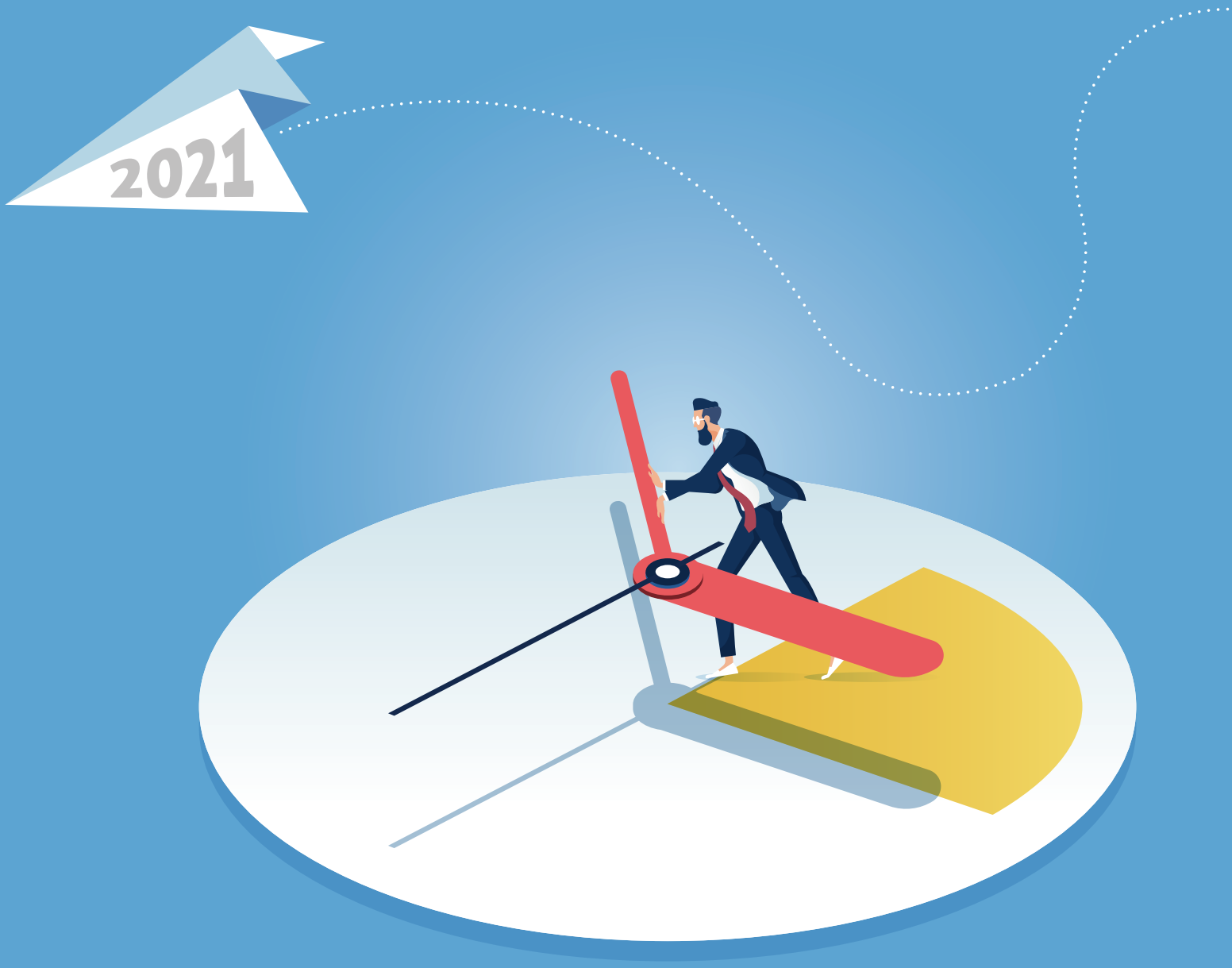
2021: THE YEAR OF COMPULSORY ADR?

The perennial tolerance of delays in civil justice is giving way, as Tony Guise explains



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The pandemic has laid bare the deficiencies of civil justice, family justice and the tribunals that had built up over the preceding years through underinvestment – and too slow deployment of what we still quaintly call 'modern technology'.

In the three jurisdictions that make up the UK, the experience of a backlog was not really an issue. There were delays but nothing on the scale of say, the backlog in Greece of some 250,000 cases, or in Nigeria where it stands at 500,000.

