JUSTICE LECTURE OCTOBER 2016

THE ONLINE SOLUTIONS COURT

AFFORDABLE DISPUTE RESOLUTION FOR ALL

A REFORM CASE STUDY

1. The very recent announcement by the still new Lord Chancellor to Parliament in September that the ambitious £1 billion programme of court reform to which the MoJ is now committed would include the development of a new online court for civil cases makes this an opportune moment to pause and take stock about what I hope and expect will be the start of a whole new way of resolving civil litigation in this country. Something which in my Harbour Lecture last week I described as a central plank in a coming civil revolution. The Lord Chancellor said this, under the heading "Civil":

i. "Introducing a new online process for resolving claims: In line with plans across all jurisdictions, we will move more cases away from physical court rooms. Building on Lord Justice Briggs' proposals in his Civil Court Structures Review, we will create a new process to resolve many disputes entirely online, using innovative technology and specialist case officers to progress routine cases through the system and reserving judicial time for the most complex cases. We will create a new, streamlined Rules Committee to design this new system and keep the processes simple. When hearings are required, they may be held over the telephone or video conference, focusing court resources on the most complex and difficult cases. This will mean that cases should reach a quicker resolution."

2. Aspirational policy statements like this one are not to be construed as if they were a statute. In order to understand what is being planned, and why, we need to look at the statement in its context. That includes the history of the development of the Online Court concept, in which Justice and the Civil Justice Council have each played a central role, the emergence, funding and development of the HMCTS Reform Programme and the shocking weakness of the current civil justice structure identified in my Structure Review, to which the Lord Chancellor refers. This case study is designed to answer the following questions about this new court:
    1. Where has it come from?
    2. Why do we need it?
    3. What is it?
    4. Where is it going?

Where has it come from?

3. The concept of harnessing modern IT for the better resolution of civil disputes has a bit of a history but not, at least until very recently, what many would describe as a happy one. Several expensive but unsuccessful attempts have been made during the last decade to design and establish digital and online issue and filing in the Chancery, Commercial and Technology courts now cohabiting in the Rolls Building. Better

success was achieved during the same period in the now unified County Court for online issue, both by bulk claimants, using what is now called Secure Data Transfer, and by ordinary people and small businesses, using Money Claims Online ("MCOL") and Possession Claims Online ("PCOL"). But SDT needed large scale investment by the few large claimants with the resources to align their own databases with the government offering. MCOL and PCOL offered something much more accessible, but it still led to the printing of the process onto paper on arrival at the Northampton Bulk Centre, and did no more than imitate a paper process for issue, MCOL leaving the court user to fill in a screen corresponding to a rather small blank sheet of paper, with little guidance as to how. These systems demonstrated that a large volume of relatively straightforward cases could benefit from online issue, but otherwise did little more than add a digital gloss to procedures designed over many years to be operated on paper, and by lawyers.

4. Much more important in the history was the growing realisation by that tiny contingent of those who could understand both law and computers that modern IT could bring much more to the litigation party than just digitisation of current paper-based processes. Pride of place must surely go to Professor Richard Susskind, that voice crying in the IT wilderness, not merely for his visionary understanding of how computers would ultimately replace lawyers and (yes) even judges, if we choose to let them, as surely as they are about to replace drivers of vehicles, but also for his practical demonstration, starting in the mid 1980s, of how investigative digital processes could help litigants articulate their grievances in a way which would enable the court to resolve them. I will have more to say about Richard's central role in all this, but first I want to mention some of the green shoots of online digitally assisted dispute resolution which have started to grow up all around, but not yet within, our civil courts.
5. The first in time may have been Rechtsweiser. It was developed for the Dutch Legal Aid Board by the Hague Institute for the Internationalisation of the Law (HiiL). The service is provided by the Netherlands Ministry of Justice and Security. It is designed to help parties resolve disputes through a process that takes them from problem diagnosis, through facilitated, Q&A-based framing of their case, to problem solving and assisted negotiation and, finally, to various forms of online Alternative Dispute Resolution ("ADR"). It operates as a voluntary preliminary to court proceedings in relation to what we would call private law family disputes, and is primarily aimed at empowering the parties to negotiate a settlement fit to be put before the court for approval. Thus it does not yet address what we classify as civil claims, but a version for resolving landlord and tenant disputes is in preparation, using the same (or a similar) software package.
6. The Legal Services Society in British Columbia has this year rolled out its own version of Rechtsweiser, based on the same IT platform (Modria) and again aimed at resolving family disputes. But much more important as a forerunner of the Online Court project here is the Civil Resolution Tribunal ("CRT") of British Columbia. Backed by primary legislation, it plans to offer a form of compulsory adjudication, accessible online, for a wide range of small civil money claims, which are perceived not to be suitable for proportionate determination in their courts. Its key features are, first, an online Solutions Explorer, which takes the parties through an investigative analysis of their dispute, with a view to empowering them to resolve it

