresh agenda which, whilst not being ignorant of budgetary constraints, advocated for the building up of a user centred civil justice system which focused on resolution as opposed to trial. It introduced a new concept into the civil justice narrative, which at the time was still keenly focused on streamlining and finding efficiency savings in existing provision. There is no doubt that the Forum report represented a useful first step in meaningful reform of the civil justice system in Canada, which had not and has not since been taken in England and Wales.[176]

This being said, identification of a fundamental issue and achieving a fundamental change of approach are very separate concepts. In October 2013, the Action Committee in Civil and Family Matters produced their seminal report, entitled 'Roadmap for Change'.[177] The report concluded that 'court processes – language, location, operating times, administrative systems, paper and filing requirements, etc. – typically make sense and work for lawyers, judges and court staff. They often do not make sense or do not work for litigants'[178] and that the delays, expense and complexity of the civil justice system were too high to enable 'just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.'[179] In response, they took the key principle put forward by the Canadian Forum

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[175] Ibid at 6

[176] Save for Woolf at Cf Woolf (n12) at 119 who said 'All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists'

[177] Action Committee on Access to Justice in Civil and Family Matters. 'Access to Civil & Family Justice: A Roadmap for Change' (October 2013) <http://cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> (Date Accessed 7th December 2021).

[178] Ibid at iii

[179] Ibid at 7

on Civil Justice, advocating for a fundamental 'culture shift'[180] in the administration of civil justice and advanced it. They put forward six key principles for change, being as follows:

(1) Put the public first
(2) Collaborate and coordinate
(3) Prevent and educate on legal problems
(4) Simplify, make coherent, proportional and sustainable
(5) Take action
(6) Focus on outcomes[181]

On the face of it, these seem very generic, offering very little in the way of concrete progress. However, the report went on to identify an area where it felt previous civil justice reform had fallen short. They referred to this as the 'implementation gap,' that is to say the chasm which existed between proposals being put forward on a national level and their implementation jurisdictionally. To avoid the same issue being replicated and ensure that steps were taken by individual jurisdictions to implement measures to specifically effect a 'culture shift' in civil justice, they laid out nine Justice Development Goals. The report further required each jurisdiction to report annually on their progress towards achieving these goals so that it could be audited and evaluated effectively.[182] The goals were set out as follows:

'A. Innovation Goals:

1. Refocus the Justice System to Reflect and Address Everyday Legal Problems

2. Make Essential Legal Services Available to Everyone

3. Make Courts and Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution; and

[180] Canadian Forum on Civil Justice 'Into the Future: Confirming our Common Vision' Into the Future Conference (2006) at 5
[181] Action Committee on Access to Justice in Civil and Family Matters. 'Access to Civil & Family Justice: A Roadmap for Change' (October 2013) at 1
[182] Reports on Canada's Justice Development Goals are available from 2016, 2017, 2018, 2019 and 2020 here: https://www.justicedevelopmentgoals.ca/reports (Accessed 7th December 2021)

4. Make Coordinated and Appropriate Multidisciplinary Family Services Easily Accessible.

B. Institutional and Structural Goals:

5. Create Local and National Access to Justice Implementation Mechanisms.

6. Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education; and

7. Enhance the Innovation Capacity of the Civil and Family Justice System.

C. Research and Funding Goals:

8. Support Access to Justice Research to Promote Evidence-Based Policy Making; and

9. Promote Coherent, Integrated and Sustained Funding Strategies'[183]

This measure was of significant importance. In introducing an element of accountability, the Action Committee were taking responsibility for ensuring that individual jurisdictions were taking appropriate steps towards achieving the common set of goals it had laid out. There was a degree of continuity, as opposed to this simply being a report the recommendations of which could be ignored without consequence.

This served the dual purpose of recognising that different provinces and territories would perhaps need to adopt different paces of change but at the same time enabling those jurisdictions which had both the appetite and ability to progress more quickly to do so. Alongside the Justice Development Goals, the Action Committee also made it clear that reliable metrics and benchmarks needed to be established across all jurisdictions, so that meaningful reform could not only be implemented, but also monitored and improved. The report stated that "…we need better information in the context of increasing demand, increasing costs and stretched fiscal realities".[184] This

[183] Action Committee on Access to Justice in Civil and Family Matters. 'Access to Civil & Family Justice: A Roadmap for Change' (October 2013) at ii
[184] Ibid at 23

went beyond mere identification of the data deficiencies which existed and called for a framework by which performance and, crucially, user satisfaction could be monitored, and was a major step towards advancing the stated objective of public centred justice.

It can also be seen that the term 'proportional' is used and integrated into the strategy put forward by the Action Committee. This mirrors the ascendance of the term in the civil justice narrative in England and Wales. However, as identified above, the interpretation of the word in the context of civil justice contrasted dependent on the party using it; evidence shows that government viewed its introduction as something entirely different from those who advocated for its incorporation into the overriding objective. In Canada, the Action Committee report made clear that 'proportionality' was to exist as a guiding principle to assist with case management. Despite the potential for tension with the interpretation of the word, they clarified that '… [t]he proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.'[185]

It is also noteworthy that the underpinning objective was not exclusively that of streamlining and efficiency for the purposes of cost saving; there was a focus on reformed systems being built around everyday legal problems encountered by the public. That is not to say that efficiency was not mentioned in the report as an objective, but it was not focused upon as the *primary* objective. It recognised that efficiency could be achieved as a by-product of building a civil justice system around the needs of its users (and thus save long term cost to government), as opposed to using the principle of efficiency as a justification for cuts to frontline services. Their overarching recommendation was therefore that each jurisdictional civil justice system ought to avoid, manage, and resolve disputes in ways that are as timely, efficient, effective, proportional, and just as possible. They were to do this by preventing disputes and by early management of legal issues, through negotiation and informal dispute resolution services and where necessary, through formal dispute resolution by tribunals and courts.[186]

[185] *Hryniak v Mauldin*, 2014 SCC 7 at 27–28
[186] Ibid at 2

It was with direct reference to the Justice Development Goals, the principles of data-informed continuous evolution and the overarching vision of the future of civil justice that British Columbia developed the Civil Resolution Tribunal[187] (CRT) for low value civil claims; the online dispute resolution model on which Lord Briggs based his proposal for England and Wales. The funding, creation, development and implementation of the CRT from 2012 serves as the primary piece of evidence to show that British Columbia's commitment to a more user centred, simplistic mode of resolving low value civil dispute extended further than simply making pledges on paper: it proves that the change of direction advocated by Action Committee was adopted and implemented as part of the British Columbian civil justice strategy.

2.5 Conclusion

There are many moving parts to reform of civil justice systems: the broad term of access to justice; the chronic lack of data used to underpin reform and the ongoing issues with its collection; issues with current systems being unfit for purpose through excessive delay; high cost and high levels of complexity; the culture ingrained in civil litigation; the commitment to public and user centred justice; whether ADR can be embedded as a formal part of the dispute resolution arsenal of a civil justice system for the benefit of users or whether it is a tool used to actively divert those users away from expensive and time consuming systems of litigation; government agendas; finance and funding; the way in which an ODR system is created and the position it adopts within the civil justice system and, finally, the commitment and appetite of those involved in and with responsibility for driving an ODR initiative forward to implementation. There is little point in isolating those moving parts if this thesis is to make meaningful and realistic recommendations. This concluding section of the chapter will therefore try to make sense of where the comparator jurisdictions of this thesis are procedurally, politically and economically, the direction of policy and, finally, the culture of civil litigation in the comparator jurisdictions. This will provide the context needed to answer the first and second research questions in full.

[187] The Civil Resolution Tribunal was established pursuant to the Civil Resolution Tribunal Act, RSBC 2012, c C-25 (4 1 Sess) [Bill 44]

For England and Wales and Canada, the evidence presented in this chapter has shown that both civil justice systems came from similar places in the 1990s. Canadian jurisdictions were facing the same issues as England and Wales; high cost, lengthy delays and high levels of complexity for litigants and a system in which an adversarial culture was too heavily embedded for things to change with light touch reform. Indeed, the solutions across both comparator jurisdictions were almost identical at the time: active judicial case management as an attempt to control the excess of the barriers which faced litigants at the time and to force a change of culture in civil proceedings away from adversarialism.

Table 2.4 below maps each of the dominant agendas which this research has identified across the two comparator jurisdictions of England and Wales and British Columbia.

Table 2.4

Decade	**Dominant Agenda in Civil Justice Reform in England and Wales**	**Dominant Agenda in Civil Justice Reform in Canada**
1990s	Court reform based on identified issues of high costs, long delays and high levels of complexity facing litigants. Fundamental reform, redrafting of the rules of civil procedure and introduction of active judicial case management were the primary strategies to deal with this for low value civil claims. Culture change identified as necessary to move attitudes of litigants away from singular road to trial. Encouragement of parties to engage in external ADR by the court through active judicial case management powers.	Court reform based on identified issues of high costs, long delays and high levels of complexity facing litigants. Progressive, as opposed to fundamental reform through the introduction of active judicial case management was the primary strategy to deal with this for low value civil claims. Culture change identified as necessary to move attitudes of litigants away from singular road to trial. Adoption of 'multi-option' system model to integrate ADR into the civil justice system itself.

2000s	Identified issues of high costs, lengthy delays and high levels of complexity facing litigants continuing. Policy turns to focus on streamlining justice processes with primary focus on cost-efficiency strategies pursuing the goal of rendering the civil justice system self-funding.	Identified issues of high costs, lengthy delays and high levels of complexity facing litigants continuing. Policy turns to focus on streamlining justice processes with primary focus on cost-efficiency strategies
2010s	Identified issues of high costs, lengthy delays and high levels of complexity facing litigants persist. Policy remains focused on streamlining justice processes with primary focus on cost-efficiency strategies pursuing the goal of rendering the civil justice system self-funding. Further austerity measures taken with reduction of court estate and front-line staff with no concrete steps taken towards the creation of an Online Solutions Court. Primary legislation to lay foundations of the OSC abandoned.	Identified issues of high costs, lengthy delays and high levels of complexity facing litigants persist, however focus of civil justice reform pivoted towards user centred policy, a culture change away from adversarialism towards facilitated consensual settlement and accountability to meeting user-centred focused targets.

The problems of the 1990s and into the 2000s across both comparator jurisdictions are summed up particularly well by Cronk, who stated with reference to the many reports into the state of civil justice across the world that:

> Underlining all of these works is one dominant common theme: that serious problems of escalating costs, increasing delays, and barriers to access to justice have come to characterize modern civil justice systems in western

> countries. While most of the leading studies acknowledge that these problems are more pronounced in highly populated, litigation intensive centres, they also recognize that the same problems, to varying degrees, exist in all areas served by state-run civil justice systems. Viewed broadly, the fundamental theme of many of the recent studies on civil justice reform concerns the provision of access to civil justice and the need to address barriers to access in the form of costs, delays and procedural and legal complexities.[188]

However, there are clear divergences at two key points. The first area of divergence occurred in the late 2000s and throughout the 2010s. In England and Wales, the efficiency strategies continued with rhetoric focused heavily on rendering the civil justice system self-financing. In addition, austerity policy continued, leading to a significant reduction in public facing physical provision with no new investment in alternative civil justice initiatives to replace it.[189] During this period particularly, the needs of civil court users were completely sidelined by those with responsibility for funding the administration of civil justice in England and Wales.

On the other hand, in Canada, the agenda of progressive reform and efficiency-driven policy was still present. However, it was aligned alongside principles of user-centred justice, with jurisdictional strategies required to be tested against Justice Development Goals with in-built accountability processes to monitor ongoing compliance. Despite challenging reductions in civil legal aid, investment was made by the British Columbia Ministry of Justice to create an ODR system to relieve some of the burden on the courts which, it is submitted, serves as key evidence that the dominant agenda of short-term efficiency measures was, at the very least, diluted. This, in turn, left the comparator jurisdictions in very different positions at the times at which their respective ODR systems were being developed and implemented. It is submitted that this key difference in underlying governmental strategy was not fully taken into account in the

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[188] Eleanore A. Cronk, 'The Prospects for Civil Justice Reform' (1998) <file:///C:/Users/UD0EIH/Downloads/cronk.ed_%20(1).pdf> Accessed 10th September 2021

[189] O. Bowcott 'Court closures: sale of 126 premises raised just £34M, figures show' The Guardian (London 8 March 2018). <https://www.theguardian.com/law/2018/mar/08/court-closures-people-facing-days-travel-to-attend-hearings> (accessed 10th September 2021).

Briggs proposal for the development of the OSC and that, had the research contained in this chapter been presented alongside the proposal, it may have strengthened the evidential basis for positive, user-centred investment in the OSC to replicate the change of approach in British Columbia.

The second area of divergence concerns the integration of ADR. In 1996, evidence demonstrates that it was recognised in both jurisdictions that a culture change was necessary to move away from the assumption that trial was the only method of dispute resolution, however the approaches differed considerably. Whereas England and Wales pursued a strategy of encouragement to engage with ADR which remained outside the structure of the court service, British Columbia took steps to integrate ADR models into their civil justice system. This will be considered in greater depth as part of chapter 4.

In the late 2000s in Canada, the Action Committee in 2006 laid down a series of expectations, to which individual jurisdictions would be made accountable, which revolved around a 'culture shift' in civil litigation away from adversarialism towards consensual, user-centred facilitated settlement. This was, of course, not without risk, but it recognised that every user who encountered a dispute may not want to go through an expensive, lengthy and complex process to reach a resolution.

It built on foundations laid by the Task Force back in 1996, with consistency of commitment to a form of multi-option civil justice. British Columbia, with their funding, development and implementation of the CRT committed to this vision, in so doing redefining the relationship which previously existed between the organisations which are responsible for administering civil justice and the people who have need to use it. To refer back to the phrase used in criticism of the state of civil justice by the Action Committee, it gave court users a 'seat at the table'[190] in participating in how their own dispute was resolved and deciding what the best and most appropriate vehicle for achieving that resolution was. This was directly influenced and facilitated by the national shift in favour of user-centred justice. The impact of this, if any, will be assessed in chapter 5.

[190] Action Committee on Access to Justice in Civil and Family Matters. 'Access to Civil & Family Justice: A Roadmap for Change' (October 2013) at 17

It is here that the lack of data collected and published in relation to court users' experiences, delays and costs does need to be highlighted as extremely problematic across both jurisdictions. Policy papers and reports can represent, to an extent, the political position of relevant periods of time. The research presented by this chapter certainly evidences a significant divergence in approach to reforming the civil justice system from the late 2000s onwards between the comparator jurisdictions. However, very few, if any, of the conclusions reached by any of the report referred to in this chapter regarding the problems inherent in civil justice at various points are supported by empirical evidence involving court users. To an extent, in the absence of evidence to the contrary, the conclusions of the various reports need to be taken at face value, however this is a point which needs continual consideration throughout this thesis, particularly if reform in civil justice is to be 'user-led' in the future.

Both jurisdictions saw the ascent of the principle of proportionality in the 2000s, however evidence shows that again there is a divergence in its interpretation across the comparator jurisdictions. In England and Wales, the evidence available shows that, despite the best intentions of those who proposed its absorption into the overriding objective, at best proportionality was used to justify micro-management of judicial function and at worst to justify austerity measures on the basis that the cost of the civil justice system ought to be proportionate to the needs of the taxpayer. In British Columbia, evidence suggests there was a unified acceptance at national and local levels that consideration of the principle of proportionality would be focused on the needs of court users, and that its application ought to be focused on whether the level of process was proportionate to the needs of an individual case.

This is really where there seems to be a worrying chasm between the attitudinal approaches of governments in England and Wales and British Columbia. In Canada, evidence has shown that there was a common unified objective. The rhetoric which emerged from the Action Group as a national initiative and the BC Ministry of Justice provincially at the time the Civil Resolution Tribunal was being developed and implemented were all aiming towards fundamental transformational change which centred on court users as opposed to being driven exclusively by a cost-saving, short term, efficiency-based agenda, as evidence shows is still the case in England and Wales.

In the context of the overall thesis, the conclusions reached in this chapter serve a very important purpose. They give crucial context to the relationship which exists between stakeholders in civil justice: those who fund it, those who administer it, those who set the tone of the agendas which affect it and those who use it. It is from the dynamics of this relationship that a civil justice system derives its legitimacy, and it determines whether reform does or does not achieve its principal objectives. This chapter has provided key insights into important aspects of the historical development of the relationship between key stakeholders across the comparator jurisdictions, taking into account that British Columbia is directly influenced by national policy despite having its own jurisdictional civil justice system. The conclusions drawn have facilitated a deeper understanding of the nature and relevance of the impact of this relationship on addressing the key issues identified in myriad reports and studies on the civil justice systems across comparator jurisdictions.

The question is, however, how these conclusions are relevant to this thesis. The answer is significantly so. Not only have the first and second research questions been addressed, but important context has now been presented to inform the nature and direction of the proposals which will form the basis of the concluding chapter.

England and Wales are essentially at the earliest development stage of the Online Solutions Court, despite it being six years since it was first proposed. In that six years, successive budgetary cuts have reduced frontline services in civil justice. Keeping cost to a minimum is still the primary objective driving the reform agenda. It is arguable that the needs of civil court users have rarely been lower on the priority list of those with responsibility for funding and influencing fundamental reform in the form of the Online Solutions Court. It is therefore submitted that there is sound justification for the second part of the hypothesis, that insufficient investment in the foundations of the Online Solutions Court project will be provided by government to implement the OSC. This will lead it becoming largely a digitised version of the current County Court procedure, which has been repeatedly recognised as being too costly, too complex and too lengthy to provide adequate access to justice for unrepresented litigants in low value claims.

Prior to the implementation of the Civil Resolution Tribunal, British Columbia had endured similar cuts to financial budgets such as legal aid, however the political

rhetoric had turned away from efficiency-based agendas towards the creation of a more user-centric system. This thesis is concerned primarily with making recommendations to enhance the development and implementation of the Online Solutions Court in England and Wales. Given the evidence here, one of the primary recommendations needs to be a genuine and clear refocusing of national policy and narrative away from cost-saving and on to the needs of the user, and an acceptance that this this means a consistent flow of investment, at least in the medium term. Without this, it is submitted, precedent has shown that government agenda has historically overridden the objectives and principles behind civil justice reform, no matter how weak the evidence base or how strong the objection. It is submitted that this could be achieved by building on studies such as this: producing a robust evidence base to demonstrate why initiatives such as the Online Solutions Court can not only improve access to civil justice, but also, perhaps, in the medium to long term actually achieve the government's stated objective of creating a cheaper, more efficient and more cost-effective system of resolving low value small claims.

If, however, the precedent identified in England and Wales simply repeats itself, it is difficult to see how Lord Briggs's warning that '…a core element in the business case for the Reform Programme is that the funding necessary to bring that revolution about will produce net savings in the long run and that, without that investment up front, the imposition of substantial further savings on the courts would just lead to a long, not very slow, decline[191] will not simply be consigned to the history books as a startlingly accurate prediction.

[191] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 1.14

Chapter 3: Online Dispute Resolution in the Comparator Jurisdictions

3.1 Introduction

As established in the previous chapter, both England and Wales and British Columbia were faced with almost identical process-based challenges with their low value civil claims procedures at the time of building and developing their respective ODR systems: high costs, high levels of complexity and lengthy delays. Evidence showed that previous reform had not adequately addressed those issues and, in some instances, had actually made them worse.

The first part of the hypothesis of this thesis is that Lord Briggs, the author of the report which formally proposed the creation of the Online Solutions Court, did not conduct a thorough analysis on (a) how the CRT was embedded into the British Columbian civil justice system and (b) how the CRT system could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales. This chapter will begin the process of filling this gap by comparing the two systems to establish whether they are materially alike and whether they sought to achieve the same objective. Methodologically, this is of importance to ensure that conducting a detailed examination of the different stages of the two systems, as intended for chapters 4 to 6, is a well-founded and necessary exercise.

This chapter will also establish, using the data published by the CRT, whether there is any evidence that its structure has had a positive impact on low value civil claim court users. This will be used to conclude whether Lord Briggs was justified in adopting the structure of the CRT as a model precedent for the OSC.

This chapter will then build on the research conducted and conclusions reached in the previous chapter relating to the second part of the research hypothesis, concerning the risk that insufficient investment in the foundations of the project will be provided by government to develop and implement the OSC for court users with low value civil disputes, leading to the Online Solutions Court becoming largely a digitised version of the current County Court procedure. This chapter will therefore contain an exploration

and analysis of any steps which have been taken since the Briggs reports to create an online dispute resolution facility for low value civil claims.

In summary, this chapter will provide a synopsis of the initial proposal for ODR in England and Wales and how it was envisaged to work, how the system was to be structured and the position it would adopt within the civil justice system overall. Evidence will also be considered which relates to steps which have been taken to begin to implement the Online Solutions Court in England and Wales. The same will be done for British Columbia, with an accompanying analysis of the statistics relating to performance of the Civil Resolution Tribunal to date, and, given the conclusions reached in the previous chapter, the evidence available on the cost implications of running it. This will commence the process required to answer the third research question.

3.2 England and Wales

3.2.1 A Briggs Over Troubled Water: The Civil Court Structure Review and Low Value Civil Claims

Lord Briggs was commissioned by the Lord Chief Justice and the Master of the Rolls in July 2015 to conduct a full review of the structure of civil courts in England and Wales.[1] The terms of reference which are relevant to this thesis are as follows:

- 'To carry out a review of the structure by which the Civil Courts (namely the County Court, the High Court and the Court of Appeal) provide the State's service for the resolution of civil disputes in England and Wales.
- To make 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.'[2]

Lord Briggs took significant inspiration from the February 2015 report of the Online Dispute Resolution Advisory Group, set up by the Civil Justice Council[3] and chaired

[1] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015), para 1.1.
[2] Ibid
[3] The CJC was established under the Civil Procedure Act 1997 to review the civil justice system and make recommendations on how and where it can be improved.

by Professor Richard Susskind, and the Justice report 'Delivering Justice in an Age of Austerity'[4]. In both of those reports, reference is made to the urgency of reform due to the continuing, aggressive austerity measures imposed by government:

> Ongoing state retrenchment has resulted in an advice deficit that is making it increasingly difficult for ordinary people to navigate an adversarial justice system developed on the assumption that people will be legally represented.[5]

This built on the statement made by Lord Thomas of Cwmgiedd in his speech, 'Reshaping Justice', in which he said:

> Some would say that with such dramatic reduction [of legal aid provision], our system will break. But that cannot be permitted. If it breaks, we lose more than courts, tribunals, lawyers, and judges. We lose our ability to function as a liberal democracy capable of prospering on the world stage, whilst securing the rule of law and prosperity at home… our task is therefore to ensure that we uphold the rule of law by maintaining the fair and impartial administration of justice at a cost the State and litigants are prepared or able to meet. We can only do that by radically examining how we recast the justice system so that it is equally if not more efficient, and able to carry out its constitutional function…[6]

The Justice report[7] also quoted Deputy Chief Justice Faulks in the Family Court of Australia, who opined that 'there are three things that can be done in relation to self-representation by litigants: one is to get them lawyers, the second is to make them lawyers and the third is to change the system'.[8]

The report argued that the first option, to provide lawyers for litigants was no longer possible given the ongoing austerity cuts to legal aid and the general rhetoric which surrounded the civil justice system needing to be affordable to both the litigant and the

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[4] Justice, 'Delivering Justice in an Age of Austerity – A Report' (2015)
[5] Ibid in Executive Summary
[6] Lord Thomas of Cwmgiedd, 'Reshaping Justice' (*judiciary.uk,* 3 March 2014), < https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/lcj-speech-reshaping-justice.pdf> Accessed 14th September 2021
[7] Justice, 'Delivering Justice in an Age of Austerity – A Report' (2015) at 4
[8] Deputy Chief Justice Faulks, 'Self-Represented Litigants: Tackling the Challenge' (February 2013), <http://njca.com.au/wp-content/uploads/2013/07/Justice-Faulks.pdf> Accessed 14th September 2021

State. Furthermore, although reform to legal services[9] had succeeded to an extent in driving legal costs down in the marketplace, this was still not sufficient to create a universally affordable legal sector.

The second option, to make people into lawyers, had been supported by initiatives such as The Handbook for Litigants in Person,[10] the Public Legal Education Network (originally supported by the MOJ) and the subsequent creation of the Law For Life / Advice Now public legal education charity which provides user friendly guides to litigants in person seeking to engage with all aspects of the civil justice system. However, as valuable a contribution as these initiatives made and continue to make, the report highlighted the ongoing and unbridgeable disconnect between having a limited amount of information and being able to navigate an extremely complex system effectively.[11]

The report therefore argued that the third option, to change the system, was the only feasible long-term solution. This formed the principle at the heart of both the Online Dispute Resolution Advisory Group and Lord Briggs's Civil Court Structure Review.

The ODR Advisory Group was set up in April 2014 with the specific purpose of exploring the potential for ODR in civil disputes worth less than £25,000.[12] It was chaired by Richard Susskind, a long-time advocate for the power of technology in enhancing access to justice. Amongst a group of experts consulted as part of drafting the report, Susskind spoke extensively with Darin Thompson, a knowledge engineer for expert legal systems[13] who at the time was developing the Civil Resolution Tribunal in British Columbia.

The ODR Advisory Group report argued that technology could be used in two ways; the first being that it is 'grafted onto existing working practices and so replaces or perhaps enhances current systems… it replaces today's inefficient, paper-based

[9] Following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012
[10] Civil Sub-Committee of the Council of Circuit Judges, 'A Handbook for Litigants in Person' (2013), <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/A_Handbook_for_Litigants_in_Person.pdf> Accessed 14th September 2021
[11] Civil Justice Council, 'Online Dispute Resolution for Low Value Civil Claims' (February 2015) at 6
[12] Ibid at 4
[13] Further information about Darin Thompson's work, particularly his methodology for creation of knowledge engineered legal technology can be found here: <http://darinthompson.ca/about/> Accessed 15th October 2021

processes with IT-based systems but does not fundamentally change the underlying processes and procedures'[14] and the second being to 'enable delivery of services in entirely new ways'.[15] It advocated in favour of the latter approach.

The group's proposals were for the creation of a new three tier online court, established by HMCTS and known as Her Majesty's Online Court. The three tiers are set out in table 3.1 below.[16]

Table 3.1

Tier	**Description**
One	Online Evaluation. This facility will help users with a legal issue to classify and categorize their problem, to be aware of their rights and obligations, and to understand the options and remedies available to them.
Two	Online Facilitation. To bring a dispute to a speedy, fair conclusion without the involvement of judges, this service will provide online facilitators. Communicating via the Internet, these individuals will review papers and statements and help parties through mediation and negotiation. They will be supported where necessary, by telephone conferencing facilities. Additionally, there will be some automated negotiation, which are systems that help parties resolve their differences without the intervention of human experts.
Three	Online Judges – full-time and part-time members of the Judiciary who will decide suitable cases or parts of cases on an online basis, largely on the basis of papers submitted to them electronically as part of a structured process of online

[14] Civil Justice Council, 'Online Dispute Resolution for Low Value Civil Claims' (February 2015) at 4
[15] Ibid
[16] Ibid Page 5

	pleading. This process will again be supported, where necessary, by telephone conferencing facilities.

Perhaps most significantly, the report went further than simply proposing a model. It also called on the government to formally fund the development of tiers one and two, on HMCTS to set aside a 'modest fraction' of its court modernisation budget to invest in ODR and on all political parties to offer in-principle support for the creation of an ODR system for low value civil claims.[17] Building on the conclusions of chapter 2, this was a very direct recognition of the historic disparity between ambition for reform and financial investment from the government, and the high stakes nature of the project.

Lord Briggs considered the recommendations of the ODR Advisory Group as part of his Civil Court Structure Review. Perhaps acknowledging the same principle as Lord Woolf did in 1994, that piecemeal reform of an existing system which simply did not adequately serve the needs of those who needed it would be insufficient, Lord Briggs set out his vision to '…design from scratch and build from its foundations a wholly new court for the specific purpose of enabling individuals and small businesses to vindicate their civil rights in a range of small and moderate cases… without recourse to lawyers or with such minimal recourse that their services can sensibly be afforded'.[18] This was referred to as the Online Solutions Court.

Lord Briggs weighed up where this should be positioned; either as separate court with separate rules (but still to be contained within HMCTS) or as part of the existing county court, subject to the Civil Procedure Rules.[19] He concluded that 'only by making the Online Solutions Court a separate court with its separate rules will the objective of creating a court truly designed for litigants without lawyers be achieved'[20] and this was ultimately what he recommended. However, this recommendation was not based on a comprehensive analysis of why the creation of a separate court with separate rules would be the best approach for the OSC. Chapters 4 to 6 of this thesis will remedy this lacuna.

[17] Ibid at 6
[18] Ibid
[19] Ibid at 78, para 6.17
[20] Ibid at 80, para 6.29

The position of the Online Solutions Court in the court hierarchy is very important in the context of this study. Whilst Lord Briggs's proposal was that the OSC would sit outside the County Court, it would still be controlled and regulated by HMCTS and would therefore still form part of the formal court service. There was no indication or intention that it would be a separate dispute resolution service outside the remit of HMCTS and the MOJ.

Briggs proposed that the OSC would deal with non-complex civil claims worth less than £25,000.[21] Claims would be commenced by users using an online portal and involve three stages which mirrored those proposed by the ODR Advisory Group. Stage 1 would comprise of two stages; stage 0 and stage 0.5.[22] 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.[23] Stage 0.5 would include a provision for both parties to identify whether there is a dispute that the Court needs to resolve.[24] The user would then move on to be asked a series of questions by an interactive computerised decision tree.[25] Those questions would be designed to assist the user with identifying whether they have a viable legal cause of action and 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.[26]

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[21] Ibid at 41, para 4.12
[22] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at paras 6.108 and 6.109
[23] Ibid, at paras 6.108 and 6.109
[24] Ibid, at paras 6.108 and 6.109
[25] 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
[26] Sir Terence Etherton, 'The Civil Court of the Future' (The Lord Slynn Memorial Lecture, 14th June 2017) https://www.judiciary.uk/wp-content/uploads/2017/06/slynn-lecture-mr-civil-court-of-the-future-20170615.pdf accessed 23rd February 2021

The system would also prompt users to submit the documents they will require to prove their claim in an attempt to reduce issues of unrepresented litigants not submitting sufficient evidence.[27] Lord Briggs stated that this would create some significant advantages over the small claims system. 'First it enables the parties to communicate to each other the relevant details of and evidence about their case at the earliest possible stage, thereby providing a substitute for the pre-action protocols process used by solicitors in the conduct of most civil litigation. Secondly, it opens up opportunities for conciliation of their claims, whether as the simple result of the exchange of the Stage 1 materials, or by mediation or early neutral evaluation, again well in advance of trial. Thirdly, this Stage 1 triage process enables the case, if not resolved by conciliation, to be managed and made ready for trial with all the requisite information available on an electronic file, thereby making the processes of judicial preparation and determination of those cases which cannot be settled earlier more efficient.'[28]

Although it draws on more recent technological developments, it is remarkable how closely this resembles the 'kiosk' system proposed by Lord Woolf in 1995, only with a slightly more developed focus on how something of this nature could be created using more advanced information technology systems. It is therefore perhaps equally indicative of both the boldness of Lord Woolf's original vision and the lack of progress which was made in the intervening years towards achieving it that this is the case.

Stage 2 would be the Conciliation Stage, incorporating some form of dispute resolution outside of judicial determination. Lord Briggs was clear that this stage was to become formally embedded into the online procedure, however he was still clear that the process would not be mandatory.[29] This will be discussed in greater depth in chapter 5. Finally, Stage 3 would be the final determination stage for those claims which had not already settled in either Stage 1 or 2.[30] Figure 3.1 below shows the structure of the Online Solutions Court in diagrammatic form.

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[27] Previously discussed at length by 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)

[28] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015)
[29] Ibid at para 6.13
[30] Ibid at para 6.14

Figure 3.1

Lord Briggs argued that much of stages 2 and 3 involved digitised or online versions of models which existed within the low value civil claim process already[31] and that enabling them to be fit for purpose in an Online Court was simply a test of technological development. This is an example of where the Briggs report make assumptions in the absence of any analysis of how the CRT system could be transplanted into the English civil justice system.

It is posited that, whilst the conciliation phase at stage 2 and the adjudication phase at stage 3 *could* be simple digitisations of models which already existed, they should not be. Lord Briggs's proposals for the structure of stages 2 and 3 contains material and fundamental differences to the system used to resolve low value civil claims currently. To revert to Susskind's commentary, technology grafted on to existing systems is not sufficient to address the barriers which exist in low value litigation. Change must be fundamental to prevent the reappearance of the same issues which had dogged access to civil justice for over a century.

It is submitted that attitudes by actors within the civil justice system will not change (as both Lord Woolf and Lord Briggs identified that they must) with a system of which two thirds is a mere digitised version of what has come before, and which has been shown to not be fit for purpose. Whatever benefits a different system may bring risk being

[31] 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.

defeated by simple familiarity. This will no doubt become more significant as this study moves towards making recommendations on enhancing the implementation and development of the model for ODR as proposed.

However, amongst all of the optimistic language which surrounded the promise that the Online Solutions Court could bring, Lord Briggs also issued a warning. In his Final Report he was very clear about how the success of the project could be undermined by poor management, with identifiable risks being delays in developing stage 1, underfunding, poor procurement and not allowing sufficient time for rigorous testing before implementation.[32] Lord Briggs also underlined the importance of developing and trialling the 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.[33] However, the report did not go any further in addressing how this was to be achieved. Chapter 4 of this thesis will therefore build on the foundation principles laid out by Lord Briggs and conduct the analysis which it is argued was missing from the Civil Court Structure Review.

Following the Interim Report, the ODR Advisory Group sent an open letter to Lord Briggs welcoming the recommendations made. They did, however, identify key areas where further clarification would be beneficial to the development and implementation of the ODR system which Lord Briggs had proposed. They highlighted the need for an 'evolutionary approach'[34] and that 'the development should be evidence-based, and we should have rigorous ongoing studies that evaluate the performance of our online court'.[35] This recommendation very much resonates with the findings of this thesis so far. Nothing more than anecdotal data has been used to inform the nature and implementation of reform to the civil justice system in England and Wales and, up until the mid-2000s, in British Columbia. There are basic statistics available which show numbers of claims made, defences filed, and matters concluded at trial, however this does not give any indication of how courts users are actually experiencing the process or how the court procedure itself is performing. There has been no attempt to validate

[32] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at para 6.55
[33] Ibid at para 6.63
[34] Civil Justice Council, 'Online Dispute Resolution Advisory Group letter to Lord Briggs dated 31st March 2016' (https://www.judiciary.uk/wp-content/uploads/2016/04/cjc-odr-advisory-group-response-to-lj-briggs-report.pdf) Accessed 18th November 2021
[35] Ibid

the conclusions drawn from court statistics with other relevant statistics and data sources.[36] Furthermore, once a set of reforms such as the CPR has been implemented, no data is gathered for the purposes of evaluating the impact those reforms are having. This makes it impossible to both properly evaluate past reform and to properly justify the nature of future reform proposals.

The ODR Advisory Group also referred to the need to treat the Online Court as a platform on which to build and integrate emerging and developing technologies, as opposed to being presented as a finished product,[37] and highlighted their previous recommendation that stage three be rolled out first, followed by stage two and finally stage 1.[38] Their rationale for this was the fact that building and developing stage 1 involved the most complex and time-consuming process, and they in fact suggested that Lord Briggs had treated the skill and difficulty involved in engineering such a system too simplistically in his Interim Report.[39] Their view on this was also informed by practicality, commenting that '…we note that Stage/Tier 3 is the part of the new service that makes the online court a court and as such it stands alone. Consequently, it is the stage that will most relieve pressure from the current court system'.[40]

The final point of significance made by the ODR Advisory Group's letter is the importance it attaches to learning lessons from elsewhere.[41] British Columbia is specifically referenced in the letter as a jurisdiction which is regarded to be ahead of England and Wales in the development and implementation of an ODR system for low value civil claims and this further supports the rationale for undertaking this study.

Lord Briggs's report was endorsed by the Senior Judiciary in January 2017,[42] with his model of the Online Court being adopted and implemented as part of HM Courts and

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[36] [36] UK Statistics Authority, 'Code of Practice for Statistics: Code Q3.3' (*statisticsauthority.gov.uk*, 2015) <https://code.statisticsauthority.gov.uk/the-code/quality/q2-sound-methods/> accessed 14th October 2021

[37] Ibid

[38] Ibid

[39] Ibid

[40] Ibid

[41] Ibid

[42] Judiciary.uk, 'Civil Court Structure Review: Joint Statement from the Lord Chief Justice and the Master of the Rolls' (*judiciary.uk,* 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

Tribunals Service's Court Reform Programme. However, there is already evidence emerging that the government's commitment to developing an Online Solutions Court is being overshadowed by the efficiency agenda. In order to formally implement the OSC, primary legislation is needed. There was a point in 2017 where this looked like it might happen; an initial draft of the legislation was contained in the Prisons and Courts Bill 2017. This made provision for, amongst other things, the creation of an Online Procedure Rules Committee, with powers mirroring those held by the Civil Procedure Rules committee[43] and laid the framework for an online court to deal with low value civil claims up to a value of £25,000.

During a debate on the second reading of the Bill on 20th March 2017, Liz Truss the then Lord Chancellor and Secretary of State for Justice stated that '…we already have rules committees, and we are establishing a new online rules committee which will be managed by the judiciary …this Bill introduces a new online court which will enable people to resolve civil claims of up to £25,000 simply and easily online. These online services will increase access to justice.'[44]

However, exactly one month later, governmental support had disappeared. In a question-and-answer session on 20th April 2017, the Leader of the House of Commons David Lidington confirmed that the Prisons and Courts Bill had been dropped in answer to a question from MP Philip Davies. Mr Davies asked: 'will the Leader of the House confirm that the Prisons and Courts Bill has been abandoned for this Parliament and will have to start its passage through the House again in the next Parliament?'[45] In response David Lidington said: 'The Bills that were introduced to this House quite late in the current parliamentary Session and which received carry-over motions so that they could be debated in what would have been the third Session of this Parliament, including the Prisons and Courts Bill, will fall.'[46] This was to allow Parliament to be prorogued for the General Election.

A second attempt was made with the introduction of the Courts and Procedure (Online Procedure) Bill in May 2019, however again this failed to complete its passage through parliament before it was prorogued for the General Election in October 2019.

[43] Prison and Courts Bill 2017 s 39(9)
[44] HC Deb 20 March 2017, vol 623, cols 656-658
[45] HC Deb 20 April 2017 Vol 624 Col 800
[46] Ibid

Consideration of the contents of the latter Bill does reveal further points of concern. Lord Faulks, during the House of Lords debate on the Bill, raised issue over the level of authority it gave a government minister to override a rule created by the Online Procedure Rules Committee, creation of which the Bill proposed. Lord Faulks said as follows:

> My reading of the Bill—I may be wrong—is that Clause 7 gives the appropriate Minister an effective veto in respect of the rules that the committee makes or amends. Clause 8 allows the appropriate Minister to give notice to the committee to make a rule for a "purpose specified in the notice". What is to stop a Minister—not the Lord Chief Justice—doing away with oral hearings or providing that disputes be resolved by officials employed by the Government? …what safeguards are there in the Bill to prevent a Minister imposing unsuitable rules on the committee? Should there not be some restraints built in? I appreciate that this may seem alarmist, but all Governments want to save money and hearings cost money. More worrying is the possibility of a government of an extreme nature, left or right. This is not impossible in these volatile political times. Authoritarian Governments are not generally supportive of open justice systems, particularly if courts can and do find against them.[47]

Given the government's historic propensity to prioritise cost saving and efficiency over investment in reform, there is a justifiable cause for concern. The importance of the selection of format of hearing will be examined in more detail in chapter 6. The explanatory notes to the Bill also contain evidence to suggest that it could be '…perceived primarily as a cost-saving measure',[48] stating that '…they [the measures contained in the Bill] will help drive efficiencies in the system and enable delivery of wider court reform savings of approximately £237m benefits in steady state from 2024/25',[49] In line with the research presented in chapter 2, no evidence of how this figure was reached is presented, but the inclusion of this does suggest a heavy emphasis being placed on the savings which online dispute resolution processes can

[47] HL Deb Tuesday 14th May 2019 Vol 797 Col 1518
[48] Ibid at Col 1519
[49] Ministry of Justice, 'Explanatory Notes to accompany the Courts and Tribunals (Online Procedure) Bill' (May 2019) <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0176/18176en.pdf> Accessed 17th June 2021

generate, as opposed to the access to justice benefits which they can bring. That said, there is some indication of willingness to invest, with the explanatory notes going on to state that '…the annual running costs for the Online Procedure Rules Committee are expected to be £10,000, which will be met by the Ministry of Justice'.[50] This shows at least some degree of ongoing financial commitment from government to funding the transition to digital services, howsoever small the amount.

No further legislation relating to the court reform programme was included in the Queen's Speech on 14th October 2019. However, the Permanent Secretary of the Ministry of Justice did commit to the Bill being reintroduced 'as soon as time allows'[51] as part of his submissions to the Public Accounts Committee. This commitment proved correct, with the introduction of the Judicial Review and Courts Bill, introduced by the Lord Chancellor to Parliament on 21st July 2021. As with both previous bills, it sought to establish a framework for Online Procedure Rules, made by a new Online Procedure Rule Committee (OPRC), to enable parties to civil, family or tribunal proceedings to use the online procedure.[52] As part of the explanatory notes accompanying the Bill, the government reaffirmed their commitment to the OSC, stating that purpose of the Bill was to give effect to '…the introduction of an 'online court' to resolve some low value civil money claims was one of the key recommendations of the Review of Civil Court Structures led by Lord Justice Briggs, which was published in July 2016'.[53]

Furthermore, the Bill does provide for an important first step to be taken in relation to the OSC, with subsection 2 providing a non-exhaustive list of the factors by reference to which proceedings may be specified as coming within the scope of the online procedure, including the legal basis of the proceedings (for example, a breach of contract) and the factual basis of the proceedings (for example, a money claim), and

[50] Ibid
[51] Public Accounts Committee, 'Transforming Courts and Tribunals: Progress Review' (HC 2638) at Q41 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/public-accounts-committee/transforming-courts-and-tribunals-progress-review/oral/106416.html accessed 24th June 2021
[52] Judicial Review and Courts Bill, HL Bill 102
[53] Ministry of Justice, 'Explanatory Notes to accompany the Judicial Review and Courts Bill' (January 2022) <https://bills.parliament.uk/publications/45057/documents/1344> Accessed 8th February 2022 at p14, para 45

the value of any claim within the proceedings.[54] It is reassuring that this remit clearly covers the intended jurisdiction of the OSC.

The accompanying impact assessment also restates the financial commitment to funding the estimated £10,000 per year to maintain the Online Procedure Rules Committee,[55] although as with its predecessor, there is no explanation regarding how this figure has been reached. Whilst this does serve as limited evidence that perhaps the efficiency agenda may have been diluted slightly with regard to creating the foundations of the OSC, the limited financial commitment and the nine references to procedural efficiency in the explanatory notes do still suggest that the conclusions reached in chapter 2 remain valid, and that therefore the second part of the overall thesis hypothesis remains well-founded. It should be noted that this only refers to maintaining the committee itself; the government are still yet to formally commit any specific funding to the creation of the OSC.

