THE RESOLUTION OF SMALL CLAIMS

FINAL REPORT

January 2022

1. INTRODUCTION

1.1 The small claims track is the usual track within the civil justice system of England and Wales for claims of not more than £10,000 in value.[1] It is the subject of a specific set of rules within the Civil Procedure Rules (contained in Part 27), with the aim of setting out a proportionate method of dealing with straightforward cases of limited financial value.[2] The approach taken to the management of small claims is of critical importance to the efficient operation of the civil justice system, in circumstances where the large majority of claims determined at final hearings in the civil courts are small claims.[3]

1.2 During the coronavirus pandemic, the judiciary and court staff were largely successful in ensuring that, despite limitations on the ability to hold attended hearings, cases of 2021 value progressed and (when necessary) hearings continued to take place, with some taking place on a remote basis. It was the view of the Civil Justice Council that it was likely that lessons could be learned from the methods adopted within different courts to ensure that small claims continued to progress to resolution, and that a review of these methods was necessary so that best practice could be identified. Improvements in the resolution of such claims would reform the litigation experience for litigants in person with modest financial claims, being by far the largest group of court users; would maintain public confidence in the civil justice system; and would allow limited judicial and administrative resources to be properly focused.

1.3 The Civil Justice Council set up a working party to consider the resolution of small claims ("the Working Party"). The background to the establishment of the Working Party and the review is set out in the Interim Report dated 3rd June 2021 ("the Interim Report").

1.4 This Final Report makes additional recommendations to those set out in the Interim Report. To the extent that some of the matters considered in the Interim Report have been addressed since its publication, an update to those matters is contained at Section 2.

1.5 In the Interim Report, the Working Party made the following recommendations:

> *"HMCTS should have a target that no case in which the parties have opted into mediation should reach a court without a mediation appointment having been*

[1] Civil Procedure Rules ("CPR") 26.6. Prior to April 2013, the limit for small claims was £5,000.
[2] CPR Part 27 superseded the arbitration procedures under the County Court Rules Order 19.
[3] In the year to February 2021, small claims made up 77.8% of the total number of final hearings in the civil courts.

offered. If this standard is not achieved in the near future, then further investment in the service should be considered.

The parties should be required to provide information within the questionnaire:

a) About the wish and ability to participate in remote hearings (with relevant contact details) and vulnerability within the directions questionnaire (with a risk claim/defence struck out if the information is not provided).

b) If they consent to an ENE/settlement hearing in advance of the final hearing.

There should be a review of the third-party mediation pilots and consultation by MOJ and HMCTS with mediation providers with the aim of setting up the facility of private third-party mediation for all small claims. Consideration should be given to a further pilot at a court with referral across all claims tracks.

The civil procedure rules should be amended to be less prescriptive as to when a preliminary hearing can be held (as CPR 27.6 is unduly restrictive).

HMCTS should, as a matter of urgency, plan and undertake a detailed data analysis of the benefits of the practice of preliminary hearings in operation at Birmingham and Hereford as compared to practices at selected other court centres so that their effectiveness can be fully evaluated.

Court centres should give consideration to implementing the practice of:

Consideration of the listing of preliminary hearings at the directions stage in complex small claims where it is proportionate to do so e.g. some claims which require expert evidence (such as building disputes) or other set types of claim where a clear benefit has been identified;

pre-hearing triage in all claims before a final hearing with a checklist filled out for/by the judge, to ensure that directions have been complied with and the hearing remains effective and the time estimate realistic (this step being subject to the provision of adequate administrative capability for the task at the court centre);

'Blitz' lists in the event of a build-up/backlog of hearings."

The Interim Report proposed[4] that in a second stage of its consideration of these matters, the Working Party should consider some additional/further issues—specifically:

"Issues for further consideration

a) Proportionality and the small claims procedure (including whether there should be different rules for claims under a modest financial limit);

b) Pre-issue and post-issue mediation;

[4] Paragraph 162 of https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf

c) Pre-issue information;

d) Better guidance for litigants and directions in simple language;

e) Harmonisation of directions;

f) The impact of the changes to RTA personal injury claims;

g) Written/template judgments;

h) Guidance as to when the remote hearings may be appropriate in small claims."

1.6 An enlarged Working Party[5] met and considered that, given the preferred timeframe for the production of a report and having regard to the work being separately undertaken by HM Courts and Tribunal Service (HMCTS) and the Civil Procedure Rule Committee (CPRC), the issues for consideration in this Final Report should be amended so as to cover the following issues:

- Proportionality and the small claims procedure (including whether there should be different rules for claims under a modest financial limit);
- Pre-issue and post-issue mediation;
- Pre-issue information;
- Better guidance for litigants and directions in simple language;
- Harmonisation of directions;
- The impact of the changes to RTA personal injury claims;
- Written/template judgments;
- Single sheet for triage;
- Better use of judicial and estate resources (e.g. scanning in case files and sending to courts with capacity if a remote hearing is possible);
- Assisted digital (and specifically ensuring that this issue is not overlooked with the reform programme);
- Vulnerability; and
- Appeals (and the merits of a restricted right of appeal).

1.7 As at the date of this Final Report, cases which are destined to be allocated to the small claims track are commenced in the County Court using the same forms and procedures as

[5] See Annexe 1 for a list of members of the Working Party for the purposes of preparing this Final Report.

claims of higher financial value. However, it is anticipated that a combination of the HMCTS Online Civil Money Claims process (OCMC) and an online process for other damages claims will at some point replace the current procedures for the issuing, allocating and setting of initial directions in small claims. However, the Working Party considers that the issues considered in this Final Report will help guide and develop improved practices in the management and hearing of small claims regardless of whether those claims be managed through the current procedure, the OCMC or any other process.

2. UPDATES FOLLOWING PUBLICATION OF THE INTERIM REPORT

2.1 Since the publication of the Interim Report in June 2021, some matters considered in the Interim Report have already been addressed or have otherwise been the subject of substantive changes.

Mediation and reforms to the small claims mediation service

2.2 In the Interim Report, the Working Party recommended that HMCTS should have a target that no case in which the parties have opted into mediation should reach a court without a mediation appointment having been offered.[6] It was also stated that if this standard could not achieved in the near future, then further investment in the service should be considered.[7]

2.3 HMCTS accepted this recommendation.[8] By 21st July 2021, HMCTS was able to confirm that the Small Claims Mediation Service (SCMS) was offering a mediation appointment in every case that was referred to mediation, unless mediation was deemed not suitable (such as where a case had been discontinued or had already settled).[9]

2.4 The improvement in the performance of the SCMS was brought about by a package of measures, including the introduction of a new listing system (which moved away from reliance upon 20 individual calendars, and now uses one list for all mediators) with additional bulk listing slots. These measures have increased appointment availability by 25%. The number of bulk lists has been increased to accommodate the significant volumes of generic types of claim, such as 'car parking charges' claims.

2.5 HMCTS has also formed a SCMS working group to concentrate on external communications with litigants, and has improved the content of information being sent out. These changes have included (without limitation) changes to the wording used in text messages, and to the subject header on emails to include the notice "Response Required". This SCMS working

[6] Interim Report, paragraph 156.
[7] Ibid.
[8] HMCTS having previously been provided with draft copy of the Interim Report in April 2021.
[9] Confirmation provided in a report to the Civil Judicial Engagement Group (being a reform group chaired by the Deputy Head of Civil Justice) dated 21st July 2021.

group is also looking at measures including producing a video that will give litigants better insight in to how the mediation process works, and improving information available on the web pages. The Working Party considers these improvements to be a very welcome step.

2.6 It was reported that the number of SCMS mediation appointments which had been abandoned, cancelled or not attended by litigants remained a major problem, and that the numbers of such appoints continued to increase.[10] This issue was to be kept under review, and consideration given to what could be done to influence the behaviour of litigants to ensure that valuable appointment slots were not wasted.

2.7 Another SCMS working group has been formed to begin looking at particular types of 'bulk cases', with a view to proposing different ways of dealing with them other than referral to the SCMS. One example of these claims is car parking charges claims. This working group has formed a preliminary view that such bulk cases may benefit more from a separate ADR process rather than a full small claims mediation process. It is hoped to test the concept in a pilot. Again, the Working Party welcomes this step.

The impact of changes to RTA personal injury claims: the "whiplash reforms"[11]

2.8 The Civil Liabilities Act 2018 and the Whiplash Injury Regulations 2021 have introduced significant civil procedural reforms in respect of road traffic accident (RTA) claims involving lower value personal injury damages from the end of May 2021.