without judicial intervention and second, a quasi-judicial adjudication process, which makes use of the analysis and evidence complied during stage one to produce an adjudication which becomes binding only if neither side objects to it within a time limit. An objector may then commence proceedings in court, but the fruits of the adjudication process are not fed into any court system. If court proceedings ensue, the parties must start again, on paper. The CRT went live in July, by means of the soft launch of a service for the resolution of Strata claims. If that succeeds, a much wider roll-out is expected next year.

7. In this country, the most relevant green shoots consist of an out of court ODR program called Resolver designed to assist consumers resolve complaints with subscribing businesses, the developers of which have recently adapted it, under the banner "Decider" as the IT platform for the new Online Traffic Penalty Tribunal, for the determination of appeals about parking penalties, and non-payment penalties imposed on users of the Dartford Crossing. This is a system for resolving high volume, low value, narrow streams of statutory disputes, well suited to online analysis by the parties, where the tribunal members decide the cases by reference to what the parties put online about their cases. It began to supercede a partly email and telephone based service earlier this year. Transfer by the subscribing councils from the old to the new service is ongoing.
8. Next, Cybersettle. Thus is pure ODR, in the sense that it empowers parties to settle money claims without any third party human intervention, by taking part in an online multi-stage bidding process on a basis under which, if no settlement is reached, the amount of bids remain confidential to the party making them. If bids match in a particular round , there is a settlement. If they overlap (i.e. the defendant in a round offers to pay more than the claimant offers to accept), then the computer announces a settlement by splitting the difference. This essentially very simple system originated in the USA, and has only very recently become available here.
9. I have thus far said nothing about eBay, which offers an ODR service, for its existing customers. It is said to resolve more claims every year than the whole of our civil courts but it has, of course, a captive market of those who transacted online with eBay in the first place.
10. I must now return to the mainstream of the historical narrative, and back to Richard Susskind. He was commissioned by the Civil Justice Council in 2014 to lead an ODR advisory group of distinguished academic, IT and legal experts, to conduct a review of the potential and limitations of the use of ODR for resolving civil disputes of value less than £25,000 in England and Wales. The result, in February 2015, was the concise but seminal and utterly compelling report to the CJC, warmly welcomed by Lord Dyson MR, called "Online Dispute Resolution for Low Value Civil Claims". I will call it the ODR Report for short.
11. The principal recommendation in the ODR Report was the creation of an entirely new court, Her Majesty's Online Court, or HMOC for short, for the resolution or final determination of the majority of such claims, accessible online, and using mainly online methods at all stages of its procedure. The three stages were:
    1. Online evaluation: this was to be done by the parties online, using a suite of purpose designed evaluative software, but without third party assistance, from the court or otherwise.

2. Online facilitation: this was a service to be provided by court-employed, investigative, independent, facilitators, trained in mediation and early neutral evaluation ("ENE"), working mainly online but partly by telephone, designed to empower the parties to resolve their dispute without the need for expensive judicial determination.
3. Online judges. These would be judges trained to work as far as possible online, with recourse to telephone conferences where necessary. Their decisions would be binding, but subject to conventional avenues of appeal. They would have discretion to transfer cases to the conventional courts on grounds of complexity or public importance.