This chapter now turns to conducting an analysis of the structure of the Civil Resolution Tribunal to determine the degree of similarity which exists between the two systems, thus legitimising the in-depth analysis of the development and implementation of each of the three stages intended for chapters 4 to 6.

3.3 Canada

This section will consider the introduction of the Civil Resolution Tribunal in British Columbia, specifically the model which was proposed and adopted and that which was implemented. This will address the second part of the third research question concerning how the ODR system has been developed, implemented and used to deal with low value civil claims in British Columbia although, as with England and Wales, further exploration of this will take place in chapters four, five and six. In this section, an analysis will be conducted on the remit of the Civil Resolution Tribunal, its position within the British Columbian civil justice system and the way in which its development

[54] Section 2 Judicial Review and Courts Bill
[55] Ministry of Justice: 'Impact Assessment MOJ 07/2021' (Ministry of Justice, July 2021) < https://bills.parliament.uk/publications/42313/documents/1347> Accessed 8th February 2022

was approached by stakeholders. It will conclude by assessing the evidence available on the cost of the CRT, particularly in light of the conclusions drawn in chapter 2.

3.3.1 Towards Online Dispute Resolution: The Civil Resolution Tribunal

On 31st May 2012, Bill 44[56] was passed by the British Columbia Legislature. This brought the Civil Resolution Tribunal Act into force, which formally created the Civil Resolution Tribunal (CRT). The mandate of the CRT was set out in section 2[57]. This formally legislated for the creation of an integrated part of the civil justice system in British Columbia for claims which fell under either the Small Claims Act[58] or the Strata Property Act,[59] which was focused on court users, on public information and on online dispute resolution. Section 23 also created a new role of case manager[60] to facilitate settlements to resolve disputes, to review claims and identify facts relevant to resolving disputes and the issues which needed to be determined, to identify evidence or additional information which would assist with resolving the dispute and to recommend to the tribunal an appropriate procedure for hearing the dispute if it reached adjudication stage. Finally, the Act also made specific provision for a technology-enabled support system for people who were trying to resolve their disputes *before* they formally filed a case with the CRT. This would eventually become known as the Solution Explorer.

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[56] Bill 44 of 2012. Civil Resolution Tribunal Act

[57] (2) The mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that
(a)is accessible, speedy, economical, informal and flexible,
(b)applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,
(c)uses electronic communication tools to facilitate resolution of disputes brought to the tribunal, and
(d)accommodates, so far as the tribunal considers reasonably practicable, the diversity of circumstances of the persons using the services of the tribunal.
(3) In fulfilling its mandate, the role of the tribunal is
(a)to encourage the resolution of disputes by agreement between the parties, and
(b)if resolution by agreement is not reached, to resolve the dispute by deciding the claims brought to the tribunal by the parties.
(4) In addition to its responsibilities in relation to disputes brought to the tribunal for resolution, the tribunal may
(a)provide the public with information on dispute resolution processes generally, and
(b)make its online dispute resolution services available to the public generally

[58] Small Claims Act 1996

[59] Strata Property Act 1998

[60] Section 23 Civil Resolution Tribunal Act 2012

Two things are clear from reading the legislation itself. The first is that the CRT was not mandated to simply be an online addition to the existing system. The objective of its creation was that it was to be a completely new system, designed from scratch ensuring that, where possible, parties' relationships could be preserved after resolution of a dispute and parties' needs were accommodated by the operation of the system itself. The second is that, whilst it would be an Online Dispute Resolution service, it would not simply be an automated justice dispenser.[61] Humans would be at the heart of the system, ensuring its fair and effective operation but they would be *enabled* by the available technology to run a provision which was quicker, cheaper and more convenient for court users. This positionality, both in approach and integration within the civil justice system was something which set the CRT aside from anything which had preceded it in Canada.

In February 2013, the British Columbian Ministry of Justice released the second part of a White Paper specifically on Justice Reform, entitled 'A Timely, Balanced Justice System'.[62] Amongst a number of other initiatives across the province, it outlined its view on the role of the CRT:

> The tribunal will encourage people to use a broad range of dispute resolution tools to resolve their disputes as early and efficiently as possible, while still preserving formal adjudication as a valued last resort. Canada's first 'online' tribunal, the Civil Resolution Tribunal, will meet citizen needs by making the majority of dispute resolution services available online or by email, telephone, and video. In-person meetings and hearings will also be possible but will be used only when necessary. These services represent an attempt to modernize the justice system through a focus on meeting citizen needs, user satisfaction, and continuous improvement through innovation.[63]

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[61] Carl Baar, "The Myth of Settlement" (Paper presented to the Annual Meeting of the Illinois Law and Society Association, 28 May 1999) at 12 and see also Richard Susskind & Daniel Susskind, 'The Future of the Professions: How Technology Will Transform the Work of Human Experts' (Oxford: Oxford University Press, 2015)

[62] BC Ministry of Justice, 'White Paper on Justice Reform – Part Two: A Timely, Balanced Justice System' (2013), https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/whitepapertwo.pdf> Accessed 4th December 2021

[63] Ibid at 3 and 11

As part of the same White Paper, the British Columbian Ministry of Justice committed to appointing a Chair for the CRT and to investing in the appropriate technology to enable it.[64] In 2014, Shannon Salter was appointed to the role of Chair, with the remit of 'enhancing access to justice by making its [the CRT's] services available 24 hours a day, seven days a week for British Columbians seeking to resolve strata property disputes and small claims'.[65]

The CRT incorporates four phases of dispute resolution. They are reproduced in table 3.2 below for the purposes of comparison with the three stages of Lord Briggs's proposal.

Table 3.2

Phase Number	Description
1	Problem Diagnosis, Information, Self-Help
2	Monitored Party to Party Negotiation
3	Case Management: Facilitated ADR and Hearing Preparation
4	Adjudication

Source: Civil Resolution Tribunal (https://civilresolutionbc.ca/)

The rationale behind the structure was explained by Salter as being to 'maximize the chances of an early resolution by agreement'.[66] She argued that, by shifting the linguistic focus away from trial and towards resolution, it would automatically better

[64] Ibid at 11
[65] Canadian Condominium Institute, 'Announcement of the New Chair of the Civil Resolution Tribunal (CRT) – Canada's First Online Tribunal' (*ccivancouver.ca)* <http://www.ccivancouver.ca/other-resources/news/announcement-of-the-new-chair-of-the-civil-resolution-tribunal/> (Accessed 1st February 2021)
[66] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol 113

serve 98%[67] of the courts users whose disputes would never reach trial in the first place and in so doing would 'invert the traditional public justice process model by *assuming* that disputes can be resolved consensually, with the right assistance and expertise.'[68] At all stages of the process, parties would be supported with advice and guidance about their options, using technology to enhance accessibility.

3.3.2 The Four Phases of the Civil Resolution Tribunal and its position in the BC Civil Justice System

This section will outline the way in which the Civil Resolution Tribunal runs, the theories which underpin that design strategy and the way in which its structure support the 'culture change' promoted by the Action Committee. It is of key importance to give a detailed description of the CRT process, as it formed the basis of the recommendations of the Online Dispute Resolution Group and Lord Briggs for the design of the Online Court in England and Wales. It is therefore necessary to conclusively establish whether this was, in fact, the case.

The first phase of the CRT takes place prior to a case even being formally started. This makes use of the Solution Explorer,[69] which is an online expert system designed to assist a litigant with understanding the nature of their dispute and how they could possibly resolve it. An expert system is essentially a computer programme which analyses a user's responses to a series of questions and seeks to provide a similar level of guidance as a human expert would in the same situation.[70] It does this by utilising an inbuilt knowledge base which has been pre-populated based on data collected from human experts.[71] The data is then used to create a series of questions, the answers to which will enable the system to analyse the user's problem and provide

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[67] Canadian Centre for Justice Statistics, 'Civil Courts Study Report' (Ottawa: Minister of Industry, 1999) at 10. See also British Columbia Justice Reform Working Group, 'Effective and Affordable Civil Justice (2006)' at 2**.**

[68] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) Windsor Yearbook of Access to Justice 112.

[69] Civil Resolution Tribunal, 'What is the Solution Explorer?' (*civilresolutionbc.ca)* <www.civilresolutionbc.ca/what-is-the-solution-explorer/> Accessed 12th September 2021

[70] Richard Susskind, 'Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning' (1986) 49:2 Modem Law Review 168 at 172.

[71] George F Luger & Chayan Chakrabarti, 'Knowledge-Based Probabilistic Reasoning From Expert Systems to Graphical Models' (2009), online: University of New Mexico < https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.440.5451&rep=rep1&type=pdf> at 1.

basic guidance about it.[72] In the case of the CRT, this almost works like a funnel. Salter and Thompson give the following example to demonstrate how the questions work:

> Karin has a Small Claims problem

>> Karin's Small Claims problem relates to the purchase of a good or service

>>> Karin's purchase is a consumer (personal, family or household use) type

>>>> Karin is the consumer (purchaser)

>>>>> Karin's purchase is a service contract

>>>>>> Karin's service contract is a continuing service contract (e.g., a fitness club membership)

>>>>>>> Karin wants to cancel and is having a disagreement over the terms of cancellation[73]

The benefit of this, Salter and Thompson argue, is that targeted information specifically concerning the area of their dispute can be given to the user rather than a huge amount of information designed to encompass every possible eventuality. This, in turn, encourages the user to become an active participant in their dispute and, ideally, allows them to understand its nature and what steps can be taken to resolve it.

The system then provides a series of 'self-help tools', such as letter templates, to support the litigant with opening conciliatory communication lines with the other party. Due to the fact that the system has already recognised the legal nature of the user's dispute, the Solution Explorer's template letters include references to the relevant sections of applicable legislation or regulations.[74] Finally, at the end of the process, the user is provided with a customised report which details the facts of their dispute, the legal guidance which has been provided and the self-help resolution processes which have been recommended.[75] All stages, letters and reports are written in 'natural language' to facilitate understanding. In the event that the user cannot resolve the problem themselves at that point, the summary also includes a link to initiate

[72] B. Anbarasan, 'Using the Computer Brain Cognitive Computing', (2014) 7 *Special Issue of International Journal of Emerging Technologies in Computational and Applied Sciences* 22

[73] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol 113

[74] Ibid at 130

[75] Ibid

proceedings with the CRT formally, meaning that the user does not have to instigate a separate process to take matters further.[76]

The user then commences the case by explaining what the dispute is about, what evidence they have and what their position is. They are also asked for any information which may be useful to assist collaborative dispute resolution, designed to isolate the CRT from the adversarial process of the courts. Focus throughout is on how the dispute can be resolved. Once the case has been started, it is referred to a case manager who screens the dispute to check that it falls within the CRT's jurisdiction and to ensure that all necessary information has been provided. If so, the matter proceeds to phase 2 which is essentially party-to-party negotiation; a final opportunity for parties to resolve matters between themselves without the intervention of the CRT. Salter and Thompson acknowledge that few cases will settle this way, presumably as phase one has evidently not been successful, however they state that this phase is necessary to further the objective of 'empowering people' to resolve their disputes consensually, reinforcing the 'culture change' in civil litigation which the CRT is seeking to promote.[77]

Phase three then moves to 'facilitation'. The facilitator is a mixed role, part mediator, part early neutral evaluator and part case manager. In the initial stages of phase three, the facilitator clarifies the claim with all parties to make sure they understand what the dispute is about and facilitate mediation between the parties. The facilitator has a range of powers at their disposal to assist parties with settlement at this stage, including inviting the parties to exchange evidence, conducting a non-binding neutral evaluation of the parties' case and explaining what is likely to happen in the event it proceeds to adjudication, communicating with each party separately if required and assisting the applicant with describing exactly what they want.[78]

In the event that an agreement is reached, the facilitator assists the parties with drafting it formally and, upon request of the parties, can also refer this agreement to a

[76] Ibid at 131
[77] Ibid at 115
[78] Civil Resolution Tribunal, 'What can a CRT Case Manager do?' *(civilresolutionbc.ca)* <https://civilresolutionbc.ca/tribunal-process/facilitation/#what-can-a-crt-case-manager-do> Accessed 15th November 2021

Tribunal member who will make a binding order on the basis of its terms.[79] If agreement is not reached, the facilitator can take on the role of a case manager and advise the parties on the ways in which they can prepare for adjudication, identify any relevant facts and evidence and prepare arguments.[80] All of stage three is carried out online.

There are several points for note here. The first is that the focus is at no point on adjudication until right at the end. As Salter & Thompson previously set out, the *assumption* is that the matter will settle by agreement and therefore the entire structure is built around that.[81] This is materially different to the current small claims procedure, governed by the CPR in England and Wales, but very similar to the culture which Lord Briggs sought to embed in the Civil Court Structure Review. The second point is that, by this stage, a user will have had neutral advice on the nature of their dispute at multiple points from multiple sources, initially through the Solution Explorer and subsequently from the facilitator. This advice is not based on whether they can 'win', but what the legal issues in question are and what that party needs to show to persuade the other party as to their claim's merit, again to promote settlement. The third point is that technology is being used here as a facilitation mechanism itself, as opposed to being the primary driver. Human intervention and involvement are facilitated by technology, as opposed to it being imitated by technology.

It is only if the facilitation stage fails to produce agreement between the parties that the matter will then move to binding adjudication. This is an adversarial process, where parties are required to articulate their positions in the same way as they would in a court hearing. The decision of the Tribunal Adjudicator is binding and enforceable and decisions are often on the basis of the paperwork rather than at an attended hearing. Where a hearing is necessary, this is conducted by telephone, via video conference

[79] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol at 114
[80] Civil Resolution Tribunal, 'What can a CRT Case Manager do?' *(civilresolutionbc.ca)* <https://civilresolutionbc.ca/tribunal-process/facilitation/#what-can-a-crt-case-manager-do> Accessed 15th November 2021
[81] Ibid

or, where necessary, in person with power reserved under Bill 44 to ask parties questions and request further evidence from them.[82]

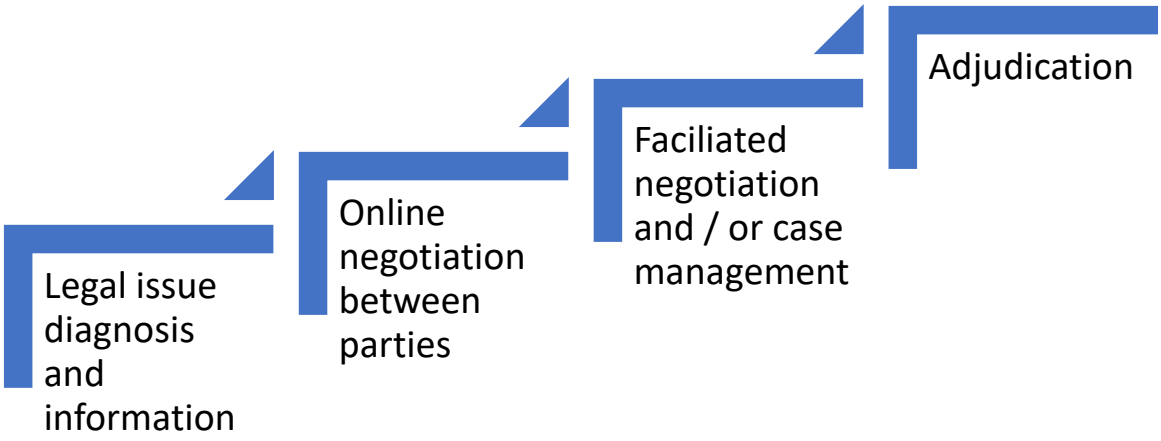
In many ways, the final adjudication stage is based on the same principles as the small claims track in England and Wales and the small claims court in British Columbia. This makes sense; the virtues of the small claims system allowing for a less formal and more inquisitorial approach have been well established and, from British Columbia's perspective, the CRT is essentially replacing the small claims court for disputes which fall within its jurisdiction. It does not move away entirely from an adversarial model however it only incorporates this element after all possibilities of settling the matter consensually have been exhausted. Parties are still required to present their cases, to be able to articulate their legal arguments and present evidence to persuade the tribunal that the final decision should be made in their favour. However, the structure of the three phases which precede final adjudication mean that the parties are not left in what Salter and Thompson refer to as a 'u-shaped justice system',[83] that is to say one where they are left broadly to their own devices between the points of issue and final determination.

The process is linear, and intervention increases as the matter progresses through those stages. When viewed through the lens of the true meaning of proportionality, where more resource is targeted at claims which need it, the CRT system follows this model in a very effective fashion. It also embraces the spirit of the 'culture change' called for by the Action Committee, and in fact has been cited as one of the major initiatives which demonstrates British Columbia's commitment to and implementation of the Justice Development Goals.[84] Support to empower users to resolve matters themselves initially armed with an idea of the legal principles provided to them by the Solution Explorer, followed by facilitated negotiation makes a genuine attempt at establishing a new cultural tone in low value civil justice with a presumption that most matters can settle by consent without the need to have a decision imposed on the

[82]Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol at 114
[83] Ibid
[84] Canadian Forum on Civil Justice, 'Into the Future: Confirming our Common Vision' (Into the Future Conference, 2006). < https://cfcj-fcjc.org/sites/default/files/docs/2006/commonvision-en.pdf> Accessed 1st October 2021

parties by a third-party adjudicator. Whether claims can be resolved more quickly and cheaply for users this way remains to be seen, and this will be explored below. Figure 3.2 demonstrates the structure of the CRT in diagrammatic form.

Figure 3.2



Finally, consideration must be given to the position the CRT adopts within the BC civil justice system. In the context of low value small claims, as of 1st June 2017, the CRT has had the jurisdiction to deal with claims[85] with a value of up to and including $5,000,[86] the Small Claims Court deals with claims between a financial value of $5001 and $35,000[87] and the Supreme Court deals with claims above $35,000.[88] The only circumstances in which the Small Claims Court can deal with a civil claim below $5,000 is where the CRT has refused to resolve it, the matter in question is exempt from the CRT, a Notice of Objection to a decision taken by a CRT Adjudicator has been filed or if a CRT Order requires enforcement.[89] The point here is that the CRT *must* be used

[85] Limited to the following domains: debt or damages, recovery of personal property, opposing claims to personal property, demanding performance of an agreement about personal property or services.

[86] Tribunal Small Claims Regulation, BC Reg 232/2018, s. 3.
[87] Small Claims Court Monetary Limit Regulation, BC Reg 179/2005.
[88] Supreme Court Act, RSBC 1996, c 443.
[89] Civil Resolution Tribunal Act, SBC 2012, c 25, s 113.

by members of the public who have a dispute which falls within their remit.[90] Salter concluded that 'a main proposition is that the transformational potential of ODR will only be realized when ODR is fully integrated with public justice processes'.[91] Indeed, in properly embedding the CRT as a formal part of the civil justice system, British Columbia have committed to this approach.

3.3.3 Has the CRT had any measurable impact on parties' low value civil issues, and at what cost?

In order to consider the extent of the impact which the CRT has had, the average duration from claims being commenced to facilitation stage, then to adjudication stage can be compared with the data obtained from the small claims court on time taken between issue and settlement conference, then final hearing. This will compare the delays experienced by users before and after the CRT came into existence.

Between September 2011 and September 2013 (a two-year period), the average time for a small claim to reach settlement conference stage was 4.95 months, so based on the average number of days in a month being 30.42, this is 150.58 days. The average time for a small claim to reach adjudication stage was 10.78 months, or 327.93 days. For the CRT between April 2019 and April 2021, the average number of days between intake (or application) and facilitation stage was 48 days, with an average of 169 days between intake and adjudication.

There are, however, some caveats with this data. The CRT dealt with significantly fewer claims than the small claims court over the comparator two-year time periods and the data relating to the level of resource available to deal with those claims was also not captured or published. Therefore, the reliability of the comparison does need to be treated with some caution.

That said, from the point of view of the users, the data does show a significant, measurable impact on the time it would take a low value civil court user to reach

[90] See also Orna Rabinovich-Einy & Ethan Katsh, 'The New New Courts' (2017) 67 Am U L Rev 165
[91] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34 Windsor YB Access Justice 112 at 115

resolution either through assisted negotiation or through final adjudication. Evidence therefore suggests that the CRT has had a notable impact on a court user achieving resolution more quickly compared with their only previous option of using the small claims court.

However, the point made repeatedly throughout this thesis so far is that the positives cannot be considered exclusive of cost. Evidence has shown that cost-saving and efficiency remains the dominant rhetoric in the civil justice narrative in England and Wales, so whatever gains may have been made in reducing the delays to resolution for a low value civil court user by the CRT, the cost of achieving that must also be taken into consideration.

As an embedded component of the civil justice process, the CRT was originally funded by the Ministry of Justice as part of the British Columbian Government's Tribunal Transformation Initiative and is now funded by the Ministry of Justice on an annual basis. The cost of running the CRT is published as part of their annual reports, and so comparative data is available to assess the annual cost for each year the service has been in existence. However, whilst cost must be taken into account, it should not be considered separately from other small claims data which is available from those reports, such as the numbers of low value claims considered by the Solution Explorer and the number of small claims which, having gone through the first three phases, are still in need of adjudication to be resolved. Table 3.3 below draws on key data available from the annual reports produced by the Civil Resolution Tribunal.

Table 3.3

Year (1st April to 31st March)	Solution Explorer Volumes for Small Claims	Number of Small Claims Applications	Number of Small Claims Resolved by Consent	Number of Small Claims to Adjudication	CRT Revenue ($)	CRT Total Expenses ($)

2016/17	N/A	N/A			38,152	2,665,946
2017/18	16950	3668	947	100	452,990	2,916,683
2018/19	20101	4821	1,953	1,074	645,005	5,449,187
2019/20	38648	4926	2,321	889	679,620	10,152,597
2020/21	30075	4238	2,210	1,026	589,765	12,506,291

Source: Civil Resolution Tribunal Annual Reports 2016 - 21[92]

This shows that there are high numbers of litigants making use of the Solution Explorer, growing on an annual basis. There is a slight decrease in 2020 / 21, however it is explained in the relevant annual report as a consequence of the Covid-19 pandemic. This point aside, the percentage of issues which then enter the Tribunal system has reduced, from 21% in 2017/18 to 14% in 2020 / 21, although there is no accompanying explanatory evidence which gives context to why this might be. It could be that user feedback is improving the operation of the Solution Explorer. It could also suggest that the Solution Explorer is a genuinely effective way of allowing lay litigants to make a properly informed decision on the merits of their claim or defence and their likelihood of success prior to proceeding. It could equally be suggestive that court users are dissatisfied with the operation of the Solution Explorer and simply give up. Further data collection and evidence would be required to confirm this, and it is submitted that this ought to be gathered and published with the CRT's report on an annual basis.

[92] Civil Resolution Tribunal Annual Reports 2016/17, 2018/19. 2019/20, 2020/21 available here: https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2016-2017.pdf , https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2017-2018.pdfhttps://civilresolutionbc.ca/wp-content/uploads/2020/03/CRT-Annual-Report-2018-2019.pdfhttps://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdfhttps://civilresolutionbc.ca/wp-content/uploads/2021/11/CRT-Annual-Report-2020-2021.pdf

Positives can be drawn from the high proportion of small claims which are settled and the small number which reach adjudication stage. The discrepancies between the figures presented here, mainly concerning the difference between the cases issued and the combined numbers of those which are settled or are referred to adjudication, are also explained in the reports as being cases where the CRT has refused jurisdiction, those which have expired due to default or non-compliance by one or both parties and those where a party has refused to resolve. The evidence does, however, suggest to a point that the intervention of trained facilitators is increasing the number of parties settling rather than seeking a final, adjudicated determination. Again, however, it is difficult to reach firm conclusions here as the claims forming the subject matter of the data could have been weaker than those against which they are being compared, which naturally may lead to a higher rate of settlement.

Costs remain a concern. Whilst CRT revenue has increased on an annual basis (save for 2020 / 21) it has become significantly more expensive to run. During its first year of operation, revenue represented 0.014% of the overall cost, and although by 2020/21 this had increased to 0.047%, the total operating costs for that year were over $12 million. In 2019 / 20, the CRT's total budget was $10.5 million, increasing to $24.5 million in 2020 / 21 and $29 million in 2021/22.[93] As part of the annual budget and fiscal plan, the British Columbian Ministry of Finance committed an additional $32 million between 2018 and 2022 to fund the CRT under their Access to Justice initiative.[94] This is not to say that this is a true representation of the exact cost. Whilst it is outside the scope of this thesis to carry out a full cost analysis, it is important to remember that the CRT is removing the burden of dealing with small claims matters from the Provincial Court, thus saving resources and money there. Indeed, in 2021/22, 4187 small claims matters were brought to the CRT, freeing up capacity in the Provincial Court.[95] The introduction of the OSC would do the same in England and

[93] Civil Resolution Tribunal: 'Technical Briefing for Media' (29th March 2019) at https://civilresolutionbc.ca/wp-content/uploads/2019/03/Technical-Briefing-March-29-2019.pdf Accessed 8th January 2021

[94] British Columbia Ministry of Finance: Budget and Fiscal Plan 2019/2020 – 2020/2021 (19th February 2019) <https://www.bcbudget.gov.bc.ca/2019/pdf/2019_budget_and_fiscal_plan.pdf> p15 Accessed 8th January 2021

[95] Civil Resolution Tribunal, 'Civil Resolution Tribunal Annual Report 2020/21' *(civilresolutionbc.ca,* April 2021) https://civilresolutionbc.ca/wp-content/uploads/2021/11/CRT-Annual-Report-2020-2021.pdf Accessed 12th January 2021

Wales, removing from the County Court low value civil claims which could be more efficiently dealt with in the OSC.

The questions which surround the reliability and validity of the data here could, however, be used for positive gain in this thesis. As set out in the opening chapter, the aim of this thesis is not to evaluate whether there is a better model for the OSC: the time for having that debate has long since passed. The purpose of the thesis is to use the CRT as a model to enhance the development and implementation of the OSC for court users with low value civil claims in England and Wales. The fact that there is some data available against which to assess the performance of the CRT is certainly a positive, and something which would greatly benefit the operation of the OSC. As will be seen in later chapters, the CRT also routinely release surveys asking tribunal users how their performance could be better. However, there does seem to be a lack of data which explains the reasons behind the statistical data. Why are claims abandoned after the Solution Explorer? Do they settle or did the technology not instil sufficient confidence in the user? What motivates parties to settle their claim at stage 2? If they don't settle, why not? These are useful questions which could be incorporated into the data collection strategy of those who administer the OSC after its launch.

Alongside data collection, the financial aspect here cannot be ignored, particularly when looking at the evidence presented in chapter 2 regarding the English government's commitment to rendering the civil justice system self-financing. It is submitted that there is a risk that, upon launch of the OSC, reduction of the liability of the state to pay for it will be achieved in the same way it has been previously: with the introduction of a costly fee structure to transfer the cost from the taxpayer to the court user. It is essential that this does not happen. For the CRT, some cost is inevitable when an initiative which has served an average of 26,444 people per year since its first year of operation is being set up, however it is indicative of the fact that the creation, implementation and ongoing maintenance costs of an ODR system such as that proposed by the ODR Working Group and Lord Briggs would necessitate an alteration of current government policy on making cuts with no simultaneous investment in the system of the future. The evidence shows that British Columbia have

accepted that a level of investment is necessary and provided funding for it, supporting the commitment made in the White Paper, ‘A Timely, Balanced Justice System’.

3.4 Conclusion

This chapter set out to do two things. The first was to begin the process of conducting a comprehensive analysis on (a) how the CRT was embedded into the British Columbian civil justice system and (b) how the CRT system could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales. This chapter has taken the first step towards this by comparing the two systems side by side to establish whether they are materially alike and whether they sought to achieve the same objective.

The research has revealed that the structures of both the Online Solutions Court and the Civil Resolution Tribunal are very similar indeed. Both commence with a knowledge-engineered automated system which seeks to provide parties with information regarding basic legal principles relating to their claim and to encourage them to engage in various forms of dispute resolution which do not involve a trial. If the matter cannot be resolved by the parties alone, the matter must then progress to the formal stages of OSC or the CRT. Stage 2 of the OSC and phases 2 and 3 of the CRT are essentially the same, save that the British Columbian system incorporates a further self-directed negotiation phase which is not present in Lord Briggs’s model. However, both phase 3 of the CRT and stage 2 of the OSC have the same purpose: facilitated negotiation using technology as a platform to allow human intervention in the dispute to try and facilitate a consensual settlement. It is only if this fails that the final stage of both systems is brought into play: adjudication. This is the adversarial part of the process and involves parties submitting their positions and evidence to an adjudicator, who will then make a binding decision. It is submitted that this part of the chapter has therefore methodologically justified conducting a detailed examination of the different stages of the two system, as intended for chapters 4 to 6, as a well-founded and necessary enterprise.

The chapter also presented the available evidence showing the impact of the CRT on low value civil claims users, and highlighted areas where this data collection model could be improved for use in the OSC. However, it is submitted that the available data demonstrates that Lord Briggs was justified in using the Civil Resolution Tribunal as a model precedent for the OSC. From the annual data that has been produced on the CRT, the Solution Explorer seems to work, with an average of only 17.5% of claims proceeding to intake from Solution Explorer stage. This is positive, as it supports Lord Briggs's position that the Solution Explorer seems to be making a genuine impact on numbers of small claims which need further intervention.

Similar positives can be drawn from the numbers of small claims which are settled and the small number which reach adjudication stage. Further, the evidence also suggests that the intervention of trained facilitators at phase 3 is having a positive impact on the numbers of parties settling as opposed to seeking final, adjudicated determination, although again more explanatory data is required to validate this. Furthermore, the delays faced by parties who have a small claim issue under the jurisdiction of the CRT have significantly reduced when compared with using the Provincial Court. It can therefore be concluded that, whilst the Briggs reports did not carry out the evaluative analysis necessary to demonstrate it, there is strong justification for Lord Briggs seeking to replicate the precedent laid down by the CRT.

This chapter also sought to build on the research conducted and conclusions reached in chapter 2 relating to the second part of the research hypothesis, concerning the risk that insufficient investment in the foundations of the project will be provided by government to implement the OSC, leading to it becoming largely a digitised version of the current County Court procedure. Key evidence has been presented which gives cause for some concern, which it is submitted further justifies the risk outlined in the second part of the hypothesis of this thesis. The cost of running the Civil Resolution Tribunal has risen every year since its inception. It is important to not only acknowledge this, but actively take it into consideration when concluding recommendations are made by this study, particularly given the conclusions reached in chapter 2 which suggest that cost-saving and efficiency are still key drivers in the government's underlying rationale for backing the creation of the OSC.

It is submitted that the research contained within this chapter shows that this concern is still valid. Whilst the reintroduction of the bill to create the Online Procedure Rules and the Online Procedure Rules Committee, and its specific reference to furthering the objectives of the Briggs reports on low value civil claims is welcomed, it is concerning that such limited long term financial commitments from government remain, alongside multiple references to procedural efficiency in the explanatory notes to the Judicial Review and Courts Bill.

This chapter has answered the third research question, dealing with how it is proposed that an ODR system will be developed, implemented and used to deal with low value civil claims in England and Wales and British Columbia. The study must now progress to conduct a thorough analysis of the three individual stages, using comparative data to enhance the way in which they can be embedded into the civil justice system in England and Wales.

Chapter 4

Stage 1: The Development of Knowledge-Based Systems in Online Dispute Resolution

4.1 Introduction

The previous chapter demonstrated through conducting a side-by-side comparison of the composite stages of the Online Solutions Court and the Civil Resolution Tribunal that both systems were almost identical in both structure and objective. This was to methodologically justify the following three chapters, which will conduct a detailed investigation and analysis into each of the individual stages of (a) how that particular stage of the CRT was embedded into the British Columbian civil justice system and (b) how that particular stage of the CRT system could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales.

The purpose of this chapter is to achieve two things. The first purpose is to test the first part of the thesis hypothesis in relation to stage 1 and establish whether Lord Briggs conducted a comparative analysis on (a) how the Solution Explorer was developed and embedded into the British Columbian civil justice system and (b) how the Solution Explorer could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales. The second purpose is to test the second part of the thesis hypothesis in relation to stage 1: that insufficient investment of both time and money in the foundations of stage 1 will be provided by government, which will lead to the Online Solutions Court becoming largely a digitised version of the current County Court procedure.

This chapter will explore stage 1 and will answer the first thematic element to research question 3, which looks to determine the ways in which the comparator jurisdictions are seeking to use knowledge-based expert systems as part of their platforms to deal with low value civil claims, and what steps have been or are being taken to build those

systems prior to implementation. As will become a recurring theme across the following three chapters, there is a paucity of research in this particular area.

Lord Briggs was clear that it was stage 1 which could prove most challenging to the implementation of the OSC,[1] and advised that approaching the development incorrectly could potentially lead to the whole project being placed in jeopardy.[2] However, in line with the first part of the hypothesis of this thesis it is submitted that the Briggs reports did not advance this further than a mere warning, by explaining with reference to evidence (a) why the creation of stage 1 would be so challenging and (b) what steps were taken by British Columbia to develop and implement their Solution Explorer. This chapter will remedy this lacuna.

For the purposes of clarification, this chapter will not conduct a technical appraisal of the system itself. It will not discuss competing systems, nor will it consider systems which may be preferable to that which is currently in place at phase 1 of the CRT and is proposed for stage 1 of the OSC. This chapter considers the legal dimensions and methodological considerations which need to be taken into account by HMCTS in developing and implementing the knowledge-based system used in the CRT for use as part of the Online Solutions Court. Researchers, particularly Jacob Turner, continue to publish key research and commentary into the evolution of systems such as that which is being proposed here, and the legality of that evolution,[3] and there is no doubt that further research and assessment of whether a more advanced or suitable system than that which is proposed here is appropriate and necessary in the future. However, that is outside the scope of this thesis and this chapter.

The first part of this chapter will therefore begin by outlining the version of stage 1 which exists as part of the CRT, the Solution Explorer. Analysis will then be carried out on the steps which were taken by the Civil Resolution Tribunal and the British Columbia Ministry of Justice in building and developing the Solution Explorer so that a series of key steps can be identified in the development and use of an automated legal diagnostic system for low value small claims.

[1] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at p49, para 6.63
[2] Ibid at para 6.67
[3] Jacob Turner, *Robot Rules: Regulating Artificial Intelligence* (Palgrave Macmillan, 2018)

The second part of this chapter will then explore the steps which have been taken by HMCTS in England and Wales to build the foundations of stage 1 as part of their court reform programme to date. This is to test the second part of the thesis hypothesis in relation to stage 1, whether there is any evidence that government is failing to provide sufficient investment of money or time in the foundations of the project to implement the OSC which would prevent it from becoming largely a digitised version of the County Court procedure which exists for low value claims presently.

The research and evidence presented will then enable conclusions and recommendations to be provided on enhancing the development and implementation of stage 1 of the Online Solutions Court for courts users with low value civil disputes.

4.2 British Columbia and the Solution Explorer

Phase 1 of the Civil Resolution Tribunal is called the Solution Explorer. This is described by its creators as an 'expert system'.[4] An expert system is '…a technology-based platform that imitates or emulates the feedback, guidance, or reasoning of a human expert'.[5] Therefore, whilst humans are directly involved in developing and building the system, once launched the system must be able to provide an automated response to its users with a high degree of similarity to the way that a human expert would.

In order to do this, the system relies on a knowledge base which has been obtained from human experts in a particular field and translated into a series of questions, answers and pathways before being inputted into the system itself.[6] The knowledge is then filtered and organised in a very particular way so that the system interface can make it understandable and accessible to the system's user.[7] Once the user has

[4] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2

[5] Richard Susskind, 'Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning' (1986) 49:2 Modem Law Review 168 at 172.

[6] George F Luger & Chayan Chakrabarti, "Knowledge-Based Probabilistic Reasoning From Expert Systems to Graphical Models" (2009), online: University of New Mexico < https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.440.5451&rep=rep1&type=pdf> at 1.

[7] Mary Lou Maher & Panay Longinos, "Development of an Expert System Shell for Engineering Design" (1986), online <http://repository.cmu.edu/cee/l/> at 9. And also see Darin Thompson, 'Introduction to Knowledge Engineering' (darinthompson.ca) <http://darinthompson.ca/knowledge-

completed the pathway, the system is then able to provide the user with relevant information based on the answers given.[8]

As has already been established in chapter 3 of this research, the model adopted by England and Wales is very similar to that of the Civil Resolution Tribunal. This includes the embedding of an automated system into the first stage of both systems which seeks to obtain information from users about the nature of their dispute, provide them with basic legal information on the area which their dispute concerns and provide them with options in terms of how they could go about resolving it. Even from this brief description, it can be seen that this fits within the definition of an expert system.

It is important to clarify at this stage that at no point is this chapter seeking to research or comment upon the technological complexities and requirements of building a knowledge-based system, or the theories which are involved in knowledge engineering. The needs of this study are limited to being concerned with process, as opposed to the technical debates and implications surrounding how knowledge-based systems are best created and the ethics and risks of using knowledge engineered systems in public dispute resolution.

On the topic of digital justice, Katsh and Rabinovich-Einy posited that '…the initial impulse is to create online mirror images of the 'live' or offline process. In such instances, some agencies aim to replicate exactly their current processes online. Public agency staff may have been using the existing system for so long that it may be difficult for them to envision the new system as something other than an online replica of their offline process'.[9] Shannon Salter, Chair of the CRT and Darin Thompson, the chief knowledge engineer for the Solution Explorer in British Columbia submit that it seeks to both resist and reverse that initial impulse when dealing with low value civil claims. They describe the Solution Explorer as '…a simple, web-based expert system that carries out several functions to assist a user in understanding and resolving their dispute'.[10] This is, fundamentally, with a view to assisting the parties to

engineering/knowledge-engineering-start-to-finish/introduction-to-knowledge-engineering/> Accessed 6th July 2021

[8] Ibid

[9] Ethan Katsh & Orna Rabinovich-Einy, Digital Justice (Oxford University Press, 2017) at 174-75

[10] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol at 129

a dispute with early resolution, providing them with a framework to assess their position and options of how resolution could be achieved.[11]

Users with a dispute which is covered by the jurisdiction of the CRT are presented with an '…intelligent questionnaire style of interaction, using plain language questions and answers'.[12] Salter and Thompson provide the following example:

What can we help you explore?

- I have a problem with something I purchased
- I have a problem with something I sold
- I have a problem with privacy or personal information[13]

The answer to the previous question determines the next one which the user is asked.[14] There is no fixed number of questions which will lead to the system being able to provide a full response to the user: the number of questions which the user is asked depends entirely on which answers they select on their pathway.[15] The pathway which the user follows changes depending on the answers they input, even to the point that the questions will change based on whether they are an individual user or a corporation.[16] Once the interactive questions have concluded, the answers provided by the user then allows the system to provide targeted information on the user's specific dispute, as opposed to general information which the user would be required to sift through to find something which is relevant to them.[17] This includes what Salter and Thompson refer to as 'self-help tools',[18] such as letter templates pre-populated with relevant legislation to enable the user to concisely articulate the nature of their issue and to open a dialogue with the other party to the dispute. This is all with the

[11] Ibid
[12] Ibid at 130
[13] Ibid
[14] Mary Lou Maher & Panay Longinos, "Development of an Expert System Shell for Engineering Design" (1986), online <http://repository.cmu.edu/cee/l/> at 9
[15] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol at 130
[16] Darin Thompson 'The Online Justice Experience in British Columbia' (*scl.org*, 22nd November 2016) <https://www.scl.org/articles/3784-the-online-justice-experience-in-britishcolumbia> Accessed 6th July 2021
[17] Ibid
[18] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol at 131

objective of facilitating settlement, or at the very least narrowing down the matters in dispute to those which matter legally.

Once the party has reached the end of the Solution Explorer, it will generate an individualised report which provides the user with '…a natural language summary of the user's situation, along with the expert guidance and self-resolution options that were provided. The summary might also set out additional options the user can try if the first option did not resolve the problem'.[19] In the event that the user has not been able to resolve the dispute using the self-help tools suggested, the system provides a link, embedded into the summary report, which enables them to be taken to the formal intake process and into phases 2 and 3 of the Civil Resolution Tribunal.

From this brief synopsis of the Solution Explorer's capabilities, it is clear how a system such as this has the power to impact unrepresented users who seek resolution of low value disputes. The software and the platform are designed to take a user down a particular pathway and store the information given to them in order to produce relevant and directly useful legal information as well as a series of recommendations. Users can then use it to inform how they proceed. Now that it has been established how the Solution Explorer is structured and how it operates, an exploration must be conducted into how it was built.

4.2.1 How was the Solution Explorer developed?

According to Thompson, the basic structural components of an expert system are the knowledge base, inference engine and user interface.[20] The knowledge base is the fundamental part of the system, within which specific expert knowledge is stored.[21] Within the knowledge base are a series of production rules, which are programmed into the system to enable it to make deductions based on the information which is inputted into it by a user.[22] This therefore forms the heart of any expert system. The

[19] Ibid

[20] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2.

[21] L.Y. Shue, C.W. Chen & C.H. Hsueh, 'An Ontology-Based Expert System for Financial Statements Analysis', in A. Eardley & L. Uden (Eds.), Innovative Knowledge Management: Concepts for Organizational Creativity and Collaborative Design, IGI Global, New York, 2010, pp. 125, 138.

[22] M. Aikenhead, 'Legal Knowledge-Based Systems: Some Observations on the Future', (1995) 2 Web Journal of Current Legal Issues 54

inference engine is the platform which uses the knowledge base to essentially perform the system's reasoning.[23] So, when a user gives a particular direction, the inference engine will interact with the knowledge base to produce a specific action in response.[24] Finally, the user interface is the vehicle through which users will interact with the system itself, and essentially is a programme which converts the user's response into language which the system can understand and vice versa.[25]

Therefore, the first part of this section of the chapter will concentrate on the steps which were taken by the British Columbian Ministry of Justice to create both the inference engine and the user interface elements of the Solution Explorer expert system. The second part of this section will focus on the way in which the Civil Resolution Tribunal built the knowledge base which forms the core of the system itself. This research can then be used to build on the foundation of the stage 1 proposal put forward by Lord Briggs, as well as answering the first part of research question 3.1.