2.9 The effect of these reforms is that more claims will be treated as small claims under a new regime set out in CPR Practice Direction 27B.[12] A new RTA small claims portal, Official Injury Claim,[13] has been set up in conjunction with these reforms, which will allow resolution of such claims without the need for formal proceedings. However, a claim may 'leave' the portal to allow District Judges to give directions when it is necessary for the court to resolve a liability or quantum issue or to order an interim payment. Claims may also leave the portal

[10] A failure by parties to follow through with an appointment is not recorded within the statistics as a failure by the SCMS to offer an appointment.

[11] It should be noted that it is not just RTA whiplash claims that fall within the increased small claim limit and the new protocol. CPR 26.6(1)(ii)(aa) applies to all RTA injury claims where, on or after 31st May 2021, pain, suffering and loss of amenity damages are limited to £5,000 and overall losses to £10,000, save where an exception excludes the claim.

[12] See CPR Practice Direction ("PD") 27B – "Claims under the Pre-Action Protocol for Personal Injury Claims below the Small Claims Limit in Road Traffic Accidents – Court Procedure".

[13] https://www.officialinjuryclaim.org.uk/

for a liability issue to be determined in the County Court and then return to the portal for the purpose of the determination of the amount of damages.

Review of the Birmingham dispute resolution hearings data

2.10 In the Interim Report, the Working Party considered[14] the use of preliminary hearings in small claims, and in particular the schemes in operation at Birmingham and Hereford within which all small claims (except for RTA claims where liability is in dispute) are listed for a preliminary hearing called a Dispute Resolution Hearing (DRH).

2.11 It was the view of the Working Party, on the limited data then available, that a universal approach across all hearing centres of the County Court of the listing of all small claims (regardless of the sum in issue) for a DRH could not be viewed as a necessary or desirable step for the long-term improvement or advancement of the just and proportionate resolution of small claims. The Working Party noted that the scheme in Birmingham had shown some success in terms of resolution of cases at the DRH but also that there was a delay in listing final hearings for cases which had not settled.[15]

2.12 The Working Party's view was that given the increased demands and costs in terms of judicial and other resources arising from the use of DRHs, there was not yet sufficient evidence of overall economic and efficiency benefits arising from their use in Birmingham and Hereford to justify recommending a requirement for their use in all or most small claims.

2.13 The Working Party recommended that HMCTS should, as a matter of urgency, plan and undertake a detailed data analysis of the benefits of the practice of preliminary hearings in operation at Birmingham and Hereford as compared to practices at selected other court centres so that the effectiveness of the DRH process could be fully evaluated.

2.14 At the beginning of 2020, the Birmingham settlement rate was slightly above the national average but tracking the same downwards trend. As this figure represents the settlement rate of *all* small claims allocated to the small claims track (and so includes claims that are out of scope for Birmingham's DRH scheme, including RTA liability claims and also those that

[14] Interim Report, paragraphs 119–148.

[15] In the 12 months to February 20, the timeliness of small claims had declined at Birmingham to 14% completed in 30 weeks (against a measure of 70%) and cases took on average 44 weeks from receipt to trial (against a measure of 30 weeks). Nationally, for the same time period, small claims timeliness stood at 50% completed within 30 weeks and cases took on average 38 weeks. See further paragraph para 2.17 below.

settled either before a DRH or between a DRH and the final hearing date), it gave only a generalised picture. However, that picture showed an increased settlement rate over the national average. Since the onset of the pandemic, the national settlement rate increased slightly but largely remained stable. In contrast the trend at Birmingham began to increase significantly ahead of the national average. So far in 2021, settlement rates at Birmingham have remained high and above the national average by almost 25 percentage points. In the last five months, the trend has fallen around 10 percentage points but remains over 17% above the national average.

2.15 For the period between July 2020 and November 2021[16] District Judge Phillips collated data in relation to 1892 DRHs.[17] Of the 1892 listed DRH listings - 11.5 % settled before the DRH and 47.9 % were disposed of at the DRH. Of the 47% listed for final hearings:[18]

a) 1.8% were listed for a paper determination
b) 79.2 % were dealt with remotely[19]
c) 19.1% had an attended hearing.

2.16 During the period covered by this data the DRH have been listed as 30-minute telephone appointments. From November 2021, to ease the administrative burden on staff, DRHs are to be listed as attended hearings.[20] It is important that the data is monitored to assess whether this change has had an effect on disposal/settlement rates.

2.17 As for timeliness, in a report compiled in August 2021 in relation to the Birmingham pilot, HMCTS noted that in the 12 months to August 2021, the timeliness of small claims[21] improved to 28% completed in 30 weeks (against the HMCTS standard measure of 70% of claims required to achieve this timeframe)[22] and cases took on average 55 weeks from receipt to trial (against a measure of 30 weeks). Nationally, for the same time period, small claims timeliness stood at 23% of cases being completed within 30 weeks, and cases took on average 52 weeks. Accepting the preliminary nature of these figures, it appears that

[16] A period in which the pandemic significantly affected the number of small claims issued
[17] All small claims received in BCJC are given directions to a Dispute Resolution Hearing (DRH) except disputed liability RTA claims.
[18] 5%; principally cases stayed, transferred to another court or listed for a further DRH.
[19] See recommendation at para 3.21b (i) below.
[20] Using block lists of up to 16 cases per day per Judge.
[21] Over the two months to August 2021, an average of 261 cases per months were allocated to the small claims track at Birmingham.
[22] As at February 2020, this figure had been 14%.

timeliness has improved significantly since the period covered by the data set out in the Interim Report.

2.18 The Working Party believes that this data provides evidence of the success of the DRH scheme. However, members still have concerns as to the cost/benefit analysis of the DRH hearing—that is, the cost in terms of an extra hearing, and the concomitant additional administrative and judicial time, for those claims that *do not* settle, which must be weighed against the benefit of an apparently increased settlement rate where a DRH is used. These concerns are particularly apparent in relation to claims of modest value, where the resource cost of an additional hearing for those claims which do not settle raise greater proportionality concerns.

2.19 The Working Party recommends that HMCTS continue to monitor closely the use of DRHs in Birmingham and should seek to break down the analysis to allow consideration of different value brackets, the effect of a small claims mediation hearing and the stage of the relevant small claims proceedings at which settlement was achieved. Specifically, the Working Party recommends for the bands using a claim value:

- £500 or less
- £501 - £4999
- £5000 or more.

Data should be obtained/retained for the stage at which settlement was reached (other than that already compiled and retained in relation to settlement at small claims mediation). The Working Party suggests using the following categories:

- After Defence and before any DRH
- At a DRH/within 1 week after DRH
- More than 1 week after DRH and more than 1 week before Final Hearing
- Less than 7 days before Final Hearing.

There should also be a comparison of DRHs disposal rates when conducted in person as opposed to by telephone, and of the number of applications to set aside orders made at DRHs.

2.20 The Working Party believes that its recommendations in relation to the increased use of mediation, revised questionnaires and triage (as considered in the Interim Report and as below) should deliver some of the intended efficiency benefits of DRH hearings without precipitating delays, and duplications in hearing dates, for cases which do not settle.

2.21 Nonetheless, the Working Party remains of the view that DRHs should be used in appropriate cases and the Birmingham data has evidenced that they can be a very effective tool in the resolution of claims. If (as set out below) a DRH is only conducted in claims above £500, the cost/benefit balance is likely to be further weighted in favour of holding such a hearing in every case. The Working Party repeats its recommendation that current restrictions on the use of preliminary hearings set out in CPR 27.6 (1) should be relaxed to allow their more flexible use in the future.

2.22 For those court centres which are not currently using the DRH process, consideration should be given to a default position of setting a DRH in more complex and higher value small claims, where proportionality justifies what may be an additional hearing. The additional judicial resources which the Working Party hopes are freed up by the implementation of its recommendations in relation to the significant number of claims which are under £500 (see paragraphs 3.14 and 3.21 below) should assist with the problem of the judge hearing a DRH being unable to hear the final hearing.

2.23 In conclusion in due course, if the changes recommended by the Working Party are implemented, the data may justify the listing of a DRH being the default position in all small claims over £500.

Written/template judgments

2.24 CPR 27.10 provides that the court may, if all parties agree, deal with the claim without a hearing.[23] In the absence of agreement, the court cannot order that a claim be determined on the papers.

2.25 The Working Party recommended that consideration be given to increasing the court's ability to determine small claims by written judgment (potentially using a template for the judgment) in Part 2 of the Interim Report. However, after the publication of the Interim Report, the Civil Procedure Rule Committee set up a sub-committee to draw up a practice direction for a pilot for the paper determination of small claims. District Judge Lynda Nightingale of this Working Party was invited to join the CPRC sub-committee to allow liaison and information sharing between the two groups.

[23] Part 27 also permits a party to submit its case in writing instead of appearing at the hearing; seven days' notice must be given under CPR 27.9 to the court and the other party.