Many other jurisdictions around the world tell similar tales. But not in the UK, largely because we tolerated delays as they did not amount to backlogs; and because, despite the delays between issue and trial growing longer, we love a good queue.

THE HAVES AND HAVE NOTS

The court users' grudging acceptance of dither and delay is ending. The pandemic illustrated the sharp divide between the 'haves' and the 'have nots'; that is to say, the courts that have IT of some kind and those that do not have IT of any kind.

The courts that do have IT are the jurisdictions in the Rolls Building, the senior courts costs office (SCCO) and some of the jurisdictions in the Royal Courts of Justice (RCJ). There are some 30,000 cases issued in a normal year in those courts. Of those 30,000 the overwhelming majority are petitions to wind up companies and bankruptcy presented by HM Revenue and Customs.

Nevertheless, they do have IT of some kind (albeit clunky), provided by at least two different systems: Thomson Reuters' C-Track and the document upload centre supported by Microsoft.

With this leitmotiv of technology, those jurisdictions (which include the business and property courts in the regional centres) have ensured that despite the pandemic, around 80 per cent of business as usual was able to continue. Thus, those courts have no backlog.

COUNTY COURT

Every year, the civil courts see something between 1.8m and 2.1m cases issued, depending on the state of the economy. It is not in the Rolls Building or the RCJ that the bulk of this country's civil litigation takes place, but in the county courts.

In the county court there is no technology. Consequently, there is a significant backlog which is going nowhere anytime soon. Using video platforms and recruiting more district judges will not help. At first blush those measures might help, but consider these issues:

- HM Courts and Tribunals Service's (HMCTS) preferred video conferencing platform is now the Kinly Cloud video platform (CVP). However, as I explained in an earlier article for this journal (Busting the litigation backlog, September 2020 Volume 163 No 8), use of video slows down disposal rates.
- More district judges (whether deputies or fulltime) cannot help unless the resources are available to support those additional members of the judiciary, a point well made recently by the Lord Chief Justice. The 2015 settlement with the Treasury required the Ministry of Justice (MoJ) to make staff redundant on a significant scale (reducing headcount from 15,000 to 10,000) in return for the £1.4 billion given to fund the modernisation programme. Unfortunately, that funding ran out in December 2019 and the signs are not encouraging that further funding will be made available (see below).

Unsurprisingly, the backlog is to be found in the county court, in the small claims and fast track. There have been anecdotal reports that adjournments are leading to hearings being relisted in 2023.

The latest civil justice statistics were published by government on 3 December 2020 for the third quarter (July to September 2020) and they continue to paint a bleak picture. They reveal the scale of the issue (statistics shown in Figure 1 are, for both years, Q1 to Q3 to enable like for like comparison).

There are 656,398 fewer cases issued last year than compared with the same period in 2019.

That figure of circa 656,398 has not altered (save to increase slightly) since we last looked at this deficit following the statistics for the second quarter (published on 3 September). On that occasion, we at DisputesEfiling.com estimated the rolling shortfall by the year end would be 650,000. To see one of our forecasts being shown to be pretty accurate would be pleasing if the circumstances were other than they are.

Will all 656,398 cases be issued in the New Year? In our view, most will but a significant number will not because:

- Claimants will be deterred from issuing due to the backlog;
- Claimants and or defendants may be insolvent; and or
- Parties may grudgingly accept any kind of deal they can broker for themselves.

FIG 1: THE GROWING BACKLOG

Year	Claims issued	Cases going to trial
2019 Q1-Q3	1,552,732	48,098
2020 Q1-Q3	896,334	32,055

Note: the figures for September 2020 are provisional as at 4 December 2020 but the statistics usually change only slightly.

This seems less likely as a defendant with cash flow issues is unlikely to bring upon themselves obligations to make payments unless compelled to do so, or there is a continuing commercial dependence which drives such a settlement.

So we discount the 656,398 cases for the above reasons to 400,000 to 500,000. This is a tsunami on a scale similar to that found in Nigeria and other jurisdictions.

One little considered effect of this rolling shortfall of around 36 per cent of normal caseload is how that affects the MoJ's income from court fees. Receipts have and will continue to reduce by approximately the same percentage. This amounts to a massive shortfall of income from which the treasury expects MoJ to pay the running costs of HMCTS.