12. I draw attention to the following points:
    1. The choice of £25,000 as the upper limit for the jurisdiction of HMOC was heavily influenced by the authors' terms of reference.
    2. Similarly the heavy reliance for the procedure of HMOC upon online processes, rather than, for example video or face to face meetings, was again a consequence of the question which the group was set, namely, what has ODR got to offer the civil courts? Nonetheless the advantages of speed, low cost and efficiency of online process was well explained, with full reference to contemporary developments, including those to which I have referred.
    3. The report was written in the knowledge that, for the first time, steps were afoot for HMCTS to undertake a court reform programme with substantial annual funding. The group assumed that it would be £75m per year for five years.
    4. The group recognised that HMOC would need to be regulated as to its procedure by an entirely new rule book, in much simpler form that the CPR.

13. The ODR Report was very closely followed in April2015 by the report of a working party set up by Justice, chaired by my former colleague in the Court of Appeal Sir Stanley Burnton, called "Delivering Justice in an Age of Austerity". I will call it the Justice Report. The working party was unconstrained by any terms of reference that I have been able to discover. Its principal recommendation was that much civil litigation, in the courts and most tribunals and regardless of value, should in future be conducted on the basis of a fundamentally new and different model, in which the centre stage would be taken by an investigatory court official (to be called a Registrar). I can't provide a better description than appears in their Executive Summary, as follows:

"This model will feature a primary dispute resolution officer – whom we suggest calling a registrar – who has been trained to specialise in particular types of disputes. Using an investigative or proactive approach for all cases where a defence is lodged, and the evidence needed to resolve the case.

On the basis of this proactive case management, registrars will get to the heart of cases quickly, drawing on their expertise and authority to resolve as many cases as possible using alternative dispute resolution methods. Registrars will refer to a judge only those cases where no other resolution is likely to be effective or appropriate.

The model is designed to operate effectively and fairly, engaging directly with unrepresented parties, with the aim that the majority of disputes will be resolved quickly and informally and that, on the assumptions set out in the report, resources will be saved in the long term. "

14. The authors did not suggest that their model should be applied to all civil disputes, but rather to those in which a high number of LiPs were engaged with difficulties in understanding relevant law and procedure, where there was typically (and consequentially) unsatisfactory preparation before trial and finally (and again consequentially) a high number of successful appeals. They were cognisant of the proposals in the ODR Report (Richard Susskind being a member of the working party), and regarded their model as building upon stages two and three of HMOC, with an equivalent to stage one in the form of a comprehensive online and telephone platform offering litigants information, legal advice and assistance as their cases proceeded.
15. The most interesting and innovative part of the model was the Registrar. The Justice Report proposed that they should be legally qualified, sufficiently trained to be able themselves to offer mediation and ENE for resolution of cases, and specialists in particular types of litigation, working therefore in teams so as collectively to be able to offer a comprehensive service. Apart from mediation and ENE they should be empowered to strike out hopeless cases, and to refer to judges for determination only those cases unsuited for resolution by any less costly means.
16. By this time a vehicle for taking these proposals forward was taking shape in the form of the HMCTS Reform Programme. HMCTS is a unique form of 50/50 partnership for the running of the courts, between the Lord Chancellor (representing Government and the MoJ) and the Lord Chief Justice (representing the judiciary). Its general ambitions and funding basis are now well known. In connection with the civil courts its work is summarised in Ch 4 of my CCSR Interim Report. Foremost among its objectives is grappling for the first time effectively with digitisation of all court process; i.e. breaking the centuries old tyranny of paper and moving away from the time-honoured but very expensive presumption that every decision in court proceedings has to be made at the end of a face to face oral hearing before a judge in a physical court building. The revolutionary implications of these ambitions are convincingly explained in another recent report commissioned by Justice: "What is a Court".
17. For present purposes I need to focus on some early decisions taken by HMCTS (with full MoJ and judicial engagement) which have impacted on the evolution of the civil Online Court. The first is that it was decided at the outset not to undertake a root and branch replacement of the CPR. This was thought to be a bridge (or a battle) too far. Our current lawyerly and adversarial civil procedure is not therefore simply to be done away with. The second is that it was decided at a very early stage to focus in particular, within the civil sphere, on money claims under £25,000, as fit for the most radical re-think, if necessary without the constraint of the CPR as the procedural basis of the court's work. These are, overwhelmingly, the largest number of civil court claims by number, although not of course in the time and resources devoted to them. The vast majority of these claims are in fact undefended. There is no underlying dispute, and the court is resorted to for its enforcement role in the

maintenance of the rule of law, rather than for dispute resolution. Thirdly, a major objective from the outset was the development and enlargement of the role of the Case Officer, originally unfortunately named Delegated Judicial Officer, to undertake much more of the routine and often non-contentious current workload of judges. Fourthly, an early decision was made to approach the work of Civil courts, Family courts and Tribunals on as far as possible an holistic basis, under the banner of CF&T, for purposes connected with digitisation, the use of court space, new procedures, and the deployment of judges and Case Officers.