2.26 Although that sub-committee will consider the role of paper determinations within the whole of the small claims track, the Working Party agreed that it would be inappropriate to consider the issue in detail, as set out below. The Working Party considers that in any event the current rules should be changed to allow a judge to order a paper determination in claims under £500, in the absence of the agreement of the parties.

3. PROPORTIONALITY AND LOWER VALUE CLAIMS

Historical approach to lower value claims

3.1 The CPR, which came into force on 26 April 1999, prescribe an extensive array of procedural rules that are currently used by the courts in England and Wales when dealing with civil matters. As noted above, Part 27 of the CPR contains the primary procedural requirements in respect of the small claims track.

3.2 Prior the enactment of the CPR, Order 19 of the County Court Rules 1981[24] covered the automatic reference of small claims to arbitration.[25] The arbitration procedure[26] was the normal method of resolving small, relatively simple claims under £3,000[27] (or £1,000 in the case of personal injury). Claims were automatically transferred (i.e. referred)[28] for arbitration when a defence was filed.[29]

3.3 A party could apply for rescission of the reference to arbitration or a District Judge could order it of his or her own motion,[30] but courts were slow to find that arbitration was not appropriate for claims within the financial limit. In 1994, 87,885 County Court cases were disposed of by arbitration as compared to 24,219 being disposed of by trial.

3.4 Many of the rules were the same as, or similar to, current rules under CPR Part 27. A preliminary appointment was fixed only when the standard directions provided by Order 19, r 6(3) were insufficient to enable the proceedings to be disposed of. Strict rules of evidence did not apply, and there was a no costs rule.[31]

3.5 The hearings were conducted in private unless there was an order otherwise and the arbitrator (usually a District Judge)[32] had the same broad powers available to them as when

[24] https://www.legislation.gov.uk/uksi/1981/1687/made
[25] The Administration of Justice Act 1973 extended the powers of county courts to refer matters to arbitration. Section 7(1)(a) of that Act amended s 92 of the County Courts Act 1959. For a more comprehensive history of these legislative developments, see the judgment of Beldam LJ in *Afzal v Ford Motor Co* [1994] 4 All ER 720 ("*Afzal*").
[26] The small claims procedure was a statutory form of arbitration to which the Arbitration Acts 1950 and 1979 did not apply.
[27] A counterclaim in excess of £3,000 did not prevent automatic referral of the claim to arbitration.
[28] Meaning that the term *arbitration* was inappropriate, as the reference was not consensual.
[29] This included a document which admitted liability but which disputed or did not admit the amount of damages to be awarded.
[30] County Court Rules 1981, Order 19, r 3(2); see generally *Afzal*.
[31] Subject to an unreasonable conduct exception: Order 19, r 3(4).
[32] A Circuit Judge could be appointed if leave was given.

sitting in open court - meaning that they could make orders, for example, for specific performance and other forms of equitable relief. Rule 7(4) gave the arbitrator a wide discretion as to the procedure at the hearing, which was necessarily brisk, efficient and informal.[33] As noted in 1995:

> *"[The] small claims arbitration procedure is no more and no less than a procedure for resolving low value claims…with a minimum of formality and expense."*[34]

3.6 There was no right of appeal on fact (or on the basis of fresh/additional evidence). Rule 8 provided that an award could only be set aside where it was given in the absence of a party or on the grounds that there had been misconduct by the arbitrator,[35] or that the arbitrator had made an error of law.[36]

The position under CPR Part 27 and PD 26

3.7 Under the regime as enacted by the CPR, the small claims track was introduced for claims under £5,000 (or £1,000 for personal injury claims and certain housing disrepair claims).[37] Due to the perceived success of the small claims track, the 60th update to the CPR (which came into effect in April 2013) doubled the qualifying limit of small claims to £10,000 (and substantially increased the sum recoverable for experts to £750). The amended Part 27 retained certain limited exceptions to the small claims track, as set out in CPR 26.6.

3.8 Court fees in the small claims track are lower than those on the fast track or the multi-track - yet the fees are still significant, in particular for larger value claims within the track. The fee to issue a claim is determined in line with a sliding scale, starting at £35 and rising to as much as £455 (depending on the value of the claim). Hearing fees charged for all cases are also calculated on a sliding scale, depending on the value of the claim.

3.9 PD 26 paragraph 8 contains guidance on those cases suitable for small claims track, describing them as 'straightforward claims'.[38] PD 26 contemplates that cases which will be 'generally suitable' for the small claims track will include consumer disputes, accident

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[33] Per Simon Brown LJ in *Starmer v Bradbury* [1994] Times, 11th April 1994 (Court of Appeal); [1994] C.L.Y. 200. See also generally D. Greenslade, "Small claims arbitration and the solicitor' (1996) New Law Journal Vol 176 (6729), 118.
[34] Per Bingham MR in *Joyce v Liverpool Council* [1995] 3 ALL ER 110.
[35] As the Arbitrator has a wide discretion as to procedure the task of showing misconduct was difficult: see further *Starmer v Bradbury*, above.
[36] An application to set aside "shall, giving sufficient particulars, set out the conduct or error of law relied upon": r 8(4)
[37] Also where the claim includes a claim by a tenant against the landlord for an order requiring the landlord to carry out repairs or some other work (whether or not another remedy is sought), if the cost of repairs is not more than £1000 and any other claim for damages is not more than £1000.
[38] CPR PD 26, paragraph 8.1(1)(a).

claims, disputes about the ownership of goods, and 'most disputes between a landlord and tenant' (with certain exceptions).[39] The apparent complexity of the case and the importance of the matter to persons who are not parties to proceedings are also relevant to determining the track.[40] However, given that the small claims track can be considered suitable for cases including those involving important questions of law and/or fact[41] the principal determinant of track is the value of the claim.

3.10 The effect of CPR 27.2 is to limit the degree to which ordinary procedural requirements contained in other parts of the CPR will apply to small claims. The rule expressly disapplies other Parts of the CPR pertaining to a wide range of matters including interim remedies, disclosure and inspection, evidence and expert evidence, amongst other things.[42] The intent of these carve-outs is to simplify the steps needed in preparation for the final hearing of a small claim, and to ensure the case is dealt with justly and at proportionate cost. By way of example, parties to a claim within the small claims track cannot make formal requests for further information pursuant to the well-known Part 18 regime, reflecting the lower level of formality and procedural rigour inherent in the track - but the court, of its own initiative, may give directions for either party to clarify the case if it considers it appropriate to do so.[43]

3.11 As set out in CPR 1.1, the overriding objective of the CPR is to enable the court to deal with cases justly and at proportionate cost. The Working Party considered concerns raised as to whether the current approach to progression of claims and the form and conduct of final hearings of small claims under CPR 27, which treats a claim for £90 exactly the same as one for £9,999 (this despite the difference in fees charged) and, unlike the position when there was the arbitration procedure, allows the same appeal rights as any other claim,[44] adheres to this aim, and also whether a disproportionate amount of the court's resources is devoted to small claim hearings in the lowest value bracket .

3.12 The Working Party recognises that to many what could objectively be considered as relatively modest sums are very important, but notes that the arbitration procedure

[39] That is, not including opposed claims under Part 56, disputed claims for possession under Part 55 and demotion claims whether in the alternative to possession claims or under Part 65. See PD 26 8.1(1)(c).
[40] See PD 26 8(1)(c). The value of the counterclaim is relevant when determining the track, but the fact the counterclaim is excess of £10,000 does not *automatically disqualify* the case from proceeding on the small claims track.
[41] Applying *Afzal.*
[42] CPR 27.2(1).
[43] See CPR 27.2(1)f); 27.2(3).
[44] Including with a right to an oral hearing if permission is refused on paper (unless totally without merit). See further para 3.21e below.

operated for claims up to a current equivalent value of over £15,000 (applying annual inflation).

Lower value claims

3.13 Claims under £300 require an issue fee of £35 and a hearing fee of £25 (a total of £55). Claims under £500 require and issue fee of £50 and a hearing fee of £55 (a total of £105). These fees are modest sums given the judicial and administrative resources which are allocated to claims of this value, there being no differentiation within the rules between a claim under £500 and one involving a claim for £9,500.

3.14 As the Interim Report set out,[45] nearly half of small claims issued are for a sum up to £500. In the three-year period from the end of March 2018 to 1st April 2021, 51% of claims issued were for a value of £500 or under (in 2019-20 the figure was 47.92%). No data was available to the Working Party as to the number of final hearings which involved claims issued for £500 or under, which would have been very useful when considering the likely practical impact of any recommendations for reform.[46]

3.15 In OCMC the need both for increased administrative efficiency and to reduce the judicial burden, cases with a value under £300 are being triaged by Legal Advisors as opposed to Judges.[47] The Advisors draw the necessary orders. In Autumn 2021 the figure rose to £1,000.

