



ONLINE DISPUTE RESOLUTION ADVISORY GROUP

Lord Justice Briggs
Royal Courts of Justice
Strand
London
WC2A 2LL

31 March 2016

Dear Lord Justice Briggs

CJC ODR Group Response

On behalf of the Online Dispute Resolution Advisory Group of the Civil Justice Council, I have pleasure in submitting this response to the interim report of your 'Civil Courts Structure Review' (December 2015). Our observations here focus mainly on Chapter 6 of your report, entitled 'The Online Court'.

Generally, we wholeheartedly welcome your recommendations on the introduction of an online court in England and Wales.

We are pleased that you felt able to endorse and then build on the concept of the three-tier online court that our Group introduced in our report to the Civil Justice Council in February 2015 ('Online Dispute Resolution for Low Value Civil Claims'). We are, therefore, as you would anticipate, a very receptive group of readers. We have, however, some refinements and further suggestions for your consideration.

- 1. The concept of an online court.** We regard the 'online court' as an interim concept as well as a pragmatic first step in online dispute resolution. In the long run, we believe that court service will be a blend of online service and conventional courtroom activity. *Where it is both just and proportionate to do so*, it will be preferable, we believe, to allocate cases or parts of cases to the online service. In the short term, however,

we see merit, in practical terms, in the idea of creating a distinct online court – an online service to which appropriate cases will be allocated; a court with a new, greatly simplified body of rules; built using new technology rather than grafted onto existing systems; and designed to be accessible to non-lawyers. Building this online court from scratch will enable us not simply to refine old ways of working but to introduce entirely new processes and systems. Over time, we expect more and more work will be allocated to the online court and its use will become commonplace rather than exceptional. In turn, as its workload increases, many outmoded practices of the traditional courts will be replaced. On this view, the online court is the spearhead that leads the way to an integrated online and physical court service of the future.

2. **Starting a claim.** One clear area of overlap between online and physical courts is the process by which a claim is formally commenced. We are of the view that, as soon as possible, in all cases, whether progressed through the traditional system or via some online court, actions should be started online. In most cases, we hope that this can be a simple and intuitive task that most users can take on without assistance. But we do recognize that here, as in other uses of the online court, some litigants may require help (also paragraph 11 below).
3. **Evolutionary approach.** In two respects, we suggest that the introduction of the online court is best regarded as an evolutionary process. First, we do not think it is currently possible to produce a full and detailed specification of the online court. Rather, we recommend that the online court is evolved through succeeding versions. From daily use, we will learn what works well and what does not, and we should be prepared to refine and adjust as practical experience informs us. In other words, the development should be evidence-based and we should have rigorous ongoing studies that evaluate the performance of our online court. This approach would have the added advantage of reducing the risk of IT-project failure that is inherent in a ‘big-bang’ approach. Second, in years to come, we anticipate, as we discussed in our report last February, that new techniques and technologies will be introduced to the online court. Sometimes these will augment elements of the early online court; and on other occasions they will replace parts of the system. There are, for example, emerging technologies (such as social networking, artificial intelligence, and predictive analytics) that are of great potential impact but have not yet being sufficiently discussed or tested to include in the initial stages.
4. **Building a platform.** The evolutionary approach that we advocate can be described in a different way. In introducing online courts, we are not just specifying, developing, and delivering a new system. Rather, we are creating a platform upon which increasingly advanced systems and features can added. The first online court facility is likely to be an effective but, technically, a fairly crude facility. Judges, the legal profession, and the government should not regard this first system as the last word. We are

on the start of a journey with no effective finishing line. As new techniques and technologies emerge and as our experience builds, we will refine and develop our online court.

- 5. Starting simply at Stage 3.** We recommend that the online court be built in modules rather than as one monolithic system. In other words, we do not advise that all three stages/tiers need to be completed before the service is up and running. (In our report, we talked about the three ‘tiers’ of the online court, while you write of three corresponding ‘stages’ through which cases progress. The concepts are similar but not identical.) More specifically, we recommend that Stage/Tier 3 is delivered first, followed by Stage/Tier 2, and then Stage/Tier 1. This means that the first service from the online court, as we envisage the facility, will be the disposal of suitable cases (see paragraph 6 below) by judges, working on the papers alone, sometimes with the support of telephone conferencing. This will require a set of systems that enable users to submit claims, pleadings, and documents; and enable judges to receive and work with these documents, and communicate with the parties. We would prefer that a stable and robust Stage/Tier 3 is established before Stages/Tiers 2 and 1 are introduced. Aside from our practical reasons for launching Stage/Tier 3 first (see paragraph 6), 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.
- 6. The difficulty of designing Stage 1 systems.** We share your enthusiasm for what you call online ‘triage’, although we would not use a medical or any technical term. We continue to see great promise in online tools that can help users to identify their entitlements and obligations, to understand the options available to them, and to guide them in making or defending their cases. However, we believe that the development of these systems is more technically challenging than you allow. For example, to deliver what you have in mind would require the development, amongst other tools, of a suite of ‘diagnostic rule-based expert systems’. We know from experience that these systems are time-consuming and often difficult to engineer. We agree that these systems can indeed be developed but it will take longer to put the content and systems fully in place for Stage/Tier 1 than the systems required for Stages/Tiers 2 and 3 – hence, our recommendation that we start at Stage/Tier 3, then build Stage/Tier 2 services, and after that introduce the full set of facilities of Stage/Tier 1.
- 7. Online legal help.** In our view, your conception of Stage 1 would need to be supported by at least three sets of facilities. The first should be a range of legal websites, to help users browse and understand broad sets of legal issues, such as the sites provided by Advicenow, Citizens Advice, and Shelter. The websites that you and we envisage go beyond providing information to offering guidance. Second, there should be a generic diagnostic tool that assists users in understanding what kind of legal