4.2.2 How were the inference engine and the user interface developed?

As part of the White Paper on Justice Reform, Part 2,[26] the British Columbian Ministry of Justice committed to investing in new technology to enable the creation of the Civil Resolution Tribunal.[27] As set out by Engelmore & Feigenbaum, creation of inference engines and user interfaces from scratch is time consuming and incredibly complex, which makes the acquisition of commercially available systems in many cases more economical and pragmatic.[28] Richard Susskind also endorsed this approach, arguing that the risk of government technology failure and the painfully slow pace of

[23] R.S. Engelmore & E. Feigenbaum, *Introduction*, in R.S. Engelmore (Ed.), *Knowledge-Based Systems in Japan* (JTEC, 1993) https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.157.4715&rep=rep1&type=pdf
[24] Ibid
[25] M.L. Maher & P. Longinos, 'Development of an Expert System Shell for Engineering Design', (Carnegie Mellon University Technical Report, Department of Civil and Environmental Engineering, 1986) p. 9.
[26] BC Ministry of Justice, 'White Paper on Justice Reform, Part Two: A timely, balanced justice system' (Victoria, 2013)

[27] Ibid at 11
[28] R.S. Engelmore & E. Feigenbaum, *Introduction*, in R.S. Engelmore (Ed.), *Knowledge-Based Systems in Japan* (JTEC, 1993) https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.157.4715&rep=rep1&type=pdf

government procurement processes could be minimised by the purchase of off-the-shelf platforms.[29]

The Ministry of Justice therefore needed to decide between hiring experts to build the platform and software from scratch, or purchase ready-made systems which simply needed customising.[30] As set out at the beginning of the chapter, at no point is this thesis seeking to research or become involved in the complex technological process which goes into building an expert system such as the Solution Explorer. This seems to have been the exact same position adopted by those involved in developing phase 1 of the Civil Resolution Tribunal, where they used a customised version of Salesforce (an existing platform).[31] The basis on which this was selected is that it minimised the risk of government technology failure due to the fact that it was a private software company, subject to market discipline. It was thus, Salter argued, much safer to use a product developed for the open market than placing development of the system in the hands of government who have much less to use from software failure. She also justified the strategy on the basis that governments are notoriously risk adverse, with a strong bias towards inaction and that government initiatives, by their nature, often take more time than private ones.[32]

As a result, in 2014 the BC Ministry of Justice formed a partnership with the private, customer relationship management platform Salesforce[33] to deliver the environment into which the software for the Solution Explorer would be introduced. This was to serve as the inference engine. Salesforce were provided with the blueprint of the CRT, which then enabled them to create what Salter argues is a solid, well-designed CRT platform.[34]

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[29] Richard Susskind, '*Online Courts and the Future of Justice'* (Oxford University Press, 2019) at 249
[30] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) Windsor Yearbook of Access to Justice 112 at 128
[31] Darin Thompson 'The Online Justice Experience in British Columbia' (*scl.org*, 22nd November 2016) <https://www.scl.org/articles/3784-the-online-justice-experience-in-britishcolumbia> Accessed 6th July 2021

[32] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) Windsor Yearbook of Access to Justice 112 at 128
[33] Ibid and also see Shannon Salter, 'BC's Civil Resolution Tribunal' (Speech to the Osgoode Forum on Administrative Law and Practice in Toronto, 23–24 October 2014) <https://cfcj-fcjc.org/sites/default/files//Annual%20Forum%20on%20Administrative%20Law%20Paper%20-%20CRT%20-%20Salter.pdf> Accessed 4th July 2021
[34] Ibid

This was followed by a further partnership between the BC Ministry of Justice and PriceWaterhouseCoopers (PWC) in 2014.[35] PWC's role was to build the software for the Solution Explorer itself, as well the CRT communications portal through which the parties and the tribunal could communicate with each other, which would then be powered by the existing Salesforce platform.[36] This would therefore serve as the user interface part of the process. The entire philosophy around which the partnerships with both companies were based was that of Agile System Development.[37] Hoda, Salleh and Grundy have defined this way of working as '…small, co-located teams, with an onsite or easily available customer, an emphasis on programming and early testing, and frequent feedback on iterative delivery of working software… .[38] In other words, enhanced systems and solutions to problems encountered evolve through collaboration between multiple parties who perform different roles but are striving to build something which serves the same function.

By late 2014, the British Columbia Council of Administrative Tribunals announced that a beta version of the Solution Explorer would be ready to be trialled by summer 2015, with a full launch of the dispute resolution software by the end of 2015.[39] A beta version is defined as 'a version of a piece of software that is made available for testing, typically by a limited number of users outside the company that is developing it, before its general release'.[40] In fact, this was delayed by around six months, with the call for participants in the beta trial of the CRT not being released until November 2015 and

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[35] PriceWaterhouseCooper 'Digital Government Spotlight: The Digital Justice Imperative' (*pwc.com*) <https://www.pwc.com/ca/en/industries/government-and-public-services/citizen-experience.html> Accessed 4th July 2021

[36] Roger Smith, 'Digital Delivery of Legal Services to People on Low Income, The Legal Education Foundation Quarterly Update Summer 2015' (Legal Education Foundation, 2015) <https://www.thelegaleducationfoundation.org/wp-content/uploads/2015/09/Digital-Technology-Summer-2015.pdf> Accessed 6th July 2021

[37] R. Hoda, N. Salleh & J. Grundy, 'The rise and evolution of agile software development.' (2018). 35 IEEE Software 58

[38] R. Hoda, N. Salleh & J. Grundy, 'The rise and evolution of agile software development.' (2018). 35 IEEE Software 58

[39] BC Council of Administrative Tribunals, 'BCCAT Spring / Summer 2015 Newsletter' (2015) <http://bccat.net/wp-content/uploads/2014/12/BCCAT_newsletter_springsummer2015.pdf> Accessed 19th September 2021

[40] Cambridge University Press (n.d.) 'Beta' in Cambridge Dictionary Retrieved 18th September 2021 from < https://dictionary.cambridge.org/dictionary/english/beta>

the trials not taking place until the beginning of December 2015.[41] Further discussion surrounding user testing will take place in the next section.

From the perspective of England and Wales in developing both the inference engine and the user interface, there are a number of key lessons which can be taken from the British Columbian approach. The first is the importance of recognising the three stages which are accepted as forming part of any expert system and, following on from that, being able to articulate a clear plan for what the software is to do so that it can be built to specification. The fact that the model for stage 1 is so similar to the Solution Explorer ought to help with this significantly. The second is the value of engaging third party companies, experienced with development of online platforms and software to execute the creation of technology aspect of the process.

However, as Feigenbaum stated, 'the performance of an AI system depends not on the technology used, but on the knowledge that is programmed into it.… the knowledge base is the most important of the central problems in artificial intelligence research. The reason is simple: to enhance the performance of AI's programs, knowledge is power. The power does not reside in the inference procedure. The power resides in the specific knowledge of the problem domain.'[42] It is therefore now necessary to explore the steps taken by the CRT in developing the base of expert knowledge which would be fed into the software once it was built.

4.2.3 How did the Civil Resolution Tribunal build the knowledge base?

Unlike the work involved in developing the platform and software for the CRT, the development of the expert knowledge base was carried out in-house by employees within the BC Ministry of Justice.[43] This section will therefore focus heavily on the specific process which those responsible followed to develop the knowledge base, so

[41] Civil Resolution Tribunal, 'Got a Strata Problem? Help us test the Solution' (*civilresolutionbc.ca,* 19th November 2015) <https://civilresolutionbc.ca/got-a-strata-problem-help-us-test-a-solution/> Accessed 5th April 2021

[42] E. Feigenbaum, 'Knowledge Engineering 'The Applied Side of Artificial Intelligence' (1984) 426 Annals of the New York Academy of Sciences 91

[43] Lauryn Kerr, 'AI, Expert Systems and the Justice System' (20th June 2017) <https://www.youtube.com/watch?v=g2MFbnx1QXY> Accessed 5th September 2021 with accompanying slides being found here: http://bhastings.com/blog/wp-content/uploads/2017/06/Solution-Explorer-for-Vancouver-Legal-Hackers-June-14-2017.pdf

that clear comparisons can be drawn between the steps taken by HMCTS to date in developing stage 1.

When talking about the early stages of building any sort of knowledge base for use as part of an expert system, Earl Chrysler commented that '…the first step is to consider the purpose… the basic question, then, is: what is one attempting to determine?'.[44] This is supported by Lodder and Zeleznikow, who posited that '…knowledge engineers must identify limits to the scope of subject matter for which it can provide expert knowledge'.[45]

Based on this, Darin Thompson, one of the chief legal architects at the CRT, framed the limitations on what the Solution Explorer was designed to do as follows: '…these systems do not 'do the thinking for users', but instead provide support and guidance with an expectation that users will exercise their own discretion over how to act on these outputs'.[46] Managing expectations of the extent of the Solution Explorer's capabilities in this way built on the position of Berman and Hafner, who stated that '…the goal [of an expert system] is not to meet every need of every user through the entire justice process, because this is unattainable with a relatively simple AI approach. But it should provide some guidance and support, while also avoiding the intensification of access to justice problems for users'.[47]

Once the purpose of the Solution Explorer was defined, the methodology underpinning the building of the knowledge base was developed. The methodology was designed by a team led by Darin Thompson. It consisted of three high level stages: the first is an expert knowledge gathering workshop, the second is the process of modelling expert knowledge in a decision tree structure through mind mapping software and the

[44] E. Chrysler, 'Using Decision Tree Analysis to Develop an Expert System' (2006) 4 Information Systems Education Journal 3

[45] A. R. Lodder & J. Zeleznikow, 'Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model' (2005) 10 Harvard Negotiation Law Review 287-337

[46] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2

[47] D.H. Berman & C.D. Hafner, 'The Potential of Artificial Intelligence to Help Solve the Crisis in Our Legal System', (1989) 32 Communications of the ACM 8

third is entering the subject knowledge into the knowledge base in a rule-based format.[48]

Lauryn Kerr, in house legal counsel for the Civil Resolution Tribunal, describes in greater detail how the methodology designed by Thompson was practically applied by the CRT team in developing the knowledge base for the Solution Explorer, and separates the process out into four categories: content creation, review and approval, extract inform and load and user testing.[49]

At the first stage, content creation, a discussion took place between subject matter experts and knowledge engineers as part of the knowledge gathering workshop.[50] The subject matter experts provided their time for free and were a mix of lawyers and non-lawyers.[51] The only criterion they had to meet to be eligible was that they were an expert in the particular field for which the knowledge base was being created. Initially, for the CRT, this was strata (property) disputes and therefore there was a narrow pool to select from.

Kerr comments that when trying to acquire the knowledge relevant to small claims disputes, this was much more challenging given the breadth of the areas of law which could be covered under that heading.[52] In order to overcome this, the CRT had to create discrete systems for each type of small claims matter which was likely to arise and consult experts in each of these discrete areas.[53] Those areas were identified as 'consumer, business to business, employment, loan and debt, injury and accident, insurance, personal property and real estate disputes'.[54] Thompson points out that those categories corresponded directly to the small claims matters identified as part of the Evaluation of the Small Claims Court Pilot Project carried out by the BC Ministry

[48] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2 at 40
[49] Lauryn Kerr, 'AI, Expert Systems and the Justice System' (20th June 2017) <https://www.youtube.com/watch?v=g2MFbnx1QXY> Accessed 5th September 2021 with accompanying slides being found here: http://bhastings.com/blog/wp-content/uploads/2017/06/Solution-Explorer-for-Vancouver-Legal-Hackers-June-14-2017.pdf
[50] Ibid
[51] Ibid
[52] Ibid
[53] Ibid
[54] Ibid

of Attorney General in 2009.[55] This is of clear importance when looking at building stage 1 of the OSC to deal with low value civil claims in England and Wales.

At the knowledge gathering workshop, the subject matter experts were interviewed by knowledge engineers, who were employed by the CRT. Quinlan describes the role of the knowledge engineer as '…work[ing] with experts to extract rules from situational examples or sample problems in the knowledge domain. Using various facilitation techniques, knowledge engineers lead experts through fact scenarios towards specific actions and outputs and record the reasoning process in decision trees'.[56] Again, it was not a requirement that these knowledge engineers were lawyers, although Kerr comments that it was helpful if they were as they would '…know when to ask additional questions and when to pry a little more into the answers… legally qualified knowledge engineers can look at the information which comes out of the subject matter expert and ask for elaboration to try to apply a logical, rule based approach to it'.[57]

The idea that both parties are legally experienced is supported by Feigenbaum, so that the knowledge acquired and explored '…consists not only of facts within the justice domain, but also of heuristic knowledge, embracing rules of expertise, judgment and practice'.[58] This suggests that a simple restatement of the law itself is insufficient for the system to achieve its purpose: the knowledge acquired must also be based on the operation of that law in action. To summarise, therefore, the job of the knowledge engineer was to facilitate acquisition of expert knowledge, to determine the structure of content and pathways and produce the solutions, based on the discussions with the subject matter expert, to various problems and challenges within a specific subject domain.

The third party to the discussion at the content creation stage was the content specialist, who recorded the interactions between the subject matter expert and the knowledge engineer and, where appropriate, contributed by asking any additional

[55] British Columbia Ministry of Attorney General, 'Evaluation of the Small Claims Court Pilot Project – Final Report' (Focus Consultants, B.C. 2009) in Table 14, p 24

[56] J.R. Quinlan, 'Simplifying Decision Trees', (1987) 27 International Journal of Man-Machine Studies 221

[57] Lauryn Kerr, 'AI, Expert Systems and the Justice System' (20th June 2017) <https://www.youtube.com/watch?v=g2MFbnx1QXY> Accessed 5th September 2021 with accompanying slides being found here: http://bhastings.com/blog/wp-content/uploads/2017/06/Solution-Explorer-for-Vancouver-Legal-Hackers-June-14-2017.pdf

[58] E. Feigenbaum, 'Knowledge Engineering 'The Applied Side of Artificial Intelligence' (1984) 426 Annals of the New York Academy of Sciences 91

questions of the subject matter expert that they believed to be necessary. The content specialist then built a decision tree using 'xmind'[59] which is free mind-mapping software. A decision tree is a visual model of a series of decisions and the range of possible consequences flowing from that decision. These are referred to as 'pathways',[60] embedded within the decision tree diagram. Chrysler comments on the advantage, and the risk, of this approach as follows:

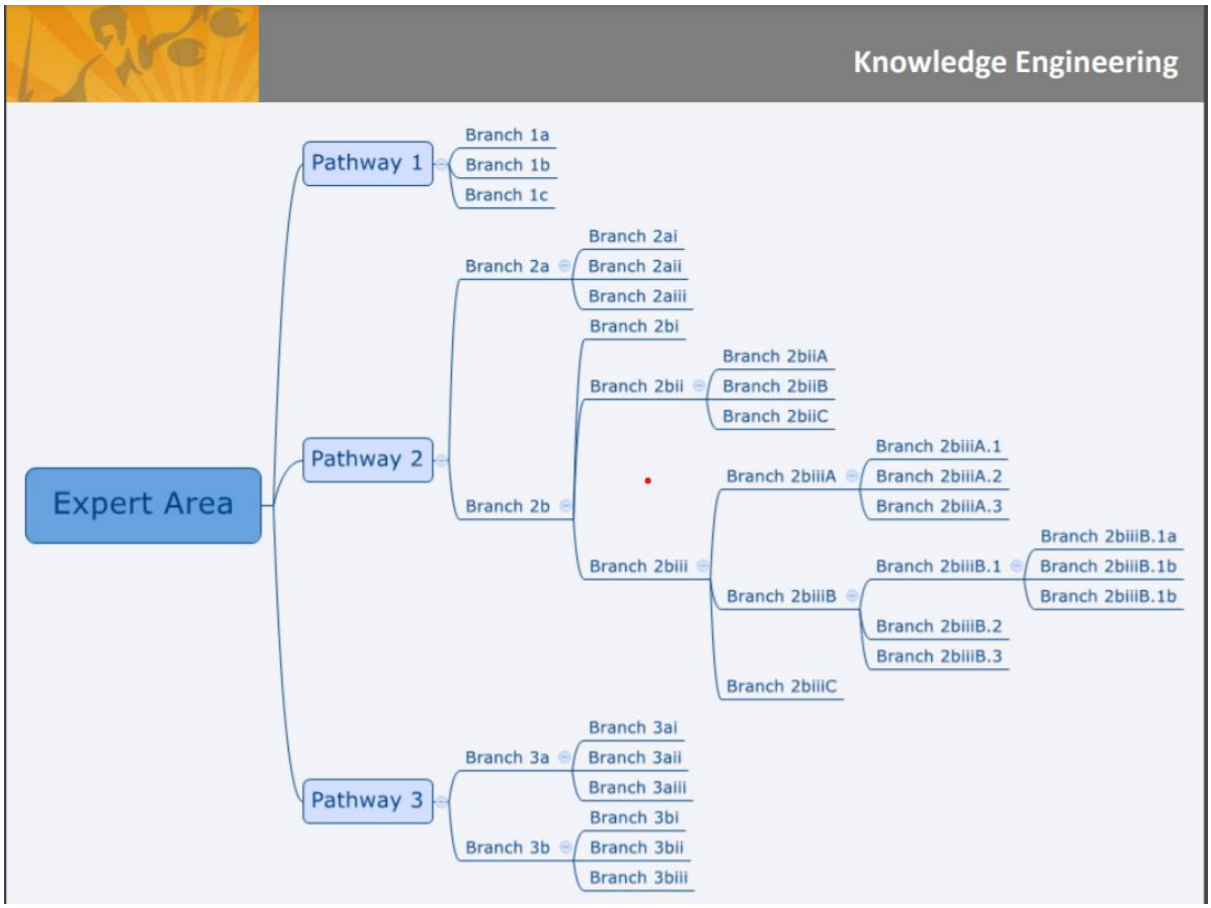
> The decision tree analysis method assists the expert system developer in the creation of the necessary knowledge base and rules section of the expert system due to the step-by-step, multi-stage decision process the developer had to follow. In addition, the developer has to consider every possible option at every step, in order to assure that the expert system would not make an erroneous recommendation to the user.[61]

[59] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2 at 40. More information can be found at https://www.xmind.net/

[60] Ibid

[61] E. Chrysler, 'Using Decision Tree Analysis to Develop an Expert System' (2006) 4 Information Systems Education Journal 3 p. 5

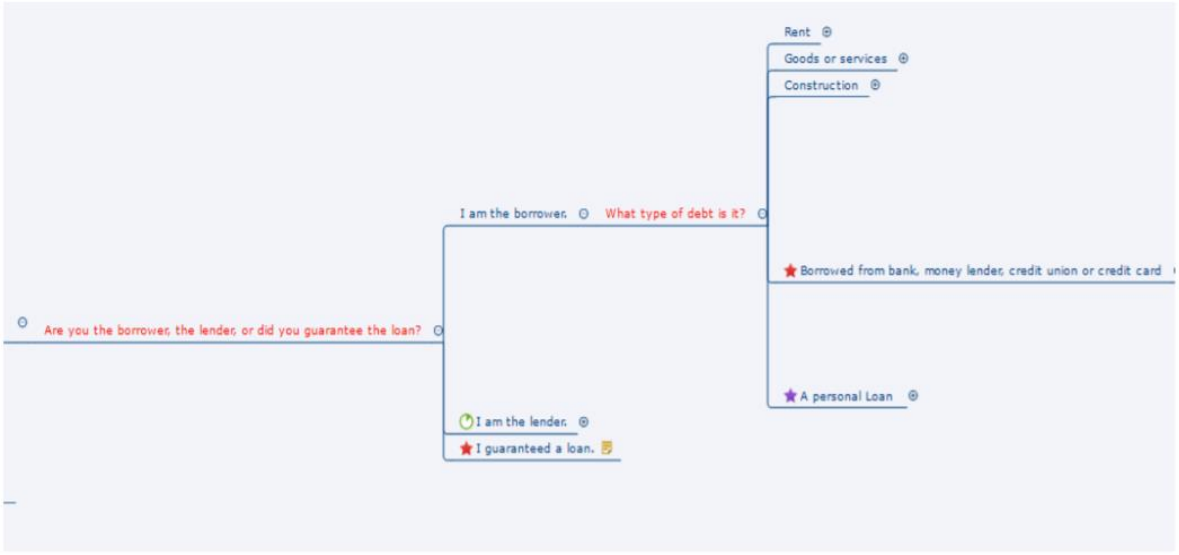
Kerr demonstrated how this then appears on the CRT user interface as follows:



Source: The Civil Resolution Tribunal: Presentation given to The Vancouver Legal Hackers, 20th June 2017[62]

These principles were then applied to a specific legal context, as demonstrated here:

[62] Lauryn Kerr, 'AI, Expert Systems and the Justice System' (20th June 2017) <http://bhastings.com/blog/wp-content/uploads/2017/06/Solution-Explorer-for-Vancouver-Legal-Hackers-June-14-2017.pdf> Accessed 5th September 2021



Source: The Civil Resolution Tribunal: Presentation given to The Vancouver Legal Hackers, 20th June 2017[63]

Once the relevant decision trees were built, the process then moved to the second stage, review and approval. At this point, the decision trees and associated subject matter expert information was presented to other knowledge engineers and tribunal members. Any feedback was then incorporated into the decision trees as appropriate.[64] This was part of the overarching quality review process embedded into the development of the expert knowledge base: each stage, where appropriate, would feed into the last before it progressed to the next.[65]

The third stage was the extract, inform and load stage. This was carried out by an expert system analyst, whose job was to translate the information which the knowledge engineers had acquired into language and terms that the system would understand. They did this with the assistance of Microsoft Visio,[66] a piece of software

[63] Ibid
[64] Ibid
[65] Ibid
[66] Ibid

which facilitates the transfer of written decision trees into diagrams which are compatible with a particular platform, in this case the Salesforce platform procured by the BC Ministry of Justice.[67] The complexity involved in this part of the process was summarised by Thompson:

> The knowledge base is built through acquisition of expert knowledge within the subject domain. It is then modelled to create the pathways. Because the system is rule-based, the knowledge must be encoded into rules. Once it has been modelled, it can be programmed into the system. These combined efforts require considerable levels of expertise, a uniform methodological approach and some programming effort.[68]

The process then reached the final stage, which is user testing. Kerr indicated that by this stage many people within the CRT had reviewed the content.[69] It was then sent for friends and family testing, with any suggested amendments or changes incorporated after that stage and then, finally public testing.[70] This was separated into two parts: the first was closed testing and the second was public open beta testing, which took place in December 2015 for strata matters and April 2017 for small claims matters.[71] The impact of the testing phase was crucial, with some of the features the design team had considered invaluable being removed due to the users finding them annoying or confusing.[72] This demonstrated the significance of not simply relying on the structure of the expert knowledge acquired at the content creation stage and also supports the position that the development process adopted in British Columbia was a time-consuming operation. The user testing stage completed the four phases of development of the knowledge base and its integration into the CRT platform.

What has emerged from the research here is that Feigenbaum's statement that 'the performance of an AI system depends not on the technology used, but on the

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[67] Ibid

[68] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2 at 39 And see also D. Ford & J. Sterman, 'Expert Knowledge Elicitation to Improve Formal and Mental Models', (1998) 14 System Dynamics Review 4 pp. 309, 310.

[69] Lauryn Kerr, 'AI, Expert Systems and the Justice System' (20th June 2017) <https://www.youtube.com/watch?v=g2MFbnx1QXY> Accessed 5th September 2021

[70] Ibid

[71] Civil Resolution Tribunal, 'Try the Solution Explorer for Small Claims' (*civilresolutionbc.ca*, 18th April 2017) <https://civilresolutionbc.ca/try-solution-explorer-small-claims/> Accessed 12th March 2021

[72] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) Windsor Yearbook of Access to Justice 112 at 128

knowledge that is programmed into it'[73] hold a great degree of resonance. The process involved in building the system, from identifying the knowledge domain to obtaining the expert knowledge to populating the expert system knowledge base is complex and requires extensive planning, multiple layers of review and trialling and, perhaps most significantly, time. From a resource-based perspective, in order to achieve this the BC Ministry of Justice had to define the scope of the Solution Explorer, agree specifics on the areas of law relating to the small claims it would seek to deal with, and recruit knowledge engineers, content specialists, expert system analysts and tribunal members who were willing to review the decision trees at appropriate junctures. Alongside this, subject matter experts needed to be sourced, as well as friends and family who were prepared to take part in the first round of testing and public volunteers who were prepared to take part in the beta testing. This is a considerable undertaking, and therefore the question arises of whether there is any evidence to suggest that it is working.

There is evidence that the Solution Explorer is working. Table 4.1 below shows the number of small claims Solution Explorer enquiries on an annual basis by comparison with the number, and percentage, of applications which are subsequently made to the CRT for resolution:

Year (1st April to 31st March)	Solution Explorer Volumes for Small Claims	Number of Small Claims Applications (%)
2016/17	N/A	N/A
2017/18	16950	3668 (21%)
2018/19	20101	4821 (23.9%)
2019/20	38648	4926 (12.7%)
2020/21	30075	4238 (14.1%)

Source: Civil Resolution Tribunal Annual Reports 2016/17, 2017/18, 2018 / 19, 2019/20, 2020/21

[73] E. Feigenbaum, 'Knowledge Engineering 'The Applied Side of Artificial Intelligence' (1984) 426 Annals of the New York Academy of Sciences 91

Therefore, an average of 17.9% of claims progress to small claims resolution after the Solution Explorer, conversely meaning that an average of 82.1% of enquiries are dealt with at that stage. There is no more detail about why those claims do not progress as was discussed in chapter 3, but it is not unreasonable to suggest that the Solution Explorer is having a demonstrable impact on assisting parties to small claims with assessing whether their claim does, in fact, have a basis in law and enabling them to take an informed decision of whether to therefore progress it to the next stage. However, it is clear that further research would be needed to verify those conclusions.

Whilst the statistical data can give some information, it does not provide a conclusive picture of how the Solution Explorer is working for those who use it. The CRT does not publish any data which contextualises the numerical data it publishes. However, independent research has been conducted which may provide an insight here. Sykes and others conducted a survey of CRT users from 10th July 2019 to 31st October 2019, seeking responses on their experiences with the CRT.[74] They received 49 responses although did place some important caveats on the data, most notably that surveys suffer from self-selection bias and that people are much more likely to participate in a survey if it is asking about a topic which they feel strongly about.[75] They also drew attention to the small sample and how it could not be used to make generalised comments about the way the CRT was perceived by the larger population.[76] However, the data does provide some insight into how tribunal users experienced the individual stages of the CRT.

Relevant to this section is the feedback on the Solution Explorer. The statistical data gathered reported as follows: '…three quarters (37) of the respondents said that the Solution Explorer was at least a little bit effective, providing some (16), most (12), or all (9) of the help that they needed. Twelve said it was not helpful at all.'[77] Positive feedback was received about users being able to use the system at times that worked

[74] Sykes K, Dickson R, Ewart S, Foulkes C, Landry M, 'Civil Revolution: User Experiences with British Columbia's Online Court' (2020) 37(1) Windsor Y B Access Just 161
[75] Sonya K. Sterba & E. Michael Foster, "Self-Selected Sample" in Paul Lavarkas, ed, Encyclopedia of Survey Research Methods, vol 1 (Thousand Oaks, California: SAGE Publications Inc, 2008)
[76] Sykes K, Dickson R, Ewart S, Foulkes C, Landry M, 'Civil Revolution: User Experiences with British Columbia's Online Court' (2020) 37(1) Windsor Y B Access Just 161
[77] Ibid

for them (43%), being able to access the system from anywhere without having to travel (39%), and ease of use (35%).[78]

That said, there was some criticism about the way parties engaged with and were assisted by the Solution Explorer. 43% of participants said that the information they received did not help with the problem they had, with 27% stating that they had a legal issue which was not covered by the Solution Explorer. A very small number of participants (4) complained that the Solution Explorer was 'incomplete, misleading or hard to understand', although it was noted by the authors of the research that this related to strata (property) issues as opposed to small claims.[79] Finally, 51% of the participants stated that they would have preferred it to be easier to contact a support worker or an advisor in person to ask for help about the way in which the Solution Explorer operates and whether they were inputting the right information. This is a point which may be useful to take forward as part of the OSC.

The section regarding the Solution Explorer concluded with the identification of a further area for additional research which would be helpful to establish how the system was operating for those who did not proceed to phase 2 once they had used it. Sykes comments that 'we have little information about its effectiveness for members of the public who use it just to get information, resources, or help with tackling a legal problem without going on to take additional dispute resolution steps'.[80] There is currently no data which conclusively suggests why the percentage of parties which proceed to phase 2 is so low. However, the high percentages of participants who felt that the Solution Explorer assisted them with their problem is certainly cause for cautious optimism and gives some limited context to the statistics published by the CRT.

This section of the chapter has therefore advanced the proposal for stage 1 put forward by Lord Briggs by using evidence to map the underpinning methodology and the blueprint adopted by the Civil Resolution Tribunal in building the Solution Explorer. The next section will set out the evidence which exists showing what steps, if any, HMCTS have taken to commencing their building of stage 1 of the OSC.

[78] Ibid at 176
[79] Ibid
[80] Ibid at 178

4.3 England and Wales and Stage 1

As required by the comparative method, this section of the chapter will mirror that of the first section. Therefore, an exploration will first be carried out on the proposed design of stage 1 of the Online Solutions Court, to identify whether this sets out to achieve the same purpose and is structured in the same way as the Solution Explorer. This will establish whether the system envisaged for stage 1 is an expert system and, if so, whether it is seeking to use the same model as the Solution Explorer. If this can be established, consideration can then be given to what steps have been taken towards adopting the approach taken in British Columbia and, specifically, towards the development of the three key elements of building an expert system: the knowledge base, the inference system and the user interface. Comparisons can then be drawn so that research question 3.1 can be answered, and so that recommendations can be provided to HMCTS on steps they can take to enhance the development and implementation of stage 1.

4.3.1 Stage 1 of the Online Solutions Court

In his Interim Report, Lord Briggs set out in detail how he viewed the purpose and structure of stage 1. Lord Briggs's report was endorsed by the Senior Judiciary in January 2017[81] and his vision was to be implemented as part of HM Courts and Tribunals Service's Court Reform Programme and, therefore, the proposal set out in the Interim Report remains the most authoritative source for how stage 1 is intended to look. Briggs referred to stage 1 as 'triage',[82] guiding a litigant through an analysis of their legal matters to enable them to produce a document, informed by basic legal principles, which could be sent to and understood by the court and the opponent.[83]

Therefore, it can be concluded from this that the overarching aim of stage 1 is identical to that of the Solution Explorer in British Columbia. The next key step is to identify exactly how it was envisaged that this objective would be achieved, and specifically

[81] Judiciary.uk, 'Civil Court Structure Review: Joint Statement from the Lord Chief Justice and the Master of the Rolls' (*judiciary.uk,* 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

[82] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 6.8, p76

[83] Ibid at 6.9

what steps a stage 1 user would have to go through in order to provide sufficient information to allow the system to conduct an analysis of their problem. This is best illustrated, particularly for comparative purposes, by reproducing the hypothetical scenario which Lord Briggs used to describe how stage 1 would work:

> Suppose that A has a dispute with her builder B relating to works carried out at her house. After entering the common Court Service Portal and selecting the OC as the appropriate court and after providing her name and contact details, A would be asked to identify the object of her grievance by reference to a series of tick boxes which might include her bank, her holiday company, her next-door neighbour and her builder. Having ticked 'Builder' the software would present new questions designed to elicit the essential nature of the dispute, for example whether it was about the quality of the work, the amount charged or delays in completion. Ticking (or clicking) the appropriate box would reveal further successive pages, including a page requiring A to identify B and provide his (or if a company, its) contact details, to state whether the building works were covered by an agreement and, if in writing, requiring A to attach any electronic copy, or scan or photograph with her smart phone any paper copy, so that the central document required by the court for determination of the dispute would be lodged electronically from the outset. Further automated pages would question A as to the details of the dispute, in much the same way as a high street solicitor might do when taking instructions after A sought his assistance.[84]

When this is compared directly with the description Salter gives of how the Solution Explorer could help the hypothetical court user Karin,[85] reproduced in chapter 3 of this thesis, the level of similarity is very clear. This vision of stage 1 also aligns with what Salter and Thompson described as an '…intelligent questionnaire style of interaction, using plain language questions and answers'[86] and it follows the same expert system model as that of the Solution Explorer, that '…the answer to the previous question determines the next one which the user is asked.[87] Therefore, the evidence suggests

[84] Ibid at para 6.8
[85] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol 113
[86] Ibid at 117
[87] Ibid

that stage 1 has both the same objective as the Solution Explorer and that its model is one of an identical expert system.

Finally, the system would generate something broadly approximating a particulars of claim once the user had answered the pathways questions. The user would then be able to approve or amend those particulars, with the approved version then being sent to the defendant along with any accompanying evidence.[88]

On the face of it, this seems to show a slight divergence from the report and letter generated by the Solution Explorer, however the key point here is to look at whether the same information is required to enable the system to produce the final document. When considered from this perspective, the system still needs to acquire the same information and use it for the same purposes, the first being to provide the user with bare advice on the legal principles relevant to their dispute (in the same way as the report generated by the Solution Explorer) and the second being to create a document to be sent to the other party setting out the nature of the issue (in the same way as the letter populated by the Solution Explorer).

By way of conclusion, stage 1 has the same overarching objective as the Solution Explorer, it is based on the same structure and can therefore be described as an identical expert system and, once the pathway questions have been answered by the user, both systems will use the information provided to generate documents which are used for an identical purpose. It therefore stands to reason that HMCTS ought to adopt an identical approach to developing stage 1 as the BC Ministry of Justice did in developing the Solution Explorer. Consideration must now be given to whether this is the case.

4.3.2 How are the inference engine and the user interface being developed by HMCTS?

As established earlier in this chapter, British Columbia navigated the complexities and challenges associated with building inference engines and user interfaces by purchasing off the shelf, ready-made platforms and software which was then

[88] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 8.5, p76

customised according to their needs. The rationale behind this approach is supported by Susskind, who stated that

> …one of the most compelling objections to the development and delivery of public online courts is precisely that the state needs to be involved in putting the systems in place. Governments around the world have a woeful track record of implementing technology projects. Case studies abound which tell of untold wastage, wanton incompetence, and scant supervision. We know that most major public IT projects fail. As a rule of thumb, technology professionals often say that only 15 – 20% of large public sector technology projects are successful, that is, on time, within budget, with systems that do what was wanted and was expected.[89]

In the same way as British Columbia, therefore, HMCTS were faced with a decision over whether to develop systems in-house or buy in existing systems for customisation. With regard to the inference engine, the UK Government had an existing contract with Microsoft Azure as part of the overall court reform programme, which was renewed in April 2021[90] for an additional three years. This is the platform on which all digital services provided by HMCTS will be based, and this therefore serves as the equivalent of the partnership between Salesforce and the BC Ministry of Justice.

With regard to the user interface, there is also evidence of HMCTS progressing with the engagement of external partners. During the period 2018 to date, contracts have been awarded by HMCTS to Solirius Consulting (digital change management).[91] PriceWaterhouseCoopers (court reform programme management consultancy),[92]

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[89] Richard Susskind, *'Online Courts and the Future of Justice'* (Oxford University Press, 2019) at 243

[90] Microsoft News Centre UK, 'UK Government signs new three-year Memorandum of Understanding with Microsoft' (*news.microsoft.com*, 21st April 2021)- <https://news.microsoft.com/en-gb/2021/04/21/uk-government-signs-new-three-year-memorandum-of-understanding-with-microsoft/> Accessed 23rd October 2021

[91] Her Majesty's Courts and Tribunal Reform Programme, 'HMCTS Civil, Family and Tribunal Services: QA, Architecture and Software Engineering Services (*digitalmarketplace.service.gov.uk*, 19th July 2021) <https://www.digitalmarketplace.service.gov.uk/digital-outcomes-and-specialists/opportunities/15260> Accessed 23rd October 2021

[92] Ministry of Justice, 'HMCTS spending over £25,000: 2018' (*gov.uk,* February 2019) <https://www.gov.uk/government/publications/hmcts-spending-over-25000-2018> Accessed 23rd October 2021

Kainos (digital transformation and cloud engineering)[93] and, most relevant to the Online Solutions Court, Version 1 Limited (responsible for the development of software facilitating 'end to end digital by default service for the civil money claims system).[94] Version 1 Limited therefore appear to be responsible for the development of the user interface for low value civil claims. The contract between HMCTS and Version 1 Limited commenced on 7th September 2021 and is due to run for two years until 6th September 2023.[95]

It is a little concerning that nowhere in the tender literature does HMCTS specify the Online Solutions Court, however given the scale of the reform programme's objectives this is perhaps unsurprising. From a positive perspective, evidence confirms that during 2021, the inference engine platform provider has been agreed and contracted by HMCTS, as well as the developer for the user interface. This suggests that the model followed by the British Columbia Ministry of Justice has also been adopted by HMCTS, and that steps have been taken towards this becoming a reality. Consideration must therefore now turn to the progress HMCTS has made in developing the knowledge base of the OSC.

4.3.3 What steps have been taken by HMCTS to build the knowledge base?

Very much aligned with the approach taken in British Columbia, Lord Briggs set out four stages of development for the knowledge base of the Online Solutions Court as follows:

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.

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[93] Kainos, 'Kainos' expertise in Azure helps HMCTS migrate and modernise' (*kainos.com*, 10th November 2020) <https://www.kainos.com/insights/news/kainos-expertise-in-azure-helps-hm-courts-tribunals-service-migrate-and-modernise> Accessed 24th October 2021

[94] Ministry of Justice, 'HMCTS CFT Programme Civil Agile Development Contract' (*hmcts.gov.uk*, 20th September 2021) <https://www.contractsfinder.service.gov.uk/Notice/4713a771-8491-4cca-9217-3adb43ee58d0> Accessed 24th October 2021

[95] Ibid

4. Coding the above into a digital format, to allow for rigorous testing.[96]

Clare Galloway, the Service Manager for the Civil Money Claims project within HMCTS further restated the commitment to following the British Columbian model of agile system development:

> To help us deliver the ambitious CMC vision by project closure we will be drawing on agile methodology. A key principle of agile methodology is to break the overall project down in to a series of manageable releases so that we can design, build and deliver iteratively …the new streamlined Civil Money Claims services will be delivered over a series of 10 releases with each new release delivering additional and improved functionality on those previous. This approach allows us to learn quickly and make continual improvements to ensure the service meets user needs.[97]

In the papers of their May 2017 meeting, the Civil Procedure Rules Committee set out their intended 3-year release plan for the Online Solutions 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

[96] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at para 6.62, p49
[97] Clare Galloway, 'Transforming Civil Justice – an update on the civil money claims procedure' (*insidehmcts.blog.gov.uk*, 30th June 2017) <https://insidehmcts.blog.gov.uk/2017/06/30/transforming-civil-justice-an-update-on-the-civil-money-claims-procedure/> Accessed 5th December 2020

- Release 11: Pre-issue (stage 0), costs, Infant settlement, etc.'[98]

As part of Release 1, the Online Civil Money Claims (OCMC) pilot[99] operated from 7 August 2017 and has now been extended to 30 November 2023[100] in the County Court. The purpose of the pilot is to test the online money claims process. It began on an invitation-only basis, with the criteria for participation being unrepresented claimants who would otherwise make their claim through the Money Claim Online website. From 6 April 2018, a beta version of Online Money Claims Pilot was made public[101] and since then has been used by court users to commence low value civil claims[102] against a single defendant in England and Wales.

Under the pilot, users are 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). Once the claim is issued online, the defendant is able to either respond online or on paper to the claim made. Amendments to PD 51R brought admissions, part admissions, part defences and defences where the claim had already been settled and payment made within the scope of the pilot.[103]

In June 2019,[104] Sir Terence Etherton advised that the Online Civil Money Claims pilot would be expanded further, with online Directions Questionnaires, the embedding of an opt-out mediation scheme, case management directions being issued by legal advisors as opposed to judges, uploading of evidence and online determination of claims with a value of less than £300. Some of these proposals were brought into force

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[98] 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

[99] 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

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

[101] https://www.gov.uk/government/news/quicker-way-to-resolve-claim-disputes-launched-online

[102] Part 7 CPR

[103] 103rd CPR Update

[104] Sir Terence Etherton, 'Rule-making for a digital court process' (Courts and Tribunals Judiciary, 27 June 2019) <https://www.judiciary.uk/announcements/speech-by-sir-terence-etherton-master-of-the-rolls-rule-making-for-a-digital-court-process> Accessed 5th February 2020

under the 111th CPR update which introduced online Directions Questionnaires and a presumption of mediation for certain defended claims as part of an 'opt out' online process. This means that, unless parties decide to 'opt- out 'of mediation, the case will proceed to mediation, and the court will refer the matter to the Small Claims Mediation Service if appropriate. The 111th update also enabled HMCTS legal advisors to issue directions in claims where the amount claimed is £300 or less. Further discussion of this will be included in chapter 5.

The scheme was expanded further with the 114th Practice Direction update giving judges the power to consider the online Directions Questionnaires and give appropriate online directions in claims worth between £300.01 and £1,000. These powers were further extended as part of the 119th Practice Direction update, which applies to all claims submitted to the court on or after 11.00 am on 14 April 2020 and allowed judges within the OCMC to consider the online Directions Questionnaire and to make directions online irrespective of the value of the claim.

The main issue from the perspective of developing stage 1, is that none of these steps do anything other than digitise existing processes, save for perhaps the development of the legal advisor role. The pilot is essentially a digital replication of the existing claims system and was the equivalent of the 'blank screen' approach which Lord Briggs warned against in 2016.[105] In press releases, HMCTS have referred to decision trees being developed[106] in conjunction with members of the Judiciary however have provided no detail on how this is progressing. It was set out in the Civil Procedure Rule Committee pages[107] that all 11 Releases were to be complete over the three years which followed their meeting in May 2017. Indeed, just prior to the release of the Civil Money Claims Pilot, Claire Galloway reiterated HMCTS's commitment to the OSC, stating that '…this upcoming pilot is not intended to deliver the 'online court' in its entirety; that will take some time. Rather, this is the exciting first step in our journey

[105] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016)
[106] Gov.uk, 'HMCTS Reform Programme: Online Civil Money Claims and Civil Enforcement (*gov.uk,* 11th March 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
[107] 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

that will eventually deliver a new and improved Civil Money Claims service.'[108] However, despite this, there is no evidence that HMCTS have progressed beyond simply piloting whether the existing process placed on a digital platform is achievable.

There has been considerable frustration at the lack of information released by HMCTS on the court reform programme overall. In September 2017, the then HMCTS Chief Executive Susan Acland-Hood apologised on the HMCTS blog for poor communication and insufficient 'listening'. She stated that '…we have not talked widely enough yet about our reform plans; but more importantly, I don't think we've listened enough, or given enough ways for people who care about the system and how it works to help shape its improvement. I'd like to change that; … So, to begin with, I propose to write a set of blogs that outline what we need to do, what we've done so far, what our plans are, and how to get involved in shaping HMCTS's reforms for the future.'[109] This has indeed happened, with the Inside HMCTS posting on a regular basis with updates on the reform programme. However, concerningly for the progress made in developing stage 1, there has been no mention of this since 2017.

Thompson highlighted the complex level of detail involved in the development of the knowledge base for the CRT, setting up an expert knowledge gathering workshop, modelling expert knowledge in a decision tree structure through mind mapping software and entering the subject knowledge into the knowledge base in a rule-based format.[110] As Kerr described, this was translated pragmatically by the CRT designers into the content creation, review and approval, extract inform and load and user testing stages.[111] In England and Wales, there has been no further information released concerning even the recruitment of subject matter experts. This suggests that the time and investment involved in developing the knowledge base has, at best, been badly underestimated.