18. These important decisions had all been made before I came on the scene, in late July 2015, with a commission from the Lord Chief Justice and the Master of the Rolls to undertake the Civil Courts Structure Review ("CCSR"). My terms of reference included the requirement:

"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."

Needless to say, detailed consideration of the Online Court concept, as a possible structure for the resolution of civil money claims under £25,000, lay right at the heart of my work. It was by a clear margin the most controversial aspect of my subject matter. Its creation along the lines which I have recommended would require much the largest structural change identified within my review. It would require the setting up of a wholly new civil court, with primary legislation for its creation and for the making by a new committee of wholly new rules to govern its procedure. It would also require the harnessing of new IT not currently in use anywhere in the world, except British Columbia, and even there, not in the main court structure. No less than 21 of my 62 final recommendations related directly to the Online Court, including a recommendation that it be known henceforth as the Online Solutions Court and eventually, when all the civil courts are accessible online, just the Solutions Court.

Why do we need it?

19. I will shortly describe some of the main features of the Online Solutions Court as recommended in my Final Report. But first I want to address the question: why do we need it? Do we not already have the finest civil courts in the world, the best lawyers and judges, an adversarial, mainly oral, culture which has proved over centuries of development to be the best attuned to getting to the right answers about fact and law? Do we not have modern procedure rules, written in plain English, effective management of costs, and a new-ish overriding objective designed to achieve fairness and justice at proportionate cost? Do we really want out civil disputes to be determined by computers, rather than by cross examination and oral legal submissions, in the time-honoured way?
20. Well, yes, we do have most of those things but, shockingly, they are simply not accessible to ordinary people and small businesses for the resolution of small and

moderate claims at proportionate costs and costs risk, save for particular types of claim, such as for personal injuries. This is firstly because the 'normal' basis of retainer of the professional legal services typically supplied makes the costs expended disproportionate to the value at stake; secondly because the normal basis of costs recovery by the winner means that the costs risk of being the loser makes the litigation doubly disproportionate; and thirdly because our civil court culture and procedure is so lawyer-centric that it is not practicably navigable by litigants without lawyers, save at crippling disadvantage.

21. Those are my words, by way of summary of what in Chapter 5 of my Interim Report I described as "the single, most pervasive and intractable weakness of our civil courts". But the same underlying sentiment is to be found both in the ODR Report and in the Justice Report. The former identified thirteen criteria for a court-based dispute resolution service for low value claims. They included affordable, accessible, intelligible and proportionate. It continued:

> "Although our current court system is populated by first-rate judges whose quality of work is very high, our shared view is that our current way of resolving low value civil cases in conventional courts fails to satisfy the majority of our thirteen criteria."

I have no doubt that the four which I have identified all scored a fail. In the introduction the authors take it as read that an affordable court service, and therefore access to justice, is under severe threat.

22. The distinguished authors of the Justice Report put the point even more forcibly. In the very first paragraph of their introduction, the authors say this:

"Our justice system is reeling from the impact of ongoing state retrenchment. We have seen major cuts to legal aid and simultaneous reductions in local authority funding of advice and assistance. At the same time, cuts to the HM Courts & Tribunals Service ("HMCTS") budget have led to reductions in court staff and court counter hours. The resultant advice deficit has made it increasingly difficult for ordinary people to navigate an adversarial justice system developed on the assumption that people will be legally represented. Many individuals are simply unable to bring good claims and enforce their rights, or adequately defend claims brought against them, due to the inaccessibility of the justice system."