problem they have (a kind of legal problem classifier) and what options (for example, dispute resolution facilities) are open to them. The third should be more specific diagnostic systems that guide users on particular legal problems. Clearly it would be too large a job to develop this third class of system for all conceivable legal problems but we could have a suite of these for the most recurrent everyday legal difficulties. As we note in paragraph 5, these diagnostic systems are challenging to develop. It should also be noted that the task of providing basic legal websites is not trivial. In our view, the current combination of available legal websites (public, private, and voluntary) is confusing for users – there is duplication, there is no consistency of style and tone, and it is hard for a non-lawyer (and even for lawyers) to know whether the materials are accurate and up to date. We should work closely with the not-for-profit legal advice providers in developing the systems for Stage 1, and hope that funds will be available to assist the relevant providers to develop this assistance in tandem with advances towards the online court. We remain of the view that good systems in Stage/Tier 1 will be fundamental to the success of the online court. It may be that we should contemplate simpler self-assessment tools in the early days, such as those already in use in the Ohio Board of Tax Appeals and in British Columbia (MyLawBC).

- 8. Suitability of cases.** We submit that much more work needs to be undertaken to identify the characteristics of cases that make them suitable for online disposal. We know from speaking to District Court judges, for example, that many feel they could properly dispose of significant numbers of their cases on the papers alone, supported perhaps by telephone conferencing or, in due course, by video conferencing. Our view, however, is that the value of the dispute is clearly an important factor but by no means the only factor. Other dimensions that seem to be important include: the volumes of documents, the complexity of the law and fact patterns, the sensitivity of the issues, the kind of legal problem at issue, and the efficiency of current processes. But we know of no attempt so far to analyze and isolate the types of cases that would be most appropriate for online courts. We advise that this work should be undertaken as soon as possible.
- 9. First wave of systems.** Accepting, however as a practical matter, that the value of claims is a useful starting point, and consistent with the evolutionary approach that we recommend, we would, in the first instance, pilot the online court with suitable cases (subject to paragraph 8) up to the value of £10,000 (aligning with the current small claims track and the Small Claims Mediation Service). This is not to disagree with the view that cases of value less than £25,000 can and should in due course be resolved on an online basis. But we think it would be too ambitious to launch the court with a threshold as high as £25,000. Our inclination is to pilot the court with cases of much lower value – many of which are currently handled by litigants in person or cases where lawyers themselves acknowledge that it is disproportionate for them to be involved. (You might be saying much the same in 6.39.)

- 10. Using off-the-shelf systems.** As a general principle, if there are off-the-shelf systems that perform most of the required functions, then we urge that tailored versions of these should be preferred to higher risk bespoke development. Certainly for pilots, there are strong arguments in favour of conducting these initial uses of online courts sooner rather than later; and using existing tools rather than waiting for systems to be developed from scratch. Failing the availability of off-the-shelf systems, it is also sensible to consider seeking to license systems that have been developed, tried, and tested in other jurisdictions.
- 11. Learning from elsewhere.** We should not attempt to reinvent the wheel. There is a wealth of thinking and practical experience on online dispute resolution on which we can draw. On top of a valuable and extensive worldwide literature, there are other jurisdictions that are in some respects ahead of us (for example, British Columbia and the Netherlands) and we should learn from their successes and set-backs. Equally, there is a thriving market of private sector businesses that can offer insight into what is possible.
- 12. Digital exclusion.** There is ongoing debate, even within our group, about the percentage of litigants in person who have access to and are comfortable with using Internet-based services. This is an area of some contention. Estimates of the extent of effective digital exclusion, even within our Group, vary from a low of 50 per cent to a high of less than 10 per cent. We agree that it is imperative for there to be ‘assisted digital service’, but to ensure that this service is appropriately designed, we strongly recommend that some robust empirical research is undertaken to pinpoint the actual rather than any assumed levels of take-up. We would benefit here from ongoing research by the not-for-profit legal advice providers.
- 13. Role of case officers.** In your discussion of Stage/Tier 2 of the online court, you express some uncertainty over whether case officers should engage either in mediation or in early neutral evaluation. We do not believe that their work need be defined as involving either one or other. Indeed, we continue to maintain, as first articulated in our report, that the case officer should have a more fully stocked tool-kit. In our view, depending on the nature of dispute, the case officer, engaged in what we called ‘facilitation’, should be able, in an effort to ‘contain’ disputes, to draw on a wide range of techniques – *not just* mediation or early neutral evaluation, but also negotiation, nudging, sometimes even ‘gently knocking heads together’, some cajoling perhaps, and certainly the liberal application of common sense. We submit that the options you propose are too limited and limiting.
- 14. Role of lawyers.** We do not support the view that one of the aims of introducing the online court is to eliminate lawyers from the dispute resolution process. When you write that, the online court will be