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[108]Clare Galloway, 'Transforming Civil Justice – an update on the civil money claims procedure' (*insidehmcts.blog.gov.uk*, 30th June 2017) <https://insidehmcts.blog.gov.uk/2017/06/30/transforming-civil-justice-an-update-on-the-civil-money-claims-procedure/> Accessed 5th December 2020

[109] Clare Galloway, 'Transforming Civil Justice – an update on the civil money claims procedure' (*insidehmcts.blog.gov.uk*, 30th June 2017) <https://insidehmcts.blog.gov.uk/2017/06/30/transforming-civil-justice-an-update-on-the-civil-money-claims-procedure/> Accessed 5th December 2020

[110] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2

[111] Lauryn Kerr, 'AI, Expert Systems and the Justice System' (20th June 2017) <https://www.youtube.com/watch?v=g2MFbnx1QXY> Accessed 5th September 2021

It is clear that HMCTS are still intending on the digitisation of the civil claims process being complete by September 2023, as evidenced by the end date of the contract signed with Version 1 Limited,[112] however if this is to match the model of the Solution Explorer as clearly intended, understanding and adoption of the same process followed in British Columbia must be carried out. As Sorabji opines, all that has really been achieved to date in as part of the reform programme relating to low value civil claims is the creation of 'an online, digital, procedural case track in the County Court, with the general expansion of e-filing, e-case and document management. The basic hierarchical model operative since the 1870s has thus, until now, remained in place'.[113]

It is submitted that this represents a clear risk to the development and implementation of stage 1, further proving the second part of the hypothesis of this thesis. The evidence here shows that insufficient investment of both time and money is currently being provided by government to develop and implement stage 1, with the structure and development of the Online Civil Money Claims Pilot adding to the concern that the Online Solutions Court will largely become a digitised version of the County Court procedure which exists presently as that is the cheapest and easiest version of online dispute resolution to achieve for low value civil claims.

This contention is supported further when the HMCTS court reform programme is examined more generally. 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 Solutions Court, by 2020.[114] 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 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

[112] Ministry of Justice, 'HMCTS CFT Programme Civil Agile Development Contract' (*hmcts.gov.uk*, 20th September 2021) <https://www.contractsfinder.service.gov.uk/Notice/4713a771-8491-4cca-9217-3adb43ee58d0> Accessed 24th October 2021

[113] J. Sorabji, 'Initial Reflections on the Potential Effects of the Covid-19 Pandemic on Courts and Judiciary of England and Wales.' (2021) 12(2) International Journal for Court Administration 6

[114] Ministry of Justice, 'Transforming Our Justice System' (*gov.uk,* 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

courts. The additional delay was to allow time to "reorder aspects of the programme[115]" although the press release was non-specific about which aspects this related to.[116]

The initial National Audit Office report details the implementation stages for the reforms,[117] separating them out into three interim stages between 2016 and 2020, with an 'end state' 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."[118] 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,[119] most recently updated on 4th June 2019. Reform of the civil claims process was mentioned more generally[120] however stage 1 was not specified. This therefore supports the conclusions drawn from the evidence already presented as part of this chapter: that no progress has yet been made by HMCTS in developing the knowledge base for the OSC.

4.4 Conclusion

The purpose of this chapter was to achieve two things. The first purpose was to test the first part of the thesis hypothesis in relation to stage 1 and establish whether Lord Briggs conducted a comparative analysis on (a) how the Solution Explorer was developed and embedded into the British Columbian civil justice system and (b) how the Solution Explorer could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be

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

[116] HM Courts and Tribunals Service, 'Reform Update Summer 2019' (*gov.uk* 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

[117] 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

[118] Ibid at p25

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

[120] 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

adopted to enhance the performance of the OSC for court users in England and Wales. The second purpose of the chapter was to test the second part of the thesis hypothesis in relation to stage 1: that insufficient investment of both time and money in the foundations of stage 1 is being provided by government, leading to risk that the Online Solutions Court will largely become a digitised version of the current County Court procedure. It is submitted that the research presented in this chapter has achieved both of these objectives.

The first part of this chapter outlined the version of stage 1 which exists as part of the CRT, the Solution Explorer. Analysis was then carried out on the steps which were taken by the Civil Resolution Tribunal and the British Columbia Ministry of Justice in building and developing the Solution Explorer. This has enabled a series of key steps to be identified in the development and use of an automated legal diagnostic system for low value small claims.

The first conclusion to be drawn from this chapter is that stage 1 of the Online Solutions Court and the Solution Explorer are identical in nature. They are designed to serve the same purpose, for the same types of court users, with the same structure. It is therefore posited that this is strong justification for the same development model being adopted in England and Wales.

In British Columbia, the evidence illustrates that a structured approach was taken to building the Solution Explorer, underpinned by a recognition of the limitations of an approach whereby every aspect was developed in-house and the execution of a theoretical methodology. Out of the three stages of the creation of an expert system, the two which required complex technological and software design techniques were contracted out to Salesforce and PriceWaterhouseCoopers respectively. This enabled the central team within the BC Ministry of Justice responsible for the development of the Solution Explorer to concentrate on building the knowledge base using the methodology designed by Darin Thompson and his team. Those steps involved the organisation of an expert knowledge gathering workshop, modelling expert knowledge

in a decision tree structure through mind mapping software and entering the subject knowledge into the knowledge base in a rule-based format.[121]

The evidence demonstrates that this requires the involvement of multiple legal parties, the skills of technicians who understand how an expert system interacts with both the information which is fed into it and its primary user and, finally, many layers of testing and refinement. Outside of the idea which formed the foundation for Lord Briggs's proposal for stage 1, none of this was included in either the Interim or Final Reports save for a brief mention of the challenges associated with knowledge engineering. It is therefore submitted that this chapter has built on the foundations laid by Lord Briggs for stage 1 and that the research presented can enhance the blueprint of the procedure which ought to be followed by those with responsibility for reforming this core area of low value small claim process.

The second part of this chapter explored the steps which have been taken by HMCTS in England and Wales to build the foundations of stage 1 as part of their court reform programme to date. The purpose of this was to test the second part of the thesis hypothesis in relation to stage 1. In England and Wales, there is evidence that progress in contracting third-party commercial organisations to create both the inference engine and the user interface of the knowledge-based system has been made. It is stated in the terms of the tender that part of Version 1 Limited's remit is to develop software services to facilitate the end to end digital by default for the civil money claims system:[122] the Online Solutions Court clearly falls underneath within this remit. It is concerning is that there is no evidence to suggest that HMCTS have taken meaningful steps to develop the knowledge base, which is the core of the operation of stage 1. No evidence exists that even the first stage of Thompson's methodological model has been considered, and it is posited by this thesis that this suggests that the time and investment involved in developing the knowledge base has, at best, been badly underestimated. This is further supported by the structure and shape of the Online Money Claims Pilot, which aside from integrating and developing the role of the

[121] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2

[122] Ministry of Justice, 'HMCTS CFT Programme Civil Agile Development Contract' (*hmcts.gov.uk*, 20th September 2021) <https://www.contractsfinder.service.gov.uk/Notice/4713a771-8491-4cca-9217-3adb43ee58d0> Accessed 24th October 2021

legal advisor in issuing directions at no point alters the process involved in issuing or managing a low value claim: it is a mere digitisation of the existing procedure.

The research in this chapter has, undoubtedly, given some cause for concern. Particularly in light of the conclusions which were drawn from chapter 2 of this thesis demonstrating that reform of the civil justice system in England and Wales remains primarily driven by the agendas of cost-saving and efficiency as opposed to furthering the interests and access to justice of court users as well as the ongoing cost of maintaining and funding the CRT,[123] it is reasonable to have heightened concerns surrounding the proper execution of stage 1. That said, even if the efficiency agenda is isolated, the evidence from the CRT shows that an effective stage 1 is likely to have a measurable impact on the numbers of cases which require further intervention after parties have used it. Over a four-year period, an average of 82.1% of enquiries through the Solution Explorer do not progress to being issued. Whilst more granular detail about why is unavailable, it is not unreasonable to assume that, at least in part, this is down to parties with weak claims or who have claims with no justifiable legal basis being diverted away from formal resolution processes due to the intervention of the Solution Explorer. When viewing this from the perspective of efficiency, if such a success rate were to be extrapolated to stage 1 in England and Wales, this would make a marked difference in the numbers of potentially ill-founded claims being issued, saving a significant amount of resource.

It is fair to comment that British Columbia were not engaged in a process which sought to reform the *whole* justice system at the same time as developing the CRT. The building of the Civil Resolution Tribunal was an individual project focused on, initially, strata disputes and moving on to resolution of small claims issues. In England and Wales, the Online Solutions Court forms part of a fundamental shift to digitising procedure in the criminal courts, as well as probate and family matters.[124] The scale of this project is huge and, given the priority which has already been given to ensuring that the criminal justice system is adequately served by the court reform programme, it is important that the Online Solutions Court does not get lost in the mix. To repeat

[123] See chapter 2 of this research
[124] Judiciary.uk, 'Civil Court Structure Review: Joint Statement from the Lord Chief Justice and the Master of the Rolls' (*judiciary.uk,* 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

Tyler's and Prince's assertions, '…the courts depend on public co-operation for their legitimacy and effectiveness[125] and, as public entities, must be designed to contain the legitimacy of the court building'.[126]

Finally, when the CRT was first launched and indeed for the first 11 months of its operation,[127] it was trialled as an optional form of dispute resolution for the cases which fell within its jurisdiction; parties still had the choice to pursue their matter through the small claims process if they so wished. England and Wales will not have this luxury. It was the intention that the Online Solutions Court would become the replacement for the small claims process within the County Court and that it will therefore become the only mode of dispute resolution for low value civil claims which fall within its jurisdiction upon its launch.[128] It is arguable therefore that the stakes are much higher for this project than they were for British Columbia and it is therefore submitted that the findings and conclusions of this chapter are acted upon urgently.

[125] T.R. Tyler, 'Procedural justice, legitimacy and the effective rule of law.' (2013). 30 Crime and Justice 283

[126] Sue Prince, 'Encouragement of mediation in England and Wales has been futile: is there now a role for online dispute resolution in settling low-value claims?' (2020) 16 International Journal of Law in Context 181

[127] Between launch on 1st July 2016 to 1st June 2017

[128] Further evidenced by the extensive reductions in the court estate and front-line staff

Chapter 5

Stage 2: Embedding Consensual Dispute Resolution into Low Value Civil Justice

5.1 Introduction

The purpose of this chapter is to primarily test the first part of the thesis hypothesis in relation to stage 2 and establish whether Lord Briggs conducted a comparative analysis on (a) how the phases 2 and 3 of the Civil Resolution Tribunal were developed and embedded into the British Columbian civil justice system and (b) how the consensual dispute resolution stages of the CRT could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales. There are also areas of this chapter which pertain to testing the second part of the thesis hypothesis in relation to stage 2: that insufficient investment of both time and money in stage 2 is being provided by government, leading to risk that the Online Solutions Court will largely become a digitised version of the current County Court procedure.

This chapter will address the themes of research question 3 which focus on the role of consensual dispute resolution methods within the proposed Online Solutions Court (OSC) for England and Wales and the Civil Resolution Tribunal (CRT) in British Columbia and also deals with whether there should be a separate set of rules developed specifically for the OSC. Up to this point, whilst there has been considerable scholarship commenting upon the relationship between alternative methods of dispute resolution and the current civil claims procedure more generally,[1] there is a paucity of research on how ADR can best be used and integrated into low value civil claims. There is also a notable lack of academic discussion and analysis on the debate over whether a new set of rules to regulate the OSC ought to be developed.

[1] See, for example, B. Billingsley and M. Ahmed, 'Evolution, Revolution and Culture Shift: A critical analysis of compulsory ADR in England and Canada' (2016) 45(2) Common Law World Review 186–213. J. MacFarlane and M. Keet, 'Civil justice reform and mandatory civil mediation in Saskatchewan: Lessons from a maturing program.' (2005) 42(3) Alberta Law Review 677 and S. Prince Mandatory mediation: The Ontario experience. (2007) 26 Civil Justice Quarterly 79–95

As discussed at length in chapter two, reformers across both comparator jurisdictions have called for a 'culture change' in their respective civil justice resolution procedures, away from the historical singular road towards adversarial trial towards a more consensual and party-led negotiated settlement process. The Briggs reports called for this to be achieved by formally embedding ADR into the civil justice system however, it is submitted, did not analyse how this could be achieved.

This chapter will therefore begin by considering how it is proposed that what historically have been referred to as alternative methods of dispute resolution are to be embedded into the formal dispute resolution framework for low value disputes in England and Wales, followed by a discussion on the current place of ADR in the English civil justice system. This will necessarily cover the relationship between ADR and the Civil Procedure Rules, the evolution of government policy and judicial positions concerning ADR and finally an assessment of whether England and Wales could be ready to accept the formal adoption of consensual methods of dispute resolution to assist litigants with resolving low value civil claims.

The same will then be considered in relation to Canada and British Columbia, with an initial assessment of where ADR fits into the Civil Resolution Tribunal model, followed by a contextual analysis of the relationship between the procedural rules and ADR, government policy in relation to ADR and judicial approaches to ADR prior to the launch of the CRT. This will allow for a comprehensive analysis on whether the key stakeholders in civil justice reform in England and Wales find themselves in a similar position to those in British Columbia in relation to accepting the formal adoption of methods of ADR into the low value civil claim resolution process. This will then enable conclusions to be drawn which respond directly to research questions 3.1 and 3.2.

5.2 England and Wales

This section of the chapter explores how the relationship between engagement with methods of dispute resolution outside that of a traditional trial and the various stakeholders in civil justice reform has evolved in England and Wales.

It is necessary to make a point relating to terminology at this point. Up to this stage, forms of consensual dispute resolution not involving trial have been referred to as

alternative methods of dispute resolution, or ADR. However, as Lord Briggs pointed out in his Interim Report, this should now be a term of historical use only.[2] He argued that the word 'alternative' only served to create the impression that settlement achieved by ADR was a version of 'second rate justice' in some way, and that continued use of the term would mean that it was always viewed as such[3].. With this in mind, and for the purposes of still being able to distinguish methods of ADR from adversarial adjudicative dispute resolution, reference will be made from this point to CDR, or consensual dispute resolution, aside from where the term ADR is used as part of a quotation.

To begin this section, consideration will be given to where Lord Briggs envisaged CDR would fit within his proposed Online Solutions Court for low value civil claims.

5.2.1 How is it proposed that CDR fits into the Online Solutions Court in England and Wales?

The focus of this section will be on stage 2 of the Online Solutions Court: the facilitation stage. This segment will provide a more detailed outline of how Lord Briggs envisaged methods of CDR to be embedded within the Online Solutions Court, with detailed consideration of whether parties would be required to engage in those methods and the role and remit of the human facilitators, referred to as case officers, in the process.

In his Interim Report, Lord Briggs set out the purpose of stage 2 of the Online Solutions Court:

> Stage 2 of the OC process is mainly directed to making conciliation a culturally normal part of the civil court process rather than, as it is at present, a purely optional and extraneous process, encapsulated in the 'alternative' part of the acronym ADR. By that I do not mean that it should be made compulsory. Rather it would build upon the current Small Claims Mediation Service by inviting the parties to engage in an appropriate form of conciliation, albeit respecting the refusal of one or more of them to do so.[4]

[2] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015), para 6.13
[3] Ibid
[4] Ibid

This segment frames the key debates and challenges surrounding the incorporation of CDR into the formal justice system, but it also gives an insight into what the creation of stage 2 is ultimately trying to achieve: the cultural normalisation of consensual settlement. By stage two, parties have already had the computerised knowledge engineered report and bare legal advice proposed to exist as part of stage one. They have been furnished with information on how they could settle their dispute without the intervention of the OSC and have been given the chance to negotiate directly with the party with whom they have a dispute. Stage two will come into play where the parties have not been able to resolve matters satisfactorily. It involves a greater level of intervention by members of the OSC, known as case officers: court employees who conduct an analysis of the legal basis of a claim and make decisions as to the most appropriate form of conciliation, or indeed adjudication, for those cases.[5]

This is based heavily on the facilitator roles described in both the JUSTICE[6] and the Civil Justice Council's[7] reports discussed in chapter 2. It is also very similar in nature to the 'screening clark' [sic] which was originally put forward by Sander[8] in his proposal for a 'multi-door courthouse' in the 70s which, again, was briefly discussed in chapter 2. In many ways, this is the underpinning model on which the OSC is based: a forced shift in structural and procedural design of the court system towards a case being managed towards resolution as opposed to trial.[9] The definition of the role of the case officer is essential to ensure the effective implementation of this key procedural and cultural shift.

In the Interim Report, Lord Briggs gave detailed consideration as to whether the case officer should conduct an early neutral evaluation of the claim in the same way as adjudicators in the Financial Ombudsman Service or undertake a facilitator mediator role akin to that of a small claims' mediator in the County Court. He recognised that training would need to be different for case officers depending on the type of role they

[5] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016), para 7.32 (d)
[6] Justice, Delivering Justice in an Age of Austerity – A Report (2015) < https://files.justice.org.uk/wp-content/uploads/2015/04/06172133/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf> Accessed 10th March 2021
[7] Civil Justice Council, 'Online Dispute Resolution for Low Value Civil Claims' (February 2015)
[8] Frank E.A. Sander, 'Varieties of Dispute Processing' (National Conference on the Causes of Dissatisfaction with the Administration of Justice, 7th – 9th April 1976), reprinted in Sander, 'Varieties of Dispute Processing', (1976) 70 F.R.D. 111
[9] For a fuller discussion about this, see J. Sorabji, 'The Online Solutions Court: A Multi-Door Courthouse for the 21st Century' (2017) 36(1) CJQ 51

were to assume in the process. He concluded that, at least initially, the CDR element of the role should be confined to conducting telephone mediations alone, with powers to carry out limited case management if a dispute did not settle consensually at this point.[10] However, there were questions on whether this went far enough. The JUSTICE report set out how they viewed the role of what they called 'primary dispute resolution officers', or registrars. They stated that:

> Using an investigative or proactive approach, the registrar will identify the relevant issues, the applicable law, the appropriate procedure and the evidence needed to resolve the case. Based on this proactive case management, the registrar can:
>
> a. Strike out a statement of case where appropriate.
>
> b. Undertake an early neutral evaluation (ENE).
>
> c. Undertake mediation; or
>
> d. Refer the case to a judge where no other resolution is likely to be effective or appropriate.[11]

Additionally, the Civil Justice Council Online Dispute Resolution Advisory Group responded to Briggs's initial proposal for the role of case officer by saying that it needed to be drafted more widely, allowing the role to encompass negotiation and even 'gently knocking heads together' rather than being limited to just conducting mediation or early neutral evaluation.[12]

By the Final Report, Lord Briggs had altered his position. He acknowledged that stage two had to play a bigger role in the resolution of disputes, which went beyond that currently adopted by small claims mediators in the County Court.[13] The purpose of the case officer would therefore be to consider the claim, narrow the issues between the parties, review the evidence presented, facilitate a mediated settlement where

[10] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at 77 and 80-82
[11] Justice, Delivering Justice in an Age of Austerity – A Report (2015) < https://files.justice.org.uk/wp-content/uploads/2015/04/06172133/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf> Accessed 10th March 2021 at page 17, paras 2.22 and 2.23
[12] Civil Justice Council, Online Dispute Resolution Advisory Group letter to Lord Briggs dated 31st March 2016 (https://www.judiciary.uk/wp-content/uploads/2016/04/cjc-odr-advisory-group-response-to-lj-briggs-report.pdf) Accessed 18th November 2021 at p. 5, para 13.
[13] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at paras 7.1 – 7.3

possible and, if unsuccessful, decide on a further appropriate method of CDR for its resolution.

Lord Briggs also confirmed that, given the widened nature of the remit, case officers would have to be trained lawyers and that although they would be employed by HMCTS, they 'should be independent of government and subject to a system of authorisation, direction and supervision that resides ultimately with the Lord Chief Justice (for the civil courts) rather than the Lord Chancellor. This welcome development should give confidence to court users that the procedural and case management decisions of Case Officers will be conducted independently of government policies and, in particular, financial objectives so that, for example, decisions by Case Officers in the Online Court about the appropriate mode of resolution of cases which cannot be settled will be uninfluenced by any undue pressure to choose the mode which is least burdensome upon resources.[14]

This evolution of the role of case officer was a significant development and went beyond the simple replication of an existing role within the Court Service. As Sorabji opines, Briggs's approach here confirmed that '…it is apparent that the proposed O[S]C can properly be understood as a modern variant of Sander's multi-door courthouse. It replicates Sander's under-developed appreciation that there should be an increased focus on preventive law by incorporating dispute prevention methods into the court's process'.[15]

However, Lord Briggs was clear to point out that parties engaging in CDR would need to do so voluntarily. Stage 2 was not designed to compel parties to take part in CDR, it was designed to present parties with the *option* to engage in it, with the case officer able to facilitate this if both parties agreed. This would be based on the same principles as the automatic referral to the Small Claims Mediation Service, which is discussed in greater detail below. That said, it is clear that Briggs's hope of framing the role of the case officer in such a way was that parties would agree to engage in CDR as a normally accepted part of the process as opposed to refusing on the basis that they felt as if they were being directed to a third-party service outside the purview of the

[14] Ibid at 7.2
[15] J. Sorabji, 'The Online Solutions Court: A Multi-Door Courthouse for the 21st Century' (2017) 36(1) CJQ 51

courts.[16] This is what Sorabji discusses at length: that the OSC is a genuine multi-option courthouse as it brings a variety of forms of dispute resolution under the court's control, with parties being directed towards the one, including adjudication, which is assessed as being most suitable for their matter. The stage which facilitates this is stage 2.

Having now considered that the purpose and structure of stage 2 of the OSC is designed to embed CDR to make conciliation 'culturally normal', it is now necessary to explore the current place of CDR in the civil justice system. This is with a view to assessing the extent to which CDR is currently viewed culturally in England and Wales as a genuine alternative to trial for resolving low value disputes.

5.2.2 What is the current place of CDR in the Civil Justice System of England and Wales?

As part of his Interim Report, Lord Briggs described the development of CDR within the context of civil justice in England and Wales as "semi-detached". [17] Whilst the civil courts encourage parties to settle their disputes by an appropriate form of ADR through ordering a short stay of proceedings or penalising those who fail to engage with a proposal of ADR from their opponents with costs sanctions, the civil courts have declined to go beyond this and to make any form of ADR compulsory.

This summarises the current position well. However, given that the OSC does seek to make the civil courts primary providers of methods of CDR, and that case officers will be actively seeking to manage a case towards resolution rather than trial, making recommendations on how to enhance that transition will require an exploration of exactly how the relationship between the civil justice system and forms of CDR has developed and evolved.

The starting point of this section is therefore to consider how CDR, specifically mediation as the dominant form referred to in English civil justice, is dealt with in the CPR. This will be followed by an analysis of the court-annexed mediation schemes which were funded by the Department of Constitutional Affairs in the 1990s and early

[16] Lord Briggs refers to the concern that the OSC will provide 'Second Class Justice' in his Final Report, Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at 37
[17] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) para 2.86 at 28

2000s, to include the Automatic Referral to Mediation scheme and the introduction of the Small Claims Mediation Service. Brief consideration will then be given to how the judiciary have used their case management powers to support the use of CDR in cases, followed by a summary of the government's position on CDR. The evidence presented will give an indication of the extent to which CDR is already an accepted part of the civil justice system in England and Wales, albeit currently an adjunct to rather than a formally embedded part of it. This will in turn inform recommendations on how any identified gaps can be bridged to enhance the development and implementation of stage 2 of the OSC.

5.2.2.1 Consensual Dispute Resolution and the CPR

Prior to the implementation of the CPR in 1999, CDR and the civil justice system were completely detached from each other, to paraphrase Lord Briggs's description above. It was only after the CPR were introduced that their journey to becoming 'semi-detached' began, primarily through a series of rules built into the CPR encouraging litigating parties to actively pursue methods of CDR and requiring the court to facilitate it where appropriate. As discussed in chapter 2, the overriding objective is the cornerstone of the procedural code. Included in this at rule 1.4(1) is the requirement for the court to actively manage cases, with rule 1.4(2) clarifying this to mean that case management includes encouraging and facilitating parties' efforts to settle a dispute.[18] Rule 3.1 (2) (m) goes slightly further, allowing the court to 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case'.[19] This is interesting, as it expressly affords the court permission to order an ENE, something which will be considered in greater detail when the evolution of the judicial position on CDR is dealt with later in this chapter.

Further, CPR 26.4 allows for parties to request a stay, or pause, in proceedings to allow for settlement efforts to take place. This power extends to the court being able to unilaterally order a stay to allow parties to attempt some form of CDR. Interlinked with this, at case management stage, parties are required to complete a directions

[18] CPR 1.4 1(1) and (2)
[19] CPR r3.1(2)(m)

questionnaire. For small claims, the opening section is devoted to encouraging parties to take advantage of the free Small Claims Telephone Mediation Service and highlighting that, under the CPR, parties should make every effort to settle their case without going to court.[20] For fast track and multi-track claims, parties are asked whether they would like a one month stay to attempt settlement and, if not, they are asked to justify this.[21] Finally, CPR 44 gives the court the power to impose costs sanctions on a party who has unreasonably refused to take steps to settle their dispute, even those who subsequently are successful at trial. Therefore, achieving settlement outside of court adjudication is an express objective of the CPR and, as a result, CDR has formed some part of the civil justice landscape since 1999. Although the express motivation for its inclusion at the time was to reduce costs and to further the efficiency and cost-saving agenda, driven by the expectation that more cases settling earlier would reduce the cost of running the court service,[22] this shows that the move to formally embed CDR into the OSC is not necessarily being made from a standing start.

5.2.2.2 Mediation Schemes

Alongside the shift towards ADR in the new procedural code, individual courts proposed and received funding to set up court-annexed voluntary mediation schemes. This section outlines those schemes and brings together the evaluative data which was gathered by those who were responsible for running them. Whilst there is broad discussion of the schemes in existing academic literature,[23] this is brief and therefore focus will be on the policy documents and reports which accompanied and followed the schemes.

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[20] HMCTS Form N180 Section A found here: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954476/n180-eng.pdf> Accessed 14th December 2021

[21] HMCTS Form N181 Section A <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953456/n181-eng.pdf> Accessed 14th December 2021

[22] See Simon Roberts, "'Listing Concentrates the Mind': The English Civil Court as an Arena for Structured Negotiation" (2009) Oxford J. of Legal Studies 1, Colleen M. Hanycz, More access to less justice: efficiency, proportionality and costs in Canadian civil justice reform (2008) 27 C.J.Q. 98 at 121 and also chapter 2 of this research

[23] See, for example, A. Brady, 'Court-Annexed Mediation' (2006) 72 (2) The International Journal of Arbitration, Mediation and Dispute Management 141

In 1996, the Court of Appeal established a voluntary ADR scheme, and the Central London County Court implemented a voluntary mediation pilot scheme. Exeter, Bristol, Birmingham, Manchester, Guildford and Reading followed, with each creating a different structure for their own individual court-annexed mediation schemes. The then Department for Constitutional Affairs,[24] provided limited funding to support schemes which had been created and run based on the good will of mediators to that point, for example the Exeter Small Claims Mediation Scheme, which had run for one year before DCA funding was provided, increasing its shelf life until 2005. As well as this, and perhaps most interestingly, funding was provided to study how effective those schemes were. Evaluations were carried out by academics and reported to the DCA. On account of each of the schemes being set up differently (a deliberate part of the experiment), there is little to be gained from directly comparing the data gathered, however the information contained in the evaluations, and the interviews and involvement of participants, is very relevant to evaluation of mediation.

Hazel Genn's study of the Central London County Court Mediation Pilot, set up in 1996, is particularly valuable when considering the motivation of parties to not just take part in the scheme, but also settle their disputes. Genn discovered[25] that for the majority of parties, their motivation came from wishing to avoid the high cost, delays and uncertainty of proceeding to a full trial, rather than a genuine desire to mediate. This was supported by Sue Prince, in her study of the Exeter Small Claims Mediation Pilot, where she said that this attitude was reinforced by the mediators themselves*;* 'Parties are generally encouraged to settle by concentrating upon the benefits that will accrue to them through bargaining and ultimately resolving their case'.[26] This therefore supports, in many ways, the suggestion that Woolf's firm encouragement towards ADR was a tacit acceptance of the likely failures of the CPR in terms of reducing costs to the user. If costs had reduced to the point where all litigants had the ability to afford access to court adjudication, then the incentive presented to litigants to settle through mediation would not have been so heavily based on the financial advantages of not

[24] Previously the Lord Chancellor's Department, now the Ministry of Justice

[25] Hazel Genn, 'The Central London County Court Pilot Mediation Scheme Evaluation Report' (Department for Constitutional Affairs 1998) at 155.<https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/central_london_county_court_mediation_scheme.pdf> Accessed 3rd April 2021

[26] Sue Prince, 'Institutionalising Mediation? An Evaluation of the Small Claims Mediation Pilot' (2007) 5 Web Journal of. Current Legal Issues 1

using the court system. The incentives would have been more heavily focused on the benefits to overall wellbeing, of creativity of settlement and of swifter termination of the dispute.

Genn also discovered that what participants actually wanted was a quick and easy adjudication of their dispute, as opposed to a negotiation. This cautious view of mediation by litigants is borne out by the low numbers of voluntary participants who took part in that particular scheme; 'During the period of the research [May 1996 and March 1998], over 4,500 offers of mediation were dispatched by the court, but only 160 cases were mediated'.[27] Again, this is supported by the qualitative data available from other schemes, such as Birmingham; '…the cases that have been stayed for mediation are a relatively small proportion of cases that were allocated in the Birmingham CJC during this period. A total of 2,742 cases were allocated in the 34 months between January 2002 and October 2004 meaning that the 331 cases stayed for mediation (most of which were prior to allocation) represent approximately 11% of similar cases in Birmingham at that time'.[28]

The lessons which were emerging on the extent to which litigants were keen to adopt this relatively new method of dispute resolution were that, despite the high costs of adversarial litigation, there was a distinct lack of appetite to do it any other way without a heavier level of encouragement, at least at the time it was introduced. This is, of course, particularly relevant to the OSC which has been designed as a low cost and simple system for resolving low value disputes without the need for a lawyer. The results from these studies suggest that, if the incentive of avoiding long delays and high costs is taken away from parties in dispute, there will need to be a mechanism built in to the rules which govern the OSC to ensure that parties engage with the case officers at stage 2.

[27] Hazel Genn, 'The Central London County Court Pilot Mediation Scheme Evaluation Report' (Department for Constitutional Affairs 1998) at 155.<https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/central_london_county_court_mediation_scheme.pdf> Accessed 3rd April 2021 at p147, para 7.1.1

[28] L. Webley, P Abrams and S. Bacquet 'Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme' (Department for Constitutional Affairs 2006) at p40. Accessed 15th March 2021

5.2.2.3 Automatic Referral to Mediation

By 2004, the CPR had been in place for five years and, on mediation and CDR, for the first time there was at least some empirical data from which to draw conclusions on key areas such as engagement, motivation and user satisfaction with the CPR's focus on consensual settlement as opposed to court-based adjudication. The results of this data established that the uptake of voluntary participation in mediation schemes was low (typically from 5% to 11%) across a variety of different areas of legal dispute. It was also clear that this voluntary uptake was not increasing.[29] The judiciary's reaction to this will be explored in further detail in the next section, as this provides some important context to the reaction across the civil justice system to the low levels of interest by litigants in undertaking mediation voluntarily, however there was also an increasing number of supporters in favour of the trialling of a compulsory mediation scheme. This was not without its justification; mandatory mediation for non-family civil case managed cases had been introduced in the Canadian province of Ontario in 1999, with an evaluative study in 2001 concluding that its introduction through Rule 24.1[30] had led to considerable reduction in cost, time taken to settle disputes and overall consumer satisfaction. Over the life of the study, some 40% of mediations were successful in bringing cases to a conclusion. In addition, as Genn states, the theory was that '…compulsion would rapidly expose a large number of people to the positive experience of mediation, thus leading to the kind of 'take-off' that had to date been elusive'.[31]

In March 2004 the Automatic Referral to Mediation scheme was introduced at the Central London County Court. This ran for one year and operated by randomly

[29] See Hazel Genn, 'The Central London County Court Pilot Mediation Scheme Evaluation Report' (Department for Constitutional Affairs 1998) at 155.<https://www.ucl.ac.uk/judicial-institute/sites/judicial-institute/files/central_london_county_court_mediation_scheme.pdf> Accessed 3rd April 2021, Sue Prince, 'Institutionalising Mediation? An Evaluation of the Small Claims Mediation Pilot' (2007) 5 Web Journal of. Current Legal Issues 1.at p9 and L. Webley, P Abrams and S. Bacquet 'Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme' (Department for Constitutional Affairs 2006) at p40

[30] Robert G. Hann, Carl Baar, Lee Axon, Susan Binnie and Fred Zemans, 'Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) 'Executive Summary and Recommendations' (2001) https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1142&context=faculty_books Accessed 16th March 2021

[31] H. Genn and others, 'Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure' (Ministry of Justice Research Series 1/07, 2007). Available at: <https://webarchive.nationalarchives.gov.uk/+/http:/www.justice.gov.uk/docs/Twisting-arms-mediationreport-Genn-et-al.pdf> Accessed 16th March 2021

allocating 100 cases per month to mediation upon the filing of a defence. The parties would pay £100 each, whereupon a three-hour court-based mediation would be scheduled. However, included as part of the scheme was the opportunity to 'opt-out'.

Parties were given the chance to object to the case being automatically referred to mediation, at which point a Case Management Conference would be listed and the judge would explore with the parties the reasons behind which they had rejected the referral to mediation. If the judge was satisfied with those reasons, the case would be transferred back into the court system, or if the judge was successful in persuading the parties to mediate then it would be so referred. An evaluation was conducted throughout the scheme's life which tracked, amongst other things, level of engagement and percentage of 'opt-outs'. Throughout the full 12 months, the maximum percentage of cases where neither party opted out of the scheme and the case therefore proceeded without judicial intervention to mediation was 23% in August 2004[32]. The lowest percentage was 9% in December 2004, and the average overall was 16%.[33]

Genn argues that this was partially a product of the types of cases involved in the scheme.[34] The percentage, for example of personal injury claims where one or both parties objected to referral was 74%, whereas in non-personal injury claims it was only 38%. She goes on to draw comparisons with the Ontario Mandatory Mediation Scheme, where the percentage of personal injury cases involved was much smaller thus, she argued, cementing the viability of the scheme with much greater conviction.

Another point of concern was the attrition rate; even once a case had been referred to mediation there seemed to be a lack of engagement in the scheme itself. Only 16% of personal injury claimants who agreed to an Automatic Referral to Mediation actually made an appointment with the service, with that figure rising to 50% for non-personal injury claims. The evaluation concludes with the percentage of cases in which mediation actually took place, and in what portion of those cases it was successful in settling the dispute.

> Between April 2004 and January 2006, 273 ARM mediation bookings were made, although only 172 mediations eventually took place. Of the 172 cases

[32] Ibid at 35
[33] Ibid
[34] Ibid at 52

> that were actually mediated between April 2004 and January 2006, 91 cases (or 53% of mediated cases) settled at the mediation and 81 cases failed to settle (47% of mediated cases). The settlement rate obtained among ARM mediated cases was lower than the 62% obtained in the Central London voluntary mediation scheme between 1996 and 1998[35]

The overall result was that the scheme was disbanded. The data gathered was, unfortunately for its supporters, sufficient to dispel the notion at that time that there was appetite among court users for such a shift, and that crucially this would be in the interests of the people who needed to access civil dispute resolution. The introduction of ARM does, however, say much about the climate at the time and, as is discussed in greater detail below, the government's attitude towards mediation and particularly how desperate the Department of Constitutional Affairs was for it to work. If the referrals to mediation had been taken up as planned, the burden of cost, volume of cases and complex procedures would have been lifted from a civil court service whose funding was disappearing dramatically. As has been highlighted, voluntary uptake for the court-annexed mediation schemes was low and yet, instead of using this evidence as an incentive to develop a more effective system of wider access to a judicial determination, ARM was trialled at considerable cost to the DCA. It speaks volumes as to the extent to which the financial constraints of the DCA civil justice budget were a driving factor in the move towards mediation as a central tool for future dispute resolution that it was extended despite the evidence to the contrary.

5.2.2.4 The Small Claims Mediation Service

This position is supported even further when the evolution of CDR within the small claims arena is considered. In 2007, HMCS (the successor to the DCA), introduced the Small Claims Mediation Service, a free integrated service where civil servants employed by the Court Service would conduct consensual mediations between parties to small claims over the telephone. Following the initial success of the project, the government released a consultation in 2011 on whether mediation should become a

[35] Ibid

mandatory aspect of small claims litigation.[36] Resulting from this, from 2012 parties to small claims litigation were automatically referred to the Small Claims Mediation Service, but only where both parties agreed in their respective directions questionnaires.[37] Additionally, the initial referral was, and still is, only made to a mediation information session where parties are given advice about the benefits of engaging in mediation and settling their dispute by consensual means. It is only then if both parties agree that mediation will take place. By 2013, the service had over 10,000 referrals per year and was estimated to have saved approximately 9,400 hours of judicial time.[38]

Up until May 2018, mediation was a voluntary "opt in" process. However, in May 2018, Online Civil Money Claims pilot introduced an "opt out" mediation referral process.[39] This means that parties had to actively indicate that they did not wish to be referred to the Small Claims Mediation Service. The rationale behind the scheme was that opting litigants in automatically to taking part in mediation would lead to an increase in the low numbers of parties in low value claims who were prepared to mediate.[40] The pilot began with defended claims up to £300, which was subsequently increased to a ceiling of £500.[41] Since May 2021, all claims up to £10,000 issued using the Online Civil Money Claims pilot have been subject to the opt-out scheme.[42]

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[36] Ministry of Justice 'Solving disputes in the county courts: creating a simpler, quicker and more proportionate system: A consultation on reforming civil justice in England and Wales: The Government Response.' (HMSO, February 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228973/8274.pdf> Accessed 20th November 2021.

[37] The Mediation Service Pilot Scheme, Practice Direction 51H for the County Court Money Claims Centre initially established the referral program commencing October 1, 2012, for claims of £5,000 or less. It was extended for further periods and made permanent through CPR, rule 26.4A

[38] Sue Prince, ODR Advisory Group Working Paper on Policy Issues (July 2014) available at [https://www.judiciary.gov.uk/publications/policy-issues/] Accessed 15th March 2021

[39] CPR PD 51R.9(B) – Online Civil Money Claims Pilot and 111th Update: Practice Directions Amendments (2019) https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/cpr-111th-pd-update.pdf Accessed 15th March 2021

[40] Kirsty Swan, 'HMCTS Small Claims Mediation Service' (*gov.uk* October 2021) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033969/HMCTS_small_claim_mediation_service.pdf> Accessed 29th January 2022

[41] The Civil Procedure (Amendment No. 3) Rules 2021 and 131st Update: Practice Directions Amendments (2021) < https://www.judiciary.uk/wp-content/uploads/2021/05/131st-PDMD-SIGNED.pdf> Accessed 30th January 2022

[42] CPR PD 51R.2.1(3)

It was initially anticipated that around 25% of eligible court users would opt out, however the figures of those who actually opted out are significantly more concerning. 73% of eligible court users actively indicated that they did not wish to participate in a free mediation appointment through the Small Claims Mediation Service.[43] There is little empirical evidence which explains the basis for such low engagement, however some commentary does exist which may advance this a little further. Personal dislike for the opposing party drives parties to engage in more expensive and time-consuming litigation,[44] Paul Randolph has argued that it is simply human nature to want to fight and win as opposed to compromise,[45] and Lord Neuberger has drawn attention to the 'credibility gap' from which mediation typically suffers in the eyes of court users.[46]

This is supported by the report following the Ministry of Justice's survey on dispute resolution in England and Wales during the latter part of 2021. It highlighted that lack of engagement stems from a range of different issues. Parties' lack of awareness of mediation and the lack of publicly available information to mitigate against this was identified, alongside mediation being only perceived as a 'hurdle to jump through' before applying to court preventing parties from viewing it as a serious route to a sustainable solution and that using mediation was regarded as a 'form of capitulation'.[47] For low value claims specifically, the relatively low court fees involved in issuing a claim were cited as a deterrent for parties engaging in external mediations to settle those disputes.[48] These issues are so significant because this is not the start of the mediation movement. As Randolph comments, campaigns have been ongoing for the past twenty years to promote awareness of mediation and its benefits, to

[43] Civil Justice Council, 'The Resolution of Small Claims: Final Report' (January 2022) < https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf> Accessed 5th February 2022
[44] Stewart P and Underwood A, 'Pride comes before a claim – The Psychology of Dispute Resolution' (Field Fisher Waterhouse, January 2008).
[45] P. Randolph, 'Compulsory Mediation' 2010, 7411 NLJ 499
[46] Lord Neuberger, 'A View from on High' (Speech at the Civil Mediation Council Conference, May 2015) < https://www.supremecourt.uk/docs/speech-150512-civil-mediation-conference-2015.pdf> Accessed 10th May 2022
[47] Gov.uk, 'Call for Evidence on Dispute Resolution in England and Wales: Summary of Responses' (*gov.uk,* March 2022) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063691/dispute-resolution-in-england-and-wales-summary-of-responses.pdf> Accessed 14th April 2022
[48] Ibid

persuade parties to engage in it voluntarily.[49] He therefore questions whether it is just a matter of the public not wanting to know.[50]

These are major challenges to overcome, and it is submitted that this calls into question Lord Briggs's suggested approach to stage 2, i.e. leaving engagement in CDR as a voluntary provision. If 73% of participants fail to engage at stage 2, this will inevitably cause a substantial backlog of cases at the final adjudication stage, as well as failing to achieve the culture change in civil procedure which Lord Briggs argued was so necessary.

This is supported by data relating to the uptake of referrals to the Small Claims Mediation Service. Figures provided to the author by HMCTS and reproduced below show the total number of referrals to the Small Claims Mediation Service between April 2016 and September 2021, the numbers of mediations which actually took place and the percentage rate of settlement. Figures were requested to cover the period January 2012 to December 2021, however, were not available from HMCTS at the time of request.

Table 5.1

	Apr-Dec2016	**2017**	**2018**	**2019**	**2020**	**Jan-Sep 2021**
Total referred	25,164	30,673	34,749	48,459	36,236	30,749
Uptake (and percentage of those referred)	12,555 (49.9%)	16,101 (52.5%)	15,087 (43.4%)	16,571 (34.2%)	25,191 (69.5%)	27,549 (89.6%)

[49] P. Randolph, 'Compulsory Mediation' 2010, 7411 NLJ 499
[50] Ibid

Total Abandoned/ Cancelled/ Not Attended (and percentages)	773 (3.1%)	1,050 (3.4%)	1,245 (3.6%)	1,185 (2.4%)	7,076 (19.5%)	11,643 (37.9%)
Mediations (and percentage of those referred)	11,782 (46.8%)	15,051 (49.1%)	13,842 (39.8%)	15,386 (31.7%)	18,115 (50%)	15,906 (51.7%)
Settled	7,618	9,477	8,296	9,448	10,345	8,805
Settlement Rate (and percentage of those referred)	64.66% (30.2%)	62.97% (30.9%)	59.93% (23.9%)	61.41% (19.5%)	57.11% (28.5%)	55.36% (28.6%)

Source: Responses to Freedom of Information Request from author to HMCTS dated 3rd January 2022

The figures here show that although the scheme is described as an 'automatic referral to mediation', this is not the case. An average of only 44.9% of cases which are referred to mediation actually make it to a mediation hearing. It is particularly concerning that in 2019, the first full year of the 'opt out' pilot conducted by HMCTS, this figure was at its lowest at 31.7%. It is similarly concerning that the figures from 2020 and 2021 demonstrate an increased initial uptake, peaking at 89.6% in 2021 but a correspondingly marked increase in mediations which were abandoned, cancelled or not attended. Although settlement rates across the years for which figures were made available are reasonable, the fact that only an average of 26.9% of cases referred to the Small Claims Mediation Service settle and the high numbers of parties who actively refuse to engage are points of major concern.

