Gardner Leader
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Commercial Litigation Newsletter:

Our regular updates on what matters to you

Issue 2 2016

Welcome to this our 2nd edition in which we hope you will find something to interest both you and your business. If there is anything in particular you would like to know more about in a future issue, do please let us know…

"You can do it all online"

How many times have you made a call, been put on hold and heard those words? Do they fill you with dread or do you like the DIY concept?

The English (& Welsh) judicial system, long lauded as the envy of the Western world, may soon also push you in that direction and all in the name of modernity and access to justice.

As part of what an ongoing and ever-changing public debate regarding the make-up of our civil justice system, Lord Justice Briggs (a now eminent appeal judge and barrister since 1978, tasked with reviewing our civil court system) has outlined plans for the introduction of an 'Online Court' (**OC**). The headline feature of his January 2016 interim report is the proposal of a 'start-to-finish' digitalised court system designed so that people and small businesses can act for themselves, in person, removing the need for legal representation.

So in a system we have spent more than 1000 years perfecting, just how would that work and what might it mean for you?

The Proposal

The role of the OC would be to oversee relatively simple and modest value disputes, dealing with claims valued up to £25,000. There would be 3 stages:

Stage 1: A litigant issues a claim through an automated system, identifying their case and uploading the necessary documents. From the outset therefore, an electronic file is available both to the parties and to the court.

Stage 2: A Case Officer will assist the parties in case management, ideally online or by telephone as well as an active view towards conciliation- building upon the Small Claims Mediation Service.

Stage 3: The assumption of a traditional trial would be abandoned in favour of establishing whether a verdict on the documents or a

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hearing conducted on the telephone or by video link could first be achieved.

The Impact

The proposal has potentially wide reaching consequences since apparently some 70% of all cases issued are valued up to £25,000. The Review recognises the limitations of an OC in complex litigation. You may not know that many of our most important authorities come from claims of low value where the decision proves to be of huge importance.

The software envisaged for Stage 1 would apparently enable a litigant to create their own particulars of claim by guiding the individual through a tick box system designed to tease out the fundamental elements of the case.

The report uses a building dispute by way of example, where once the box labelled 'Builder' is ticked, new questions are presented to establish the nature of the issue, whether it be the quality of the work, the amount charged or late completion etc. Further questions are then presented based on this answer.

The simplicity of this example gives us an indication as to the type/nature of cases for which an OC may be suited. However, use of monetary value to gauge a claim is problematic, given that alone is no indicator of complexity. In any event, £25,000 is a lot of money and in a dispute of such value you may well want to seek specialist advice to ensure your interests are protected.

The Present

91 local court and tribunals have recently closed; another 86 closures have been announced. Civil legal aid has been virtually eradicated. There is now a far more limited costs' recovery regime than ever before, and there are fixed recovery costs in the offing too. Combined with the higher court fees covered in last month's newsletter, is the OC a modern development which will actually help anyone?

Already there is talk of a 2 tier system. The Commons Justice Committee report on the effect of legal aid cuts found a proportion of people 'struggle to effectively present their case', attributing this to factors such as inarticulacy, poor education and lack of confidence. These are the very people who need lawyers to help them but Lord Justice Briggs envisages the OC as a separate court, with dedicated software, staff, and rules designed from the outset will be understood by litigants without lawyers.

Whether an OC is just an innovative idea or the virtual gateway to real access to justice for those in need remains to be seen. Meantime, nothing has stopped you acting for yourself in the past, be it as an individual or trading entity, and nothing stops you now or in the future. Assuming always you have the time and inclination of course, when you can do anything yourself. Some DIY outcomes are better than others. Practice tends to improve results but your personal or business disputes may not be the best on which to practice!

We are all experts in our own fields. We recognise the value in having any job done well, cost-effectively (which is measured in your time as well as your money) and by those who actually know what they are doing. Lawyers study and train for between 5 and 7 years before becoming 'newly qualified'. There is more to suing than just keying some words in a tick box form and far more to winning than making a claim, be it online or otherwise…

For expert advice and help especially to head off that dispute in the first place, or if you don't want to do it yourself just yet, do contact any one of our dispute resolution team who will try to find the outcome which best suits you and your business.

e-disclosure

You will hopefully manage to avoid becoming embroiled in litigation but on the off-chance you might, the electronic age in which we operate means there are some business processes and procedures you should maybe review now, and change if necessary.

In the litigation process all parties are under an obligation to make disclosure of documents which are relevant to the issues which fall to be decided. Whether their content helps or harms your case, they have to be shown to the other side.

Under the rules which govern civil litigation "document" is defined as "anything in which information of any description is recorded". This means that all forms of electronic file can constitute a "document" for the purpose of the rules.

With the almost constant use of the ever-present smart phones, more and more electronic material is created and so falls to be disclosed. That means you can get into more and more trouble than ever before.

Communicating by email is very often treated more informally than paper communication. As a consequence, people are often less guarded when using it, and may say things in an email that they would never have written in a hard copy letter, memo or fax. Communication by smart phone is if anything even worse.