'designed ... for use by litigants without lawyers' (6.5), we agree with this if you mean (as you have clarified in your article, 'The Online Court', in *Counsel*, April 2016) 'without the need for lawyers'. However, we understand that some readers have interpreted this as a concerted attempt to exclude lawyers. We do hope that the online court will be sufficiently easy to use that, in those cases where instructing lawyers would not be a proportionate expense, litigants in person will be able to enforce their entitlements without legal representation. But, we do not think it appropriate, for public policy and legal reasons, to exclude lawyers from participating in the work of the online court.

15. The need for public debate. It is clear from some of the responses to your report that the idea of an online court is welcomed by some, found to be unsettling by others, and rejected by yet others. We share your confidence and optimism and, specifically, we regard the online court as an innovation that will increase access to justice even if others fear the reverse. However, we believe it is important that there is open public debate (conferences, workshops, publications, online discussions) about the proposals for an online court - to identify common ground, to dispose of misconceptions, and to isolate the key policy questions that must be answered.

16. Online techniques in more complex work. Although we urge that online courts are introduced in the first instance for low value claims where our current system is too costly, time consuming, combative, and complicated, we maintain, for the longer term, that it may well be that online techniques will prove to be applicable in more complex and higher value cases, beyond the £25,000 upper limit that you propose. Here we anticipate a disaggregation of work – the more routine components of such cases can be handled online while other parts (where face-to-face interaction is needed) will be conducted in person in courtrooms. This already happens in large-scale arbitration work when, for example, submissions are made and decisions by arbitrators are given via e-mail.

17. Capturing online court data. Today, in England and Wales, the quality and availability of management information about the work of the courts is very low. In designing the online court, we should build in, from the outset, systems that capture all data flowing through the system, and develop techniques (from conventional management information systems to predictive analytics) for analyzing that data. This will be particularly useful in the early stages – if we capture anonymised profiles of initial inquiries and their outcomes, this will enable us to predict and guide later users who are contemplating whether or how to proceed.

18. Council of Europe Resolution. With regard to the 'assisted digital service' that you discuss (for example, in 6.54 to 6.59), we point you to the Resolution of the Committee of Legal Affairs and Human Rights of the Council of Europe (document 13918), adopted by the Council of Europe on 10 November 2015 (<http://assembly.coe.int/nw/xml/XRef/Xref->

DocDetails-EN.asp?fileid=22245) which, in calling upon its 47 member states to make ODR services available for their citizens, adds a requirement that ODR procedures should not unfairly favour regular users over one-time users. We welcome this requirement, because we envisage a potential problem with volume litigants whose staff will be handling disputes on a frequent basis and may seek to develop techniques that might take advantage of first-time users.

19. Authority of the court system. You stress the importance of incorporating 'the majesty of the court' into online courts (1.8). It is, in our view, imperative that the systems are indeed designed in a way that conveys the authority of traditional courts and that engenders the same if not greater confidence in and respect for the Judiciary. Moreover, the operation of the online court should, like the traditional courts, offer clear and daily affirmation of the rule of law. While investing the online court with this gravitas and significance may involve reproducing in electronic form some of the symbols of traditional courts, a great deal of new thinking is also needed here - about the 'look and feel' of online court service. The services of talented designers will be required here to infuse the values of the justice system into the online environment. It will be important that the public online court is clearly differentiated, in form and substance, from private dispute resolution services that are increasingly available on the web.

20. Online courts beyond Civil. We are conscious that the idea of an online court has also gained traction amongst those who are involved in the reform of Family and Tribunal work. In so far as is possible, we strongly recommend that the same broad systems be used across all three jurisdictions. We believe that the three jurisdictions have or ought to have sufficient in common (in terms of broad processes and functions) that we should introduce one set of online court technologies that can be customized for individual jurisdictions, rather than introduce three different online court systems.

We hope you find these observations and recommendations to be of help. We stand ready to help or advise you further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Richard Susskind', written in a cursive style.

Professor Richard Susskind OBE
Chair, Online Dispute Resolution Advisory Group of the Civil Justice Council