

Justice Select Committee Inquiry into Court Capacity
Supplemental evidence submitted by DisputesEfiling.com Limited

12 October 2020

This evidence supplements that submitted by us on 17 August 2020. The extension to the original deadline for submissions is helpful. The Backlog is a fast moving and complex set of issues. We are now able to update our original evidence with developments since August. As with our previous evidence we address the civil jurisdictions: Civil Courts, Family and the Tribunals.

SUMMARY

- A The Ministry of Justice (MoJ) Official Court Statistics for the second quarter of 2020 reveal the beginning of the Backlog in Civil cases and Employment Tribunals.
- B The introduction of the “Review Day” into the reactivated and post 3 August issued claims for Possession of property has introduced a form of mandatory negotiation/ADR of the nature that we called for in our Evidence of 17 August 2020. This Review Day concept needs to be extended to all civil litigation and the Employment Tribunals.

1 Statistical evidence of the rising Backlog

1.1 The Committee will be familiar with the Official Statistics prepared by the MoJ for activity in civil courts in England and Wales. Published quarterly, the most recently published statistics are for the second quarter of 2020 being the first full quarter affected by the Pandemic, Lockdown and measures taken to respond to that emergency¹.

1.2 Table 1.2 shows the dramatic effect on the number of claims issued in the April-June 2020 quarter.

1.3 In Q2 of 2019 400,126 claims were issued in the County Courts. In the same quarter of 2020 only 96,499 were issued.

1.4 It is our view that the unissued ca 300,000 will begin to be issued from December onwards. However, of greater concern is that that number is only the normal level of activity and takes no account of the Pandemic which we consider will increase the number of claims issued to historically high levels.

1.5 In addition to the quarterly statistics the MoJ has helpfully published Management Statistics on a more or less weekly basis as part of its several responses to the Pandemic. The most recent was published on 8 October and shows the data available for the week ending 20 September². This data is based on fee receipts and is subject to revision.

¹ The most recent are here: <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-april-to-june-2020>

² <https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-september-2020>

- 1.6 Table 3 shows show the rising number of cases received into civil justice.
- 1.7 Table 4a shows no statistics for Family work which is not understood; probably a mistake. Table 4b shows there is no Backlog in petitions for divorce or applications for Grants of Probate. This is because both of those work types were supported by an online system before the Modernisation Programme ground to a halt last December when funding ran out.
- 1.8 Table 7 shows the Employment Tribunal workload. This again shows an unhappy and worrying picture. Individual claims for the w/e 20 September were 1,250 with an existing Backlog of almost 40,000 cases and disposals in the same week of only 578.
- 1.9 Action needs to be taken now before these jurisdictions are overwhelmed.

2 The beginnings of a solution

- 2.1 In response to the coming Tsunami of Possession claims the Master of the Rolls (MR) convened a Working Party chaired by Mr Justice Knowles bringing together a cross-disciplinary group of individuals across the Housing sector.
- 2.2 This led to the introduction of a compulsory Review Day for those cases at which the Parties are expected to either settle the case between themselves or to engage in mediation.
- 2.3 The Judiciary have been encouraged to strike out cases where Landlords have not engaged in either form of ADR.
- 2.4 The Guidance issued by the MoJ opens with the stark, but appropriate, exhortation: “Avoid Court”³. That is excellent advice in our view.
- 2.5 Guidance from the MR’s Working Party, including a statement entitled “Overall Arrangements”⁴, makes clear that a Review Day is to take a place 21 days after the re-activation of a case or after the commencement of a possession case not subject to reactivation. A Judge will sit on the Review Day to approve an Order setting out the terms of any settlement agreed between the parties or to strike out the case as appropriate. If none is agreed the case is listed for a possession hearing 28 days thereafter. The Review Days have begun to be listed and the first is due on 19 October and every Court day thereafter.
- 2.6 DEF is supporting an ADR Service Provider in delivering online mediation services at the Review Days. We will be making the (permanently anonymised) data freely available to all concerned in order to achieve an understanding of the success or otherwise of the Review Day approach and what adjustments may be necessary to improve its efficacy.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918820/important-information-claimant.pdf

⁴ <https://www.judiciary.uk/wp-content/uploads/2020/09/Possession-Proceedings-Overall-Arrangements-Version-1.0-17.09.20.pdf>

2.7 Review Days are exactly the type of diversion of cases out of the Court system that we called for in our Evidence of 17 August 2020. The MR and all involved deserve congratulation for their imaginative and energetic response.

2.8 Given the statistics reviewed above we call for the Review Day procedure to be rolled out across civil (money claims) and employment cases and be undertaken as mediation before any specified or unspecified money claim is issued in the civil courts or application is issued in the Employment Tribunal. For those cases already issued Review Days should be introduced as a compulsory event in all money claims.

2.9 The sanction for failing to engage in mediation should be the striking out of the case of the party in default or the refusal to issue proceedings, for those cases where the Review Day takes place pre-issue. This approach to sanctions follows the scheme of the MR's Review Day process as being used in possession cases.

2.10 Family cases involving children and finances already have a form of mandatory ADR: Mediation Information Meetings (MIAMs)⁵ which are, where parties qualify, funded by the State via Legal Aid. A MIAM must be undertaken before the Court will issue any proceedings ancillary to a divorce.

2.11 Where the system fails the citizen in MIAMS (and most cases that progress to mediation) is that the process is not online. An online platform need to be provided by the private sector. HMCTS have confirmed to me that they have no plans to provide an online platform for the management of ADR.

3 When will the Backlog/Tsunami of Litigation hit?

3.1 The crucial point is that the Backlog can be stemmed or delayed and the Tsunami overcome if swift action is taken now. Thus this calamity need not occur.

3.2 In our original evidence of 17 August 2020 we took the view that the Backlog would begin to overwhelm the courts in December.

3.3 Other views about timing

Professor Sue Prince of Exeter University is someone who has long experience of and involvement with research projects for MoJ and its predecessors in name going back to the Mediation pilots that took place in the early part of this century.

3.4 In conversation with Professor Prince recently she suggested that the Backlog may not bite until later because parties are accommodating disputes not arguing cases in court. That may be true. However, the published statistics show the Backlog is growing rapidly. Regrettably we see no reason to change our view that December will be the tipping point, unless something is done now similar to the Review Day for possession cases.

⁵ Introduced by the Children and Families Act, 2014.

3.5 HMCTS Policy

The rolling out of the Review Day approach is supports HMCTS' policy for 2020-2021. As HMCTS explain in their Annual Report for 2019-2020⁶ at page 18, para 1.4:

Our entire organisational strategy for 2020-21 is driven by our response to COVID-19 and the related restrictions – with two broad themes.

Deliver justice in new ways:

- *support judicial decisions to use our estate only for hearings which need to be in person*
- ***stem or stagger demand (e.g. through alternative dispute resolution)***
- *amend processes and procedures (e.g. smaller tribunal panels; promoting digital applications) [our emphasis in bold]*

4 Conclusion

We commend the Review Day approach to the Committee as a template for stemming or staggering demand in terms of employment cases and money claims. As with the approach to Possession cases this needs to be introduced now.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902301/HMCTS_Annual_Report_and_Accounts_2019-20_WEB.PDF