To enable MoJ to pay its way, court fees were significantly increased on 9 March 2015 when enhanced court fees were introduced – the rationale being that the MoJ must pay its way. That is, of course, a deeply flawed argument which overlooks the role of the courts in society. However, when you are HM Treasury, such concerns do not take up much of your time.

ADR

What are government and the judiciary doing to protect the courts from being overwhelmed? Robust interventions are required which go beyond CVP and more judges (though more judges are required as there was a shortage even before the pandemic struck).

In our view, the correct course is greater use of alternative dispute resolution (ADR) and much greater integration of ADR in civil justice, together with the introduction of technology to support that intervention.

In my earlier article, I drew attention to the many cases which had been decided in 2020 imposing sanctions against parties who were refusing to engage in ADR of one kind or another. It is clear that this generation of judges

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has seen the benefits of ADR in practice, and the direction of travel is (or should be) clear to all practitioners now.

Practical steps have been taken toward greater introduction of ADR. In the case of the stayed residential possession cases, ADR has been introduced through the work of the Master of the Rolls' working group under the able chairmanship of Mr Justice Knowles. This working group brought together a wide range of stakeholders and led to the "overall arrangements" providing a scheme for reactivating possession cases, with diversion of such cases away from the court.

The overall arrangements provide:

- Following service of a reactivation notice, the court will list for a review day (R Day) 28 days after the filing of a reactivation notice with a substantive hearing being listed 21 days later, if required.
- At the R Day, the court's expectation is that parties will either have settled and will then record their agreement in an order; or the parties will negotiate on the R Day as between the landlord's solicitor and the tenant utilising the free services of the housing court duty solicitor (funded by the state via a Legal Aid Agency contract).
- Significantly, the overall arrangements make it clear that in the event the landlord's bundle does not include evidence of having undertaken ADR, the judge may dismiss the landlord's claim or adjourn it. This is strong stuff which amounts to de facto compulsory ADR. Normally, this would attract protest and enthusiasm in equal measure. However, these days are different. The first R Days began in late October and continue on a rolling basis.

HMCTS reported (at a public user engagement event last November) that a research project will be underway shortly to gather user feedback and analyse whether this is working or not.

Last October, the Civil Justice Council announced a call for comments on the terms of reference for a consultation about the operation of pre-action protocols (PAPs) (this closed on 18 December). I believe this is the first time there has been a consultation about the scope of a consultation. These are unusual times.

Of the list of terms of reference under review is the following (at number 8): Are PAPs a mechanism for de facto compulsory ADR prior to commencement of litigation? Should they be?

This is a good warmup for the further elevation of Sir Geoffrey Vos to the office of Master of the Rolls on 11 January 2021. Sir Geoffrey has made no secret of his intention to fuse ADR with civil justice and it may be that he comes into office at the right time.

The pace of change needs to continue at the rapid rate we have seen in 2020 if we are to overcome the tsunami of litigation. I am confident Sir Geoffrey will maintain the pace – which means we could see de facto compulsory ADR across the civil justice landscape as early as the April 2021 Civil Procedure Rules (CPR) update.

TECHNOLOGY

HMCTS has designed (and is close to launching) a number of important projects, including the expanded unspecified claims portal which is, at present, in pilot under Practice Direction 51S. In that portal, one may issue a claim; but on the filing of a defence the case falls back into the paper system.

The expanded version rolls the platform out to the point where directions are given online, but thereafter, the process is paper based. HMCTS said last November this expansion is planned to launch in April 2021.

Whether the Treasury's hesitancy to provide further funding will scupper that plan remains to be seen. Unfortunately, neither the current nor the April 2021 versions of the 51S portal accommodates cases where there are multiple parties and/or where there are counterclaims. This is the problem.

Despite £1.4 billion of funding granted five years ago, little has actually been delivered that is of use to practitioners. The current state of the 51S portal and its planned upgrade next April epitomise this problem.

I learned from HMCTS in November 2019 that there are no plans to build an ADR platform to support any de facto compulsory ADR across civil justice. The private sector must then step in to support HMCTS and enable citizens to resolve their disputes quickly, at proportionate cost and online.

If this means integration between the online solutions that have been built by HMCTS – which are intuitive and good – and private sector platforms to manage ADR, then that is what must happen, and soon.

This year promises to be another year of tension and transformation as we try to cope with what nature has thrown at us. It also promises more whirlwind reform as technology, ADR and a lack of State funding combine to give rise to imaginative solutions for all users. Happy New Year to civil justice. SJ

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