23. Some say it's all the fault of government, for severely cutting Legal Aid. But I think that misses the point. It is not just those with no money who cannot access civil justice for moderate claims. Those with a lifetime's savings wisely decide not to put

them in jeopardy by costs expenditure and costs risk which is wholly disproportionate to the amount or value of the issues at stake. If prudent potential litigants would be foolhardy to take that risk with their own money, why should the taxpayer underwrite it? During public and stakeholder consultation in stage two of my review, I repeatedly asked this simple question, of the many lawyers present: "which of you would recommend to a non-lawyer friend bringing a claim in our civil courts, other than for personal injuries, where the value at risk was £25,000 or less?" I received not a single affirmative answer. Of course Legal Aid remains a vital element in supporting those who really can't afford to litigate, provided that the support goes into a proportionate type of expenditure.

24. Others say that all this can all be put right by a fixed recoverable costs regime, or by robust judicial costs management. I agree that both of these have a major role to play, but fixed recoverable costs only address the costs risk of losing, not (directly at least) the party's own expenditure on lawyers, and the expenditure of costs on adversarial costs management hearings is itself all too often disproportionate in small to moderate value cases. Lord Justice Jackson would himself agree that those two remedies will not on their own be a complete solution for the problem, in relation to small to moderate claims. He supports the development of the Online Solutions Court.
25. Others, and litigation lawyers in particular, say that the creation of an Online Solutions Court for small to moderate money claims will be to introduce a second class service, by excluding its users from the benefits of professional legal advice and representation. Again, I believe this to be misconceived. Not only (as I shall explain) will this new court not exclude lawyers, but if the comparator is no access to justice at all, a development designed to enable litigants with no, or reduced, access to affordable legal services nonetheless to come to court without suffering the current crippling disadvantages of a lawyer-dominated litigation culture and procedure is not for them second class.
26. Some say that it is not what civil litigants need, because the very fact that it is accessible only digitally (i.e. online) will immediately exclude that large class of current LiPs who are challenged in the use of computers, either because they do not own one, do not have the skills to use one, or have no access to useable broadband. This would a very serious objection, at least in the short term, if the introduction of online access as the only, i.e. compulsory, means of communicating with the court were not accompanied by sufficient, properly funded, assistance to the digitally challenged. But that support is part of the package, and being actively developed by HMCTS with the assistance of the pro bono community through what is called a Litigant in Person Engagement Group ("LiPEG").

What is it?

27. So, what is this new court which I am proposing? Let me start by saying that I claim no originality as the inventor of any specific part of the package even if, viewed as a whole, the model which I propose differs significantly from the models proposed in the ODR and Justice Reports, and from the CRT in British Columbia and other front-runners abroad. If you simply want a full description, read chapters 6 of my Interim and Final Reports, and recommendations 5 – 26 in chapter 12 of the Final Report. In this reform case study tonight I will concentrate on those key parts which both associate it with, and set it apart from, the earlier reports and the front runners to which I have referred, and I will try to explain, and justify, the differences.
28. First and foremost it will be a court. By that I do not of course mean a court building, but a virtual court, forming part of the mainstream civil justice service for maintaining the rule of law and delivering binding resolution or determination of civil disputes. It will not, as in British Columbia, be a separate tribunal, producing adjudications by which parties may choose not to be bound, (as with the Financial Ombudsman service), and therefore have the right to start all over again in court proceedings. This is entirely in line with the ODR and the Justice Reports, but a fundamental departure from all the frontrunners such as the CRT and Rechtsweiser. It will also be mandatory (i.e. the only court) for the claims within its jurisdiction, subject to a permeable membrane through which cases may be passed to a traditional court, on grounds of complexity and public importance. It will therefore be run by HMCTS, staffed by judges and civil servants, with a conventional route of appeal, initially to a Circuit Judge and then (in cases where there is an important point of principle or practice), to the Court of Appeal and ultimately (but rarely) to the Supreme Court.
29. That feature is, in a sense, a consequence of my terms of reference, to review the structure of the civil courts. But I would have recommended a tribunal or adjudicatory body if I had considered it preferable. In my view there needs to be a court-based solution to all civil disputes, even if it is only there as a last resort. Thus for example, the availability of an affordable recourse to court, to a party to a mediation facing a more powerful or less risk averse opponent who makes only a derisory offer, is widely recognized as a necessary underpinning to mediation as a means of dispute resolution, if its outcomes are to be a fair reflection of a just result. If weaknesses in the court solution make it inaccessible to many, as at present, then improved methods of resolution outside court are only part of the answer. The court solution itself needs to be made accessible.
30. Secondly, it will be a new court, not an organic development or revitalization of the County Court, which currently has jurisdiction in relation to the relevant classes of claim. This may seem counter-intuitive, bearing in mind that the Small Claims Track of the existing unified County Court can be accessed online (via Money Claims OnLine), has a new and successful telephone mediation service, and that some highly effective judicial ENE is practiced in some local hearing centres. Why not