3.16 A further, more streamline and proportionate system is already in place for some lower value claims. Since 1st January 2009 the CPR have incorporated the European small claims procedure[48] which is set out at section 2 of CPR 78. This procedure operates a cross-border litigation civil and commercial matters were the claims do not exceed €2000 (currently just over £1,700) and facilitate easy enforcement.

3.17 The Judicial determination is usually a paper exercise. Article 5 states:

> *"The European Small Claims Procedure shall be a written procedure. The court or tribunal shall hold an oral hearing if it considers this to be necessary or if a party so requests. The court or tribunal may refuse such a request if it considers that with regard to the circumstances of the case, an oral hearing is obviously not necessary for the fair conduct of the proceedings. The reasons for refusal shall be given in writing. The refusal may not be contested separately."*

[45] Paragraph 37.
[46] See from paragraph 7.1 below in respect of data.
[47] See generally CPR PD 51 R paragraph 20. The term "legal advisor" has the meaning given in paragraph 1.2(b) of Civil Procedure Rules Practice Direction 2E – Jurisdiction of the county court that may be exercised by a legal advisor.
[48] Regulation (EC) No 861/2007.

3.18 An oral hearing will only take place if the Court considers it necessary; if the parties are to be heard, then the hearing is likely to take place by telephone or video.[49]

3.19 The Working Party has had substantial experience of the ability of modest claims, particularly when issued in bulk, to absorb a very considerable amount of administrative and judicial time and is concerned that under the current rules proportionality can be overlooked for modest claims. The Working Party believes that the current rules should be amended to reassert and enshrine properly the principle of proportionality.[50] This would also allow redistribution of necessarily finite resources to higher value claims (including other small claims). Given that, as set out above more than 50% of claims issued are for under £500 and, although a significant amount of money to many, the sums are modest within the range of civil litigation, the Working Party believes that claims up to £500 should be the subject of a streamlined procedure; effectively a track within the small claims track. The aim would be to produce a speedier and more straightforward procedure for these lower value claims with an emphasis on trying to resolve the claim without a hearing.

3.20 The Working Party believes that the underlying objectives within the rules for the determination of modest claims within a low value track should be to encourage consensual resolution before and after a claim is issued and to provide District Judges with greater discretion as to how to manage such small claims. This will allow efficient and effective practices to develop in relation to different types of large volume claim, such as parking claims.

3.21 The Working Party believes that CPR 27 should be amended so that for claims for £500 or less (other than road traffic accident, personal injury or housing disrepair claims) follow a procedure whereby:

a) After a defence is filed, attendance at a mediation appointment (or such other form of dispute resolution as the Court may order) is compulsory (unless mediation/or an attempt at alternative dispute resolution has already taken place);

b) Without the consent of the parties, the Court[51] may order:

[49] See Article 8 of the regulation "The court or tribunal may hold an oral hearing through video conference or other communication technology if the technical means are available." and part 17 of the PD.

[50] The Working Party considered that its recommendations need not cover/address the large number of small claims in which a default judgment is entered.

[51] In due course given the increase on the limit on cases in OCMC in respect of which a legal advisor can make directions from £300 to £1,000 it is envisaged that it is likely that such orders will be made by a legal advisor with the parties having the right (as set out in CPR PD51R paragraph 20.3(2A) to apply to set the order aside.

i) That the claim is to be determined by telephone or remote hearing. (As set out at paragraph 2.15 above, in the period July 2020 to November 2021 of 79.2% of final hearings listed after DRHs Birmingham have been conducted remotely)

ii) That the claim is to be determined on the papers;[52]

c) No interim hearing is usually appropriate;

d) Unless otherwise ordered, the final hearing will be of no more than one hour;[53] and

e) There is a restricted right of appeal.[54]

3.22 The Working Party also recommends that separate information for claims under £500 should be available, effectively a limited pre-action protocol, which is quickly and easily digestible.[55] Emphasis should be placed on:

a) the post defence requirement to attend mediation; meaning that it is clearly sensible for the parties to try some form of alternative dispute resolution before the commencement of proceedings.

b) the fact that the claim will be determined using a procedure ordered by the Court and that there may not necessarily be an in-person hearing. As result a party should take care to set out full details of the claim or the defence and also indicate if vulnerability is an issue (and also if a telephone or remote hearing will create difficulties).

c) the fact that in the event that Judgment is obtained for a sum of money, the Court has enforcement procedures (although further fees will be necessary).

d) requiring potential parties to litigation to consider if reduced or staged payment of outstanding sums can be agreed to avoid incurring further fees/costs.

[52] See below as regards a template judgment. Specific time must be allotted for the determination i.e.it should be considered as general boxwork without allotted time.

[53] It is the experience of the Working Group that most claims of a value under £500 currently receive a listing of no more than an hour. However, enshrining this time limit within the rules will ensure consistency and limits the expectations of some litigants

[54] Restoring the position to that previously set out under CPR 27.12 which was revoked with effect from 2nd October 2000; see from paragraph 6.23 below.

[55] See also the recommendation for a video at paragraph 5.19 and 8.3b below.

4. MEDIATION

The current position

4.1 CPR 26.4A makes provision for mediation in small claims:

> *(1) This rule applies to claims started in the County Court which would normally be allocated to the small claims track pursuant to rule 26.6.*
>
> *(2) This rule does not apply to—*
>
> *a) road traffic accident, personal injury or housing disrepair claims; or*
>
> *b) any claim in which any party to the proceedings does not agree to referral to the Mediation Service.*
>
> *(3) In this rule, 'the Mediation Service' means the Small Claims Mediation Service operated by Her Majesty's Courts and Tribunals Service.*
>
> *(4) Where all parties indicate on their directions questionnaire that they agree to mediation, the claim will be referred to the Mediation Service.*
>
> *(5) If a claim to which this rule applies is settled, the proceedings will automatically be stayed with permission to apply for—*
>
> *a) judgment for the unpaid balance of the outstanding sum of the settlement agreement; or*
>
> *b) the claim to be restored for hearing of the full amount claimed, unless the parties have agreed that the claim is to be discontinued or dismissed.*

4.2 As set out above, the Small Claims Mediation Service has recently undergone significant change to ensure better performance and a mediation appointment is now offered to all suitable claims.

4.3 Up to recently mediation has been a voluntary "opt in" process. However, since May 2018, OCMC has piloted an "opt out" mediation referral process.[56] The opt out mediation pilot started with defended claims up to £300, and then £500, because of a concern about mediator resources available. Initially, the pilot saw a higher level of users opt out of mediation than had been anticipated (73%)[57] and telephone interviews were conducted by the HMCTS Insight & User Research Team with claimants and defendants.[58] As result of feedback new "screens" were introduced in the online process to increase users' awareness of mediation and its benefits. From May 2021 the opt out has been extended to cover all claims within the OCMC i.e. up to £10,000. The Experience and Insight Team are now undertaking further evaluation of the pilot (with results due before the end of 2021). The

[56] As at October 2021 over 245,000 claims have now been issued in the OCMC.
[57] It was assumed that the opt out rate would be in the region of 25%.
[58] Between 4th September and 21st October 2020.

Working Party believes that there should be careful consideration of the reasons given by parties for opting out and the extent to which they can be addressed by the provision of education/more information about the benefits.[59]

4.4 Personal injury cases are not referred to the mediation service. However, claimants in very low value (less than £5,000) personal injury claims arising from road traffic accidents must (from May 2021) follow a new pre-action protocol. Before initiating a claim, the claimant must provide certain information via a new, dedicated online portal, and in cases where liability is admitted the defendant's insurer must make a settlement offer within a set time frame. The protocol makes clear that parties are expected to attempt to settle the claim, and failure to follow the protocol by either party will result in costs consequences in any related litigation.

4.5 As set out in the Interim Report,[60] a system of interim/dispute resolution hearings has been operating in some County Court centres. The aim has been that, in appropriate cases, there should be a form of judicial mediation to seek to achieve consensual resolution.

4.6 Recently there is a clear shift in emphasis towards encouraging settlement through mediation in smaller value claims.

4.7 In June 2021, the Civil Justice Council published a report entitled "Compulsory ADR".[61] It was stated not to be in the context of any specific proposals for the introduction or extension of compulsory ADR rather to inform possible future reform and development in this area.

4.8 This report addressed two questions:

a) Can the parties to a civil dispute be compelled to participate in an ADR process? (This has been described as the "legality" question—which is fundamentally a question of the law of England and Wales, and human rights law in particular), and

b) If the answer is yes, how, in what circumstances, in what kind of case and at what stage should such a requirement be imposed? (The "desirability" question).

4.9 The authors concluded that the answer to the first question was in the affirmative.

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[59] See recommendation at para 8.4 below.