Lord Briggs opined that the reason for this lack of engagement was due to mediation's position in the justice system, and that embedding it formally would cause a change in attitude towards its merits. However, it is submitted that this explanation is not supported by the available evidence. The Small Claims Mediation Service is a court-based initiative, and it is arguably embedded to a similar extent as stage 2 would be if parties were simply given a binary choice over whether to engage in CDR. However, despite this, an average of 55.1% of parties to low value claims actively chose not to engage in mediation, increasing to 68.3% in 2019. There is no evidence to suggest that this would be any different if Lord Briggs's version of stage 2 were to be implemented as proposed, as there is no incentive or compulsion for parties to engage in CDR included.

This also further supports the call for better and more comprehensive data which explains user engagement or experience with court-based initiatives which has been made repeatedly throughout this thesis so far. Given the high percentage of court users who actively opt-out of the service, it is submitted that there ought to be a structured approach implemented which captures the reasons behind this. Presently, no data is collected by HMCTS from court users which relates to why so few engage with the small claims mediation service which, it is submitted, would be extremely useful in enhancing the development and implementation of stage 2 of the OSC.

On the other hand, there have been developments in other areas regarding the model which is proposed for stage 2 of the OSC, in the form of the creation of Small Claims Dispute Resolution Hearings (DRH). This began as a pilot scheme which has now been running since July 2020, carried out by District Judges in certain County Court hearing centres in the Hampshire, Dorset and Wiltshire area, and also in Romford whereby all defended small claims are immediately referred to a preliminary Dispute Resolution Hearing (DRH). If parties do not attend, their statement of case is struck out.

The DRH involves a judicial early neutral evaluation and encouragement of both parties to settle. The hearing takes place either over the telephone or online and is conducted by a member of the judiciary. It should be pointed out at this stage this this is a local rather than national initiative. The courts involved are not receiving any

additional funding however are committing resources from their existing budget in the hope that the DRH schemes may result in a reduction in the number of small claims trials.

Figures obtained for the recent Civil Justice Council report on the Resolution of Small Claims,[51] specifically in relation to the pilot scheme at Birmingham County Court, show that there are some very encouraging results from the first seven months of the scheme, with 47.5% of DRHs resulting in settlement.[52] As a result, the Birmingham pilot has now been made permanent and all small claims cases are automatically referred to a DRH. This is important data for the purposes of this study. It shows that where mandatory Early Neutral Evaluation (ENE) is involved, the rates of settlement through CDR (mediation or facilitated negotiation) seem to be significantly higher than the participation and settlement rates of entirely voluntary mediation schemes alone. As recommendations for the structure and composition of stage 2 are developed, it seems prudent to keep this under consideration.

Despite clear advantages, the disadvantages must not be overlooked. Across all the DRH schemes, the extra pressure on judicial time has led to a substantial backlog for claims which do not settle, an issue which has led to the closure of the schemes at Romford and Bournemouth County Courts.[53] This is something to bear in mind for stage 2, although trained case officers, rather than members of the judiciary, will have responsibility for conducting the ENE and facilitating settlement which should, in theory, mean that there is no increase in the time it takes for a matter to be listed for formal adjudication at stage 3 if it fails to settle.

In addition to the DRH schemes, the Civil Justice Council also published its final report on the resolution of small claims in January 2022.[54] This addressed, amongst other things, the issue of compulsion to engage in CDR for parties to low value civil claims.

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[51] Civil Justice Council, 'Resolution of Small Claims Interim Report' (2021) <https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf> Accessed 12th December 2021

[52] Ibid at 31, para 129

[53] Ibid at 33, para 133

[54] Civil Justice Council, 'The Resolution of Small Claims: Final Report' (January 2022) < https://www.judiciary.uk/wp-content/uploads/2022/01/20220125-CJC-Small-Claims-Report-FINAL-2.pdf> Accessed 5th February 2022

The report proposed the drafting of a new pre-action protocol for small claims under £500 which ought to highlight the need to consider pre-issue forms of CDR. It was further recommended that parties should be asked to confirm, by ticking a box in any hard copy form or digital page, that they have read the pre-action protocol.

The report concluded that 'attendance at a Small Claims Mediation Service appointment, or engagement with some other form of court approved dispute resolution, should be compulsory for defended claims of £500 or less.'[55] It went on to state that potential parties to small value litigation should be clearly informed that mediation is compulsory in defended cases[56] which would lead to '…an increased number of these modest value claims being resolved with clear advantages to the potential litigants (who would be spared incurring further costs and devoting more time to the claim) and a beneficial effect upon the availability of judicial and administrative resources for other claims.'[57] The report also recommended that any party's refusal to engage in mediation would be deemed by the court as unreasonable behaviour, with sanctions being imposed on that party for unreasonable refusal.[58] The justification for this recommendation was that, if compulsion to mediate was to work, some effective sanction must be available for those refusing to co-operate. It is submitted that this set of recommendations is supported by the evidence presented in this chapter so far.

Having now analysed the attempts that have been made previously to attach CDR to the civil justice system, consideration must be given to the way in which the judiciary have exercised their powers under the CPR to encourage parties to engage in methods of consensual dispute resolution.

5.2.2.5 Judicial Positions on CDR

This section deals with the evolution of the attitudes taken by the judiciary towards the use of CDR, and more specifically the powers bestowed on them through the CPR to encourage and facilitate it. The importance of judicial involvement in implementing the 'cultural acceptance' of CDR promoted by Lord Briggs cannot be overstated. Whilst

[55] Ibid at 23
[56] Ibid at 24
[57] Ibid at 23
[58] Ibid at 24

support for CDR had been made clear in the CPR and in the Woolf reports, the responsibility was very much on the judiciary to administer the culture change which was highlighted as being so necessary by Lord Woolf through their active case management powers. Decisions from the higher courts regarding the extent to which those powers could be used to enforce that culture change have a clear impact on low value claims as a consequence of the doctrine of judicial precedent and pertain directly to the current relationship between CDR and the civil justice system of England and Wales.

By 2002, it was clear that despite the heavy emphasis on ADR in the CPR and the investment in court-annexed mediation schemes, voluntary uptake was still low. The DCA carried out a study in 2002 evaluating the success of Woolf's civil justice reforms, and with, reference to mediation, concluded as follows; "…the latest figures from CEDR (Centre for Effective Dispute Resolution) in their newsletter for Spring 2002 show that for the year ending March 2002 there was a reduction of 26% in the number of commercial mediations over the previous year. This scale of reduction is also reported by other mediation providers. This appears to be evidence of a return to the steady growth trend that was distorted by the significant 141% increase in mediations in the first full year after the reforms were introduced. The CEDR pattern is consistent with figures from the Association of Northern Mediators which monitored 214 mediations in 2000 but only 93 in 2001. The ADR Group reports a similar large increase in the number of mediations in the year following the reforms which then subsequently levelled out'.[59] It therefore fell to the judiciary to play a more interventionist role in promoting the new culture.

From 2002 onwards, there is a noticeable rise in significant cases which dealt very publicly with the way in which the courts treated failure by a party to engage with CDR. Lord Woolf, perhaps predictably, led the way, stating in the case of *Lownds v Home Office*[60] that '...the case was one which called out for a compromise being reached before proceedings commenced' and that 'there should have been offers to settle by

[59] Department of Consitutional Affairs. 'Further Findings: A Continuing Evaluation of the Civil Justice Reforms', (*DCA,* August 2002) at paragraph 4.8
[60] *Lownds v Home Office* [2002] EWCA Civ 365 at 25

both sides'.[61] Woolf also took the opportunity to comment in *Cowl (Frank) v Plymouth City Council* that '… sufficient should be known about ADR to make the failure to adopt it, in particular where public money is involved, indefensible'.[62]

This culminated with the case of *Dunnett v Railtrack Plc*[63] where the Court of Appeal *told* the parties to consider ADR. The defendant refused to engage with it, despite requests from the claimant. The defendant was ultimately successfully on appeal, however despite this, the court was clear that they would not be entitled to their costs from Mrs Dunnett on the basis that '…if lawyers turn down out of hand the chance of ADR when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences'[64]. This was a significant flexing of the court's muscle under the CPR, by initially ordering the parties to consider CDR and then heavily penalising the refusing party for failing to engage despite the fact they were ultimately successful in defending the claim. It was described at the time as being 'a dramatic judgment as the facts of the case did not justify it',[65] however it demonstrated an emerging CDR jurisprudence which strengthened the connection between judicial support for CDR and the making of robust and highly publicised adverse costs orders.

At this point, high level judicial support for heavily incentivised CDR was consistent and was headed firmly in the direction of a heavily pro-CDR position. The message of Dunnett v Railtrack was reinforced further by Lightman J in the case of Hurst v Leeming[66], in which he stated that 'mediation is not in law compulsory, but alternative dispute resolution is at the heart of today's civil justice system'.[67] The emphasis is not on the first statement, it is on the one which qualifies it. It seemed clear that, whilst not considered compulsory, the path in that direction was being paved judgment by judgment.

[61] Ibid
[62] *Cowl (Frank) v Plymouth City Council* [2001] EWCA Civ 1935 at para 25
[63] *Dunnett v Railtrack Plc* [2002] EWCA Civ 303
[64] Ibid per Brooke LJ at para 15
[65] Gil Crocker, 'The Treatment of Mediation by the UK Courts' 5 Asian Disp. Rev. 205 (2003)
[66] *Hurst v Leeming* [2001] EWHC 1051 (Ch)
[67] Ibid at para 12

The effect of a direct judicial intervention in promoting ADR and using the cost sanctions available through the CPR was, on evidence, positive for the uptake of voluntary mediation. Hazel Genn, in her 2007 report on the impact of judicial pressure on the use of mediation, concluded that Dunnett had had a positive impact in this regard: 'Demand for the voluntary (VOL) scheme at Central London increased significantly following the case of Dunnett v Railtrack in 2002, which confirmed the power of the court to impose costs penalties on a successful party deemed to have acted unreasonably in refusing to mediate'.[68] Coupled with the ongoing DCA investment in court-annexed schemes, the shift towards parties using ADR, therefore increasing the chances of both swift and more cost-effective resolution, seemed to be working.

However, this was soon to change with the decision taken by the Court of Appeal in the seminal case of Halsey v. Milton Keynes General NHS Trust.[69] The claimant filed a claim against the Milton Keynes General Hospital following the death of her husband. The defendant made an offer to settle the case, but Mrs Halsey rejected the offer. She went on to suggest repeatedly that the parties mediate, however the defendant continued to refuse on the basis that they were not liable, and that even if they were the sum of money involved was so low that it did not justify the cost to the Trust of mediating settlement. Having witnessed the direction of judgments, particularly those which seemed to impose a heavier burden on litigants to mediate or face particularly adverse cost consequences, Lord Justice Dyson took the opportunity to make clear the extent to which he believed the court should act in the post-CPR shift towards ADR. For the first time, this directly addressed the debate which had been rising over the previous two years when judicial intervention and encouragement were becoming more pronounced; the extent to which the court ought to be using their case management powers to effectively compel parties into engaging in CDR.

At paragraph 2 of the judgment, the significance of the decision was highlighted: 'These two appeals raise a question of some general importance: when should the

[68] H. Genn and others, 'Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure' (Ministry of Justice Research Series 1/07, 2007) Available at: <https://webarchive.nationalarchives.gov.uk/+/http:/www.justice.gov.uk/docs/Twisting-arms-mediationreport-Genn-et-al.pdf> Accessed 16th March 2021

[69] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576

court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution ('ADR')? There seems to be some uncertainty as to the approach that should be adopted in answering this question: it has been the subject of consideration by courts on a number of occasions. A measure of its significance is that we have received detailed and helpful submissions from no fewer than four interveners, namely the Law Society, the Civil Mediation Council, the ADR Group and the Centre for Effective Dispute Resolution'.[70] The Government' ADR 'Pledge' was also taken into consideration.[71] The fact that such a wide range of viewpoints were requested by the court demonstrates how this judgment was being viewed; as an opportunity to make clear the judiciary's policy on the powers bestowed to them via the CPR, and to set out clear guidance on the limitations on the court to use robust adverse costs orders to essentially compel parties to engage in CDR. As set out at the beginning of this section, the impact on the judiciary's position on this was highly significant, as it was this which had the power to redefine the relationship between CDR and the formal justice system, and arguably inform the extent to which CDR was normalised in the eyes of court users when compared with judicially imposed trial-based determinations.

The views presented by the consultees were polarised; the Civil Mediation Council submitted that there ought to be a presumption in favour of mediation, whereas the Law Society felt that not every case was suitable for ADR, and therefore such a presumption should not exist. The Law Society's view was favoured by Lord Justice Dyson, who went even further in obiter in clarifying his position on the judicial role in this regard; '…it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6'.[72] These are strong words, which have formed the basis of significant and ongoing debate[73] since the date judgment was given. For the purposes of clarity, this study will not comment on the debate of the legality of compulsion to mediate: this

[70] Ibid at para 2
[71] Ibid at para 7
[72] Ibid per Dyson LJ at para 9
[73] Lord Justice Clark made clear in his speech to the annual mediation conference in Birmingham, May 2008, that it was his view that compulsory mediation did not violate article 6. See Lord Justice Clarke MR 'Speech to Annual Mediation Council Conference', (May 2008) http://www.judiciary.gov.uk

study is concerned with the pragmatic impact of jurisprudence on the relationship between CDR and the civil justice system.

The Court of Appeal then went on to comment, specifically concerning the use of costs to penalise successful parties who refused to mediate, that this directly contravened the principle that costs followed the event, i.e. that the presumption ought to be that the unsuccessful party paid the successful party's costs, unless there was good reason to depart from this[74] and that the burden should be on 'the unsuccessful party to show why there should be a departure from the general rule'.[75] This was, arguably, the most significant part of the judgment. The judicial decisions up to that stage all pointed towards the burden of proof being on the successful party to show that the reason they rejected CDR was reasonable in the circumstances. Inevitably, that led to parties taking refusal much more seriously. Post-Halsey, the weight of the incentive was removed. For context, it is important to clarify that this did not necessarily give parties the right to reject CDR without good reason, it just forced the unsuccessful party to argue that the rejection had been unreasonable. By way of assistance, the Court of Appeal went on to adopt the checklist suggested by the Law Society on factors to be taken into account when considering whether a party had unreasonably refused CDR, which are:

(a) the nature of the dispute.

(b) the merits of the case.

(c) the extent to which other settlement methods have been attempted.

(d) whether the costs of the ADR would be disproportionately high.

(e) whether any delay in setting up and attending the ADR would have been prejudicial; and

(f) whether the ADR had a reasonable prospect of success[76]

The major points to be taken from Halsey were the reversal of the burden of proof for refusing mediation and the Court of Appeal's strong stance against the judiciary being

[74] *Halsey v. Milton Keynes General NHS Trust* [2004] EWCA Civ 576 at Para 13
[75] Ibid
[76] Ibid at paras 17 - 23

perceived to force litigants to mediate against their will by using their powers to impose robust and effective adverse costs orders. With regard to the wider impact of the Halsey decision on the CDR agenda, Hazel Genn was particularly clear about the effect of the judgment on the Automatic Referral to Mediation pilot which had just started in London County Court at the time. Her strong view was that Halsey had the effect of encouraging solicitors for litigating parties to object to automatic referral for mediation in the knowledge that those members of the judiciary who might otherwise have tried to heavily encourage engagement with the scheme were now less secure in that position.[77] The evidence available does seem to support this: post-Halsey 80% of litigants opted out of being referred to the ARM scheme.[78] This conclusion also correlates with the conclusions of the Ontario compulsory mediation pilot; that effective culture change would not happen if simply left up to parties' discretion.

Halsey served to change the direction of judicial policy on CDR and created inconsistency in subsequent jurisprudence. For example, in the case of Laporte and Christian v The Commissioner of Police of the Metropolis,[79] it fell to the High Court to consider whether refusal by the defendant to engage in mediation should result in an adverse costs order, despite the claimant being unsuccessful in the overall action. The defendant had consistently failed to respond to offers to settle and offers to mediate made by the claimant, despite at one point being ordered by the court to provide a response. The basis of the defendant's refusal was that they did not believe that the claimant's case had any merit, and that any form of CDR was therefore a waste of time and resource. However, they did not communicate this with the claimant until it fell to the High Court to consider costs having found against the claimant on every point of the claim. The court decided that costs sanctions should be imposed for unreasonable refusal to engage in CDR and ordered that the defendant could only recover two thirds of its costs.[80] This can be contrasted with the decision in Burchell v Bullard,[81] in which Ward LJ found that the defendant's refusal to mediate was

[77] H. Genn and others, 'Twisting Arms: Court Referred and Court Linked Mediation Under Judicial Pressure' (Ministry of Justice Research Series 1/07, 2007). Available at: <https://webarchive.nationalarchives.gov.uk/+/http:/www.justice.gov.uk/docs/Twisting-arms-mediationreport-Genn-et-al.pdf> Accessed 16th March 2021 at 23
[78] Ibid 78-125
[79] *Laporte and Christian v The Commissioner of Police of the Metropolis* [2015] EWHC 371 (QB)
[80] Ibid
[81] *Burchell v Bullard* [2005] EWCA Civ 358.

unreasonable and opined that 'the court should mark its disapproval of the defendants' conduct by imposing some costs sanction',[82] but decided that ultimately following Halsey no costs sanction would be ordered.

Further inconsistency is evident in the case of PGF II S A v OMFS Co,[83] which considered whether being silent in face of multiple invitations to mediate was unreasonable. Lord Justice Briggs followed and endorsed the guidance which was issued in the Jackson ADR Handbook[84] in holding that silence following *repeated* invitations to consider mediation was, in and of itself, unreasonable even in circumstances where the uncommunicated reason was justifiable.[85] However, Briggs did not clarify that this related to silence in the face of *any* invitation to mediate, with his reluctance to commit to making such a statement being due to the guidance previously laid down in Halsey. Despite the nature of the judgment itself, Briggs did issue a warning to litigants on how they ought to treat CDR:

> …this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. …The court's task in encouraging the more proportionate conduct of civil litigation is so important in current economic circumstances that it is appropriate to emphasise that message by a sanction…[86]

However, this is at odds with the decision in the subsequent case of Gore v Naheed,[87] decided by the Court of Appeal only two years after PGF.[88] In that case, Pattern LJ failed to make an adverse costs order against the claimant as he agreed with the claimant that the claim was unsuitable for mediation, despite the claimant having refused to mediate. As Ahmed comments, this shows a complete lack of consistency

[82] Ibid at 42
[83] *PGF II S A v OMFS Co* [2014] 1 WLR 1386.
[84] Susan Blake, Julie Browne and Stuart Sime, *'The Jackson ADR Handbook'* (OUP 2013).
[85] *PGF II S A v OMFS Co* [2014] 1 WLR 1386 per Briggs LJ at paras 24 –30
[86] Ibid at 56
[87] *Gore v. Naheed* [2017] EWCA Civ 369
[88] *PGF II S A v OMFS* Co [2014] 1 WLR 1386

amongst the senior judiciary towards CDR,[89] meaning that the overall landscape is confused. England and Wales simply does not know where it stands in regards to the relationship between CDR and the formal justice system.[90]

Most recent jurisprudence however has seen a further shift back in a pro-CDR direction. In the case of Lomax v Lomax,[91] the Court of Appeal held that the court could order parties to engage in an early neutral evaluation to assist the case towards settlement under CPR r.3.1(2)(m), even where one party did not consent. The defendant argued that, by applying the Halsey criteria, the court had no power to do so however the Halsey decision was distinguished on the basis that Lomax involved ENE, not mediation. Moylan LJ commented that an ENE hearing was part of the court process, and therefore could be ordered in the same way as any other case management direction. He also went further, stating that 'the court's engagement with mediation has progressed significantly since Halsey was decided'[92] which, as Prince posits, perhaps suggests that the opportunity has now arrived for revisiting the Halsey guidelines on the judicial limitations on supporting referrals to CDR.[93]

Indeed, a similar question was raised by Sir Geoffrey Vos in the case of McPartland v Whitehead,[94] in which he stated that Lomax 'inevitably raised the question of whether the court might also require parties to engage in mediation despite the decision in Halsey v. Milton Keynes General NHS Trust'.[95] He offered no answer, however it does leave the door open to the Court of Appeal potentially revisiting the decision in Halsey in a future case. It is posited by this study that this, in the absence of clarification on the extent of judicial power and function regarding encouraging parties to engage in CDR through the creation of specific procedure rules, such a decision is

[89] M. Ahmed 'Mediation: the need for a united, clear and consistent judicial voice' (2018) 37 Civil Justice Quarterly 13
[90] D de Girolamo, 'Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales' (2016) 67 Civil Justice Quarterly 162
[91] *Lomax v Lomax* [2019] EWCA Civ 1467
[92] Ibid at para 27
[93] Sue Prince, 'Encouragement of mediation in England and Wales has been futile: is there now a role for online dispute resolution in settling low-value claims?' (2020) 16 International Journal of Law in Context 181
[94] *McPartland v Whitehead* [2020] EWHC 298 (Ch)
[95] Ibid at para 42

necessary if the normalisation of CDR called for by Lord Briggs, and which is so important to the success of stage 2 of the OSC, is to happen.

5.2.2.6 Government support for CDR and areas within the justice system where steps to formally adopt CDR have been taken

As has been established across the chapters of this thesis so far, the position of government is a significant factor in the advancement of any initiative in civil justice. Whilst inconsistencies with the judicial position were identified as problematic in the previous section, it must be remembered that '….it is not for the courts, however, to consider the issue; it is for government as the purveyor of public policy. The courts work with what they have: a procedural system of rules and protocols which we see are not consistently interpreted and the existence of precedent against compulsion in the form of *Halsey*.'[96] Therefore, it becomes necessary to consider the position of government on CDR.

Earlier in this chapter the consultations issued by the DCA and the court service regarding compulsory mediation in small claims were discussed, as were the provisions which were specifically included in the CPR to encourage the judiciary to use their case management powers (and specifically their powers to impose heavy cost penalties on parties who refused to mediate). Both indicate a commitment on the part of government to the advancement of CDR.

Whilst the underlying reasons for this may be questionable: efficiency, diversion of litigants away from court to preserve resources and cost-saving,[97] in the context of this chapter it is necessary to discuss whether there is any further evidence that the government's commitment to CDR has been consistent. This section will therefore

[96] D de Girolamo, 'Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales' (2016) 67 Civil Justice Quarterly 162 at 170
[97] Evidence to support this is discussed at length in chapter 2 of this research.

provide context to that discussion, as well as looking to other areas of the civil justice system where CDR has been formally adopted in an attempt to assess the extent of any resistance which is likely to be encountered from litigants in the formal integration of CDR into stage 2 of the OSC.

In March 2001, the then Lord Chancellor Lord Irvine made a pledge[98] which committed government departments and agencies to settling any cases brought against them, where appropriate and where agreement by the other side was provided, by CDR. He made the following statement:

> The Government wants to lead the way in demonstrating that legal disputes do not have to end up in court. Very often, there will be alternative ways of settling the issues at stake, which are simpler, cheaper, quicker and less stressful to all concerned than an adversarial court case. [ADR] techniques have evolved as an attractive alternative to formal judicial proceedings. They are a valuable way to accessible justice - providing services and remedies and costs which are proportionate to the issues at stake. Where the other side agrees, the Government is now formally pledged to resolve legal disputes by ADR wherever possible.[99]

This commitment was updated in May 2011,[100] incorporating the following commitments:

- 'Being proactive in the management of potential disputes and in working to prevent disputes arising or escalating, in order to avoid the need to resort to the use of formal dispute mechanisms wherever possible.
- Using prompt, cost effective and efficient processes for completing negotiations and resolving disputes.

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[98] Department for Constitutional Affairs, 'Legal Policy, Alternative Dispute Resolution' (2001) < http://www.ogc.gov.uk/sdtoolkit/reference/ogc_library/generic_guidance/dispute.pdf> Accessed 12th April 2021

[99] Ibid

[100] Attorney General's Office: 'The Dispute Resolution Commitment: Guidance for Government Departments and Agencies' (May 2011) <https://webarchive.nationalarchives.gov.uk/ukgwa/20130128112038/http://www.justice.gov.uk/downloads/guidance/mediation/drc-guidance-may2011.pdf> Accessed 2nd December 2021

- Choosing processes appropriate in style and proportionate in costs to the issues that need to be resolved.
- Recognising that the use of appropriate dispute resolution processes can often avoid the high cost in time and resources of going to court.
- Educating their employees and officials in appropriate dispute resolution techniques, in order to enable the best possible chance of success when using them.'[101]

Further, CDR clauses were drafted into all appropriate government contracts in an attempt to reinforce the commitment to seeking alternative methods of resolving disputes outside the involvement of the court. In 2014, Lord Faulks the Minister of State for Civil Justice and Legal Policy at the time reaffirmed that the government's position was that '…going to court should be a last resort, we need to cut down on the amount of unnecessary, expensive and confrontational litigation in our society. Government is leading by example by resolving issues away from court using alternatives which are usually quicker, cheaper and provide better outcomes. We are continuing to encourage others to do the same…. the success of mediation and other methods in keeping unnecessary litigation out of the courts is a key cornerstone of an efficient and cost-effective justice system'.[102]

However, despite the ostensibly strong public commitment to CDR, the government too has suffered from the same issues of inconsistency and resistance to taking concrete and meaningful steps to enforce a change of culture as the courts. In 2015, the Ministry of Justice launched a scoping study which sought views on reforming the procedural law relating to boundary disputes. This stemmed from a Private Members' Bill[103] introduced by the MP Charlie Elphicke which essentially sought to establish a Party Wall Act 1996 procedure for the resolution of boundary disputes, where they would be automatically referred to surveyors who would determine the issue between them rather than litigate through the courts.[104]

[101] Ibid at para 2.2, page 3
[102] Lord Faulks, 'Mediation and Government' Keynote Speech, (The Civil Mediation Conference, 22 May 2014) <https://www.gov.uk/government/speeches/mediation-and-government> Accessed 3rd December 2021

[103] Property Boundaries (Resolution of Disputes) Bill
[104] Ibid at ss 1-5

Although the Bill did not progress, given the historic high levels of expense involved in boundary dispute issues, the government launched a consultation.[105] Many responses suggested reforming the law to include a requirement for parties to mediate in advance of referring the matter to court, particularly given that a high percentage of such disputes were resolved by mediation in any event.[106] However, the government concluded that it was not appropriate to embed mediation as a mandatory aspect of the procedure[107] as it would simply increase the costs of those disputes which were incapable of resolution by CDR. As De Girolamo states, '…the strength of the policy statements made by the government to promote mediation in the name of a more efficient justice system is at odds with the lack of necessary steps taken to implement a clear and express policy initiative'.[108]

Therefore, emerging from the research is a high degree of contradiction between the stated desire to adopt CDR and the inertia of the civil justice system in England and Wales. However, despite this ongoing tension, there are areas of English civil justice where forms of CDR are, in fact, compulsory. Table 5.2 below sets these out, with an accompanying brief description of how they operate.

Table 5.2

Name	**Permanent / Pilot / Year Introduced**	**Description**
Early Neutral Evaluation	Permanent / Formally incorporated into the	As discussed above with reference to Lomax v Lomax, CPR 3.1(2)(m)

[105] Ministry of Justice, 'Boundary Disputes, A Scoping Study', (January 2015) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395258/boundary-disputes-a-scoping-study.pdf> Accessed 3rd December 2021

[106] Ibid at paragraph 27, where it is stated that 'One respondent estimated that mediation was successful in 95% of cases in which it was used and that the involvement of a RICS member enabled resolution without court proceedings in a large percentage of cases'

[107] Ministry of Justice, 'Boundary Disputes, A Scoping Study', (January 2015) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395258/boundary-disputes-a-scoping-study.pdf> Accessed 3rd December 2021 at p17, para 66

[108] D de Girolamo, 'Rhetoric and civil justice: a commentary on the promotion of mediation without conviction in England and Wales' (2016) 67 Civil Justice Quarterly 162 at 170

	CPR on 1st October 2015[109]	expressly allows the court to order that a compulsory Early Neutral Evaluation take place which is *not* dependent on the consent of the parties. All parties are required to attend.
Financial Dispute Resolution Hearing	Permanent. Trialled from 1996, formally incorporated into the Family Procedure Rules 2010 in June 2000.	Referred to as FDR Hearings, they are essentially compulsory court-assisted negotiations in family disputes where one party has filed an application for a financial remedy under Part 9 of the Family Procedure Rules 2010. Consent of the parties is not required and both parties are required to comply.
Mediation Information and Assessment Meeting (MIAMs)	Permanent. Trialled from April 2011, formally incorporated into the Family Procedure Rules 2010 in April 2011.	This is a short meeting which is conducted by a trained mediator for parties in relevant family applications.[110] The applicant is required to attend, and respondents are expected to attend unless exempt[111] although there are limited consequences for failing to do so.
ACAS Early Conciliation	Permanent / 6th April 2014	An applicant in the Employment Tribunal cannot commence proceedings without presenting a 'conciliation certificate' obtained from the Advisory, Conciliation and Arbitration Service (ACAS).[112] Once ACAS has received relevant information from both parties, they will

[109] Following the The Civil Procedure (Amendment No.4) Rules 2014.
[110] For the definition of 'relevant family applications' see PD3A to the Family Procedure Rules. See Paragraph 2, Practice Direction 3A to the Family Procedure Rules for information regarding MIAMs more generally
[111] For a full details of exemptions, see rule 3.8 Family Procedure Rules
[112] s.18A(4) ERA 1996

		appoint a conciliation officer who will seek to facilitate a settlement between the parties for a period of six weeks.[113] It is compulsory to provide the information to ACAS, however participation in the conciliation is voluntary.
Small Claims DRH Hearings	Pilot / July 2020 (permanent in Birmingham County Court from April 2021)	As discussed above with reference to mediation / CDR schemes.
West Midlands Employment Tribunal ADR Pilot	Pilot / July 2020.	This was a short pilot carried out on cases which were listed for trial for more than five days. Cases were listed for a two-hour ENE hearing conducted by a judge at the six week point after exchange of witness statements. Parties were required to attend. It resulted in 11 cases settling and 20 proceeding to trial.[114]
RTA Small Claims Protocol	Permanent / 31st May 2021	This applies to Road Traffic Act 1988 small claims involving personal injury. The claimant party is required to submit the claim prior to involving the court through an online portal. Where liability is admitted, paragraph 8.7(1) of the protocol requires that proposed defendant "*must make an offer to settle the claim*" within 20 days of the claimant providing the requisite

[113] r.6(1) Early Conciliation Rules

[114] For wider discussion about this, see the National Employment Tribunal User Group Minutes, (May 2021) <https://www.gov.uk/government/publications/national-employment-tribunal-user-group-minutes-may-2021/national-employment-tribunal-user-group-minutes-may-2021> Accessed 3rd January 2022

		information. In the event no admission of liability is made, court proceedings may be issued but once the court has made a decision on liability, the claim is mandatorily referred back to the portal to allow the parties to negotiate a settlement[115], thus essentially incorporating a compulsory element of CDR into the protocol.

What this shows is that there are pockets of the civil justice system in which compulsory CDR is operating, and that it has been for quite some time. In the areas in which permanent compulsory engagement in some form of CDR has been introduced, it has become a normalised part of the dispute resolution culture in those disciplines.

What is most noteworthy is that in areas where compulsory CDR has become permanent, the mandatory element has been completely integrated into the procedural rules leaving no reason or need for the exercise of judicial discretion. This is of key importance for two reasons. The first reason is that it shows that attitudinally England and Wales are capable of accepting CDR as a normal part of its dispute resolution culture. Parties may not always settle disputes, but the high rates of settlement demonstrated in the statistical evidence available from schemes such as the Birmingham Small Claims DRH give reason for optimism that, if approached the correct way, formally embedding CDR into the OSC can work. The second reason is that it demonstrates the importance of the development of a set of rules in which the expectations on parties seeking to engage with the process are made very clear from the outset.

[115] Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents paragraph 2.16(2) PD 27B

The purpose of this section was primarily to give context to the current relationship between CDR and the civil justice system in England and Wales, so that the first part of the thesis hypothesis in relation to stage 2, particularly whether Lord Briggs carried out a comparative analysis on how the consensual dispute resolution stages of the CRT could be transplanted into the English civil justice system, could be tested. It is submitted that, if the research included in this chapter so far had been the basis for Lord Briggs's decision on the structure of stage 2, particularly with regard to the engagement with CDR being voluntary, he would have reached a different conclusion.

Evidence shows that schemes designed to merely *encourage* CDR, and specifically mediation, have encountered resistance. Engagement with the Small Claims Mediation Service serves as the best and most up to date example here: even where parties were required to opt-out, 73% still actively elected not to take part in a free mediation provided by the court service. Evaluations of the court-annexed mediation schemes show that, even where mediation has been agreed to, a principal reason for that is the expense of pursuing a case to trial rather than the recognition of CDR as a genuine and equally valid method of dispute resolution; a key factor in a multi-door courthouse model succeeding. Furthermore, judicial interventions through active powers of case management have shown, over time, that there is considerable frustration within the judiciary with the limitations of the CPR, or indeed those imposed by judicial precedent, to enable the full pursuit of a pro-CDR agenda.

The research in this section has revealed a relationship between CDR and the civil justice system which is wrought with tension and inconsistency. Whilst a reconsideration of the Halsey decision by the Court of Appeal would be a welcome step as and when an appropriate case arises, it is submitted that it is of much greater importance that the government outlines its position regarding both how parties will be incentivised to engage in CDR at stage 2 and how parties who refuse to engage in CDR will be dealt with.

Clear guidance needs to be issued on what the consequences of that refusal will be and how adjudicators are expected to enforce those consequences. The evidence

presented in this chapter so far suggests that, without that guidance, the move to normalise the use of CDR as a genuine and highly regarded alternative to judicial determination amongst litigants will meet substantial challenges. This is supported by the alarming drop-in mediation rates across the ARM project and the statistics published by the CEDR study following the Halsey decision by the Court of Appeal. This is where the comparative element of this research becomes so important.

The approach, both historic and current, of British Columbia towards CDR will now be considered, with a view to identifying any lessons which can be learned from their integration of CDR into the resolution phases of the Civil Resolution Tribunal.

5.3 Canada

In order to ensure that valid comparisons can be drawn between CDR within the OSC in England and Wales and CDR in the CRT in British Columbia, this section will adopt a very similar structure to that of the previous section of this chapter. Initially, consideration will be given to how CDR is embedded into the Civil Resolution Tribunal, how it operates, what types of CDR are embedded, the role of human intervention and the extent of the powers which are afforded to those human facilitators. Structural comparisons can then be drawn between that and the proposed stage 2 of the OSC.

An analysis will then be carried out on the place of CDR in British Columbia and Canada prior to the introduction of the CRT. Again, to ensure the validity of the comparison, this will commence with an overview of the relationship between CDR and the court rules, moving on to considering government policy on CDR, any judicial involvement in dealing with CDR and, finally, assessing to what extent, if any, CDR was already embedded in any part of the British Columbian civil justice system prior to the introduction of the CRT. This will enable a comparison to be carried out between the comparator jurisdictions at the time immediately prior to the formal adoption of CDR as part of their respective online courts. This will then enable the second thematic element of research question 3 to be answered and the hypothesis relating to stage 2 to be tested.

5.3.1 How does CDR fit into the Civil Resolution Tribunal in British Columbia?

Once a party has utilised the Solution Explorer at phase 1 of the CRT, they then move through the case intake process, which is the equivalent of issuing a claim. However, as Salter and Thompson explain, this is different from the traditional model of presenting a case, as the parties are not asked to outline any arguments: they are only required to provide information about the dispute and their position on it alongside any supporting evidence. This then commences the collaborative dispute resolution phase.[116]

The collaborative dispute resolution process, and therefore the CRT's equivalent of stage 2 of the OSC is in fact split into two phases: phase 2 is negotiation and phase 3 is facilitation.[117] The negotiation stage does not involve any third-party representative of the CRT, only the parties to the dispute. An added incentive to the parties at this stage is that those who are able to settle their dispute will qualify for an automatic waiver of the CRT's Consent Resolution Order fee,[118] which is currently $25.[119]

This is an interesting phase to include in the fabric of the CRT. It fills the gap between a case being commenced in the tribunal and the facilitation stage, gives the impression to parties that the opportunity to move forward with the dispute is there if they want it and also empowers parties, where they feel able, to settle the matter consensually without intervention from a CRT facilitator.[120] Additionally, it costs virtually nothing to fund as it relies on parties contacting each other, albeit through the CRT platform provided. As Salter acknowledges, phase 2 is unlikely to resolve many of the disputes which have been commenced, but it does mean that parties have a chance to narrow

[116] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol 113 at 131
[117] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol 113 at 131
[118] Civil Resolution Tribunal 'Negotiation' *(civilresolutionbc.ca)* <https://civilresolutionbc.ca/tribunal-process/negotiation/> Accessed 1st January 2022
[119] Civil Resolution Tribunal 'Fees' *(civilresolutionbc.ca)* https://civilresolutionbc.ca/resources/crt-fees/#other-fees-all-dispute-types Accessed 1st January 2022

[120] Ibid

their issues or start the negotiation process prior to the intervention of the facilitator at stage 3. It places CDR at the forefront of the CRT's dispute resolution strategy.

In the event that parties are unable to settle their dispute at phase 2, they move on to phase 3. At this point, the level of CRT involvement increases, with a CRT case manager, or facilitator, being allocated to the case. The case manager ensures the parties understand the process, clarifies the issues, requests missing information or evidence, and adds any necessary additional parties to the dispute. They will then review the dispute, along with the parties' resolution efforts to date, and engage with them to facilitate a resolution by agreement.[121]

The extent of the powers of the case manager are laid out in the Civil Resolution Tribunal Act 2012. Those powers, and their relevant sections of the Act, are reproduced in table 5.3 below

Table 5.3

Section Number	Power
25	To determine, in accordance with the rules, which facilitated settlement service is to be used in the case management phase for a particular dispute, and to require the parties to participate in facilitated settlement services.
26	If, in the case management phase, the parties to a dispute reach a resolution by agreement on any or all of the issues or claims in the dispute, the Case Manager is authorised to prepare a draft consent resolution order respecting the issues or claims.
27	To provide a non-binding early neutral evaluation of the dispute to the parties which incorporates the Case Manager's views on

[121] Ibid

	how the tribunal would decide the issue if it proceeded to adjudication stage.
28	If the parties to a dispute consent, the Case Manager may make a recommendation to the tribunal as to the final decision resolving the dispute. A recommendation may be in the form of a draft final decision, or a draft final decision and draft order giving effect to the final decision, for consideration by the tribunal.
29	If the case manager for a dispute is a tribunal member, the case manager may, during the case management phase, offer to act as the tribunal If the parties agree to this direct resolution of any or all of the issues or claims in the dispute, the case manager may act as the tribunal panel in resolving those issues or claims and proceed to resolve the issues or claims on the basis of the information received by the case manager and without any further case management or hearing.

Source: Civil Resolution Tribunal Act 2012

As this shows, the range of statutory powers the case manager has at phase 3 to facilitate consensual dispute resolution are considerable. They can perform early neutral evaluation, assist with negotiation and mediate the dispute between the parties. The process is asynchronous however and, with their case management function in mind, the facilitator will set timescales within which parties are required to respond.[122] It is also particularly interesting that under section 25, the case manager has the power to require parties to *take part* in the CDR process. This does not, of

[122] Civil Resolution Tribunal 'Facilitation' *(civilresolutionbc.ca)* < https://civilresolutionbc.ca/tribunal-process/facilitation/> Accessed 1st January 2022

course, mean that parties are forced into settlement. It simply means that they must engage in the process of facilitated CDR at the relevant stage of proceedings and that the case manager has the statutory authority to enforce this.

If parties cannot settle the matter through facilitated consensual agreement, then they can request that the claim progresses to the phase 4 adjudication stage. In the event that this arises, the case manager will '…in a neutral fashion, assist the parties to prepare for adjudication by explaining the difference between facilitation and adjudication as well as the need to review the remaining claims, identify relevant facts and evidence, and prepare arguments.'[123] This essentially assumes the case management part of the role, ensuring the parties are prepared for adjudication and appropriately supported in advance of the final hearing.

There is a lack of literature which evaluates this approach independently, to either contradict or support it as a strategy. The only data available which can assist with establishing whether or not this approach has proven to be successful, are the statistics which are published by the CRT on an annual basis. Table 5.4 below shows the numbers of small claims applications made to the CRT and the number, with accompanying percentage, which have been resolved by consent in phases two or three.

Table 5.4

Year (1st April to 31st March)	Number of Small Claims Applications	Number of Small Claims Resolved by Consent (%)
2016/17	N/A	
2017/18	3668	947 (25.8%)
2018/19	4821	1,953 (40.6%)
2019/20	4926	2,321 (47.1%)
2020/21	4238	2,210 (52.1%)

[123] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol 113at 133

Source: Civil Resolution Tribunal Annual Reports 2016 - 21[124]

First of all, the figures do need to be treated with some caution from an evaluative perspective. As has become a recurring theme throughout this thesis, there is no context provided to explain them. There is no information about whether the settlement by consent occurred before the involvement of the facilitator, during the facilitation itself, what mode of CDR was used to assist with settlement, or whether the facilitator's intervention failed initially but the parties were able to subsequently settle. This information is important so that the true value of the facilitator's contribution can be ascertained.

As with the Solution Explorer, however, limited external data is available from Sykes's survey-based study of 49 tribunal users.[125] The study found as follows, specifically concerning phase 2:

> Sixteen survey respondents were involved in a CRT dispute that was resolved in the Case Management Phase at the CRT, either at the negotiation stage or at the facilitation stage. Of these, almost all (14, or 88%) said that they were either very satisfied or somewhat satisfied. Six of these 16 (38%) were also in the group of respondents who had been to court before. All of the survey respondents who had prior experience in court and who had resolved their disputes at one of the collaborative stages reported that the CRT was easier than court, and that they were more satisfied with the experience at the CRT than with their court experience.[126]

Therefore, coupling this data with the figures from the CRT which demonstrate an increasing proportion of claims settling by negotiation or facilitated CDR within phases

[124] Civil Resolution Tribunal Annual Reports 2016/17, 2018/19. 2019/20, 2020/21 available here: https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2016-2017.pdf , https://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2017-2018.pdfhttps://civilresolutionbc.ca/wp-content/uploads/2020/03/CRT-Annual-Report-2018-2019.pdfhttps://civilresolutionbc.ca/wp-content/uploads/2020/07/CRT-Annual-Report-2019-2020.pdfhttps://civilresolutionbc.ca/wp-content/uploads/2021/11/CRT-Annual-Report-2020-2021.pdf
[125] Sykes K, Dickson R, Ewart S, Foulkes C, Landry M, 'Civil Revolution: User Experiences with British Columbia's Online Court' (2020) 37(1) Windsor Y B Access Just 161
[126] Ibid at 178

2 and 3, this indicates that the approach adopted in British Columbia is leaving parties broadly satisfied and is having a positive impact on the numbers of claims settled by negotiation. This is particularly relevant when the statistics are compared with the proportion of settlements achieved by the Small Claims Mediation Service in England and Wales (an average of only 26.9% of cases referred to the service settled), found at table 5.2 above. It makes a compelling argument to adopt a similar structure for stage 2 of the OSC.