move slowly and carefully towards the ideal model, within the envelope of a court based structure which already services the needs of many LiPs?

31. This is a tempting alternative, with some advantages over a fresh start, but in my view it suffers from two potentially fatal disadvantages. The first is that the County Court remains, and will continue to be, regulated by the CPR which, however consistent and plain their English language, were written by lawyers for lawyers, and are still only navigable by lawyers. If you are in any doubt about that, read paras 5.28 to 5.36 of my Interim Report, with which no one disagreed during the extensive consultation which followed. A court which is to be genuinely accessible to people with minimum, affordable, help from lawyers desperately needs new, simple rules, and that is what the MoJ is now committed to produce, based on primary legislation now being prepared.
32. The second disadvantage of developing an existing court is all about legal culture. The County Court was founded in the 19th century, long before the revolution in 1875 which produced the current High Court, and although it has far more LiPs than the High Court among its users, its culture is still steeped in an adversarial approach that starts by assuming that litigants are legally represented throughout. Of course its District and Circuit judges do their excellent best to level the playing field for litigants without lawyers, but that involves trying to push against, and ameliorate, an essentially lawyerish culture. Again, if you want a more detailed exposition, see chapter 5 of my Interim Report. In my view, nothing short of a new start, with a new court, will achieve the necessary cultural break with the past. This was something fully debated during consultation during my review, and although the new court solution may not have been unanimously agreed, it gained the growing support of a very clear majority of consultees, including Justice.
33. The third core feature of the new court is that it will have resolution, rather than determination, of civil disputes at its heart. Resolution means empowering the parties to resolve the dispute themselves, with skilled assistance. Determination means judges deciding the dispute at a trial or earlier stage in the proceedings. Solutions is short for, and perhaps more user friendly, than resolution, and that is why I would like the name of the new court to be “Solutions Court” even if it continues for a time to have “Online” in the name, to disclose its ancestry (i.e. HMOC in the ODR Report) and the place where it may be accessed. By the end of the Reform Programmme, in about 2022, all civil courts will be accessible online, so that part of the current name will cease to be a distinguishing feature of this new court. There will simply be a Solutions Court, a County Court and a High Court, all accessible online.
34. Putting resolution at the heart of the process is designed to take the A out of ADR. No more will resolution be an unfamiliar alternative to going down the court route, an assumption still deeply engrained in English cultural thinking about dispute resolution despite all the advances in mediation and ENE over the last 25 years. By

that I do not mean that parties will not still be encouraged to seek resolution by any available means before going to court. The online software will explain those options and encourage their use before the issue of proceedings. I simply mean that resolution will be in the mainstream of what they receive when they do go to court.