[60] See paragraphs 125 to 139 of https://www.judiciary.uk/wp-content/uploads/2021/06/April-2021-The-Resolution-of-Small-Claims-interim-report-FINAL.pdf

[61] https://www.judiciary.uk/wp-content/uploads/2021/07/Civil-Justice-Council-Compulsory-ADR-report.pdf. The authors were Lady Justice Asplin DBE, William Wood QC, Professor Andrew Higgins and Mr Justice Trower. See also ADR and Civil Justice: Interim Report; The Civil Justice Council ADR Working Group; October 2017.

4.10 As for the desirability question the authors stated[62] that they believed that they had identified conditions in which compulsion to participate in ADR could be a desirable and effective development. The conclusion was that appropriate forms of compulsory ADR, where a return to the normal adjudicative process is always available, are capable of overcoming the objections voiced in the case law and elsewhere and could be introduced.

4.11 Reference was made in the report[63] to the argument advanced by Tony Allen in his book on mediation:

> *"A civil justice system is surely able to protect its users from themselves and to try to make sure that whatever is litigated in front of the courts justifies that level of judicial input."*[64]

Compulsory attendance at mediation for small value claims

4.12 The Working Party believes that attendance at a Small Claims Mediation Service appointment, or engagement with some other form of court approved dispute resolution, should be compulsory for defended claims of £500 or less. The Civil Justice Council has previously noted the success of alternative resolution schemes for more modest sums (e.g. that 60 million disputes amongst traders on eBay were resolved each year through online dispute resolution).[65]

4.13 Further, the Working Party believes that potential parties to small value litigation should be clearly informed that mediation/engagement with a dispute resolution procedure is compulsory in defended cases (so it is sensible to attempt to achieve consensual resolution before issuing a claim). It is believed that an increased number of these modest value claims could be resolved with clear advantages to the potential litigants/litigants (who would be spared incurring further costs and devoting more time to the claim) and a beneficial effect upon the availability of judicial and administrative resources for other claims.

4.14 As the compulsory use of the SCMS for claims of this value would be "court sponsored"[66] and so costs-neutral for the parties; the requirement should not be viewed as too burdensome or disproportionate in terms of costs and time. As it is a telephone service it should ordinarily cause no additional difficulties for vulnerable parties. It may be that in due

[62] See paragraph 71 et seq
[63] See paragraph 85
[64] Mediation Law and Civil Practice; 2nd Edition, p125
[65] Civil Justice Council "Online Dispute Resolution for low value claims"; February 2015 ; paragraph 4.2
[66] The authors state at paragraph 101 that "Where the neutral or the ADR process involved is court-sponsored or is indeed a video it is plainly easier to justify compulsion."

course other forms of dispute resolution (including online) may be appropriate for some or all low value small claims.

4.15 If compulsion is to be effective there has to be some effective sanction if a party refuses to mediate. The Working Party believes that:

c) If a Claimant refuses to mediate, the claim should be stayed (to allow compliance),[67] and thereafter struck out[68] after a set period of time;[69] and

d) If a Defendant refuses to comply, there could be costs sanctions (the rule could be amended to provide a rebuttable presumption that the refusal was unreasonable for the purposes of CPR 27.14 (2)(g).

4.16 The Working Party believes that, as stated in the interim report,[70] greater education about the mediation process, its advantages and the repercussions of refusing to engage, is essential, particularly to allow informed consideration pre-issue (including the production of a video).[71]

4.17 The Working Party understands that HMCTS has formed a working group to begin looking at types of "bulk case" with a view to proposing different ways of dealing, other than referral to the SCMS. An example is car parking charges claims. There is a preliminary view that such bulk cases may benefit more from an ADR process rather than full mediation. It is hoped to test the concept in a pilot. The Working Party welcomes this step.

4.18 Given that litigants, in claims with a value of £500 or less, will be informed that mediation will be compulsory, the Working Party considered whether it would be possible to have a scheme for pre-issue mediation or ADR, whether using the SCMS or some other method/provider. It was recognised that access to HMCTS resources without the payment of a fee would impose an additional and potentially significant financial burden. However, the Working Party believes that the issue should be considered by HMCTS;[72] an obvious vehicle being the Working Party considering bulk small claims.

[67] This step could be ordered administratively by an officer of the Court.
[68] But not any counterclaim.
[69] The time frame should be limited e.g. six weeks.
[70] Paragraph 107 of the Interim Report.
[71] See paragraph 5.19-5.20 below.
[72] The Working Group noted that in employment cases ACAS provided a service pre-issue.

Third party mediation

4.19 For claims above £500 the SCMS will remain available on an "opt out" basis. As stated in the Interim Report,[73] the Working Party believes that the use of local private mediation schemes should also be an option available for small claims and suitably encouraged within case management. If, at the directions stage, both parties have indicated a willingness for mediation and the claim is of a nature and complexity that means a telephone mediation is not suitable, then a judge should be able to refer the parties to external third party mediation (with reference to a locally approved list). This would save judicial resources and enable longer mediation meetings.

4.20 The Working Party remains of the view that there should be a review of the mediation pilots and national consultation with mediation providers with the aim of the availability of third-party mediation for all claims (albeit that travel may be necessary from some courts to larger centres). An initial step could be to set up a fresh pilot scheme in a court with a strong local mediation network to include claims across all tracks (i.e. small, fast and multi-track), possibly with the provision of facilities within court building operating hours.

[73] Paragraph 68 of the Interim Report.

5. INFORMATION FOR LITIGANTS

5.1 As the costs recoverable under the small claims track are restricted (see CPR 27.14) and usually do not include the costs of legal representation,[74] many small claims are brought and/or defended by litigants in person.

5.2 The usual path of a small claim involves the following often detailed and relatively formal steps: court orders and a final hearing which, although supposed to be relatively informal[75] often follows the trial format used in fast track and multi-track claims (having evolved from the more informal procedure often adopted for arbitrations; see from paragraph 3.2 above).

5.3 The high percentage of litigants in person presents two problems. Firstly, a significant number of litigants do not understand the substantive law in relation to their claim.[76] Secondly, litigants' lack of knowledge of procedure, place greater than normal burdens on the litigants themselves, the courts administration and the judiciary to secure an effective process.[77] Whilst little can be done to address the former, the Working Party believes that more can be done to address the latter.[78]

5.4 It is the experience of the Working Party that many litigants obviously did not fully appreciate what was required to progress or defend a small claim before they first engaged with the Court. Also, many litigants struggle to follow relatively complex Court orders. Although the Working Party could find no detailed analysis/evidence members suspect that when the sum in issue is relatively modest, litigants are less inclined to seek assistance from sources of free/pro-bono assistance.

5.5 The Working Party believes that there should be a renewed focus upon the provision of pre and post-issue information/guidance for litigants in simple language.

Pre-action protocols

5.6 Pre-action protocols are designed to focus the attention of litigants on the principle that the issuing of proceedings should be a last resort and highlight the desirability of reaching

[74] The parties at the hearing may be represented by their representative who need not be legally qualified; see CPR 27.8.2.
[75] The strict rules of evidence do not apply; see CPR27.8).
[76] What Professor A. Zuckerman, referred to as a "Justice deficit" *No Justice Without Lawyers—The Myth of an Inquisitorial Solution*, CJQ 33 (2014) 355
[77] An "efficiency deficit"; per Professor Zuckerman; supra
[78] Lord Etherton stated in his 2017 Slynn Memorial lecture that the two deficits are together properly characterised as problems of access to justice.

agreement without the involvement of the Court. They are also intended to facilitate the exchange of information and to ensure that if proceedings are issued, they progress smoothly and efficiently. The protocols are fully integrated into the framework of civil litigation.[79] CPR 3.1 (4) enables the Court to take into account compliance or non-compliance with applicable protocols when making directions and 3.1(5) to order payment of a sum of money into court if a party has, without good reason, failed to comply with a pre-action protocol.

5.7 Of particular relevance to small claims there are protocols covering:

a) Debt
b) Low value RTA claims
c) Low value Personal Injury Employer's Liability and Public liability claims
d) Housing Condition cases,[80] and
e) Package travel claims.

5.8 Where no formal pre-action protocol or pre-action procedure applies the applicable document is "The Practice Direction - pre-action conduct and protocols".

5.9 A separate Civil Justice Council Working Group[81] is currently considering pre-action protocols.[82] As a result this Working Party has not considered the adequacy of the current structure, the language used or the need for a specific small claim protocol for small claims above £500. However, the Working Party believes that, in line with the matters set out above, there should be a specific pre-action protocol for small claims under £500. The protocol would set out, in simple and straightforward language, the relevant procedure and highlight the need to consider pre-issue mediation/alternative dispute resolution.