In terms of structural similarities between the model proposed by Lord Briggs and that which is currently in existence within the CRT, it can be seen that there is substantial overlap. Whilst the British Columbian model essentially splits the 'CDR stage' into two phases, the first of those is simply to encourage parties to negotiate between themselves which is of little cost in terms of resource to the CRT and, for all intents and purposes, only really makes use of time in which parties would be awaiting phase 3 to start in any event. As Salter and Thompson state, the real purpose of this stage is to build on the principle of empowering parties to feel in control of their disputes. It was never expected to yield significant numbers of settlements. There is no consequence if parties fail to negotiate, and the only incentive (aside from early settlement) is the waiver of a $25 fee for the filing of an agreement by consent if the matter is settled. Whilst there is again no empirical evidence to suggest that this stage does anything more than give parties a platform through which to open a dialogue regarding settlement, it is difficult to see a material disadvantage in also including a formal negotiation stage within the OSC.

This research has demonstrated that there does need to be careful reconsideration given to the development of the role and powers of the case officer. Whilst Lord Briggs was initially very cautious in his proposal for the powers which would be vested in the holders of this role, the model which was eventually included in his final report was much bolder and more aligned with the approach suggested by JUSTICE.[127] Lord Briggs acknowledged that a wider range of CDR would need to be performed by the case officer and as such, those officers would need to be legally qualified. This goes

[127] Justice, Delivering Justice in an Age of Austerity – A Report (2015) <https://files.justice.org.uk/wp-content/uploads/2015/04/06172133/JUSTICE-working-party-report-Delivering-Justice-in-an-Age-of-Austerity.pdf> Accessed 2nd January 2022 at 17, paras 2.22 and 2.23

beyond the training currently undertaken by the mediators within the Small Claims Mediation Service.

When considering the British Columbian model, it is posited that Briggs was correct in adopting this bolder approach, however he stopped short of clarifying exactly what the extent of those powers should be. This further supports the contention that an analysis of how the CRT was embedded into the British Columbian civil justice system and how the CRT system could be transplanted into the English civil justice system was not undertaken as part of the Briggs reports. It is submitted that the research presented here advances Lord Briggs's proposal and highlights a range of powers which would be appropriate for adoption as part of stage 2 of the OSC.

It is clear from both the extent of the statutory powers afforded to case managers within the CRT, and from reading Salter and Thompson's description of the role they have to play, that it is a key component to the multi-door courthouse model which British Columbia has adopted. As shown in table 3.4 above, there is evidence that the balance of the role of the case manager is working well, with an average of 41.4% of small claims cases settling by consent after they have been commenced in the CRT. This also demonstrates the value of human, rather than computer involvement within the CRT and, crucially, the way in which technology is being used to facilitate targeted trained personal intervention in disputes, as opposed to ODR simply being the 'robo-justice'[128] which Salter had warned against previously. However, as positive as these statistics look, they cannot be considered as necessarily indicative of what could be expected if the same model were to be imposed in England and Wales. In order to determine this, the position of CDR within the justice system in British Columbia prior to the introduction of the CRT must be considered. This will ensure that any conclusions and recommendations take into account the extent to which CDR was normalised in the comparator jurisdictions already at the crucial point of ODR integration.

[128] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Columbia's Civil Resolution Tribunal' (2017) 34(1) Windsor Yearbook of Access to Justice 112

5.3.2 What was the place of CDR in the Civil Justice System of British Columbia prior to the introduction of the CRT?

The last section conducted an analysis on the CRT model of the facilitation stage, with specific focus on the role of the case manager and the statutory powers bestowed upon them. This section will incorporate discussion on the evolution of government policy, judicial involvement and procedural reform regarding the embedding of CDR in British Columbia. The purpose is to establish whether any mitigations and divergences of approach would need to be adopted to enhance the performance of stage 2 in England and Wales, accounting for any differences in the relationship between CDR and the civil justice system across the comparator jurisdictions at the time of ODR integration.

Following the Canadian Bar Association Task Force Report on Alternative Dispute Resolution,[129] and as mentioned briefly in chapter 2, British Columbia saw a significant reform of its small claims procedure in February 1991, with the introduction of the Small Claims Act.[130] This, amongst other things, increased the threshold of the small claims court to $10,000 and following recommendations proposed by the Justice Reform Committee Report in 1988, the Provincial Court introduced mandatory settlement conferences.[131] These were informal twenty to thirty minute meetings between the parties to small claims, facilitated by a judge who would assist the parties in reaching a satisfactory resolution to the claim. The judge could express an opinion on the strengths and weaknesses of both parties' claims and, as it was mandatory, could make a default order in the event one party failed to attend. If the matter did not settle and was referred to trial, it would be heard by a different judge. This was, for all intents and purposes, mandatory early neutral evaluation within the small claims jurisdiction in British Columbia.

[129] Canadian Bar Association Task Force on Alternative Dispute Resolution, 'Alternative Dispute Resolution: A Canadian Perspective' (Ottawa: Canadian Bar Association, 1989) at 38
[130] Small Claims Rules 1991
[131] Ibid at Rule 7

After its first year in operation, its performance was formally and independently evaluated against the benchmark recommendations of the Justice Committee[132] on the instruction of the Provincial Government.[133] On settlement conferences, they found that 40.3% of cases which reached that stage were being settled and that they offered litigants a true alternative to court imposed determination.[134] This compared to just 4.9% of disputed small claims cases settling prior to the introduction of mandatory settlement conferences.[135] When further evaluation was carried out in 2012, this figure was still holding at 35%.[136] Additionally, the numbers of claims issued had increased by 42% within the first year of the new rules being in operation[137] and the number of replies or defences filed had increased by 89%.[138] This, the Semmens and Adams evaluation argued, was a ringing endorsement of the successful implementation of the reforms proposed by the Justice Committee and showed a genuine improvement in access to justice in small claims.[139]

This must be treated with some caution for the purposes of this study. The introduction of mandatory settlement conferences represented a combining of judicial function,[140] essentially extending the powers of the judge at a case management conference to allow them to conduct an early neutral evaluation[141] and to mediate disputes.[142]

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[132] Canadian Bar Association Task Force on Alternative Dispute Resolution, Alternative Dispute Resolution: A Canadian Perspective (Ottawa: Canadian Bar Association, 1989) at 120
[133] Semmens & Adams, 'Evaluation of the Small Claims Program', (December 1992)
[134] Ibid at 21
[135] Ibid at 32
[136] BC Ministry of Justice, 'Modernizing British Columbia's Justice System' (Minister of Justice and Attorney General, February 2012). https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/justicesystemreviewgreenpaper.pdf (Accessed 29th December 2021)
[137] Ibid
[138] Ibid at 6
[139] Ibid at 9
[140] T. Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37(1) Monash University Law Review 145
[141] Rule 7.2.15, Small Claims Rules
[142] A full list of the judicial powers at Settlement Conference are here: (14) At a settlement conference, a judge may do one or more of the following:
(a)mediate any issues being disputed; (b)decide on any issues that do not require evidence; (c)make a payment order or other appropriate order in the terms agreed to by the parties; (c.1)order that the claim be set for a trial conference under Rule 7.5; (d)set a trial date, if a trial is necessary; (e)discuss any evidence that will be required and the procedure that will be followed if a trial is necessary; (f)order a party to produce any information at the settlement conference or anything as evidence at trial; (g)order a party to (i)give another party copies of documents and records by a set date, or (ii)allow another party to inspect and copy documents and records by a set date; (h)if damage to property is involved in the dispute, order a party to permit a person chosen by another party to examine the property damage; (i)dismiss a claim, counterclaim, reply or third party notice if, after discussion with the parties and

Judicial Dispute Resolution carries with it a range of advantages and disadvantages, discussion of which is outside the remit of this thesis,[143] however given the historical adversarial structure of civil justice in British Columbia, the fact that CDR was being carried out by a judicial member is likely to have had some impact on the proportion of settlements.[144] It must be remembered that case officers in the OSC will not be judges.

Relevant to this study is the fact that a form of mandatory early neutral evaluation has now been in existence for small claims in British Columbia since the early 1990s, that steps were taken to properly evaluate its impact and that the findings of that state-endorsed evaluation were positive. That is supported by the fact that mandatory settlement conferences are still firmly embedded into the Provincial Court small claims procedure in British Columbia thirty years after their introduction, and that ENE is one of the key functions of the case manager at phase 3 of the CRT. When considering the integration of CDR into the OSC, it must be taken into account that British Columbians had been used to a mandatory form of CDR being embedded into their small claims resolution system for 25 years prior to the introduction of the CRT.

Further moves towards the integration of CDR were made in 1996, when the British Columbia Court Mediation Program was formed. The programme itself was part of the court, although the mediators to whom disputes were referred were independent of the court service. The scheme was funded by the Ministry of the Attorney General and administered by the BC Dispute Resolution Practicum Society (now the Mediate BC Society).[145] This not-for-profit scheme provided mediators to the Court Mediation Programs in the small claims courts throughout British Columbia. Under the 1998

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reviewing the filed documents, a judge determines that it (i)is without reasonable grounds, (ii)discloses no triable issue, or (iii)is frivolous or an abuse of the court's process; (j)before dismissing a claim, counterclaim, reply or third party notice, order a party to file an affidavit setting out further information

[143] For a full discussion on Judicial Dispute Resolution, see T. Sourdin, 'Evaluating Mediation in the Supreme and County Courts of Victoria' Department of Justice, Victoria, Australia, (April 2009) and research comparing dispute resolution processes in the Supreme and District Courts of NSW in T Sourdin and T Matruglio, 'Evaluating Mediation – New South Wales Settlement Scheme' La Trobe University, Melbourne and the University of Western Sydney (2002) , H Jolson, 'Judicial Determination: Is it Becoming the Alternative Method of Dispute Resolution?' (1997) 8 Australian Dispute Resolution Journal 103, K J Mackie, 'A Handbook of Dispute Resolution: ADR in Action' (Routledge, 1991, Landerkin and A Pirie (2004) 'What's the Issue? Judicial Dispute Resolution in Canada' 22 No 1 Law in Context (Federation Press) 25

[144] T. Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37(1) Monash University Law Review 145 at 152

[145] Further information can be found at https://www.mediatebc.com/about-us

Practice Direction which originally governed the Small Claims Mediation Program (now Small Claims Court Rules 7.2 and 7.3), referrals to the programme were made either through voluntary election by the parties, referral by a judge at a Settlement Conference or by mandatory referral in construction cases or by the date of reply (defence).[146]

By 2003, the Court Mediation Program was running 1200 small claims mediations per year across British Columbia[147] and there was evidence that the scheme was working to the satisfaction of court users: in 2002, settlement rates were 56% and 67% for mandatory and voluntary mediations respectively, 91% of the participants indicated that they would use mediation again and average satisfaction with the scheme was 4.32 out of 5.[148] As a result, in April 2003 an addition was made to Rule 7.2 Small Claims Rules which made mediation mandatory in certain classes of cases, specifically cases involving low value disputes of up to $10,000.[149] This represented an expansion of the CDR agenda in British Columbia, and the Court Mediation Program ran until May 2016 when it was brought to a close,[150] just before the CRT was launched on 13th July 2016. During its 18 years of operation, the Court Mediation Program had conducted over 25,000 mediations,[151] an average of 1388 per year.

The introduction of the British Columbia Small Claims Court Mediation Program was therefore an exercise in adding a further form of alternative dispute resolution to the small claims arsenal. This was expanded again in 2003 with the introduction of 'notice

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[146] Practice Direction SM CL 02 Small Claims Mediation Program

[147] S. Vander Veen, 'A Case for Mediation: The Cost Effectiveness of Civil, Family, and Workplace Mediation.' (Mediate British Columbia, 2014) https://pdfs.semanticscholar.org/c9d6/ea19a55f165d936277f372737a270eb4a301.pdf accessed 15th June 2021 and also see Sarah Vander Veen and Angela Mallard, 'Three Years of Court-Connected Small Claims Mediations: The Importance of System, Program, Case, and Mediator Characteristics to the Court Mediation Program Outcomes' (Mediate BC, 7 August 2012) <www.mediatebc.com/PDFs/152Reports!and!Publications/Lessons!Learned!FINAL!VERSION_07!Aug!2012.aspx> accessed 21 September 2021

[148] J. Hogarth and K. Boyle, '*UBC Program on dispute resolution: Is mediation a cost-effective alternative in motor vehicle personal injury claims? Statistical analyses and observations.' (*Vancouver: Faculty of Law, University of British Columbia, 2002)

[149] Rule 7.2 Small Claim Rules

[150] Thomas J. Crabtree. 'Provincial Court Recognized Court Mediation Program's Contributions' (May 2016) <https://www.provincialcourt.bc.ca/downloads/announcements/Annoucement-May-05-16%20Information%20about%20CMP.pdf> Accessed 12th January 2022

[151] Ibid

to mediate' mechanism,[152] described by McHale as 'quasi-mandatory mediation.[153] It introduced the option for one party to serve another with a notice to mediate. Once that notice had been served, the other party was *obliged* to attend a mediation with their opponent. If that party still refused, the requesting party could file an Allegation of Default notice with the court under section 33. This provides that if a participant believes that another has failed to comply with a provision of the regulation, it may (on notice to the other participant) apply for relief under s. 34.

Section 34 then goes on to provide that, on application, if confronted with an allegation of default that cannot be excused, the court may make various orders compelling the defaulting party's participation and, in extreme cases, dismiss a claim, strike out a defence or 'may make any order it considers appropriate with respect to costs'.[154] Section 35 goes on to provide that 'The court may consider the existence of an Allegation of Default in making any order about costs, whether that order is made following final disposition of the action or otherwise.'[155]

It can be seen from examination of the regulations why the term 'quasi-mandatory mediation' is such a good description. First, it is dependent on one party serving the other with a notice. If neither party wants to mediate and therefore no notice is served, there is no requirement for parties to engage in the process. It should be noted that at this stage, the court is not involved. Notices do not need to be filed with the court and the mediation process is separate from the court. Parties are essentially required to take responsibility for the negotiation process themselves.

Embedded into the procedure is an 'opt-out' system, where a party can argue exemption from mediation 'if in the court's opinion it is materially impracticable or unfair to require a party to attend'.[156] However, since 2001, this exemption has only been claimed twice, in the cases of Matsqui First Nation v. Canada (Attorney General)[157]

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[152] Notice to Mediate (General) Regulation, see https://www.bclaws.gov.bc.ca/civix/document/id/lc/statreg/4_2001#section34

[153] M Jerry McHale, "Mediation in Civil and Family Cases in British Columbia" (*BarTalk*, June 2008) www.cba.org/bc/bartalk_06_10/06_08/PrintHtml.aspx? DocId=31893> accessed 1st January 2022.

[154] Section 34 (1) (f) Notice to Mediate (General) Regulation

[155] Section 35Notice to Mediate (General) Regulation

[156] Section 23 (c) Notice to Mediate (General) Regulation

[157] *Matsqui First Nation v. Canada (Attorney General)*, 2015 BCSC 1409

and Executive Inn Inc. v Tan.[158] This is strong evidence to suggest that, on the whole, parties are compliant with the regulations once a notice to mediate has been served on them. In the event of non-compliance, the regulations then 'specifically contemplate uncooperative party behaviour in relation to ADR and confer a jurisdiction to penalize that behaviour in costs'.[159] A judge can compel a party who has refused to engage without reasonable excuse and, in extreme situations, strike their statement of case out on the basis of this failure. Finally, if the case does proceed to final adjudication, the court has the power to impose costs penalties on the non-compliant party. The scheme therefore represents a well-structured series of procedural steps centred on a heavily pro-CDR agenda.

The notice to mediate scheme has been described as the catalyst for a wider culture change in attitudes towards CDR[160] in British Columbia. Swanson argues that, as a consequence of its structure, it has succeeded in normalising the use of CDR in settling disputes[161] as 'the Notice to Mediate can be served without court interference and that this means parties take responsibility for mediation themselves and are then encouraged to use mediation in future'.[162]

The differences between the process adopted in the Notice to Mediate Regulations and that of the CPR are clear. The only area of overlap comes at the end: the way in which parties *can* be penalised by the court for failing to engage in CDR. However, whereas the Notice to Mediate Regulations follow a clearly articulated process, the CPR simply confers a general expectation that parties will engage in CDR, followed by affording judges the power to encourage this at case management stage, with a potential but by no means guaranteed risk that a party may face a costs penalty for refusing to engage. As was demonstrated in the discussion earlier in this chapter, this has led to a significant amount of inconsistency and, thus, a failure to encourage any

[158] *Executive Inn Inc. v Tan* 2008 BCCA 93
[159] Thomas S. Woods, 'Costs Sanctions for Unreasonable Refusal to Mediate: Coming to a Courthouse Near You' (2006) 31 Advoc Q 393
[160] Swanson, D. Creative Mediation System in British Columbia: A Model for us All. (*mediatbankry.com*, 2018) <https://mediatbankry.com/2018/01/09/creative-mediation-system-in-british-columbia-a-model-for-us-all/> Accessed 13th October 2021
[161] Ibid
[162] Scottish Government: 'An International Evidence Review of Mediation in Civil Justice' (June 2019) <https://www.gov.scot/publications/international-evidence-review-mediation-civil-justice/pages/9/> Accessed 10th January 2022

more than a ‘semi-detached’ relationship between CDR and the justice system in England and Wales. If stage 2 is to achieve its potential, the barriers which historically have prevented full integration need to be removed. Analysis of the evolution of the system in British Columbia offers some suggestion of how this can be achieved.

The question which follows therefore is whether the British Columbian approach has led to the same level of judicial involvement in enforcing regulations and rules relating to CDR. Upon review of the case law, cases involving unreasonable refusal to engage in CDR are conspicuous by their absence. While the judiciary in England and Wales were considering the position on how the provisions of the CPR should be used to encourage CDR or penalise those litigants who refused to engage in it, there is a noticeable lack of such jurisprudence across the same period in British Columbia.[163]

This therefore informs this study in two ways. Firstly, it is supportive of the position that the adoption of a structured, quasi-compulsory CDR approach laid out clearly by the rules is more likely to lead to compliance and normalisation of CDR than the use of judicial discretionary encouragement and penalty costs alone and secondly, it suggests that Swanson was correct in his view that the notice to mediate scheme succeeded in achieving a culture change regarding use of CDR in British Columbia. As Ross comments ‘…the effectiveness of the British Columbia approach stemmed in part from decisive implementation but is also surrounded by a range of approaches to dispute resolution that are top-down and more diverse… change there was driven by government’.[164]

This also adds to the increasing weight of evidence which supports the creation in England and Wales of an entirely new set of rules to regulate the OSC which, ultimately, is one of the core recommendations of this thesis. Although it is outside the scope of this thesis to provide extensive guidance as to the full content of those rules,

[163] For discussion on how English case principles relating to unreasonable refusal to mediate could be adopted in an appropriate case in British Columbia, see Thomas S. Woods, 'Costs Sanctions for Unreasonable Refusal to Mediate: Coming to a Courthouse Near You' (2006) 31 Advoc Q 393

[164] M.L. Ross, ' Embedding mediation in Scottish Civil Justice: Riding the tide for a cultural shift? ' (2021) 40.1 Civil Justice Quarterly 41

a full review of this is something which ought to be undertaken if the recommendations of this thesis are adopted.

Were the OSC to remain under the auspices of the CPR, it difficult to see how meaningful progress can be made, particularly in enhancing the development and implementation of stage 2. There is evidence that the British Columbian system has, over the years, recognised that disputes of different natures require different regulations, with a specific emphasis on small claims being capable of being resolved in a different way to the traditional adversarial trial. It also recognised that in order to facilitate a culture change in the users who conduct such disputes, a harmonised top-down approach to creating individual sets of rules and regulations was necessary, the result of which has been that phases 2 and 3 of the CRT are achieving high rates of consensual settlement without the imposition of default mandatory CDR. The conclusions which can be drawn from the evidence presented here pertain directly to answering the part of the third research question concerning the creation of a new set of rules to regulate the OSC.

5.4 Conclusion

The purpose of this chapter was to primarily test the first part of the thesis hypothesis in relation to stage 2 and establish whether Lord Briggs conducted an analysis on (a) how the phases 2 and 3 of the Civil Resolution Tribunal were developed and embedded into the British Columbian civil justice system and (b) how the consensual dispute resolution stages of the CRT could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales. In doing so this chapter has answered two of the research questions of this study: the way in which the two comparator jurisdictions have or are intending to embed CDR into their online dispute resolution provision and whether evidence suggests that the creation of a separate set of rules is necessary for the OSC, to remove it from the scope of regulation by the CPR.

Whilst the two questions may seem different, it has been demonstrated that they are also inextricably linked. The research presented and used to answer the thematic

element of research question 3 concerning CDR has also enabled conclusions to be drawn on whether a new set of rules to regulate the OSC is necessary and vice versa. Turning first to CDR, there are very clear areas of structural similarity between stage 2 of the OSC and phases 2 and 3 of the CRT, as may well be expected. The evidence available from the annual reports produced by the CRT is that phases 2 and 3 are successfully assisting large numbers of low value tribunal users with consensually resolving their claims without the need for adjudication. Therefore, the level of similarity between the two models is justified.

Where it becomes more complicated is when the background to the comparator jurisdictions' relationship between CDR and their respective civil justice systems is considered. In England and Wales, it is arguable that Briggs's description of the relationship being 'semi-detached' is perhaps even a little generous. There is a clear gap between the objective of the CPR, to encourage parties to engage in CDR at all stages and the adoption of CDR as a formally accepted method of dispute resolution in appropriate cases. This is demonstrated by the low levels of engagement with the court-annexed mediation schemes during the 2000s, the CEDR study carried out in the same time period and the uptake and percentage engagement and settlement rates of the free Small Claims Mediation Service from 2012 to date. It is therefore fair to conclude that the culture change towards parties attempting as a matter of course to resolve matters without judicial intervention has simply not happened to date in England and Wales. In the absence of a clear policy mandate, there is no evidence to suggest that the position will change following the introduction of stage 2 of the OSC.

In British Columbia, the notice to mediate scheme completed a trio of CDR options which were embedded into the civil justice system prior to the launch of the CRT. Although the relevant schemes were not operated in the same way as Sander envisaged in 1976, it is fair to argue that some form of multi-door courthouse was already in place by 2016, namely ENE through settlement conferences, mandatory mediation schemes in small claims and quasi-mandatory external mediation through the notice to mediate scheme. The CRT simply brought these already widely used variants of CDR together and incorporated them as normalised methods of resolving disputes in phases 2 and 3. The statistical evidence presented through the CRT annual reports shows an increasing rate of settlement achieved across both of these

stages although, as commented upon in the chapter, the lack of contextual evidence does mean that any conclusions which are drawn from this data need to be treated with some caution. What can be determined from the data, however, it that it suggests that CDR is viewed as a genuine alternative to formal adjudication amongst small claims tribunal users in British Columbia.

The evidence in this section has served to demonstrate that British Columbia was therefore in a markedly different place in terms of normalisation and acceptance of CDR as a natural part of the low value claims resolution process prior to the launch of the CRT than England and Wales are prior to the launch of the OSC. This needs to be taken heavily into account when deciding how users of the OSC are going to be incentivised to engage with the CDR options on offer at stage 2.

Lord Briggs's resistance to some form of compulsion to engage in CDR at stage 2, and his contention that simply embedding CDR would naturally affect the culture change which he identified is not supported by the evidence available. It is submitted that, if the same position as that adopted by the CPR (i.e., sanctions-based encouragement) were to be embedded into the Online Solutions Court rules, it would simply lead to stage 2 being largely bypassed. In British Columbia, despite the fact that the evidence illustrates that CDR was a normalised method of dispute resolution prior to the CRT, there is still a statutory power reserved for the case manager to compel parties to mediate. In England and Wales, the evidence demonstrates that CDR is far from being a normalised part of the process, with 73% of people actively opting out of taking part in mediation through the Online Civil Money Claims pilot. There is simply no evidential basis to suggest that, without some form of compulsion, engagement with CDR at stage 2 would be any more successful than this.

The evidence from British Columbia is that the culture change proposed here is not an overnight process. It will require leadership and consistency in approach from those who develop and implement policy and it will take time. This is not to say that embedding CDR into stage 2 should be abandoned for thirty years in favour of a gradual piecemeal approach. Implementation of CDR in family and employment cases, and the permanent adoption of it in small claims matters through Dispute Resolution Hearings in Birmingham County Court demonstrate that there are grounds

for optimism. It must be remembered that whilst British Columbia had already embedded CDR into their justice system before the launch of the CRT, prior to settlement conferences, court mediation program and the notice to mediate scheme they still just had an expensive, adversarial, complex and lengthy court process as in England and Wales. Culture change and normalisation of CDR is possible, but only with clear direction and, it is submitted, some form of compulsion for parties in low value claims.

As an extension of this, the research conducted in this chapter has also advanced the proposal put forward by Lord Briggs on the role of the case manager. In British Columbia, the powers of the case manager are clearly set out in the Civil Resolution Tribunal Act which include clear direction on how parties who refuse to engage in CDR at stage 2 will be dealt with. It is therefore one of the recommendations of this study that a compulsory CDR approach be adopted as part of a newly drafted set of OSC Rules. Embedded into those rules should be the power for the case officer to require parties to engage in CDR, with power reserved to the adjudicator to impose penalties for failure to engage.

Consideration also needs to be given to what the penalties for unreasonable refusal to engage may be. Adopting the CPR approach of a discretionary penalty on recovery costs is unlikely to be sufficient an incentive in the OSC at it is designed to be primarily used by unrepresented litigants who will therefore not be seeking to recover anything beyond disbursement costs such as court fees in the first place. It would therefore be worth considering the possibility, in extreme cases, of allowing adjudicators the power to reduce damages by a discretionary percentage in the event of cases where parties have unreasonably refused to engage with stage 2 of the OSC, with power reserved specifically for cases where the case officer at stage 2 has made an order requiring the parties to take part in CDR. This therefore provides a conclusion to the element of research question 3 regarding how CDR can be embedded into the OSC, as well as advancing Briggs's proposal for how the consensual dispute resolution stage of the CRT could be transplanted into the English civil justice system.

With regard to whether the creation of a new set of rules to regulate the OSC is necessary, all of the schemes where CDR has been embedded in England and Wales,

and all of those which have embedded it on a permanent basis in British Columbia, have done so with the benefit of individually drafted sets of rules which focus specifically on the types of matters to which those methods of CDR are going to be applicable. This, coupled with the evidence presented by this chapter on the inconsistent way in which the judiciary have utilised the general powers conferred to them under the CPR suggest that failing to adopt a new set of rules for the OSC would be the incorrect way to proceed. Therefore, the conclusion to this element of the third research question is that the creation of a separate set of rules to regulate the OSC is necessary.

The recommendations which flow from that are based upon defined positions being incorporated relating to parties' obligations to engage with CDR at stage 2, the extent and remit of the powers of case managers and the discretionary penalties which can be imposed on parties who unreasonably refuse to engage. The risk, in the author's opinion, is that if this is not made clear from the outset then there is the potential for stage 2 to suffer the same issues as the court-annexed mediation programmes in the 2000s and the small claims mediation service, with low uptake from parties. The natural consequence of this will be higher levels of adjudication, which will lead to delays. As was shown in chapter 2, the way in which policy in England and Wales has attempted to deal with overwhelming levels of litigation in the past has been to increase fees and, essentially, restrict access, which is the absolute antithesis of what the OSC was supposed to, and has the potential to, achieve. It is submitted that the conclusions and recommendations resulting from the research carried out in this chapter has set out the most effective way of mitigating against that risk.

Chapter 6

Stage 3: Resolution by Adjudication

6.1 Introduction

The previous chapters of this thesis have demonstrated that, to this point, there has been a failure to conduct a comparative analysis on how phases 1 to 3 of the CRT were embedded into the British Columbian civil justice system and how the models for those phases of the CRT system could be transplanted into the English civil justice system for the benefit of court users with low value civil disputes. The research presented in those chapters has built on the foundations of the original proposal made by Lord Briggs and put forward evidence-led recommendations which ought to be adopted to enhance the development and implementation of stages 1 and 2 in England and Wales for those court users.

The evidence presented so far in this study has also revealed that there is a significant risk that insufficient investment in the foundations of the project will be provided by government to develop and implement the OSC, which will lead to it becoming largely a digitised version of the current County Court procedure: something which has been repeatedly recognised as being too costly, too complex and too lengthy to provide adequate access to justice for unrepresented litigants in low value claims.

The purpose of this chapter is to advance the research put forward in previous chapters to address the final stage of the OSC: stage 3. It will answer the final thematic element of research question 3, which relates to the way in which the process for formally adjudicating disputes in the ODR systems within the comparator jurisdictions works or is envisaged to work. This is the stage which will deal with the fewest claims, but which will require the greatest amount of judicial involvement.

It will also provide some additional context to an emerging theme from this research: the MOJ's lack of robust strategy for collecting, analysing and sharing data. The collection and use of data within the CRT will also be explored. It will be argued that progress in developing and embedding such a strategy in the OSC is crucial to enhancing its operation for litigants with low value civil claims.

There is also a notable lack of academic research into the alternative approaches to final adjudication for low value civil claims. This chapter will remedy this deficiency. It will commence by considering how stage 3 of the Online Solutions Court is proposed to be structured and identify any areas where it appears that Lord Briggs's proposal as to its operation is incomplete. An exploration will then be conducted on the proposed format of trials at stage 3, with an analysis being undertaken of any risks which the proposed formats may present. Finally, an evaluation will be carried out on any steps which have already been taken towards changing the current format of final hearings by HMCTS.

In line with the overarching methodology of this thesis, a comparative analysis will then be undertaken on the adjudication stage of the Civil Resolution Tribunal, phase 4. This will necessarily cover the structure of phase 4, the formats for trial which can be adopted by the CRT member with responsibility for the case as well as how and by whom the decision on format is taken. Following this, conclusions can be drawn on whether the proposal for stage 3 of the OSC is the same as that which exists as part of phase 4 of the CRT in terms of structure, purpose and format. Where areas of divergence exist, analysis will be carried out on whether there are any reasons for this and, if so, whether there is any justification for the adoption of the British Columbian model in England and Wales.

6.2 England and Wales

Stage 3 is the final part of Lord Briggs's proposal for the Online Solutions Court. In contrast to stages 1 and 2, which are based on parties engaging in forms of consensual dispute resolution either on their own or with the assistance of an OSC case officer, stage 3 involves a binding, adjudicated decision being made and imposed on the parties by a deputy or district judge.[1] On the face of it, this appears identical to the way in which small claims disputes are resolved in the County Court. That process involves cases being managed towards a face-to-face final hearing in which a member of the judiciary will read the evidence presented by the parties, listen to their oral

[1] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 6.7

submissions and make a judgment based on the judge's application of the relevant law to the facts of the case.[2]

Lord Briggs stated in his Final Report that this part of the process would remain the same, only the format of how the adjudication was conducted would change.[3] This section of the chapter is designed to test the accuracy of that statement. It is therefore separated into three parts. The first part concerns the proposed format of the stage 3 adjudication itself with an accompanying analysis of any steps which have already been taken in England and Wales towards the stage 3 model proposed by Lord Briggs, and the second part considers who will make the decision on the format of the final hearing.

6.2.1 How was it proposed that stage 3 of the Online Solutions Court would be structured?

The final adjudication stage of the OSC is the point at which a decision is taken relating to the parties' substantive rights. Lord Briggs was clear in both his Interim and Final Reports that the power to make such a decision was to remain exclusively with the judiciary.[4] No form of substantive decision-making power was to be conferred on to the case officers at stage 2. However, where he was significantly more flexible was in his view of the format of the hearing which would lead to that decision being reached.

Historically and indeed currently, parties to small claims in the County Court would attend a hearing, generally face to face though recently these have been via video link because of Covid-19 restrictions.[5] This is discussed in greater detail below. During that hearing, particularly if both parties are unrepresented, the judge presiding over proceedings would adopt an inquisitorial approach and ask each party a series of questions relating to the case they had presented and the evidence upon which they were relying. Lord Briggs did not see any need to fundamentally overhaul this process: as set out in chapter 2, it had long since been praised as a beneficial way of conducting trials for small claims matters where litigants are typically without representation.

[2] Ibid
[3] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at para 6.42
[4] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at para 6.8, p38
[5] Section 55 Coronavirus Act 2020

However, he did suggest that stage 3 of the OSC could adopt a more flexible inquisitorial approach.

This therefore gives rise to two key questions on the structure of stage 3. The first is what the proposed alternatives to face to face trials are, and the second is who will make the decision on the format of the trial. Both of these will now be considered in turn.

6.2.2 Alternatives to Physical Hearings

In his Interim Report, Lord Briggs set out the alternatives to physical hearings. He stated that there was to be '…no default assumption that a live claim would have to be settled at a traditional face to face trial. Rather, the traditional trial would be regarded as the last resort, if the alternatives of resolution on the documents, by telephone or by video conference were deemed to be unsuitable'.[6]

Before exploring what these alternatives would involve and analysing their implications, it is important to highlight that this change of approach would therefore do two things. The first is to widen the range of formats in which judicial determination could take place, and thus necessarily changing the perception of what a 'trial' or a 'hearing' means to a disputant who enters the OSC seeking resolution of their matter. As Mulcahy comments, '…the physical architecture of the courtroom, for example, will often condition people's experiences and perceptions of their treatment'.[7] The second is, as Briggs dealt with in his final report, that it 'deprives the loser of that basic feature of English justice, namely a day in court'.[8] He said this of the challenge which that conundrum posed to the introduction of the OSC:

> Reliable although anecdotal evidence suggests that they [litigants in person] have greater distrust of telephone hearings than do lawyers. There is by contrast a good level of court-user approval of the day in court provided by the Small Claims Track short trial, which is almost always face to face[9]

[6] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 6.14
[7] L. Mulcahy, *'Legal architecture: justice, due process and the place of law'* (Routledge, 2010).
[8] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) para 6.5.9 at page 37
[9] Ibid at para 6.7.8 at page 52

It is here where, once again, it is submitted that the Briggs reports remain incomplete in their analysis of how to enhance the CRT model for the OSC, despite the gravity of its implications in respect of maintaining the system's legitimacy in the eyes of court users. The reports allude to, but do not directly deal with, a very particular challenge presented by fundamentally altering the format of procedural justice: that of effective participation. This concerns the right of a litigant to actively take part in court proceedings, a right which is fundamentally protected under Article 6 of the ECHR.[10]

The OSC is intended to be a court and is therefore covered by this provision. Furthermore, whilst it is the position of this thesis that a new set of rules for the OSC ought to be created by statute, it is submitted that a key provision built into the overriding objective of the CPR which ensures the effect of Article 6 would also need to be incorporated into those new rules: the principal that dealing with cases justly and fairly means 'ensuring that parties are able to participate fully in the proceedings'.[11] Indeed, this has also been enshrined in case law, for example R (Gudaniviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor[12] in which it was stated that access to the formal process to resolve disputes must be 'practical and effective, rather than theoretical and illusory' and R (Howard League for Penal Reform and The Prisoner's Advice Service) v Lord Chancellor in which was confirmed that appropriate processes must be in place to ensure effective participation.[13]

As Tyler, Thibault and Walker have extensively commented upon, participation is therefore an intrinsic part of procedural justice[14] and, if face to face trials are to become the exception as opposed to the default in the OSC, any potential impact that this may

[10] Article 6 ECHR states that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The Court has held that the right to participate in a lawful and fair recruitment procedure in public service constitutes a "right" within the meaning of Article 6 s1 (Frezadou v. Greece, 2018, s30).The ECtHR has developed the principle that a person must be able 'to participate effectively' in their trial: 'In general, this includes, inter alia, not only his right to be present but also to hear and follow proceedings'.(Standford v UK [1994] ECHR 6)

[11] CPR 1(2) (a)

[12] *R (Gudaniviciene & Ors) v Director of Legal Aid Casework & Lord Chancellor* [2014] EWCA Civ 1622

[13] *R (Howard League for Penal Reform and The Prisoner's Advice Service) v Lord Chancellor* [2017] EWCA Civ 244 [51]

[14] See for example J Thibault and L Walker, *'Procedural Justice: A Psychological Analysis'* (Hillsdale 1975); E Lind and T Tyler, *The Social Psychology of Procedural Justice* (1988, Springer); T Tyler, 'Social Justice: Outcome and Procedure' (2000) 35 International Journal of Psychology 117; R Moorhead, M Sefton and L Scanlan, 'Just Satisfaction? What drives public and participant satisfaction with courts and tribunals?' (MOJ Research Series 5/08, 2008) and T Tyler, "Procedural Justice and the Courts" (2007) 44 Court Review 217

have on effective participation must be accounted for when considering how to enhance the development and implementation of stage 3. As Assy summarises, '…accuracy aside, the absence of a traditional trial might be said to run the risk of being perceived as a degradation of justice, so undermining public confidence and the court's authority and legitimacy.'[15]

It is therefore not merely a desired outcome, but a *requirement* that stage 3 of the OSC maintains, and preferably enhances, the civil justice system's ability to ensure parties to claims can effectively participate in them. With this in mind, the alternatives to physical trials put forward by Lord Briggs can now be analysed.

Given the structural similarity with face-to-face trials, it is pragmatic to initially consider remote and telephone hearings before moving on to explore how trials conducted on the documents would work. Lord Briggs envisaged that remote, video or telephone hearings would broadly be structured in the way in which they take place in physical courtrooms.[16] His view was that the only difference would be that the parties would be present virtually, rather than physically.[17] This would therefore simply transplant current physical provision into a virtual court, thus retaining familiarity with the process and only changing the venue.

It is primarily necessary to analyse this transplant approach in light of the concerns raised above regarding effective participation. Specifically in relation to remote hearings, research carried out by McKeever points out that 'participation in legal hearings is not a binary process, whereby a litigant either participates or does not participate… there are different types of legal participation, defined by the extent to which the intellectual, practical, emotional and attitudinal barriers to participation can be managed or overcome'.[18]

McKeever's research led her to develop a ladder of legal participation, which 'groups the broad range of experiences of litigants as non-participatory, tokenistic or participatory, and identifies different types of participation within each of these

[15] Rabeea Assy, 'Briggs' online court and the need for a paradigm shift' (2017) 36(1) C.J.Q. 70
[16] Lord Justice Briggs, 'Civil Courts Structure Review: Interim Report' (2015) at para 12.7 on p122
[17] Ibid
[18] G McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during COVID-19', (Modern Law Review Forum, 2020) <http://www.modernlawreview.co.uk/mckeever-remote-justice> Accessed 12th January 2022

categories'.[19] Non-participatory experiences are defined as: isolation and segregation, tokenistic experiences are defined as: obstruction and placation and participative experiences are defined as engagement, collaboration and being enabled.[20] It is the third stage which needs to be achieved to overcome the potential barriers relating to effective participation in remote or virtual hearings at stage 3.

Much therefore centres on the experience of litigants themselves so that an adequate balance can be struck between effective participation in virtual hearings and procedural proportionality can be struck in developing the blueprint for stage 3 of the OSC. This does present some difficulty in England and Wales. As Tomlinson has stated, there is 'very little evidence of the impact of digital procedures on public justice … many views were therefore grounded in speculation'.[21]

That said, in 2018 HMCTS did begin to pilot the use of remote hearings and to evaluate their impact. This started with the year-long Video Hearings Pilot Scheme[22] in the First Tier Tribunal (Tax Chamber). The report which followed revealed that, whilst the majority of hearings which took place remotely suffered from technical difficulties requiring the hearings to stop and be restarted, the majority of participants were happy with the format primarily due to the fact that they did not need to travel to the hearing.[23] That said, only 23 hearings were evaluated, and therefore it is not possible draw any significant conclusions from their findings. The scheme was closed in March 2021 following a request from HMCTS, due to continually very low usage.[24]

This tentative step towards evaluating the usage of remote hearings was accelerated significantly however with the arrival of the Covid-19 pandemic in March 2020. On 23 March 2020, the United Kingdom government introduced restrictions on society to reduce the spread of coronavirus. These measures closed non-essential businesses and venues, prohibited all public gatherings of more than two people and required everyone to stay at home except for very limited purposes such as for daily exercise, travelling to work where this could not be done from home, or to purchase basic

[19] Ibid
[20] Ibid
[21] J. Tomlinson, *Justice in the Digital State*, (Bristol University Press, 2019) at 49
[22] CPR PD51V – The Video Hearings Pilot Scheme.
[23] M. Rossner & M. McCurdy, 'Implementing Video Hearings – Party to State: A Process Evaluation' (Ministry of Justice, 2018) and M. Rossner & M. McCurdy, 'Video Hearings Process (Stage 2) Final Report' (Ministry of Justice, 2020)
[24] Approved Minutes of the Civil Procedure Rule Committee Friday 4th December 2020

necessities.[25] Anyone who left their home for one of the permitted reasons during what was colloquially referred to as 'lockdown' needed to practise social distancing by ensuring they remained two metres apart from anyone outside their household. The measures came into force through the passing of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. In order to ensure the continued operation of the courts and tribunals, the use of remote hearings was rapidly expanded.[26]

Following this, the Civil Justice Council agreed to undertake an evaluative review which explored the impact of the changes mandated by COVID-19 on the operation of the civil justice system. They partnered with the Legal Education Foundation to conduct the 'rapid review'.[27] The Master of the Rolls and Chairman of the Civil Justice Council Sir Terence Etherton stated that '…it is essential that we understand quickly how court users are being affected by the widespread changes adopted by the civil justice system in response to COVID-19. This review is a chance for users to give feedback on how the changes are impacting them and to suggest areas of improvement. The evidence collected by this review will be invaluable in shaping the way forward for the civil justice system, both immediately and in the longer term.'[28]

The rapid review gathered data from 1st to 15th May 2020 and used a questionnaire to seek details from court users who had taken part in remote audio and video hearings.[29] 1077 responses were received, covering 486 remote telephone and video hearings with 27% of those hearings taking place with none of the participants in a court room.[30]

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[25] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. <https://www.legislation.gov.uk/uksi/2020/350/contents/made> accessed 18th November 2021

[26] N. Johnson, A. Pertoldi, R Mendoza & M. McIntosh, 'COVID-19: The evolving picture for remote hearings in the English courts' (*hsfnotes.com,* Herbert Smith Freehills, 26th March 2020) https://hsfnotes.com/litigation/2020/03/26/covid-19-the-evolving-picture-for-remote-hearings-in-the-english-courts/ Accessed 15th November 2021

[27] N. Byrom and others, 'The impact of COVID-19 measures on the civil justice system' (Civil Justice Council, Legal Education Foundation, 2020) <https://www. judiciary.uk/announcements/civil-justice-council-report-on-the-impact-of-covid-19-on-civil-court-users-published/> Accessed 12th September 2021

[28] Courts and Tribunals Judiciary, 'Update: Rapid Consultation on the impact of Covid-19 measures on the Civil Justice System (*judiciary.uk*, 1st May 2020) <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/> Accessed 6th September 2021

[29] Ibid

[30] N. Byrom and others, 'The impact of COVID-19 measures on the civil justice system' (Civil Justice Council, Legal Education Foundation, 2020) <https://www.judiciary.uk/announcements/civil-justice-

It was noted by the review as a weakness in the data that only 17 of the respondents were litigants.[31] whereas the bulk of responses came from lawyers or groups who had been involved in remote hearings. As such, the rapid review was clear that the findings it reported could not be generalised across all court users.