35. This core feature in my model follows seamlessly from the recommendations in the ODR and Justice reports. It is the main purpose of stage two. The key role of the Case Officer, who will preside over that stage, will be to select the most appropriate means for resolution of the dispute as presented by the material input by the parties during the stage one online triage. This was the essential function of the facilitator on the ODR model, and of the Registrar in the more developed Justice model.
36. There are some significant differences between this part my recommended model and its two forbears. Consistent with its terms of reference the ODR report envisaged stage two resolution being provided mainly online. Both the earlier reports suggested, I think, that the skilled resolution assistance (whether by mediation, ENE or otherwise) would all be provided personally by the facilitators or registrars themselves. That was my original view also. I therefore suggested, in my Interim Report, that stage two resolution would mainly consist of telephone mediation, for which there already is a trained and experienced (though much too small) body of civil servants, by no means all of whom are legally qualified. In my view ENE is only effective in this context if it is provided by someone 'on the same level' as the judge who will determine a dispute if it cannot be resolved: i.e. by a judge or perhaps by a very well qualified and experienced lawyer. Judges already do formidably effective ENE, in the Family Court at FDR hearings, in 'family chancery' cases, e.g. about inheritance and TOLATA, and in some County Courts using the Small Claims Track.
37. After much further research and consultation I have concluded that although the Case Officers will make the choice of appropriate resolution methods in stage 2, and will for that purpose clearly need to be legally qualified to as to be able to get a grip of the dispute in legal terms, they need not be the only resolution providers. They should be able to offer their own resolution service if suitably trained, e.g. in telephone or online mediation, but they should also be able to offer third party resolution services, such as a resumed after hours short face to face mediation in a hearing centre (such as existed before the demise of the National Mediation Helpline) or ENE by a District Judge at a hearing centre convenient to the parties. They should also be able to recommend resolution by any suitable form of ODR.
38. In my view there is no reason to take a 'one cap fits all' approach to the offer of resolution services in the new court. Although initially limited to money claims up to £25,000, the cases will range widely in complexity, emotional content and therefore suitability for different kinds of resolution. Furthermore the available choices are growing apace. Online mediation is in its relative infancy, at least in England, and resolution services by online automated bidding, such as Cybersettle, are just

starting up, though they have been available in the USA for some time. There is no reason to think that the categories are closed.

39. Fourthly, the final determination of people's substantive (rather than procedural) rights and duties in the new court will be done entirely by judges, and parties will have the right to go to the judge, if they either cannot resolve them with assistance, or choose not to do so. Resolution will I hope be the new cultural norm, but still not compulsory. Rights and duties will not be determined or even adjudicated upon by Case Officers. This is in sharp contrast with the CRT and other online predecessors, and a respectful but modest departure from the Justice model, but it is I think of the very essence of a court. In keeping resolution ultimately voluntary I am working in line with settled Court of Appeal authority (*The Halsey* and *PGF II* cases). But even if parties may be compelled to attend a resolution event, such as a MIAM or FDR or its civil equivalent, they cannot be compelled to settle their dispute.
40. Finally the third, judicial determination, stage in the new court should adopt what according to the recent MoJ statement may well become common to all court proceedings, namely the abandonment of any presumption that there should be a face to face hearing, i.e. a trial as we currently envisage it. There will, for as long as we continue to adhere to the Human Rights Convention, and indeed should be, a hearing of some kind unless the parties agree otherwise. But subject to that, determination may take place in whichever of an online, telephone, video or face to face environment appears to be most appropriate for the case in question. It may be possible to have an online hearing. Since proportionality will always be a main criterion, parties proposing the more expensive types may have to justify the extra expense. In this respect again my model may be said to depart from the predominantly online and telephone model for stage three envisaged by the ODR Report.
41. I have thus far said very little about the new court's vital first stage, namely automated online investigative triage. It is from the English court's perspective the only completely novel part of the structure, apart from a modest first step in Accelerated Possession Claims. This first stage makes no departure of principle from the ODR Report, but it does go into more detail, and my recommendation of it gains confidence from my going to Vancouver and Victoria in BC to study the advanced stages of development of something very similar for the CRT called the Solutions Explorer, a short time before its soft launch, which took place last July. This is the most challenging and time-consuming part of the design of the new court, because it calls for separate sets of sequential screens, like leaves on a decision tree, developed for each of the main case types within the court's jurisdiction, designed to tease out the legally relevant nuts and bolts of a party's claim or defence, and prompt the parties to upload their main evidence in the form of documents and statements.
42. The software must be designed to draw out from the party's unformulated but deeply held grievance the elements necessary to build a statement of case (including

defence), and to convert it into a form of online pleading, entirely free from legal jargon but identifying the key facts relied upon. This is not at its core a technological challenge. Richard Susskind did one, for latent damage claims, as long ago as the mid 1980s. The Canadians have been patiently designing them now for some years. Their experience is that the challenge lies mainly in the required knowledge engineering and then in choosing the appropriate jargon-free language. Once that is done and iteratively tested, putting it into code for populating online screens is, they say, the easy bit. And they have now done lots of them.