5.10 The Working Party also believes that in a claim for a sum under £500 the parties should be asked to confirm (by ticking a box in any hard copy form or digital page) that they have read the pre-action protocol.

5.11 As for the procedure/conduct of a claim post issue there are a number of sources of information for litigants.

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[79] See generally **Jet2Holidays-v-Hughes** [2019] EWCA Civ1858
[80] There are separate protocols for England and Wales
[81] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/pre-action-protocols-working-group/
[82] Chaired by Professor Andrew Higgins.

Sources of guidance regarding procedure

5.12 In 2017 HMCTS produced a leaflet to explain the small claims track to litigants in person (Form EX306).[83] Whilst the document is clear and comprehensive, the Working Party has concerns as to its length.

5.13 Given the belief that additional straightforward and constructive guidance was required for litigants in person conducting small claims, some County Court Centres have also produced guidance; "instructions" for the conduct of small claims e.g. Nottingham (see Annexe 2). Birmingham Civil Justice Centre has produced a number of helpful fact sheets to assist litigants in person; see e.g. Annexe 3.

5.14 A Claimant proposing to bring a claim within the small claim financial limit who accesses Gov.uk pages seeking information will be directed to a link[84] which provides assistance and takes the user directly to OCMC pages. However, if a user types 'money claims' into their search browser, they will arrive at a different link[85] directing them to Money Claims Online (MCOL).

5.15 For a defendant to an OCMC claim there is a link to a Gov.uk page which provides information in relation to responding to a claim.[86] However as with typing in "money claims" if a user types in 'Respond to a Money Claim' into their search browser, they will arrive at a different link.[87]

5.16 As yet there is no specific guidance once a user is viewing OCMC screens, although HMCTS has provided separate mediation guidance.[88]

5.17 The Working Party is concerned about the signposting to, and adequacy of, HMCTS guidance for potential litigants/litigants and believes that a full review is necessary.

5.18 Specifically, the Working Party believes that relevant sources of advice and assistance should be brought together in a single part of the HMCTS website (with hyperlinks) which can be accessed through likely simple searches and with links set out with the court documentation and OCMC procedure. Relevant guidance should be in simple language and comprehensive.

[83] There is also a leaflet (Form EX342) "Coming to a Court hearing: some things you should know"
[84] https://www.gov.uk/make-court-claim-for-money
[85] https://www.gov.uk/make-money-claim
[86] https://www.gov.uk/respond-to-court-claim-for-money
[87] https://www.gov.uk/respond-money-claim
[88] https://www.gov.uk/guidance/a-guide-to-civil-mediation

5.19 The Working Party understands that HMCTS has formed a SCMS working group to concentrate on external communications with litigants and that this has improved the content of information being sent out e.g. changes to the wording on text messages and to the subject header on emails to include the notice; 'Response Required'. This group are also looking at producing a video that will give litigants better insight in to how the mediation process works, and improving information available on the web pages. The Working Party considers this a very welcome step but that the scope of this work is not wide enough (as it solely covers mediation) and that a separate working group should be formed to consider the provision of adequate information to litigants in person in relation to all aspects of the small claims procedure, including OCMC.

5.20 The Working Party particularly welcomes the consideration of a video to give litigants better insight into the mediation process and believes that an HMCTS working group considering the information available to litigants should consider the creation of videos to help with all stages of the small claims journey. Many members of the public will now seek a self-help video if facing an unfamiliar issue (e.g. through YouTube) and their success should be taken into account.

Relevant guides produced by other organisations

5.21 Law for Life works in partnership with the Litigants in Person Support Strategy partners to provide online resources on the "Advice now" website that can be used by litigants, by Support Through Court staff and by pro bono lawyers. One helpful guide for litigants in person is "A survival guide to going to court when the other side has a lawyer and you don't" produced by Advice now.[89]

5.22 The Working Party believes that an HMCTS working group considering the provision of information to litigants should investigate whether there should be reference/links to such organisations.[90]

[89] https://www.advicenow.org.uk/guides/when-other-side-has-lawyer-guide-litigants-person-0

[90] It is recognised that some form of disclaimer may be necessary.

6. PROCEDURAL MATTERS AND JUDICIAL RESOURCES

Harmonisation of directions

6.1 CPR 27.4 deals with directions. A District Judge may use the standard directions suggested by PD27,[91] or make specially tailored directions e.g. requiring a party to clarify their case.[92] Judges often use a template system.

6.2 OCMC now has a directions order system for judges. The system for unspecified damages claims will also have a suite of orders.

6.3 The Working Party believes that as a result of these changes greater consistency within standard orders will inevitably result and no recommendation is needed.

Single sheet for triage

6.4 In the Interim Report the Working Party recommended pre-hearing triage in all claims before a final hearing with a checklist filled out for/by the judge, to ensure that directions have been complied with and the hearing remains effective and the time estimate realistic (this step being subject to the provision of adequate administrative capability for the task at the court centre).

6.5 The Working Party recommends that HMCTS produces a standard triage form to ensure consistency. A single form would make communication/the provision of information between courts about cases subject to a standard practice. Also, Deputy District Judges who sit in many courts will not face a number of different 'local' forms.

Better use of judicial and estate resources

6.6 Listing is a particular problem at courts with only one resident District Judge. It is very difficult to block list without a risk of the adjournment of cases (including when the parties have attended) unless two or more judges are sitting "back to back". Listing for one judge creates increased scope for inefficient use of judicial time and the Court facilities if cases settle.

[91] The practice direction which accompanies CPR 27 sets out standard directions which apply including for those in relation to Road traffic accidents, a variety of contractual claims, dispute between landlord and tenants and breach of duty cases.

[92] The District Judge may order a preliminary hearing if considered necessary. The use of expert evidence on small claims track is limited and permission must always be obtained in advance (see CPR 27.5)

6.7 The Working Party suggests that given the increased use of remote hearings, single Judge Courts should consider listing small claims back to back with larger centres with claims suitable for hearing remotely at another court centre identified at the earliest possible stage (and in any event at the triage stage).

6.8 An obvious issue arises if a case can be heard remotely as to how the file could be passed from one court to another. Whilst paper files remain, scanning in case files and sending to another court is the only solution. However due to size some files will be difficult to scan and given staff resource issues HMCTS should consider guidance as to an acceptable page limit. Further it would be necessary to ensure that a file was available in time to allow necessary preparation.

Vulnerability and assisted digital

6.9 Recommendations for rule changes made in the Civil Justice Council report "Vulnerable Parties and Witnesses within Civil Proceedings" have now been implemented.[93] The overriding objective now sets out at CPR 1.1(2):

> *(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –*
>
> *ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;*

6.10 A new Practice Direction PD 1A supplements the rule and deals with the participation of vulnerable parties and witnesses. It sets out that:

> *5. When considering whether a factor may adversely affect the ability of a party or witness to participate in proceedings and/or give evidence, the court should consider their ability to—*
>
> *understand the proceedings and their role in them;*
>
> *express themselves throughout the proceedings;*
>
> *put their evidence before the court;*
>
> *respond to or comply with any request of the court, or do so in a timely manner;*
>
> *instruct their representative/s (if any) before, during and after the hearing; and*

[93] https://www.judiciary.uk/wp-content/uploads/2020/02/VulnerableWitnessesandPartiesFINALFeb2020-1-1.pdf

attend any hearing.

6. The Court, with the assistance of the parties, should try to identify vulnerability of parties or witnesses at the earliest possible stage of proceedings and to consider whether a party's participation in the proceedings, or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make directions as a result.

7. If the court decides that a party's or witness's ability to participate fully and/or give best evidence is likely to be diminished by reason of vulnerability, the court may identify the nature of the vulnerability in an order and may order appropriate provisions to be made to further the overriding objective.

8. Subject to the nature of any vulnerability having been identified and appropriate provisions having been made, the court should consider ordering "ground rules" before a vulnerable witness is to give evidence, to determine what directions are necessary in relation to the nature and extent of that evidence, the conduct of the advocates and/or the parties in respect of the evidence of that person, and/or any necessary support to be put in place for that person.

6.11 The report also recommended that:

a) Claim forms and all other methods of commencing proceedings, initial response forms or other forms of first engagement with the Court should contain a question as to whether the proceedings involve or may involve a vulnerable party or witness;[94]
b) Questionnaires for all tracks and requests within online procedures should be amended to obtain (through straightforward and easily understandable questions) information as to the vulnerability or potential vulnerability of a party (which should include an obligation to disclose whether a party knows details of the vulnerability of another party) or a witness; and
c) Any online portal/access which dispenses with directions questionnaires should ensure a request is made for such information at the earliest opportunity.