Furthermore, only 10.9% of the remote hearings covered by the review involved an unrepresented litigant,[32] of which 56.6% were civil claims with a value of less than £10,000. Issues with effective participation were identified.[33] There were repeated serious issues with the technology in 44.7% of cases,[34] most of which stemmed from the systems which were used by the judiciary.[35] Most concerning for this study is that low value civil claims in the County Court were the subject of the highest level of dissatisfaction[36] and that, when the technology did go wrong, technical assistance was only able to be provided in 19.5% of cases due to the fact that there were not sufficient administrative staff.[37] 36.6% of County Court hearings proceeded without any technical support whatsoever. As Sorabji comments, this 'may suggest that the HMCTS reform programme's assumption that a digitised system, i.e., one that has digitised procedures such as e-filing and e-management and remote hearings, can run effectively with a significantly reduced court administration was overly-optimistic and may need to be revisited'.[38]

It also demonstrates that, despite the fact that government had committed to investment in IT for the court service since the Woolf Report, and the fact that Lords Woolf, Jackson and Briggs had all warned that the court service did not have an

council-report-on-the-impact-of-covid-19-on-civil-court-users-published/> Accessed 12th September 2021 at 29.

[31] N. Byrom and others, 'The impact of COVID-19 measures on the civil justice system' (Civil Justice Council, Legal Education Foundation, 2020) <https://www.judiciary.uk/announcements/civil-justice-council-report-on-the-impact-of-covid-19-on-civil-court-users-published/> Accessed 12th September 2021 at 36.

[32] N. Byrom and others, 'The impact of COVID-19 measures on the civil justice system' (Civil Justice Council, Legal Education Foundation, 2020) <https://www.judiciary.uk/announcements/civil-justice-council-report-on-the-impact-of-covid-19-on-civil-court-users-published/> Accessed 12th September 2021 at 38–39.

[33] Ibid

[34] Ibid at 30

[35] Ibid

[36] Ibid at 29, 39.

[37] Ibid

[38] John Sorabji, 'Initial Reflections on the Potential Effects of the Covid-19 Pandemic on Courts and Judiciary of England and Wales' (2021) 12(2) International Journal for Court Administration 6

adequate IT infrastructure to enable the delivery of civil justice at proportionate cost,[39] that infrastructure remained in the same poor condition as it had done for the past twenty years. The rapid review also reported issues with parties speaking over one another, concern that the judiciary had failed to hear and understand submissions being made and commented on the poor quality of the audio or video link of the hearing.[40] Particularly relevant to stage 3 is that it also identified that the additional layer of technology over a system which was already too complex caused significant problems, commenting that '…whilst respondents acknowledged that physical court hearings could pose barriers to effective participation, particularly for litigants in person, many expressed concerns that the overlaying of existing complex processes with technology would exacerbate, rather than ameliorate issues for lay users'.[41] This is, of course, particularly relevant to the second part of the hypothesis of this thesis: the risk that the OSC could largely become a digitised version of the same small claims system which exists presently.

Despite that, there were some positive conclusions drawn from the rapid review. For example, 75% of survey participants were positive or very positive about how they found the use of video or telephone as part of the hearing, although it was noted that levels of satisfaction were higher for video hearings when compared with those over the telephone.

However, it was the conclusion of the rapid review overall that video and telephone hearings were worse than physical hearings, based on the difficulties presented to enabling effective party participation. Much of this was reported to have stemmed from major technological difficulties, with 44.7% of the hearings, equating to 217 out of 486, experiencing such problems. Further, as Sorabji notes, '…this finding was based primarily on responses from professional court users rather than their lay clients, or litigants-in-person, which leaves open the question whether the position is actually

[39] Lord Woolf, 'Access to Justice Final Report' (Lord Chancellor's Department, 1996) at chapter 21, Lord Justice Jackson, 'Review of Civil Litigation Costs: Final Review' (2009) at 439 and Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at para 5.34, p32

[40] N. Byrom and others, 'The impact of COVID-19 measures on the civil justice system' (Civil Justice Council, Legal Education Foundation, 2020) <https://www.judiciary.uk/announcements/civil-justice-council-report-on-the-impact-of-covid-19-on-civil-court-users-published/> Accessed 12th September 2021 at 43

[41] Ibid

worse for those individuals for whom the civil justice system properly exists.'[42] Applying McKeever's ladder of legal participation, this is therefore quite some distance from the participative experiences she describes as essential. The results of the rapid review ought to be considered as a central piece of evidence if video or telephone hearings are to be the primary replacement for physical hearings at stage 3.

Discussion of the results and findings of the rapid review also gives rise to another key point; one which has been made repeatedly throughout this thesis. This concerns the value of data which contextualises statistics. The report which followed the rapid review provided more useful and targeted data from court users which can be used to inform future policy than any of the statistical data which HMCTS routinely publish, and any amount of anecdotal evidence which has been used to justify recommendations in civil justice previously. Although this thesis did not set out to comment specifically on the nature of the data collection and publishing policies which underpin reform, it has become clear that this has, historically, been unfit for purpose to inform developments in civil justice. Conclusions were reached which ultimately may have been correct, but at the time the appropriate data was not available to support those conclusions. Exclusive observation of just statistics with no contextual data can lead those who use it to interpret it in different ways, 'to attempt to justify arguments not arrived at by valid reasoning but offered instead to promote a particular agenda.'[43] The rapid review is good evidence of how much better informed HMCTS could be, and how much more effective the continual development of the OSC could be, with an appropriate data strategy in place.

This echoes the conclusions reached by the Legal Education Foundation in their 2019 report 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice',[44] which investigated the way in which HMCTS gather and use data to improve the operation of the civil justice system as it moved online. Whilst a full exploration of the report is outside the scope of this thesis, there are some key areas where its findings

[42] John Sorabji, 'Initial Reflections on the Potential Effects of the Covid-19 Pandemic on Courts and Judiciary of England and Wales' (2021) 12(2) International Journal for Court Administration 6
[43] Kenneth Sawka, 'The Use and Misuse of Statistics' in Craig Gruber (ed), *The Theory of Statistics in Psychology: Applications, Use and Misunderstandings* (Springer 2020) 95.
[44] The Legal Education Foundation, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (2019) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF> accessed 15th February 2022

and recommendations overlap with what has emerged from this study. The report was clear in its opening sections of the work which HMCTS needed to do to improve its use of data:

> In order to test, review and, where necessary, improve systems to meet this commitment, a robust strategy for data collection, analysis and sharing must be in place…. The collection and publication of this data is critical to building trust in reformed processes and encouraging adoption of new services.[45]

It went on to state that '…this report, based on extensive stakeholder consultation with the judiciary, policy makers, national and international experts in evaluation, public justice system digitisation, public law and equality and diversity monitoring recommends an approach to data collection for service design, iteration and ongoing evaluation… the adoption of this approach will enable HMCTS to design inclusive services, demonstrate that reformed processes uphold access to justice, meet their legal obligations and strengthen public trust and confidence in the justice system.'[46]

HMCTS had made public commitments to improve the quality and type of data which it kept prior to the Legal Education Foundation's report. In October 2017 the CEO of HMCTS announced that '…we will build excellent data systems into all our new systems, so that we can keep track of how well they and we are working; learn and improve; and measure the right things (for example, finding ways of measuring and then reducing other people's wasted effort, not just our own use of buildings or speed of resolution)'.[47]

The commitment to using data to inform a programme of continuous improvement across the justice system was restated in May 2018: 'Finally, we are consciously and deliberately planning the data and management information that we want our new systems to provide, and which will be the foundation of further improvement–allowing us to see much more readily where there are blockages or difficulties, and whether the

[45] Ibid
[46] Ibid
[47] Susan Acland-Hood, 'Susan Acland-Hood sets out our priorities for the next phase of courts and tribunals reform.' (*insidehmcts.blog.gov,* October 2017). https://insidehmcts.blog.gov.uk/2017/10/26/susan-acland-hoodsets-out-ourpriorities-for-the-nextphase-of-courts-and-tribunalsreform/ Accessed 11th March 2022

things we are doing to address them are working… 'we will also make data available – in a suitably anonymised way – for researchers and academics to use.'[48]

Following the Legal Education Foundation's report, HMCTS stated that they would use continued evaluation to inform future practices and ongoing changes to justice systems and service design,[49] and they adopted the 29 recommendations which were put forward.[50] However, as has been established from this study, there is no evidence that this contextual, user-centred data is being shared or used to inform continuous improvement in low value civil justice. The information available remains just bare data, with no accompanying evidence to explain certain trends. The most obvious example of this is the poor uptake of the free small claims mediation service discussed in the previous chapter: there is no data available which explains why this is, which could be used to enhance stage 2 of the OSC. The CRT's approach will be explored in further detail below, however it is clear that this has to form a central part of HMCTS's strategy as they build the OSC.

Moving on to consider how remote hearings at stage 3 of the OSC can impact participation, the introduction of remote hearings in principle does not automatically render effective participation impossible.[51] Donoghue stated that '…to date, there is no empirical support to affirm or disprove that remote legal services cannot provide an appropriate setting in which standards of communication and reassurance are maintained…. technologies must however be built and deployed in ethical ways which enhance rather than compromise court user participation, while simultaneously upholding fundamental legal principles such as fairness, impartiality and access to

[48] HMCTS. Reform Update: May 2018 at page 20. (*insidehmcts.blog.gov,* May 2018) <https:// assets.publishing.service.gov. uk/government/uploads/system/ uploads/attachment_data/ file/711535/HMCTS_Reform_ Update_May_2018.pdf> accessed 11th March 2022

[49] Ministry of Justice (2019). Evaluating our Reforms: Response to PAC recommendation 4, p2, para 6. < https://assets.publishing. service.gov.uk/government/ uploads/system/uploads/ attachment_data/file/775588/ Public_Accounts_Committee_ Recommendation_4_31_ Jan_2019pdf.pdf> Accessed 11th March 2022

[50] HMCTS. 'Making the most of HMCTS data' (October 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925341/HMCTS_Making_the_most_of_HMCTS_data_v2.pdf> Accessed 11th March 2022

[51] Jane Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice (2017) 80 (6) MLR 995

justice.'[52] This conclusion is also supported by McKeever's research.[53] Therefore, where there seems to be a major issue in England and Wales is not in the principle itself, but in the underinvestment in the technology to make remote hearings operate satisfactorily.

Both Donoghue and McKeever conclude that there are barriers to overcome when seeking to make the transition from face-to-face to remote hearings. These include ensuring understanding of the process, technological barriers, preparing parties for hearings and what they are to expect, and how unrepresented litigants will be directed to services when needed.[54] These conclusions are firmly supported by the results of the rapid review conducted by the Civil Justice Council.

Much of this therefore centres on the necessity to include the court users in the process rather than isolate them from it, communicate with them clearly and ensure that technology enhances their experience, as opposed to causing a loss of confidence and distrust in the civil justice system. As McKeever suggests, technology has the power to isolate as well as bring benefits however, in order to avoid the latter, careful thought needs to be given on how to ensure the former.[55]

The Briggs review was incomplete in its analysis of the scale of the risk here which resulted in a simplification of the proposal for how it envisaged remote and video hearings would operate as part of stage 3.[56] The evidence suggests that this perhaps stemmed, at least in part, from an assumption that there would be investment in technology for the court service which simply has not materialised. This provides

[52] Ibid

[53] G McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during COVID-19', (Modern Law Review Forum, 2020) <http://www.modernlawreview.co.uk/mckeever-remote-justice> accessed 5th December 2021

[54] Jane Donoghue, 'The Rise of Digital Justice: Courtroom Technology, Public Participation and Access to Justice (2017) 80 (6) MLR 995–1025 and G McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during COVID-19', (Modern Law Review Forum, 2020) <http://www.modernlawreview.co.uk/mckeever-remote-justice> accessed 5th December 2021

[55] Ibid

[56] For further discussion on this point, see D. Reiling, 'Doing Justice with Information Technology' (2006) Information and Communication Technology Law 152; F. Senecal and K. Benyekhlef, 'Groundwork for Assessing the Legal Risks of Cyberjustice' (2009) Canadian Journal of Law and Technology 41; L. Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Oxford: Routledge, 2010); L. Mulcahy, 'The unbearable lightness of being? Shifts towards the virtual trial' (2008) 35 Journal of Law and Society 464 and R. Mohr and F. Contini, 'Reassembling the Legal: "The Wonders of Modern Science" in Court-Related Proceedings' (2011) 20 Griffith Law Review 994.

further evidence which proves the second part of the hypothesis of this thesis: that the development and implementation of the Online Solutions Court will be hampered by insufficient investment in the foundations of the project by government.

Having now undertaken an analysis of remote and telephone hearings and the risks associated with their replacing physical hearings, it is now necessary to turn to Lord Briggs's alternative: that determinations in the Online Solutions Court are taken on the basis of a mixture between the documents presented to the court and asynchronous communication taking place between the judge and the parties. The proposal for resolving low value civil claims this way originated from the Online Dispute Resolution Group, in which Richard Susskind particularly spoke of the benefits of what has become known as 'continuous online resolution'.[57]

Continuous online resolution involves asynchronous messaging between the judge and the parties to allow questions to be asked and answered, further information to be gathered and, if necessary, a short interactive hearing to be scheduled to enable the judge to make a determination on the case presented.[58] Communications take place through a portal and could take several days to conclude. As Susskind comments, continuous online resolution '…means that there is no need for everybody to be available at the same time. Like using email, participants can make their contribution whenever suits them. Diaries do not need to be aligned. And judges do not need to be sitting at their laptops when parties submit their documents.'[59]

Therefore, when Lord Briggs spoke about decisions being taken 'on the papers', this is not an exact replica of how that principle currently operates in the County Court, where judges will receive interim applications as an example and make a decision on whether or not to grant them during the course of their box work based exclusively on the paperwork in front of them. Stage 3 in this format would therefore be an extension

[57] As part of the ODR report, Susskind states that: Tier Three will provide a new and more efficient way for judges to work. Online judges will be full-time and part-time members of the Judiciary, who decide suitable cases (or parts of cases) on an online basis, largely on the basis of papers submitted to them electronically, as part of a structured but still adversarial system of online pleading and argument. This process will again be supported, where necessary, by telephone conferencing facilities. The decisions of online judges will be binding and enforceable, enjoying the same status as decisions made by judges in traditional courtrooms. A court fee will be payable but much lower than in today's courts

[58] Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2019) at 143

[59] Ibid

of the way in which case officers communicated with parties at stage 2, except with a judge assuming the role of the point of contact.

This therefore raises the question of whether this mode of asynchronous hearing will impact effective participation. In fact, there is evidence of continuous online resolution being trialled, adopted and evaluated in England and Wales as part of the Traffic Penalty Tribunal, in which adjudicators decide appeals against penalties issued for traffic contraventions by enforcement authorities in England (outside London) and Wales.[60]

Parties initially complete an automated diagnostic questionnaire to ensure that they meet the procedural requirements for filing an appeal. Once the system determines eligibility, users file their appeal and upload evidence using a single online dashboard through which they can follow the progress of the case. The local authority responding to the appeal accesses the information using the same dashboard, uploads its evidence and comments on the appeal itself. This is all visible to administrative staff and adjudicators, who use their own dashboard to communicate asynchronously with the parties to issue directions for further information or evidence. Parties can then indicate their preferred mode of hearing, either via an e-decision where the adjudicator takes a decision on the documents, a telephone hearing or a face-to-face physical hearing.

Discretion remains with the adjudicator to determine what form the final hearing should take.[61] Decisions are uploaded with reasons given and, if parties fail to view this via the portal within two days, are sent out in hard copy form. Management of cases takes place on a continuous basis and procedures have been put in place to redeploy staff who previously had inputted data or scanned papers to support users who have issues with interacting with the process:

> This has had the effect that appellants now have a more bespoke and improved user experience than they did before the digital reform. Those not wanting or able to appeal online can telephone for a form. They are telephoned back by a customer

[60]Traffic Penalty Tribunal of England and Wales, 'Annual Statistics Report 2017/18' (2018) https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2020/09/TPT_Annual-Appeal-Statistics-Report_2017-2018.pdf Accessed 15th December 2021 at page 2

[61] Traffic Penalty Tribunal of England and Wales, 'How Your Appeal Will Be Decided' <https://www.trafficpenaltytribunal.gov.uk/how-your-appeal-will-be-decided> Accessed 1st December 2021

service representative who talks them thorough the process, and 10% are assisted in appealing online when it becomes clear they use email. The others can send the form back to the named customer service representative, who, as a 'PA' to the appellant, creates a 'proxy' appeal in the system. This enables the respondent authorities and adjudicators to continue to use the digital functionality. The assigned customer service representative sends letters and prints out messages for the appellant and sends them with a personal note. The experience of the 'offline' has been enormously positive, without holding back the digital initiative.[62]

This reorganisation of existing resources has sought to take proactive steps to ensure a fully participative experience, to use the terminology in McKeever's ladder of participation. Evaluation has also been carried out on user interactions with the process itself. In 2016, the Tribunal commissioned a research report which surveyed users on their experiences. The data gathered showed some interesting trends, which could be particularly relevant when considering how to enhance the format of stage 3. 45.1% of respondents indicated that making an appeal online was fairly straight-forward, with 29.2% indicating that it was very straight-forward. The report goes on to comment on the satisfaction feedback from those who selected the different modes of adjudication offered:

> Of the 17.9% of appellants who chose a 'face-to-face' hearing before an adjudicator, some 35% summarised the overall experience as 'excellent', 25% as 'good', 15% as 'adequate', and 15% as 'poor'. The equivalent figures for those who chose a telephone hearing were only slightly less positive – with 29.4% citing their experience as 'excellent', 35.3% as 'good', 17.6% as 'adequate', and a further 17.9% as 'poor'. Then of those who chose to appeal in writing, 32.9% felt the process to be 'excellent', and a similar proportion (31.7%) to be 'good', while just 7.8% described it as 'fairly poor' and 12.2% as 'very poor'.[63]

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[62] *J. Aitken, 'Lessons from a trailblazer model'* (Judicial College: Tribunal Journal, Autumn 2016) https://www.judiciary.uk/wp-content/uploads/2013/07/tribunals-journal-autumn-2016.pdf Accessed 1st December 2021

[63] John Raine, Adam Snow & Eileen Dunstan. 'To Appeal or Not To Appeal? Motorists' Awareness and Experience of The Traffic Penalty Tribunal. Institute of Local Government Studies.' (May 2016) https://researchonline.ljmu.ac.uk/id/eprint/7540/1/To-Appeal-or-Not-to-Appeal.pdf Accessed 2nd December 2021

It is important to qualify this data by pointing out that only 213 respondents took part in the survey[64] out of 12,734 appellants during that particular year.[65] This therefore cannot be taken as fully representative of every user's experience with the tribunal itself. However, it is interesting that the satisfaction levels across those who selected face-to-face hearings and e-decisions is almost equal, whereas the feedback on telephone hearings were found to be substantially less positive.

This is elaborated on further in the report, with feedback suggesting that user experience for telephone hearings could have been improved by the introduction of webcams: a recommendation which was adopted by the Traffic Penalty Tribunal in the wake of the report. This was done in 2017, by conversion to MS Teams, with a survey conducted by the tribunal in 2018 suggesting that this move had been positive for effective participation specifically. 83.9% of respondents in that survey said that they were able to hear all of the parties throughout the hearing and 87.1% of respondents indicated that they felt that they had sufficient opportunity to put their point across to the adjudicator.[66]

No data was offered on user experience of the e-decision process however, save for stating that 90% (of 28,669 appeals[67]) of determinations were made with no hearing at all and that reviews were requested in only 3% of cases.[68] Indeed, over the same time period, 75% of tribunal users *elected* to have the adjudicator make a decision on the material supplied and the comments made by the parties online[69] which does suggest a degree of satisfaction with the way in which the continuous online resolution process is conducted. It is submitted therefore that, whilst this data is limited in some

[64] Ibid at p11
[65]Traffic Penalty Tribunal of England and Wales, 'Annual Statistics Report 2015 / 16' (2016) <https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2020/09/TPT_Annual-Appeal-Statistics-Report_2015-2016.pdf> Accessed 2nd December 2021
[66] Traffic Penalty Tribunal of England and Wales, 'Revolutionising a Service' (2020) <https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2020/09/TPT_Revolutionising-a-Service_2020.pdf> Accessed 12th January 2022
[67] Traffic Penalty Tribunal of England and Wales, 'Annual Statistics Report 2018 / 19' (2019) <https://www.trafficpenaltytribunal.gov.uk/wp-content/uploads/2020/09/TPT_Annual-Appeal-Statistics-Report_2017-2018.pdf> Accessed 2nd January 2022
[68] John Raine, Adam Snow & Eileen Dunstan. 'To Appeal or Not To Appeal? Motorists' Awareness and Experience of The Traffic Penalty Tribunal. Institute of Local Government Studies.' (May 2016) https://researchonline.ljmu.ac.uk/id/eprint/7540/1/To-Appeal-or-Not-to-Appeal.pdf Accessed 2nd December 2021
[69] Ibid

ways, it is valuable when assessing whether the 'decision on the paper' model proposed by Lord Briggs is something which could work in the OSC.

A further finding noted in both the reports discussed above was that the majority of respondents had been successful in their appeal, and that those who lost and submitted feedback almost universally indicated dissatisfaction with the process.[70] This was most evident in decisions which had been taken in writing, where none of the respondents who lost their appeals following a decision taken in writing gave any positive feedback.[71] This led them to conclude that active participation in the hearing itself, either by telephone or in a physical hearing, increased satisfaction levels amongst those who ultimately lost their appeal, albeit only very slightly.[72] On this point, it is particularly relevant to this study that the authors of the report concluded with this:

> That said, this is not to imply that improving procedures and explaining them better is necessarily ineffective in transforming appellant confidence in the justice being dispensed. Indeed, research on procedural justice theory (e.g., Tyler, 2006) clearly indicates that efforts to emphasise and demonstrate fairness and impartiality are likely to improve the standing of courts, tribunals and other public agencies amongst the community.[73]

This therefore suggests that there is a slight discrepancy in experience-based data as the outcome remains to be the dominant determinative factor behind positive feelings, however it is submitted that this can be mitigated by clear and careful explanation from the commencement of the involvement of the adjudicating body which demonstrates how the approach is fair and enables participation in a manner which is equivalent to that of a physical hearing. That said, it is noteworthy that no positive feedback on the process was given by a party who lost their appeal where it was decided online without a hearing.

There are very clear similarities between the operation of the Traffic Penalty Tribunal and the proposal for the Online Solutions Court, and there is no doubt that the evaluative data gathered on user experience with that process is valid for consideration. However, it is also important to identify some key differences in the

[70] Ibid
[71] Ibid at 13
[72] Ibid at 14
[73] Ibid at 17

purposes served by both the Traffic Penalty Tribunal (TPT) and the OSC. The TPT is an independent tribunal and is not part of HMCTS. It is comprised of part-time adjudicators, who are trained lawyers appointed by the Lord Chancellor. It is funded by a Joint Committee of local authorities and its existence is necessary to comply with the statutory duty under the Parking and Traffic Regulations outside London to make available an independent tribunal to consider appeals.[74]

The TPT also deals with a very specific type of legal issue, whereas the OSC will deal with a wide range of legal matters under the banner of low value small claims. That said, the data presented above is being used to comment upon process and its potential impact on effective participation. The joint expertise of the case officer and the judge will render them equally well, if not better qualified to deal with issues arising in low value civil claims as the tribunal adjudicators are in traffic appeal cases. This is the advantage of technology facilitating human interaction, as opposed to case management and decisions being executed by digital analytical systems.

There is also some evidence that progress is being made towards trialling continuous online resolution as part of the Online Civil Money Claims pilot. In June 2019,[75] Sir Terence Etherton advised that the pilot scheme would be expanded further, with the introduction of online directions questionnaires, the embedding of an opt-out mediation scheme, case management directions being issued by legal advisors as opposed to judges, uploading of evidence and online determination of claims with a value of less than £300. Whilst online determination has not yet been introduced, this does suggest a commitment to doing so in the imminent future.

However, as has become a recurring theme throughout this thesis, evidence is emerging of cost-saving agendas having a direct impact on development of this stage. In 2017, CPR 27.10 was introduced. This allowed the court to determine a small claim without a hearing provided that approach was agreed by the parties in their respective directions questionnaires. The dispute would therefore be determined on the basis of the paperwork only, not comparable to the way continuous online resolution is

[74] Traffic Penalty Tribunal of England and Wales, 'How Your Appeal Will Be Decided' <https://www.trafficpenaltytribunal.gov.uk/how-your-appeal-will-be-decided> Accessed 1st December 2021

[75] Sir Terence Etherton 'Rule-making for a digital court process' (Courts and Tribunals Judiciary, 27 June 2019) <https://www.judiciary.uk/announcements/speech-by-sir-terence-etherton-master-of-the-rolls-rule-making-for-a-digital-court-process/> Accessed 12th January 2022

designed to work. Despite not having gathered any data to support an extension of this scheme, from 1st June 2022 Practice Direction 51ZC came into force. Referred to as the 'Small Claims Determination Pilot', this gives the county courts in Bedford, Luton, Guildford, Staines, Cardiff and Manchester the power to direct that a small claim is determined without a hearing, *without* the consent of the parties. This therefore becomes a unilateral decision taken by the court in cases it deems suitable.

Whether the case is suitable for determination without a hearing is a matter for judicial discretion with guidance being offered at paragraph 4.1 of PD 51ZC: 'A determination without a hearing can be a proportionate and efficient means of determining a small claim in cases where it is not necessary to hear oral evidence or oral advocacy to determine the issues justly' and, specifically concerning small claims, by paragraph 4.4 (c) which states that '…any other claim of £1000 or less by value where there is no significant factual dispute which requires oral evidence, and the issues are not of such complexity as to require oral advocacy' is suitable for paper determination. It is important to clarify that this is not continuous online resolution. Under the pilot, the judge would simply make a decision based on the paperwork. There would be no contact with the parties at all. This is problematic, as Leader points out, as identifying the legal importance of a claim or defence is exceedingly difficult for a litigant in person.[76] She goes on to state that 'this shift… in fact aims at the widespread exclusion from the courts of a majority of low value civil claims.'[77]

It is difficult to argue with this. There is no evidence or data to support the expansion of the 'on the papers' determination procedure, which is especially relevant as the consent element of a claim being decided without a hearing has been removed. It places at risk the ability for litigants in person particularly to effectively participate in the determination of their matter. This is materially different to the proposal for Stage 3, in which remote hearings and determination by continuous online resolution were the options put forward. Given the findings of this thesis so far on the extent to which governments' cost-savings agendas dominate reform in civil justice particularly, it is

[76] Kate Leader, 'The Small Claims Paper Determination Pilot: Filtering out the County Court's "Garbage Claims"' [2022] MLRForum 002 (available from: http://www.modernlawreview.co.uk/leader-small-claims-pilot).
[77] Kate Leader, 'The Small Claims Paper Determination Pilot: Filtering out the County Court's "Garbage Claims"' [2022] MLRForum 002 (available from: http://www.modernlawreview.co.uk/leader-small-claims-pilot).

concerning that this is the latest development as part of the court modernisation programme.

However, turning back to the proposal for stage 3, the evidence suggests that both suggested formats for trial in stage 3 are possible and have the capacity to work in England and Wales. This has been shown particularly by the positive outcomes of the rapid review and the willingness of parties to engage in continuous online resolution in the Traffic Penalty Tribunal. However, both formats also present challenges in terms of resources, management and ensuring effective participation. It is for this reason that careful consideration must be given to which of the alternatives is most appropriate in any given individual case. With this in mind an examination must be undertaken on how it was envisaged that a decision on the format will made, who makes that decision and what criteria they take into account when making it.

6.2.3 Who makes the decision concerning format of the stage 3 hearing?

Lord Briggs's Interim and Final reports state that the decision relating to the appropriate format of trial will be made by the case officer as part of stage 2, subject to an unqualified right by any of the parties involved to have that decision reconsidered by a judge. Briggs stated that '…determination of all disputes about litigants' substantive rights and duties, which cannot be settled at stage 2, should be made by judges… at stage 3, by whichever of a traditional trial, a video hearing, a telephone hearing or on the documents (or by some combination of those) is best suited to the individual case, and *as directed by the Case Officer,* subject to the parties' right to have the mode of determination reconsidered by a judge'.[78] This is confirmed later in the report, when setting out '…the primary function of the Case Officer at stage 2 will be case management for resolution, that is, finding the most appropriate means of conciliation for each case, and the most appropriate means of determination of those cases which cannot be conciliated'.[79]

Under Briggs's proposal, there would therefore be a delegation of judicial case management function to case officers as part of the OSC, however, it is clear that the remit will extend further than simply replicating the general case management powers

[78] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at para 24, p120
[79] Ibid at para 7.22 (a) p69

found in CPR 3.[80] Considerable discretion seems to be conferred on case officers to decide on the appropriate mode or format of adjudication. This chapter has already outlined the challenges associated with both of these alternatives to physical trial, however despite the significance of the decision there was no guidance offered as to what criteria would be applied to determine the format of trial which is appropriate. Assy is particularly critical of this point, pointing to a range of questions left unanswered by the proposal for the structure of stage 3, such as whether the judge be obliged to conduct a trial whenever there is a dispute about the facts, or how significant would such a factual dispute need to be to require a trial, or what would the precise difference be between summary judgment and the proposed conclusion on paper or when would an audio conference be preferable to a video conference, and under what circumstances should the last resort of a face-to-face trial be taken?[81]i

Whilst Lord Briggs was clear that the default format of trial should no longer be a face-to-face physical hearing, he was non-committal on whether there should be a *default* format of trial and, if so, what that ought to be. There are parts of the report where he suggests that a decision taken asynchronously on the papers will be the primary approach of the OSC judiciary, others where he suggests this should be a video hearing and others where there is no default, implying that cases be dealt with on an individual basis.[82]

This has led to some confusion with interpretation, with Assy commenting that '…stage 3 affords judges very broad discretion to decide on a critical matter: whether to conduct a trial and in what form'[83] and Cortes interpreting Briggs's comments differently stating that '…stage 3 will therefore deal with unresolved claims where a judge will make a final determination on the documents (and occasionally, when necessary, after a telephone, video, or face-to-face hearings)'.[84] No further clarity has been offered on any preferred or default mode of trial to replace a face-to-face hearing since the Briggs

[80] CPR 3
[81] Rabeea Assy, 'Briggs' online court and the need for a paradigm shift' (2017) 36(1) C.J.Q. 70
[82] For example at para 6.80 on p52 of the Final Report, Lord Briggs justifies the removal of the default face to face trial as follows: 'Secondly, the first alternative, video hearing, will offer much of the essence of the day in court'
[83] Rabeea Assy, 'Briggs' online court and the need for a paradigm shift' (2017) 36(1) C.J.Q. 70
[84] P Cortes 'The online court: filling the gaps of the civil justice system?' (2017) 36(1) C.J.Q. 109

reports or, if this is to be left to the absolute discretion of the case officer, what guideline principles could be applied in the selection process.

Again, this is an area where the research conducted to form the proposal remains incomplete. The decision on format of trial ultimately affects the parties involved, particularly in light of the concerns already raised about mitigating against the risk that alternative forms of hearings may impact the ability of litigants to participate effectively and would also risk binding the judge to a mode of adjudication which they may not deem appropriate for the dispute. It is a complex assessment to make.

Lord Briggs did acknowledge this to a point, however sought to avoid addressing the core issues by building in an absolute appeal mechanism against format of trial decisions, stating that '…the conferral upon Case Officers of decision-making functions currently performed by judges makes it essential that litigants affected by those decisions have an unqualified right to have them referred to a judge for reconsideration afresh… reconsideration will be limited to a document-based exercise, not requiring a hearing, save in the very rare case where the judge doing the reconsideration thinks that a hearing is necessary'.[85] It should be noted here that this is an *unqualified right*. This means that no reason or basis needs to be given for the request for reconsideration: it will take place as a matter of course upon request by one or both of the parties.

This therefore gives rise to further potential issues when considering the operation of the Online Solutions Court itself, particularly when trying to balance this against the ever-present spectre of the efficiency and cost saving agenda. The unqualified right solution gives rise to the risk that a backlog of reconsideration cases will be created, limiting judicial time to deal with adjudication and, ultimately, creating delays in final trials being scheduled. The practical way around this is not to limit a litigant's right to appeal a decision which has been taken by a case officer (given they are not judicial officers this is right and appropriate) but to produce robust guidelines on when cases will be, as standard, allocated to adjudication on documents, adjudication by video or telephone and, finally, adjudication by face-to-face trial. This would be with the intention of managing parties' expectations, thus trying to *prevent* high numbers of cases being referred for reconsideration, as opposed to exclusively focusing on the

[85] Lord Justice Briggs, 'Civil Courts Structure Review: Final Report' (2016) at para 7.35, p72

remedy that can be offered to have decisions which are perceived to be incorrect reconsidered.

The questions which remain unanswered here about the role of the case officer have served to strengthen the recommendations which arose from chapter 5. The role itself must be clearly defined and if, as seems to be expected here, it will encompass delegated judicial duties including taking decisions on the format of trial, then rules which clearly set out criteria and guidelines relating to the decisions those case officers will be making must be settled upon. It is submitted that simply conferring a wide discretion as Briggs proposes is therefore the incorrect way to proceed. The study will now move to consider whether the model of the adjudication stage in British Columbia can offer any guidance on how to enhance the development and implementation of stage 3.

6.3 Canada

This section of the chapter is designed to explore the structure of phase 4 of the Civil Resolution Tribunal, the adjudication stage. As with previous chapters, in order to ensure a valid comparison, the same structure will be followed here as it was with England and Wales. This section is therefore separated into two parts. The first part concerns how phase 4 of the CRT is structured, with specific focus on the formats of trials and whether there is any evidence to suggest the existence of any barriers to effective participation to tribunal users, including any steps taken by the CRT to overcome those barriers. This will include reference to user satisfaction surveys conducted by the CRT. The second part will then focus on who makes the decision on which format is adopted, whether any guidance or criteria exist to inform that decision and what parties can do if they disagree with it. This will then enable conclusions to be drawn which answer the final thematic element of research question 3.

Before commencing this part of the chapter, it is worthwhile highlighting one key difference between stage 3 of the OSC and phase 4 of the CRT. The CRT is an administrative tribunal as opposed to a court, which means that although it makes decisions regarding disputes, and indeed is the mandatory route of resolving low value disputes in British Columbia, it is not a part of the traditional court system. Adjudication

is carried out by tribunal members, who are lawyers with specialised expertise in particular areas of the CRT's jurisdiction.[86] The Online Solutions Court, however, is proposed to be a court, with disputes being adjudicated by judges as discussed above. This may be relevant when considering the justification for any divergences of approach between the comparator jurisdictions at this stage.

6.3.1 How is phase 4 of the Civil Resolution Tribunal structured?

As set out in chapter 3 as there are two separate phases during the CDR stage of the CRT (negotiation and facilitated settlement), the adjudication stage occurs at phase 4. As with the proposal for the OSC, this is only necessary where parties have been unable to resolve their dispute in the earlier stages. Salter and Thompson state that '…the purpose of adjudication is to provide finality to the parties through a binding decision on the legal merits of the dispute, which results in a tribunal order.'[87] Phase 4 continues the interactive approach of the facilitated negotiation stage, with communications taking place between the adjudicator and the parties via either the online platform, email or on paper on an asynchronous basis.[88]

Section 39 of the Civil Resolution Tribunal Act 2012 sets out the range of formats which the tribunal can adopt to conduct the final hearing. 'In resolving a dispute, the tribunal may conduct a hearing in writing, by telephone, videoconferencing or email, or through use of other electronic communication tools, or by any combination of those means[89]… it is not necessary for the means of communication to allow all parties to the dispute to take part at the same time.[90] The tribunal may hold an in-person hearing if the tribunal considers that the nature of the dispute or that extraordinary circumstances make an in-person hearing necessary in the interests of justice.'[91] Therefore, the statutory powers contained in the CRT Act allow for an identical range of hearing formats to those proposed for the Online Solutions Court. It is also noteworthy that the legislation does not provide for a default hearing format, save for

[86] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol 113 at 133
[87] Ibid
[88] Ibid
[89] Section 39 (1) Civil Resolution Tribunal Act 2012
[90] Section 39 (2) Civil Resolution Tribunal Act 2012
[91] Section 39 (3) Civil Resolution Tribunal Act 2012

making clear that face to face hearings are to be held only in exceptional circumstances. Even when an oral hearing is deemed necessary, they are conducted through telephone or videoconferencing as opposed to in person.[92]

This suggests therefore that, whilst it is not statutory, the default mode of hearing is by continuous online resolution, with parties engaging with the tribunal member electronically. This is also how the process is described on the public-facing CRT website, which states that '…the Tribunal Decision Process is usually done online, in writing. Sometimes telephone or video is used too. The independent CRT member will apply the law to the evidence, consider the arguments, and make a decision about how to resolve the dispute.'[93] This shows a clear focus on managing parties' expectations on the format of final hearing they are likely to receive if their matter proceeds to that point, echoing the approach of the Traffic Penalty Tribunal in England and Wales.[94]

The CRT website literature is consistent that disputes will primarily be heard 'on the documents',[95] it is important to investigate whether this is what occurs in reality and, if so, whether any major problems, particularly with effective participation, have been encountered. The author conducted a review of all final hearings in small claims cases heard between 1st January 2019 and 31st December 2021, a full two-year period. This timescale was selected in order to give a representative sample of small claims cases to allow sufficiently valid conclusions to be drawn. Cases only reach a 'final hearing' where both parties have participated in the dispute. In cases where one party has not responded at all, a 'default decision' is taken. Given the focus of this section, default decisions were excluded from the data sample.

The research was conducted using the 'decision' repository on the Civil Resolution Tribunal website and applying the filters 'small claims', final hearing' and the relevant

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[92] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol 113 at 133

[93] Civil Resolution Tribunal: 'Tribunal Decision Process', (*civilresolutionbc.ca*) <https://civilresolutionbc.ca/tribunal-process/tribunal-decision-process/> Accessed 10th January 2022

[94] Traffic Penalty Tribunal of England and Wales, 'Want to Appeal' <https://www.trafficpenaltytribunal.gov.uk/want-to-appeal/> Accessed 11th November 2021

[95] Civil Resolution Tribunal: 'Tribunal Decision Process', (*civilresolutionbc.ca*) <https://civilresolutionbc.ca/tribunal-process/tribunal-decision-process/> Accessed 10th January 2022

dates.[96] The search revealed that 2,904 small claims cases reached final hearing stage overall.[97] There are no further filters which enable hearing types to be isolated, and therefore a review of every claim was conducted by the author for the purposes of this study. From the 2,904 final hearings which took place, all decisions were taken on the documents using continuous online resolution.

The research also revealed that the option is given to parties to request an oral hearing when they move from phase 3 to phase 4, where they feel that this is necessary. From the case sample there were only four instances where oral hearings were requested by one of the parties. Those were in the cases of Wei Liu v. Timberland Cedar Products Limited[98], Baker v. Carmel Custom Contracting Ltd,[99] Parallax Contracting Ltd. v. Anand[100] and Fortin v. Peacock dba The Rock and River Rustic Resort.[101] In all of these cases, the tribunal member refused. The decisions clearly articulate that the tribunal member gave due consideration to the request, exploring its basis and explaining their determination in line with the powers afforded to them under section 39.[102]

This data supports the position laid out by both Salter and Thompson, and on the CRT website, that adjudication on the documents is the default position for phase 4 of the CRT. It also strongly suggests this does not seem to be causing a significant issue with parties to small claims issues, with only four requests being submitted for an oral hearing. It can therefore be determined that parties are sufficiently satisfied with the asynchronous method of communication adopted at earlier stages of the CRT that they are confident in its merits at the final determination stage. The evidence shows that there is very little demand for oral hearings, something which is particularly interesting when considering that 75% of Traffic Penalty Tribunal users in England and Wales indicated that they wanted an e-decision to be made on their claim. This is a

[96] Civil Resolution Tribunal, 'Decisions' < https://decisions.civilresolutionbc.ca/crt/en/nav.do>
[97] Search result: <https://decisions.civilresolutionbc.ca/crt/en/d/s/index.do?cont=&ref=&d1=2019-01-01&d2=2021-12-31&p=&typ=121&col=119&or= >
[98] *Wei Liu v. TIMBERLAND CEDAR PRODUCTS LTD*., 2019 BCCRT 493
[99] *Baker v. Carmel Custom Contracting Ltd*., 2019 BCCRT 794

[100] *Parallax Contracting Ltd. v. Anand*, 2020 BCCRT 256

[101] *Fortin v. Peacock dba The Rock and River Rustic Resort* 2021 BCCRT 571

[102] Civil Resolution Tribunal Act 2012

very interesting correlation, and it is certainly worthy of consideration when looking at how best to structure stage 3 of the OSC. It is therefore reasonable to conclude that there is an overall satisfaction amongst small claims litigants in British Columbia with the continuous online resolution, decision taken on the documents approach.

The question is what this says about effective participation. It should be noted at this point that, unlike England and Wales, there is no fundamental protection of the right to effectively participate in a civil trial. In fact, civil trials are not mentioned at all in the Constitution Act 1982, the Canadian Charter of Rights and Freedoms, or the British Columbia Human Rights Code. Further, the Civil Resolution Tribunal Act 2012 does not make any reference to the need to consider whether a party can effectively participate when tribunal members are making their decision on the format of hearing.

However, review of the small claims data set collected for this study shows evidence that effective participation is an active consideration of tribunal members when deciding how to proceed. In 127 of the 2,904 cases, participation issues were directly referred to. All except one concerned situations in which parties who had participated up to phase 3 had subsequently failed to respond to any attempts at communication by the tribunal member in phase 4. In ten of those cases, participation of a party had been excluded due to their non-compliance with the CRT's mandatory directions.[103] The remainder concerned cases where parties simply stopped engaging, and therefore the preliminary decision to be taken by the tribunal member was whether proceeding without that party's participation was prejudicial to them. In all of those remaining cases, the tribunal member decided to proceed without the participation of the non-engaging party to avoid unnecessary prejudice being caused to the participating party.