43. It is this feature which, more than any other, will in my view provide that quantum leap in accessibility for ordinary people and small businesses that will make litigating small claims affordable. I do not suggest that any online software (at the present level of technological development) will be a sufficient substitute for bespoke advice on the merits of individual cases by a qualified lawyer, or for that matter a substitute for specialist forensic legal skills like cross examination. It is my wish that the new court should accommodate both of these, with elements of fixed recoverable costs to encourage them. But the new stage one should in my view enable litigants to do most of the intervening donkey work, including communication with opponents and the court, themselves rather than through lawyers. So much of the disproportionate cost of litigation is expended on these elements of the process. Furthermore the early exchange of documentary and other evidence should also enhance the prospects of successful resolution at stage two since, as all experienced ADR practitioners will tell you, lack of information about an opponent's case is often the enemy of effective resolution.

Where is it going?

44. So, these are the essential features of my model. Where is it going? It's time to have another look at the ministerial statement with which I began. It speaks again and again of resolving claims: i.e. of resolution. It speaks of new process, of new simple procedure and rules by a new streamlined rule committee, of online resolution, of telephone and video hearings, of focusing resources on the most complex and difficult cases. It calls for specialist Case Officers and the for use of innovative technology. Although the word is not used, proportionality breathes from every pore. It speaks of building upon the proposals in my review.
45. These are not just fine general words. Practical steps are already being taken by HMCTS within, and funded by, the Reform Programme. A project to build this new court has started. An early draft of a stage 1 decision tree for holiday claims has already been prepared. Ground rules for the qualification, training, supervision and deployment of Case Officers are starting to be discussed. Court user research is beginning, and there is a separate project already started, called Assisted Digital, for putting together the necessary assistance for those challenged in the use of

computers and IT rather than paper.

46. Some of this work is, necessarily and in fact, specific to a civil Solutions Court. But much of it is generic to similar developments across what is called CF&T, i.e. Civil, Family and Tribunals. This reflects that fact that much of the basic requirements for proportionate, affordable and accessible justice are common to all of these types of court or forum. The users all speak the same jargon-free language. The underlying IT platform should, surely, be shared. The civil courts have much to learn from simple rule-sets in Family and Tribunals. In short there is more of the basics which CF&T share than what separates them.
47. Although this is an HMCTS project, there is a growing level of engagement (i.e. actively sharing responsibility for success) by the judiciary, by the pro bono community and by the professions. The front line design team for the new civil court includes a serving judge. Separate Judicial Engagement Groups provide specialist expertise for each of Civil, Family & Tribunals. There is an Engagement Group with experts from the pro bono community specifically tasked with addressing the needs of litigants without lawyers, and the computer challenged in particular. There are now professional engagement groups which will meet regularly.
48. It is not intended that there just be a Big Bang, when a fully fledged Online Solutions Court jumps onto the stage, without exhaustive prior testing and exposure on a trial basis to ordinary members of the public as guinea pigs. There will almost certainly be a soft launch, either to a limited ceiling well below £25,000, or covering a limited number of case types, as in BC.
49. None of this means that the underlying concept of this new Solutions Court is free from risks, from controversy or from the understandable fear of the unknown, particularly among those with vocations, careers and livelihoods which currently depend on the existing system. But I repeat what I said last week, giving the Harbour lecture, (with apologies to those who heard it then), in response to the suggestion that this new court will bring about a dumbing down of civil justice, and introduce a second class service:

"In my view the reality is that the current system is one which altogether excludes a silent but growing class of ordinary people and small businesses from any real access to civil justice (save in particular areas such as personal injuries). The true comparison lies between their continuing exclusion and the creation of an affordable civil justice system, using every aspect of modern technology which may be brought to bear for that purpose. Enabling litigants to do more of the work themselves, and empowering more of them to resolve their disputes without recourse to expensive judicial determination should be the hallmarks of accessible civil justice in the future. It may mean that, in some areas, lawyers will have less to earn from each case. But if the

result is to enable many more people to use the courts, and for that purpose avail themselves of affordable, unbundled, professional legal services, where really needed for the vindication of their civil rights, then lawyers should in my view have nothing to fear from this revolution."