6.12 The Civil Procedure Rule Committee has set up a committee to consider the recommendations. However, the Working Party is concerned that some relatively simple changes e.g. to court forms and, importantly directions questionnaires, have not been progressed by HMCTS. The Working Party can only underline the importance of the recommendations and recommends that HMCTS undertake an urgent review of progress in respect of the report's recommendations.

[94] Recommendation 2 page 125

Assisted digital

6.13 It was recognised at the outset of the reform programme that a civil justice system which was "digital by default" would pose difficulties with those who have no, or limited, means to access digital means of communication or lack the skills and/or experience to navigate a digital portal or platform. As a result, HMCTS has the stated aim of putting in place a comprehensive system of support to provide assistance to such individuals.

6.14 A new national Digital Support contract is now in place, to replace the contract which supported a pilot of the provision of digital assistance which had been in place since 2018. This contract has been awarded to an organisation called We are Digital (WAD). A **"**mobilisation period" started in October 2021 and is expected to end in April 2022. Within this time, HMCTS will be working with WAD to design, test and implement the service before rolling out to full coverage. The aim is that this national contract will increase the availability of digital support for litigants.

6.15 Importantly, a commitment has been given to users who face barriers when accessing online services that paper channels and offline processes will still be offered to allow access to justice.

6.16 The Working Party understands that the service will be delivered across different channels to ensure all those who need help are able to access it. These channels will include:

a) local centre support[95]
b) over-the-phone support[96]
c) remote video
d) in-home face-to-face support[97]

6.17 The Working Party also understands that HMCTS will be procuring a partner to carry out evaluation of the digital support service contract.

6.18 The Working Party recognises its own limited remit and that the issues surrounding the provision of assistance to those who are wholly or partly digitally disenfranchised are complex and apply across the full range of civil and family litigation. However, members

[95] WAD has 300 centres in place for their Home Office contract already across the UK, covering every town and city geographically. They will also be adding new sites made up from the new partnerships with advice sector organisations.
[96] As with HMCTS staff, legal advice will not be offered by WAD, however there will be signposting to a partner organisation that can offer such support.
[97] It has been stated by HMCTS that under the contract a "dedicated trainer" will attend a litigant's home/agreed venue, with all necessary equipment to enable them to deliver support.

believe that it is necessary to express their concerns as to how the service will work in practice in respect of small claims, especially given that it is likely that a significant proportion of debt and small contract claims are likely to involve parties with limited financial means which may often translate into limited means to access, or reliably access, digital services.

6.19 In particular the Working Party has concerns about:

a) The lack of access of some litigants to the hardware needed for digital interaction with the court and the difficulties and disadvantages of mobile phone, as opposed to computer, use for any hearing using a visual medium and/or requiring consideration of documents. As set out above[98] the Working Party recommends that a judge should have the power to order that a claim under £500 be determined by a telephone or remote hearing. Before doing so the judge will need to know that a readily accessible and comprehensive system of (non-legal) advice and assistance is in place and that built into such a system is recognition of the problems of conducting hearings by mobile phone.

b) How the court will communicate with a party who has no or no reliable digital access e.g.

    i) How there will be communication with Defendants to an online claim

    ii) If a claim is started online with digital assistance how a party will then receive directions/notifications from the Court.

c) The risk that the paper channel becomes a "second class" service and litigants who use it suffer a disadvantage when compared with digital users (e.g. significant delay).

6.20 The Working Group recommends that these concerns be considered by WAD/HMCTS and the evaluating body (including through/after consultation with the LIPEG)[99] and also that there be an urgent analysis of how the contract will work in practice using "walk throughs" of the main generic types of civil claim, including small claims.

6.21 The Working Group recommends judicial involvement in the evaluation of the service particularly as regards small claims given the numbers of such claims relative to other higher value civil claims and the high percentage of litigants without legal or other assistance and/or limited financial means.

[98] See paragraph 3.21b (i) above.

[99] The Litigants in Person Engagement Group, which liaises with and receives regular updates from the HMCTS digital inclusion team.

6.22 It is also the Working Group's recommendation that detailed and comprehensive data must be collected about the use of digital support services and, importantly the extent and effectiveness of use of the paper channels.

Appeals against small claims decisions and restricted rights of appeal

6.23 Whereas in the past the right to appeal against a small claims track decision was limited, the right to appeal is now consistent with the appeals against other judicial decisions. Formerly, CPR 27.12 broadly reflected the limitation on appeals that had existed in relation to arbitrations:

> *Right of appeal under Part 27*
>
> ***27.12**—(1) A party may appeal against an order under this Part only on the grounds that—*
>
> *(a) there was serious irregularity affecting the proceedings; or*
>
> *(b) the court made a mistake of law.*
>
> *(2) On an appeal the court may make any order it considers appropriate.*
>
> *(3) The court may dismiss an appeal without a hearing.*
>
> *(4) This rule does not limit any right of appeal arising under any Act.*

6.24 However, the Rule was revoked with effect from the 1st October 2000.

6.25 Appeals against decisions of District Judges are dealt with by Circuit Judges. Permission is required in the party seeking to appeal must lodge the document set out in PD52B paragraphs 4.2 and 6.4. A transcript or note of the judgement in a small claims case is only required if ordered by the judge handling the appeal (PD52B) paragraph 6.4(1)(g). Rule 27.14(2) applies the no cost rule to appeals.

6.26 As set out above, the Working Party believes that it is not proportionate to have the same appeals procedure for modest small claims, specifically those under £500, as with those of higher value. It recommends that CPR 27.12 be restored for such claims. This will mean that there is ordinarily no appeal in respect of the findings of fact (e.g. on the basis that fresh/additional evidence is now available).[100] Further the appeal can be determined on the papers (consistent with power to order that the claim being determined on the papers).

[100] It is the experience of the Working Party that a significant number of appeals against small claims involve the appellant seeking to rely on evidence which was not before the Judge at the hearing.

However, the Working Party makes no recommendation in relation to the appeals procedure for small claims with a value in excess of £500.

7. DATA

7.1 The Working Party was faced with a similar issue to that faced by other Civil Justice Council working groups[101] in that data provided by HMCTS did not allow an adequate assessment of how the current system was operating. By way of example, although data was available to the Working Party as to the number of small claims issued broken down by value[102] no data was available as to the number of final hearings which involved claims issued for £500 or under, which would have enabled better consideration of the likely practical impact of any recommendations for reform. Further, as set out within the interim report, the data available did not allow an adequate analysis of the benefits of DRH hearings to be undertaken.

7.2 In the interim report the Working Party recommended that HMCTS should, as a matter of urgency, plan and undertake a detailed data analysis of the benefits of the practice of DRHs in operation at Birmingham and Hereford as compared to practices at selected other court centres, so that the effectiveness of the DRH process could be evaluated fully. As set out above,[103] the Working Party recommends in this report that HMCTS continues to monitor closely the use of DRHs in Birmingham, and seeks to break down the analysis of claims to allow consideration the stage of the relevant small claims proceedings at which settlement was achieved: that is, whether settlement was reached before, after or at a DRH. The Working Group recommends using the following claim values when compiling such data;

- £500 or less
- £501 - £4999
- £5000 or more;

Also there should be a comparison of DRHs disposal rates in when conducted in person as opposed to by telephone and also of the number of applications to set aside orders made at DRHs.

7.3 Recently a civil data group "Civil MI Working Group" has been formed under the chairmanship of the Deputy Head of Civil Justice. The Working Party recognises that until the reform programme has introduced improved programmes/systems for the handling/progression of civil claims, data has to come from existing system, principally

[101] See e.g. the reports: Anti-Social Behaviour and the Civil Courts [2020] section 8: Data p 92 and Vulnerable Parties and Witnesses [2020]; p 105.
[102] See paragraph 3.14 above.
[103] See paragraphs 2.13 and 2.19 above.

Caseman, and, also, that any manual system of collection/analysis may be unreliable. However, the Working party recommends that Civil MI Working Group group/HMCTS consider four areas for the collection/analysis of data as a matter of priority as steps may need to be taken now to incorporate the ability to access the data within any new system. The areas are:

a) A breakdown of final hearings by value e.g. £500 or less, £501 - £4999 and £5000 or more[104] and also subject matter (by broad categorisation)
b) Appeals against small claims. There is very limited hard and reliable information as to how many appeals are lodged (by value band), how many gain permission to appeal, how many proceed to a final appeal hearing and how many are successful[105]
c) Challenges to the orders of Legal Advisors (see CPR 20.3 (2A); specifically, how many applications are made and how many are successful i.e. the order is set aside or varied. It will be important to continue to monitor the effectiveness and success of the use of legal advisors
d) the extent of use of digital support services for civil claims by value
e) the extent of use (and effectiveness of use) of the paper channels when digital channels cannot be used.