Consideration of particular cases reveals that the bar to parties being successful in requesting an oral hearing based on submissions relating to their ability to effectively participate in a documentary-based application is high. The Fortin case is particularly relevant in this respect. In that case, the tribunal member needed to weigh up evidence

[103] For example, *Zhang v. Colobong*, 2020 BCCRT 1070, *Cader v. ICBC*, 2021 BCCRT 1049 and *Attfield v. Stadnyk*, 2020 BCCRT 741

to see whether the respondent had a fair opportunity to participate if the case was considered on the documents as opposed to being allocated for an oral hearing. In her request for an oral hearing, the respondent stated that she had had great difficulty navigating the CRT's online system and wished to be heard by a live voice in order to be understood. However, as the tribunal member identified in their judgment, no details were provided about why she was having such difficulty.[104] Furthermore, the respondent had previously been able to provide evidence to and communicate with the tribunal by email seemingly without issue.[105] The tribunal member therefore determined that '…based on the evidence before me, she was clearly proficient with email and text communication. In the circumstances, I find that Miss Peacock has had a fair opportunity to participate. Bearing in mind the CRT's mandate that includes proportionality and prompt resolution of disputes, I decided to hear this dispute through written submissions based on the evidence and written arguments before me.'[106]

Further insight can be obtained by considering the case of Parallax Contracting Ltd. v. Anand.[107] In that case the respondent had made a counterclaim and had requested to make verbal rather than written submissions due to a serious health condition. She further claimed that she could not prepare submissions and evidence without a great degree of assistance.[108] However, on review of the case the tribunal member found that she had submitted 43 documents by way of evidence, leading them to conclude that she had received the assistance she needed in order to participate fully.[109] As a result, a decision was taken on the documents.[110]

The case analysis reveals a number of key points. The first point is that the issue of effective participation is an active consideration of the tribunal member when deciding on the format of hearing. In making their decision, they carry out an evaluation to determine whether the evidence available supports the submission that the party in question is unable to engage fully. If the evidence does not support that submission,

[104] *Fortin v. Peacock dba The Rock and River Rustic Resort* 2021 BCCRT 571 at para 13
[105] Ibid
[106] Ibid
[107] *Parallax Contracting Ltd. v. Anand*, 2020 BCCRT 256
[108] Ibid at para 5
[109] Ibid
[110] Ibid

the request is denied. Therefore, whilst the legislative provisions do not expressly provide that effective participation is to be considered, the evidence from a substantial sample of cases suggests that it is something to which tribunal members have due regard. The second point is that the evidence confirms that once parties who have both participated in the CRT process are referred to phase 4, they continue that participation in over 95% of cases. This is a very impressive rate of engagement, and again suggests that the manner in which the CRT handles disputes is well received by participants.

This evidence does not, of course, address concerns about effective participation in video or telephone hearings, however it does provide a key insight into how the phase 4 process within the CRT operates, and how continuous resolution is perceived as a format of hearing in small claims in British Columbia. Salter argues that this way of adjudicating disputes 'increases access to justice and fairness, because it allows decision-makers to seek out relevant evidence instead of relying on self-represented parties to divine both the content of legal tests and how to marshal evidence to fulfil them. In other words, it saves parties the stress, confusion, and unfairness of requiring them to blindly play a legal version of "pin the tail on the donkey."'[111] Two further sources of evidence are available to test whether this is in fact the case: the numbers of decisions in the small claims hearings from the sample which are objected to by one or both of the parties involved and the user satisfaction data which is published as part of the CRT's annual reports. These will now be considered.

If a party does not agree with a decision made in a final hearing in a small claims matter of the CRT, ss56.1 to 56.4 of the CRT Act 2012 allow that party to file a Notice of Objection within 28 days of the decision being made.[112] This does not need to give reasons for objecting, it simply needs to indicate that the filing party does not agree with the decision taken. Once filed, this renders the decision non-binding[113] and unenforceable[114] and means that the party with the claim must re-issue it in the British Columbia Provincial Court. Parties who have been given default decisions, and

[111] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol at 114
[112] S 56(2) Civil Resolution Tribunal Act 2012
[113] S 56(3) Civil Resolution Tribunal Act 2012
[114] S 56(4) Civil Resolution Tribunal Act 2012

therefore those who have not participated in the tribunal proceedings at all or have breached the directions issued by the tribunal, are barred from submitting a Notice of Objection.[115]

Considering the sample cases used for this study, out of 2,904 final small claims hearings, there were 386 Notices of Objection filed. That represents 13.2% of the final hearings which took place. Of those cases in which a party who requested, and was denied, an oral hearing only one objected, in the case of Fortin v. Peacock dba The Rock and River Rustic Resort.[116] Unfortunately, as there is no requirement to give a reason accompanying the Notice of Objection, the data is not available to establish whether issues surrounding decisions being taken on the basis of documents was a concern of the objecting parties. What can be said however is that despite the fact that no grounds need to be established for an objection, 86.8% of parties did not feel the need to file one and thus accepted the 'on the documents' decision of the tribunal.

Whilst this suggests that a high percentage of parties are happy to accept the judgment of the CRT and the way in which it has been reached, the data obtained by Sykes's survey does give some further context to this.[117]

> Another source of frustration for some of the survey participants was having to continue on to another step to enforce an order from the CRT. Of the 39 people who were applicants at the CRT, six (15%) said that they received an order from the CRT and then had to go to start new court proceedings to enforce it.96 Survey respondents' open-ended responses indicated considerable frustration about this. In one respondent's view, "[t]he gap in the law between a CRT order and actually ensuring anyone adheres to it effectively enables it to be invalid ... in essence this means that it is futile to have or use a CRT." The same problem exists in the traditional courts. We had one survey respondent indicate that the other party in their dispute had filed an objection to the CRT decision. This respondent said this was why

[115] S 56(2) (1) Civil Resolution Tribunal Act 2012
[116] *Fortin v. Peacock dba The Rock and River Rustic Resort*, 2021 BCCRT 571
[117] Sykes K, Dickson R, Ewart S, Foulkes C, Landry M, 'Civil Revolution: User Experiences with British Columbia's Online Court' (2020) 37(1) Windsor Y B Access Just 161

> they were less satisfied with their experience at the CRT compared to their prior court experience, stating “had this just gone to Small Claims court in the beginning, it probably would already be finished but here we are over a year later and back at square 1.[118]

Therefore, it is important to not treat the low numbers of notices of objection filed as overwhelmingly positive evidence of satisfaction. The fact that filing a notice of objection leads to the case having to be re-issued and heard again by the small claims court is clearly something, for some users, which prevents them from undertaking that course of action. However, from the point of view of the OSC, given it will essentially replace the function of the county court in relation to low value civil claims, this should be less of an issue.

The CRT also continuously acquires and uses survey data from participants on their experience with the tribunal. This is published on a monthly basis via their website, with annual figures being published in the annual report. Table 6.1 below sets out the aggregated results of the surveys conducted.

Table 6.1

Question	2018/19	2019/20	2020/21
Would you recommend the CRT to others?	79% (yes)	80% (yes)	80% (yes)
Did the CRT provide information that prepared you for dispute resolution?	84% (yes)	80% (yes)	85% (yes)
How easy to understand was the CRT process? Easy, and neither easy nor difficult	76% Easy, and neither easy nor difficult	85% Easy, and neither easy nor difficult	85% Easy, and neither easy nor difficult

[118] Ibid at 181

How easy to use were the CRT's online services? Easy, and neither easy nor difficult	74.5% Easy, and neither easy nor difficult	83% Easy, and neither easy nor difficult	86% Easy, and neither easy nor difficult
Do you feel CRT staff were professional? Very or somewhat professional	94% (Very or somewhat professional)	95% (Very or somewhat professional)	91% (Very or somewhat professional)
Do you feel the CRT treated you fairly throughout the process?	86% (yes)	85% (yes)	82% (yes)
Do you feel the CRT handled your dispute in a timely manner?	76% (yes)	80% (yes)	80% (yes)
Total number of participants in survey (number of new CRT applications for dispute resolution and percentage)	385 (4,391, 9%)	658 (5,468, 12%))	539 (5,880, 9%)

Source: Civil Resolution Tribunal Monthly Survey Data

However, this data does need to be treated with some caution for three reasons when assessing its validity as part of this section of the thesis. The first reason is that it is not limited to small claims matters, but everything the CRT covers. The second reason is that the survey has been completed by parties who resolve their claims at any stage of the process, not just those who have gone to final hearing. The third reason is that a relatively low percentage of tribunal users responded to the survey, with only an average of 10%.

Again, Sykes's study does provide some additional, if limited, further context of user experience here. Firstly, many of the respondents echoed the high levels of satisfaction with the system, some even suggesting that they would not have disputed the matter if it were not for the flexibility of the CRT.

> Seven of the survey respondents who had filed a claim with the CRT (18%) said that if the CRT had not been available they would have done nothing to pursue the claim. Four of those who responded to a claim filed by someone else (29%) said that if the CRT had not been available and the claim had been filed in court, they would have done nothing and hoped that the claim would go away. One respondent wrote: "This online thing really helped me. I seriously would not have been able to do this in person." Respondents said: "I would not have hired a lawyer as it would be too expensive. The amount of money I wanted was only $360. [If the CRT did not exist] I think I would have not known where to turn and just give[n] up"[119]

Sykes also confirmed that the survey responses were also roughly consistent with the data on ease of use and satisfaction published by the CRT.[120] However, some criticism was noted from respondents about the lack of physical provision and the fact that parties were made to conduct the process online. This was linked to the participants feeling that they had been deprived of justice and procedural fairness, although it was noted by the authors that this was very much a minority view.[121]

This can be deemed relevant for two reasons. This first reason is that it does demonstrate that a high percentage of those respondents feel that they are treated fairly by the CRT, suggesting that the way in which the CRT engage with them across all four phases, which as established is primarily through asynchronous means, is received positively overall. The second reason is related to data collection. As referred to repeatedly throughout this thesis, the quality and quantity of data which is gathered and shared by HMCTS to evidence how existing provision is performing and to inform how future practices can be improved is in need of substantial improvement. Adopting a similar model to that which is used by the CRT here would be a good place to start, although it is noteworthy that the CRT does not publish data which adds additional context to the statistics here. Given that has had to be provided by a limited external study, future research into how the CRT approach can be used to inform the data

[119] Sykes K, Dickson R, Ewart S, Foulkes C, Landry M, 'Civil Revolution: User Experiences with British Columbia's Online Court' (2020) 37(1) Windsor Y B Access Just 161

[120] Ibid at 181
[121] Ibid

strategy adopted as part of the OSC ought to focus on remedying the lack of qualitative data available.

Sykes's study's concludes that the CRT has improved access to justice on a number of dimensions,[122] primarily, the process by which users can access either assisted or adjudicated dispute resolution. From the OSC's perspective, this therefore provides welcome confirmation that, whilst not perfect, the CRT is having more of a positive impact than negative. This, it is submitted, further justifies the rationale for basing the OSC on the model of the CRT.

This section has therefore established the structure of the final stage of the CRT, both how it appears in the rules and how it operates in reality. Consideration must now be given to how the role of the case manager changes once it is clear that a dispute is not going to be resolved by negotiation and, crucially, whether the extent of their case management powers allows them to take decisions on the appropriate format of the final hearing.

6.3.2 Who makes the decision concerning the format of the hearing in the Civil Resolution Tribunal?

In a very similar way to that proposed for stage 3 of the OSC, if the parties are unable to resolve all of their claims or issues during facilitation, the role of the facilitator in phase 3 reverts to a case management function, with the facilitator assisting the parties to prepare for adjudication by explaining the difference between facilitation and adjudication as well as the need to review the remaining claims, identify relevant facts and evidence, and prepare arguments.[123]

The powers of the case manager are set out in the Civil Resolution Tribunal Act and include ordering parties to provide information regarding the issues in dispute, their positions in relation to those issues and the resolution that they are requesting.[124] In

[122] Sykes K, Dickson R, Ewart S, Foulkes C, Landry M, 'Civil Revolution: User Experiences with British Columbia's Online Court' (2020) 37(1) Windsor Y B Access Just 161
[123] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol at 133
[124] S32 (1) (a) Civil Resolution Tribunal Act 2012

addition, the case manager can make orders requiring parties to provide evidence,[125] prepare an agreed statement of facts[126] or arrange for expert evidence to be acquired and presented.[127] Once a set of case management directions has been made, the case manager will then create a 'Tribunal Decision Plan' to assist parties with preparing for the adjudication stage.[128] This will include timelines for compliance by the parties, assisting the parties with narrowing the issues and organising their evidence.[129] As Salter comments, '…the flexibility built into the facilitation phase means the facilitator can avoid the access to justice barriers created by a one-size-fits-all, exhaustive process, and instead tailor the process to make "the forum fit the fuss"'[130]

The commentary provided here extols the same virtues as those surrounding the introduction of active judicial case management discussed in chapter 2: ensuring that the amount of process required of the parties is proportionate to the dispute at hand and allowing for the dispute to be treated flexibly in accordance with its needs. The question of comparison therefore falls to be considered.

The descriptions of the way that the case officer is proposed to operate and the way in which the case manager does operate are very similar indeed and the powers found in the CRT Act overlap substantially with the current judicial case management powers contained within CPR 3 referred to earlier. In fact, the powers and duties go far beyond those currently experienced by small claims parties in England and Wales, where under CPR 27, which deals specifically with the small claims track, the standard direction is that 'parties do file and serve all documentation upon which they intend to rely no later than 14 days prior to the hearing date.'[131] No specific directions are provided by the court beyond that, unless the judge feels that the dispute requires them. If the Online Solutions Court were to allow for more specific and proactive support to be provided by case officers, particularly to unrepresented litigants, this

[125] S32 (1) (b) Civil Resolution Tribunal Act 2012
[126] S32 (1) (d) Civil Resolution Tribunal Act 2012
[127] S32 (1) (e) Civil Resolution Tribunal Act 2012
[128] Shannon Salter & Darin Thompson, 'Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal' (2017) 3 McGill J Disp Resol at 128
[129] Ibid
[130] Ibid at 114

[131] CPR 14

would represent a markedly increased level of intervention than that which is found in small claims matters currently and, it is posited, a significant improvement in the current way in which court users are directed to prepare for trial.

However, there is a clear divergence when considering to whom responsibility is allocated for deciding on the mode of the final hearing. In British Columbia, case managers can explain and prepare parties for the hearing itself, but they are not responsible for deciding on the format. As established above, the default format is decisions being taken on the documents, with parties able to request an oral hearing where they feel necessary. It then falls to the tribunal member to take that decision: the case manager is not involved.

6.4 Conclusion

The purpose of this chapter was to establish that, to this point, there has been a failure to conduct a comparative analysis on how phase 4 of the CRT was embedded into the British Columbian civil justice system and how phase 4 of the CRT system could be transplanted into the English civil justice system. In doing so it provides an understanding of any relevant mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales. It also produced additional evidence to support the contention that insufficient investment in the foundations of the Online Solutions Court will be provided by government to develop and implement stage 3, the adjudication stage.

It is submitted that the chapter has met these objectives, as well as answering the final element of the third research question. This concerned the way in which the comparator jurisdictions deal or are proposing to deal with the format of the adjudication stage of their respective online dispute resolution systems. The analysis conducted in this chapter has enabled an assessment to be undertaken which covers both the suitability and the risks involved with trial formats alternative to physical hearings. This, in turn, enables recommendations to be made which will enhance the proposed structure of stage 3 of the Online Solutions Court.

This chapter has demonstrated that that the formats available for adjudicating CRT matters are identical to those proposed for the OSC. Those formats consist of

decisions being taken on the documents, following a telephone or a video hearing or following a face-to-face physical hearing. Both jurisdictions are clear that physical hearings are only to be scheduled in exceptional circumstances as confirmed in both the Civil Resolution Tribunal Act 2012 and Lord Briggs's Interim and Final Reports.

However, it can be said with some certainty that, beyond proposing the formats themselves, the Briggs reports are silent beyond that. It is submitted that this primarily stemmed from an over-simplification of the challenges of transitioning away from default physical hearings. Much of the discussion in the Final Report particularly centres on stage 3 simply being a digitised version of the process which already exists which, it is submitted, evidence has shown is simply not the case for either remote telephone or video hearings or continuous online resolution.

It is submitted that the research which has been presented in this chapter therefore advances the initial proposal for stage 3 set out in the Briggs reports. Moving away from a default physical trial presents challenges, specifically to ensuring that the statutory principle of effective participation is protected, that resources are made available, and that court users' expectations are appropriately managed.

Lord Briggs suggested a combination of two formats for trials: the first by telephone or video and the second by continuous online resolution. On telephone or video hearings, research conducted by McKeever and Donohue concludes that effective participation is not impossible in remote or telephone hearings, but that the format presents particular barriers to litigants which can only be overcome by ensuring that support mechanisms exist, and that investment is made in structuring online platforms to enhance rather than compromise party participation.

The evidence presented on the current systems in place in England and Wales to support the enhancement of user participation, particularly by the rapid review conducted on behalf of the Civil Justice Council, suggests that the barriers identified by McKeever and Donohue are still significant in the current IT infrastructure within HMCTS. Where consensus exists is that telephone hearings are the most unsuited to full hearings, with both the rapid review and the evaluative study published on the Traffic Penalty Tribunal showing that user satisfaction with telephone hearings was

significantly lower when compared to video. It is therefore submitted that telephone hearings in the OSC are only used in very exceptional circumstances, largely where there exists no viable alternative option.

Video hearings were much better received, with the Traffic Penalty Tribunal reporting that the conversion to MS Teams had generated much higher levels of positive feedback. However, the data published from both the Video Hearing Pilot Scheme and the rapid review serves as evidence that the current technological infrastructure within HMCTS overall, and particularly the County Court, is simply not capable of dealing with high volumes of claims without causing significant barriers to parties' participation in hearings. The court's equipment accounted for 44% of the hearings which suffered serious technological issues, with 36% of the County Court cases included for review in a small, two-week window having no standby IT support at all.

As demonstrated in the evidence presented in chapter 2, this is the result of decades of cuts in the name of efficiency and, in the event that video hearings were to become the default for stage 3 of the Online Solutions Court, substantial initial investment would need to be made by HMCTS to provide an infrastructure which was capable of handling the caseload. Whilst it is fair to say that covid-19 was unexpected and that it perhaps stress tested a system which was not quite ready, it is clear that there is an urgent need for the level of investment to be costed and committed to in order to enable a transition to be made towards the adoption of video or telephone hearings as part of stage 3 of the OSC.

With regard to continuous online resolution and decision being taken 'on the papers', the data presented here suggests that there is a place for it in the OSC. The experience of the Traffic Penalty Tribunal, whilst not entirely determinative of how such a measure would be accepted in the OSC, illustrates that adoption of such a process is possible and that a move away from default face-to-face hearings towards a platform-based online process is achievable in England and Wales without causing a complete disintegration of both levels of effective participation and positive user experience. While there may be barriers to effective participation there is not absolute resistance to the principle of continuous online dispute resolution.

This is an important foundation upon which to build when considering the development of stage 3. Decisions being made in such a way have the power to enable litigants to engage in the process in a more flexible manner, having time to consider their responses and in the knowledge that, ultimately, a judge will not make a final determination until the point at which they are in possession of all of the information they require. Indeed, 75% of Traffic Penalty Tribunal users indicating that they *want* an e-decision to be made serves as good evidence that the legitimacy of the traffic penalty appeals system has not been undermined by the transition away from physical hearings towards continuous online resolution. Reorganisation of existing resources to create support officers is a principle which is very sound and has been shown to have an impact in reducing barriers to effective participation, although this would require a reversal of the policy of reducing numbers of front-line staff by the MOJ. Given the more immediate needs for additional investment, reorganisation of existing resources seems to be an eminently sensible interim measure.

It is in the area of continuous online resolution that the comparative element of this study is most valuable for the purposes of stage 3. In British Columbia, analysis of the final decisions taken in small claims matters shows that adjudication on the papers is the default position here. Across all of the small claims cases which were referred for final decisions in phase 4 between 1st January 2019 and 31st December 2021, none were granted an oral hearing. Indeed, an oral hearing was only requested in four cases, suggesting that an overwhelming percentage of parties are satisfied with the way in which the CRT engage with them prior to adjudication stage, i.e., the same way in which the tribunal members communicate with them in phase 4. The small percentage of parties who file a Notice of Objection against the final tribunal decision also suggests that the majority of parties are also satisfied with the way their hearing has been conducted after final adjudication.

The statistical analysis carried out on the cases from the CRT, coupled with the satisfaction data produced in the annual reports, suggests that the process of continuous dispute resolution is working very well in British Columbia. Particularly significant is that parties seldom *request* oral hearings, and that when they do those requests are considered by the tribunal member in light of any barriers to effective participation received. Combining the research from the adoption of continuous

dispute resolution in the Traffic Penalty Tribunal and the use of it in the Civil Resolution Tribunal therefore suggests that this method of final hearing potentially has a positive future in the OSC, if developed and implemented in a similar way.

This therefore leads to the area of the OSC proposal which, it is recommended, needs immediate alteration. It is submitted that the remit of the case officer at stage 3 of the OSC ought to be revisited to exclude taking a decision on the format of hearing which is most appropriate for the claim. It is proposed that this can be dealt with in two ways: either creating a 'default' format of trial, as per the model used by the Civil Resolution Tribunal and the Traffic Penalty Tribunal with parties requesting alternative formats by exception at the conclusion of stage 2, or via a portal through which judges will give an electronic indication of their proposed format of trial having reviewed the papers passed to them from stage 2. Either method would ensure judicial consideration of format of allocation decisions, and further mitigate against the risk that judicial time would be unnecessarily absorbed by dealing with high volumes of reconsideration decisions flowing from case officer decisions on trial format. This also, it is submitted, allows for a more robust method of ensuring that cases are allocated to the format most appropriate to allow for effective participation.

It is here where there could have been a noticeable difference between the two jurisdictions. In England and Wales, it is a statutory requirement to preserve the right to effective participation. In British Columbia, no such requirement exists. However, the evidence from the case sample review confirms that considerations over whether parties can effectively participate are integrated into the tribunal members' decision-making process when assessing whether a case is suitable for a decision being taken on the documents. Where decisions on whether the parties can effectively participate in continuous online resolution processes have been taken, they have concluded that the level and quality of engagement that the party has shown has meant than an oral hearing is unnecessary. This does not rule out the fact that an oral hearing *could* be scheduled, merely that it is assessed as being needed in only very limited circumstances. The data here suggests that British Columbia is therefore achieving the third stage of McKeever's participation ladder, with continuous online resolution allowing for a participative experience for users to be facilitated. It is submitted that research demonstrates that the preservation of judicial discretion to allocate a case to

an appropriate format of trial, or to consider when a divergence from a default position is necessary, is essential to facilitate the same result in England and Wales.

Finally, this chapter has built on the conclusions drawn in earlier chapters regarding the woeful lack of contextual data which has informed developments in civil justice historically and which continues to be lacking in the current proposal for the OSC.[132] The rapid review conducted by the Legal Education Foundation provided context to the statistical data it gathered which enabled firm conclusions to be drawn, rather than simply interpreted, which have been able to feed directly into the research conducted and the recommendations made as part of this chapter. Indeed, the tribunal user satisfaction data from the CRT reproduced as part of this chapter is a good example of how questions regarding user experience can be used as part of a programme of continuous improvement of an existing system.

The statistical data gathered by HMCTS can only take those who are reviewing it so far. It is not able to provide sufficient information for the reviewer to arrive at firm conclusions and, at worst, it enables those with alternative agendas to justify their reasoning for departing or retreating from previous pledges.[133] As demonstrated earlier in this thesis, political agendas have been repeatedly prioritised over reform in civil justice in England and Wales and it is therefore submitted that clearer and more available information should be made available by HMCTS to inform future decision making.

[132] The Legal Education Foundation, 'Digital Justice: HMCTS Data Strategy and Delivering Access to Justice' (2019) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/835778/DigitalJusticeFINAL.PDF> accessed 15th February 2022

[133] Kenneth Sawka, 'The Use and Misuse of Statistics' in Craig Gruber (ed), *The Theory of Statistics in Psychology: Applications, Use and Misunderstandings* (Springer 2020) 95

Chapter 7: Conclusion and Recommendations

7.1 Introduction

The aim of this thesis was to enhance the design, development and implementation of the Online Solutions Court. It has achieved this aim by testing and proving the hypothesis that the development and implementation of the OSC is at risk of failure for the following reasons.

1. There has been a failure to conduct a comparative analysis on (a) how the Civil Resolution Tribunal was embedded into the British Columbian civil justice system and (b) how the Civil Resolution Tribunal system could be transplanted into the English civil justice system, taking account of any mitigations and divergences of approach which would need to be adopted to enhance the performance of the OSC for court users in England and Wales.
2. Insufficient investment in the foundations of the project will be provided by government to develop and implement the Online Solutions Court, which will lead to it becoming largely a digitised version of the County Court procedure which exists presently: something which has been repeatedly recognised as being too costly, too complex and too lengthy to provide adequate access to justice for unrepresented litigants in low value civil claims.

In proving both elements of the hypothesis, as well as undertaking an analysis of the design, development and implementation of the Civil Resolution Tribunal and the socio-political attitudes towards funding civil justice reform in the comparator jurisdictions, this thesis has also addressed the five predicted outcomes which were put forward in chapter 1. They were:

1. That a new set of rules, which removes the OSC from the scope of regulation by the CPR, should be created.
2. That insufficient progress towards building the knowledge engineered stage 1 of the OSC has been made, meaning it will be impossible to create an automated system which functions in the same manner as phase 1 of the CRT

by the current deadline for the conclusion of the HMCTS court modernisation progamme.

3. That the introduction of compulsory ADR will be necessary to normalise its use and effect a genuine culture shift in the mindsets of court users.
4. That a continuous online dispute resolution model of adjudication, with judicial discretion to hold a full hearing embedded, ought to be adopted at stage 3.
5. That a change of approach to funding is necessary, away from the short-term, efficiency-based model which has dominated civil justice reform in the past and towards a long-term, strategic, investment-based funding framework for the future.

It is submitted that this study has contributed to understanding how the model of the Civil Resolution Tribunal could be transplanted into the civil justice system in England and Wales for court users with low value civil disputes, and where modifications or diversions of approach are necessary. This is important, as the research contained in chapter 2 reveals, in view of the need to establish a more cost-effective, less complex and swifter model of dispute resolution for low value civil claims in England and Wales. This thesis has outlined what an online dispute resolution system for low value civil claims in England and Wales could look like, drawing on the approaches and experiences of British Columbia in developing the Civil Resolution Tribunal, and it is submitted that the conclusions and recommendations of this thesis provide a consolidated framework for the Online Solutions Court upon which it is possible for HMCTS to build.

7.2 Thesis Summary, Conclusions and Findings

This thesis has addressed, challenged and contributed to existing scholarship in a number of existing ways and has offered commentary, analysis and recommendations at, to paraphrase Zweigert and Kotz, both a micro and a macro level.

Primarily it has added to and enhanced the current academic literature concerning the proposal for the Online Solutions Court. There is no current body of work which has engaged in an analysis which is as extensive as that contained in the body of this

work, using the comparative element to inform recommendations which enhance the design, development and implementation of all three stages of the Online Solutions Court. These recommendations enhance stage 1 by proposing measurable objectives are put in place concerning the proposed scope of the legal disciplines the system will cover, the recruitment of knowledge engineers, content specialists, expert system analysts and subject matter experts, and the introduction of a timeline to be built in for subject experts and members of the judiciary to review the content and for informed changes and improvements to be made before it progresses to friends and family testing and, finally, public beta testing. Stage 2 is enhanced by the recommendations on defining the role of the case officer, the introduction of compulsory CDR with a view to normalising its use within low value civil claim resolution and the proposals concerning sanctions for those who unreasonably refuse to engage in it. Finally, stage 3 is enhanced by the proposal to adopt a hybrid between the approaches adopted in Traffic Penalty Tribunal and the Civil Resolution Tribunal widening the role of the case officer, early in stage 2, to identify any barriers to effective participation, make accommodations accordingly and ensure that the case management stage includes direction towards requesting an oral hearing where necessary. The default mode of hearing ought to replicate that in both the Traffic Penalty Tribunal and the CRT: continuous online resolution with a right reserved by parties to request oral hearing if they believe that it is necessary. In this instance, the matter will be referred to the adjudicating judge at stage 3 to decide on the format of the hearing on the papers, with the option that the judge will be able to contact the parties through the OSC platform to ask any question or seek clarification prior to determining the appropriate format. Case officers ought not to be making decisions on the format of hearing: this should be reserved for the judge.

Furthermore, whilst primary legislation allowing for the creation of a separate set of rules to govern the OSC has been passed, it is submitted that this thesis provides a comprehensive and research led argument which supports that position; something which hitherto has been absent from published scholarship.

However, this does not mean that there is not further research to be done. This thesis has identified several areas in which further research is necessary, specifically in connection with the stages of the OSC. At stage one, there must be urgent further research carried out on the steps which are currently being taken to build the OSC's

equivalent to the Solution Explorer, although the nature of this research is elucidated in greater depth later in this chapter as it overlaps with the findings of this thesis regarding the risk of government underfunding. At stage two, there must be further work done on investigating the range of penalties which could be at the adjudicator's disposal for a party's unreasonable failure to engage in CDR. This thesis has sought to make some recommendations of what such penalties could be, however further investigatory work is necessary to establish how compulsion to engage in CDR could be optimally enforced. Additional work also needs to be carried out which builds on the recommendations of this thesis concerning the judicial case management powers devolved to the case officer. Clear definition of the role of case officer is of pivotal importance to ensuring that the OSC can provide to low value civil court users the multi-option civil justice system which underpins its rationale, with the remit of this role being given statutory footing as part of the new set of Online Solutions Court rules.

Linked to this is the urgent further work which needs to be carried out in connection with stage 3. This focuses more on the current direction of travel for adjudicating low value civil claims cases. The Small Claims Determination Pilot, the procedure which enables the court to direct that a small claim will be determined without a hearing without the agreement of all parties, is a far cry from continuous online resolution. There is no online case management of the dispute which would enable the parties to effectively participate at the decision-making stage, such as that embedded into the CRT or the TPT. It is a simple exercise in attempting to reduce court backlogs, at the potential expense of a trial at which parties feel like they have been able to contribute. There is little information about the pilot's progress, nor does there appear to be an evidence base, robust or otherwise, supporting its introduction. It is therefore submitted that urgent further research to monitor and evaluate the pilot is required so that, in the event that the results are unfavourable, its form cannot become the default mode of adjudicating low value civil claims which emerges from the modernisation programme.

Outside of the three stages, further research needs to be conducted into developing the content of the Online Solutions Court rules themselves. It is imperative that this is done to avoid litigants' experiencing similar complexity issues to those they have with the current Civil Procedure Rules, which are well documented. This will involve, by necessity, engagement with court users to ensure that not only are the rules

sufficiently simplistic in content, but also in terminology. This could be achieved by using a similar methodology to that used by Darin Thompson and his team in developing the content of the Solution Explorer; using focus groups of experts to build the necessary legal content followed by multiple rounds of testing on volunteer members of the public. If the OSC is to achieve its aim of simplifying the process by which litigants access justice in low value civil claims, it is submitted that they must be involved in shaping the content of the rules which will govern it. Stakeholders must also be involved in developing the system after it is officially launched, and a further area of key research which must be conducted following this study is the investigation into how clearer, court-user experience data can be gathered and made available by HMCTS to allow for continuous improvement of the OSC specifically.

This thesis has also added to the existing scholarship regarding the relationship which exists between the process by which low value civil claims are resolved and technology. Commentators, particularly Richard Susskind, have for many years promoted the value of technology in legal processes. When it is used in the right circumstances and in the right ways, there is no doubt that it has the potential to be transformative for civil court users. For example, litigants who do not have the time to attend a physical hearing but can conduct a claim through a portal using continuous online resolution are undoubtedly benefited by the integration of technology into the justice system. The Traffic Penalty Tribunal and the Civil Resolution Tribunal provide a solid evidence base to support this contention. However, this thesis has demonstrated that the systems integrated to facilitate this change cannot operate in isolation by removing the human element. This human element not only encompasses the lawyers who input knowledge into a system, but also the administrators who facilitate the use of a system and the users of that system. All of these key stakeholders need a voice in how the OSC is built and how it evolves. It is submitted that simply treating AI technology as the answer in isolation is the incorrect approach.

Finally, this thesis has added to existing scholarship, in particular the ongoing work by John Sorabji and Debbie De Gilrolamo, on the effect of austerity on the civil justice system more widely, by demonstrating that civil justice reform in England and Wales is inextricable from the political context in which it is being carried out. Political initiatives have extensive influence in determining the way in which reform is carried out and in molding the process through which civil disputes are resolved. As the early

stages of this thesis developed, it became increasingly clear that an evaluation of the design, development and implementation of the OSC which sought to exclude the political imperatives at work would not meet the objectives of the research project; that is to say the proposal for the OSC could simply not be enhanced without investigating those imperatives and taking them into consideration when making any recommendations. Indeed, as the research and write up stages of this project developed, it became increasingly obvious that there needed to be a heavier focus on the element of the hypothesis which concerned underfunding the OSC, particularly with the emerging financial impact of Brexit and the economic shock of the Covid-19 pandemic which have both adversely affected public finances and, in turn, court users' personal finances. It is arguable that the austerity measures which are now emerging from the current government's fiscal policy have made the implementation of an enhanced version of the OSC more urgent, to allow for a simplified, quicker and lower cost version of the court process which exists currently.

In employing an innovative, functional comparative framework which comprises of a mixed-methods approach between functionalism, doctrinal legal research and a socio-legal methodology, this thesis has provided fresh insight into the diverse range of tensions which exist in reforming the modern-day civil justice system in England and Wales and, crucially, the gap which exists between the views of reformers and the State regarding who reform is ultimately aimed at benefitting. In British Columbia, evidence has shown that the objective of creating, maintaining and improving the process involved in low value civil dispute resolution based on user-centred principles is significant in the narrative which drives reform. In England and Wales, evidence has demonstrated that no matter how honorable the intentions of those who propose and design reform, they are repeatedly undercut by the primary state neoliberal agenda of economising the process through which litigants access civil justice. This has, over the past thirty years, led to an increasing 'cost-first' approach of government to civil justice procedural reform, culminating in this now being placed in reality as the MOJ's apparent central objective of the reform programme. Thus, the fundamental purpose of procedural reform itself has been remodeled gradually to fit around economic imperatives of government, with a corresponding erosion of the consideration of the needs of court users themselves.

The more general agenda of economisation has also been exacerbated by other wider external societal challenges. The experiment with online justice conducted during the Covid-19 pandemic accelerated the reform programme's integration of digital technology but, it is arguable, down the wrong road. It showed that online hearings were possible and could be executed, even with an IT infrastructure found to be significantly lacking. It was positive in that it showed hearings *could* be conducted online. However, this short-term positive can also be considered a potential long-term risk. The Covid-19 experiment showed that the existing system for resolving low value civil claims was able to be repurposed to incorporate technology, consequently providing a potentially cheaper option for reform. As outlined at various point of this thesis, when faced with a choice between investment in services and making short term cuts to reduce budgets in civil process, successive governments have a consistent track record of opting for the latter. Challenges have existed in ascertaining exactly what progress has been made in developing the OSC since the pandemic and, with research showing a clear policy preference in favour of economising reform, the risk is that the proposed shape and form of the OSC has been or will be repurposed in light of economic objectives. This would be a significant failing.

As outlined in chapter 6, there were significant challenges to ensuring the fundamental right to effective participation under Article 6 was preserved during the shift to virtual trials during the Covid-19 pandemic. Outdated technology integrated into an outdated procedural system highlighted just how far away the reform programme is from achieving symbiosis between digital technology and the justice system. Further research is needed to assess the development work, which is going on behind the scenes at HMCTS, and there continues to be a considerable lack of transparency in this regard. Indeed, this was one of the particular challenges which emerged when conducting the research for this study, with only piecemeal information being released by HMCTS on progress of the reform programme more generally and virtually nothing on the development of the OSC. This thesis provides a foundation for this urgent future work. In the absence of information to the contrary, it is difficult not to conclude that the foundational work necessary to build the OSC is simply not being done.

7.3 Summary of Recommendations and Areas for Future Research

By way of summary, this thesis makes the following recommendations to enhance the development and implementation of the OSC in England and Wales:

General Recommendations:

- That a full financial review is carried out, using financial data from the CRT to provide a realistic assessment of the short-, medium- and long-term cost and benefit of the OSC.
- This review should be accompanied with a restatement of government commitment to funding the OSC as evidence of the new, 'user-centred' approach to funding civil justice referred to by Lord Burnett.[1]
- That a separate set of rules for the Online Solutions Court, established in statute and removing the OSC from the scope of the Civil Procedure Rules should be drafted and implemented.
- That a full review is commissioned and carried out which focuses on how clearer, court-user experience data can be gathered and made available by HMCTS specifically for the OSC by the time it is launched. This data strategy should look to collect experience-based data from court users at the end of each stage of the Online Solutions Court and use it to inform a programme of continual improvement on a monthly basis.

The following recommendations are made to enhance the development and implementation of the individual stages of the OSC:

For stage 1:

- There ought to be agreement and publication of the proposed scope of stage 1, specifically the areas of law relating to small claims it would seek to deal with.
- At the same time, recruitment of knowledge engineers, content specialists and expert system analysts to work specifically on the stage 1 project ought to take place, alongside subject matter experts being sourced. This will enable HMCTS to enter the first phase, content creation, with the correct infrastructure to

[1] [1] I. Burnett, 'The Cutting Edge of Digital Reform' (First International Forum on Online Courts London, 4 December 2018.) Available at https://www.judiciary.uk/wp-content/uploads/2018/12/speech-lcj-online-court.pdf Accessed 14th October 2021

acquire knowledge from subject matter experts as part of the expert knowledge gathering workshop, and to model this expert knowledge in the form of multiple decision trees.

- Expert system analysts can then proceed to enter the subject knowledge into the knowledge base.[2] Time then needs to be built in for subject experts and members of the judiciary to review the content and for informed changes and improvements to be made before it progresses to friends and family testing and, finally, public beta testing.
- Concurrent to all of this, open dialogue needs to take place between HMCTS, Microsoft as the platform provider and Version 1 as the software development company so that the objectives of agile system development, where results are maximised by collaboration, can be achieved.

For stage 2:

- Once a matter proceeds to stage 2 of the OSC, attendance with a case officer at an appointment to engage in a form of CDR deemed appropriate by the case officer is made compulsory
- The case officer should also have the power to order parties to attend such an appointment. Where parties refuse to engage following an order by the case officer, the matter ought then to be referred to stage 3, with power reserved to the adjudicator to impose penalties for failure to engage.

For stage 3:

- That a hybrid between the approaches adopted in Traffic Penalty Tribunal and the Civil Resolution Tribunal is adopted.
- The case officer, early in stage 2, will identify any barriers to effective participation, make accommodations accordingly and ensure that the case management stage includes direction towards requesting an oral hearing where necessary.

[2] D. Thompson 'Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution' (2015) 1 International Journal of Online Dispute Resolution, 2 at 40

- Case officers will not make decisions on format of hearing: this should be reserved for the judge.
- The default mode of hearing will be continuous online resolution with a right reserved by parties to request oral hearing if they believe that it is necessary.
- If a party requests an oral hearing the matter will be referred to the adjudicating judge at stage 3 to decide on the format of the hearing on the papers, with the option that the judge will be able to contact the parties through the OSC platform to ask any question or seek clarification prior to determining the appropriate format.
- In the event that an oral hearing is granted, it will be conducted by video rather than by telephone.

If the recommendations set out here are adopted, it is posited that this will enhance the development and implementation of the OSC for court users with low value civil disputes.

7.4 Original Contribution to Knowledge

This thesis has contributed to existing scholarship by proving that the assumption that transplanting the CRT system into the English and Welsh civil justice system without any mitigations or divergences of approach is incorrect. It has addressed fundamental questions on how the development and implementation of the Online Solutions Court can be enhanced to enable its operation for low value civil court users in this jurisdiction. It has shown that significant modifications to the current model proposed for the OSC are necessary and, by conducting a comparative analysis of the relationships which exist between the respective civil justice systems and the economic agendas of the governments which fund them, demonstrated that there is substantial justification for a change of approach in how low value civil justice is funded and, crucially, who it is funded for.

Adoption of the recommendations which this thesis has made will have significant practical impact if they are followed by HMCTS as part of their implementation of the Online Solutions Court, thereby improving the way in which low value disputants can

access the civil justice system. This study has therefore made an original contribution to knowledge in the field of dispute resolution.

7.5 Final Remarks

The research presented in this thesis has tested and proved both elements of the research hypothesis by answering the research questions put forward in chapter 1. It has built on the foundations set out by Lord Briggs's vision for the Online Solutions Court by conducting a comparative analysis of the way in which the Civil Resolution Tribunal was developed and implemented in British Columbia whilst providing an exploration of the complex dynamic which exists between reform of civil justice processes and governments' agendas in England and Wales and how that differs from that in British Columbia. This has enabled a package of pragmatic and evidence-based conclusions and recommendations to be put forward in the final chapter.

Having analysed both the Online Solutions Court and the Civil Resolution Tribunal and the evidence which exists as to their capabilities both in detail and holistically, it is this author's view that the potential to fundamentally improve access to justice for low value civil claims in England and Wales by implementing the Online Solutions Court is astonishing. Much criticism of the proposal has necessarily been included in this thesis when the granular detail of the composite stages has been considered, however the comparatively low cost, speed of resolution and simplicity of accessibility provided to tribunal users by the Civil Resolution Tribunal is something which, if replicated in England and Wales, would be revolutionary for unrepresented low claim value civil court users.

The Online Dispute Resolution Group and Lord Briggs were, it is submitted, absolutely justified on building their proposals for the Online Solutions Court on the model developed and implemented in British Columbia. It is the author's opinion that the recommendations contained within this thesis would enhance the development and implementation of the Online Solutions Court, but that is stated in full recognition that those recommendations are a mere drop in the ocean when compared with the work, effort and commitment involved in setting forward such a bold agenda in the first place.

However, attention must be drawn to the challenge outlined in the second part of the research hypothesis concerning the risk of government underinvestment. The

evidence presented has shown that this is a real risk. Whilst reference has been made to the Online Civil Money Claims pilot being only the beginning of the digitisation of low value civil claim procedure, the evidence of historic withdrawal from bold reform and the seemingly unrelenting pursuit of a cost-saving agenda has given credence to the risk that insufficient investment in the foundations of the project will be provided by government to implement the Online Solutions Court, leading to it becoming largely a digitised version of the County Court procedure which exists presently.

The findings and recommendation of this thesis cannot fix civil justice; however, they can contribute to improving procedural access for millions of future litigants in small claims matters. That said, further investigation, research and governmental investment in the project is certainly required to ensure that the findings are not in vain. It is incumbent on those who finance the civil justice system in England and Wales to keep this in mind and properly fund the development and implementation of the Online Solutions Court, incorporating the recommendations of this thesis.

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