Smart phones allow communication which may now appear in the e-disclosure context, such as instant messaging, text messaging, as well as social media such as Twitter and Facebook. Audio technologies such as VOIP for business telephones and Skype also means telephone conversations and voicemails can be recorded. It is therefore increasingly common for audio communications to be provided on disclosure too.

You have a duty to preserve evidence once litigation is on the horizon and this applies to **all** the electronic documents that have been created. They must be preserved so as a business you need to think about how you might keep electronic documents which would otherwise be deleted in accordance with your document retention policy or otherwise deleted in the ordinary course of your business. You might also want to think about what you want to keep now in case you have to sue or are sued in the future.

You will undoubtedly discover that the preservation exercise for e-documents can be more complicated and expensive than preserving hard copy documents for a variety of reasons. That it is complicated and expensive does not excuse breaching the duty to preserve documents once the duty to do so kicks in. The consequence can be serious and include:

- Costs penalties.
- Adverse inferences of fact.
- A court order compelling the party to try to recover the deleted data forensically.
- Striking out of the party's case.
- The criminal offences of obstructing or perverting the course of justice.
- Proceedings for contempt of court.

Specialist IT support should be sought for the preservation exercise and such support would be the best way to image mobile devices rather than attempt to extract documents from them yourself. You certainly do not want to face the consequences of any breach.

The Coca-Cola Company recently lost a legal battle to trademark for its bottle design. The General Court of the European Union rejected their request to register a contour bottle without fluting (so not the one we all know and love then) as a Community trademark because the design does not have any characteristics to make it stand out from other products in the market.

Apparently the application was originally rejected on the grounds that the design was devoid of any distinctive character. In its judgment, the General Court also remarked that the company had failed to show that the design had gained distinctive character through use. Nestle suffered a similar defeat in the High Court recently when it ruled that it could not register Kit Kat's four-finger bar shape as a trademark because it was not distinctive enough.

We might not yet immediately recognise the 'contour' Coke bottle but probably think the Kit Kat shape is actually pretty distinctive, allowing us to recognise the brand instantly. But trade-marking is a tricky business it seems. So what if any application might this have for you and your business? If Coca-Cola and Nestle battle so hard for each of their products, what should you be doing? How valuable is your brand and what can you do to protect it?

In the first of 2 parts, we look at the often little considered matter of trade marks, to help you to understand why now is the time to take stock and act.

Part 1 – protection and enforcement

Intellectual Property (IP) covers Trade Marks, Patents, Designs and Copyright. Businesses should consider taking steps to protect their IP to support their brand and so *adding value to their business*.

What is a brand? All businesses, whether sole traders, SMEs or vast corporations, have a brand. This is made up of their overall company name and logo, operating style, marketing genre and goodwill creating a unique proposition and reputation. This is supported by their trade marks being product names, words, symbols, logos, shapes, numbers and so on, all used to identify and distinguish one trader's goods and/or services from a competitor's. The aim of any business is to grow goodwill, create brand loyalty from customers and to create a *successful profit making venture*.

Protection: *"Prevention is better than Cure".* We have all heard the adage, so what is stopping you doing something before it's too late? Legal consideration needs to be given to protecting trade mark rights by all enterprises. That means you. Whether you are a start-up or an established business, launching a new venture or selling a product you need to look at your IP.

Trade marks can be protected by law giving the owner, i.e. you, the right to the exclusive use of that name in relation to the goods and/or services of interest. *The cost of protection is minimal* in comparison to the cost of trying to cure the damage that can be caused by a third party infringer (whether intentional or not) or a counterfeiter.

It is a wonder why anyone would not protect themselves if it prevented a competitor using the same or similar trade mark in the same business sector? In a worst case scenario, protection of a trade mark can be used to *prevent criminal counterfeiters* from directly copying your trade-marked goods and/or services. In both cases the effect of an infringement can be very damaging and can seriously harm your reputation and goodwill, putting your business at risk.

So many, too many in fact, businesses consider IP rather a low priority. It may be they simply do not understand the value of what they have and how easily they can protect it. That can cost them dearly when they find themselves in difficulty enforcing their rights or, worse still, trying to defend their business again a competitor which has protected itself.

We recognise this is a specialist area, and we work with a local trade mark attorney to ensure our clients have the specialist advice they need. Our specialist has 25 years' experience in private practice and in-house legal departments. We can arrange a free consultation for you if you would like any help in protecting your rights. You have nothing to lose but your brand…

We hope you have enjoyed reading this newsletter. We really would like to hear from you with any feedback, comments, suggestions and of course if we can assist on any specific issue you have, just give us a call.

At Gardner Leader we understand you need a law firm which you can trust, which understands your priorities and delivers practical, exceptional value legal solutions. We will work closely with you to ensure that we can deliver the results you need. Legal situations can be stressful, but we are committed to giving you peace of mind with the reassurance that your case will be handled sensitively and professionally by our legal experts.

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