[104] Preferably with additional bands up to the financial limit.
[105] Such data may be important when considering whether a restricted right of appeal such be extended beyond claims limited to £500 or under

8. RECOMMENDATIONS

8.1 The Working Party makes the following recommendations.

Low value claims

8.2 The Civil Procedure Rules should be amended so in a claim of £500 or less (other than road traffic accident, personal injury or housing disrepair claims)

i) After a defence is filed, attendance at a mediation appointment (or such other form of dispute resolution as the Court may order) is compulsory. Further

(a) If a Claimant refuses to mediate/engage in dispute resolution, the claim will be stayed

(b) If the Defendant refuses to mediate/engage in dispute resolution this will, unless the contrary is established[106] be deemed unreasonable behaviour for the purposes of CPR27.14 (2) (g)

ii) Without the consent of the parties the Court may order that the claim

(a) is determined by telephone or remote hearing

(b) Is determined on the papers[107]

iii) Unless otherwise ordered the final hearing will be no more than one hour in length to include judgment

iv) There is a restricted right of appeal[108] (CPR 27.12 should be reinstated for claims of £500 or less).

Information

8.3 There should be a full review of the adequacy of HMCTS signposting/guidance for potential litigants/litigants (including a review of additional guidance provided by individual Court Centres). Specifically, consideration should be given to:

(a) Ensuring that relevant sources of advice and assistance in relation to all aspects the small claims procedure (including OCMC) are brought together in a single part of the HMCTS website (with hyperlinks) which can be accessed through likely simple searches and with links set out to the court process/documentation and OCMC procedure.

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[106] The burden being on the Defendant.

[107] See below as regards a template judgment. Specific time must be allotted to the determination (i.e. such determinations should not be considered general box work without allotted time).

[108] Restoring the position to that previously set out under CPR 27.12 which was revoked with effect from 2nd October 2000.

(b) Reference/links to advice provided by external organisations which provide assistance to litigants in person.

(c) Ensuring relevant guidance is in simple language and comprehensive.

(d) Making available through the website (and other sources) videos to give litigants better insight into all stages of the small claim journey.

Mediation

8.4 Careful regard should be had to the evaluation by the HMCTS User Experience and Insight Team of the opt out pilot in the OCMC as to why parties opt out of mediation. There should be greater education about the mediation process, its advantages and the repercussions of refusing to engage through information available on the website, including a video with the aim of addressing the reasons why parties do not want to mediate.

8.5 HMCTS should consider the viability of a scheme for pre-issue mediation or other form of ADR for small claims under £500 (given that mediation will be compulsory post issue).

8.6 HMCTS should continue to investigate methods of ADR other than use of the small claims mediation service for bulk issued claims

8.7 After consultation with the Judiciary (in a method agreed with the Master of the Rolls or his nominee), HMCTS should undertake a review of the third-party mediation pilots and consult with relevant mediation providers with the aim of the availability of third-party mediation for all claims.

8.8 A pilot scheme should be set up in a court with a strong local mediation network to include claims across all tracks (i.e. small, fast and multi-track).

Pre-action protocol

8.9 There should be a specific pre-action protocol for small claims under £500. The protocol should set out, in simple and straightforward language, the relevant procedure and highlight the need to consider pre-issue mediation/alternative dispute resolution.

8.10 The parties to a small claim should be asked to confirm (by ticking a box in any hard copy form or digital page) that they have read the pre-action protocol.

Dispute resolution hearings

8.11 Current restrictions on the use of preliminary hearings set out in CPR 27.6 (1) should be relaxed to allow their more flexible use.

8.12 For those court centres which are not currently using the DRH process, consideration should be given to setting a DRH in more complex and higher value small claims.

8.13 To enable an evidence based decision as to whether the listing of a DRH should be the default position in small claims over £500, HMCTS should continue to monitor closely the use of DRHs in Birmingham, and should seek to break down the analysis to allow consideration of the effect of a small claims mediation hearing, and in particular should have regard to the stage of the relevant small claims proceedings at which settlement was achieved (see below under Data).

Single triage sheet

8.14 The Working Party recommends that HMCTS produces a standard triage form to ensure consistency of approach across court centres. A single form would enable communication/the provision of information between courts about cases to become subject to a standard practice.

Hearings

8.15 The Working Party suggests that given the increased use of remote hearings single Judge Courts should consider listing small claims back to back with larger centres when administrative resources allow and this will assist with listing/the disposal of cases.

Scanning in files

8.16 Guidance should be given to staff and Judiciary about the ability to scan in case files and sending to courts with capacity (if a remote hearing is possible).

Vulnerable parties and witnesses

8.17 HMCTS should undertake an urgent review of progress in respect of the Civil Justice Council's recommendations set out in its 2020 report.

Assisted digital

8.18 The concerns set out at paragraphs 6.13 to 6.22 above should be considered by WAD/HMCTS and the evaluating body (including through/after consultation with the LIPEG) and there be an urgent analysis of how the assisted digital contract will work in practice using "walk throughs" of the main generic types of civil claim including small claims.

8.19 There should be judicial involvement in the evaluation of the service, particularly as regards small claims.

8.20 Detailed and comprehensive data must be collected about the use of digital support services and, importantly the extent and effectiveness of use of the paper channels.

Data

8.21 HMCTS should continue to closely monitor the use of DRHs in Birmingham. The Working Party recommends for the bands using a claim value:

- £500 or less
- £501 - £4999
- £5000 or more

Data should be obtained/retained for the stage at which settlement was reached (other than that already complied and retained in relation to settlement at small claims mediation). The Working Party suggests using the following categories;

- After Defence and before any DRH.
- At a DRH/within 1 week after DRH.
- More than 1 week after DRH and more than 1 week before Final Hearing.
- Less than 7 days before Final Hearing.

Also, there should be a comparison of DRHs disposal rates in when conducted in person as opposed to by telephone and also of the number of applications to set aside orders made at DRHs.

8.22 The Civil MI Working Group/HMCTS should consider four areas for the collection/analysis of data as a matter of priority, as steps may need to be taken now to incorporate the ability to access the data within any new system. The areas are:

a) A breakdown of final hearings by value and subject matter
b) appeals against small claims;
c) challenges to the orders of Legal Advisors
d) the extent of use of digital support services, and
e) the extent of use (and effectiveness of use) of the paper channels.

TABLE OF ACRONYMS

Acronym	Expanded description
ADR	Alternative Dispute Resolution
BCJC	Birmingham Civil Justice Centre
CJC	Civil Justice Council
CPR	Civil Procedure Rules
CPRC	Civil Procedure Rule Committee
DRH	Dispute Resolution Hearing
ENE	Early Neutral Evaluation
HMCTS	Her Majesty's Courts and Tribunals Service
LIPEG	Litigants in Person Engagement Group
MCOL	Money Claims Online
MI	Management Information
MOJ	Ministry of Justice
OCMC	Online Civil Money Claims
RTA	Road Traffic Accident
SCMS	Small Claims Mediation Service
WAD	We Are Digital

ANNEXE 1 - THE WORKING PARTY

The Working Party for the purposes of preparing this Final Report has consisted of:

- His Honour Judge Barry Cotter QC (Chair)
- His Honour Judge Graham Wood QC
- District Judge Ian Avent
- District Judge Judy Gibson
- District Judge Hywel James
- District Judge Simon Middleton
- District Judge Linda Nightingale
- District Judge Chloë Phillips
- Nick Hanning (Civil Justice Council member and deputy District Judge)
- Jeremy Thompson (Support through Court)

With assistance from/liaison with:

- William Wood QC (Civil Justice Council member; chair of mediation working party)
- Dr Andrew Higgins (Civil Justice Council member; chair of pre-action protocol working party)
- Leigh Shelmerdine (Deputy Secretary to the Civil Justice Council)

ANNEXE 2 - INSTRUCTIONS IN SMALL CLAIMS TRACK CASES

WHAT IS THE SMALL CLAIMS TRACK?

The small claim claims track is the procedure used by the court to deal with straightforward claims where the value is typically less than £10,000. It is a more informal process and hearings usually take place in a District Judge's chambers rather than a courtroom.

The Civil Procedure Rules (CPR) are available online at the Justice Website: follow the link to "Part 27 – the Small Claims Track". www.justice.gov.uk/courts/procedure-rules/civil/rules

COURT LISTINGS AND TIME ESTIMATES

Small Claims Track final hearings are usually listed together in blocks at the same time. This allows cases to be given a hearing date more quickly, but it may mean that you will have to wait for your case to be heard. The court staff will try to ensure that are kept informed and will let you know if you can leave court and return later in the day for your hearing**. You should make arrangements so that you can remain at court until 4pm on the day of your hearing if necessary**.

HEARING FEES

If the Claimant fails to pay the hearing fee by the date specified in the order, then the claim will be automatically struck out and at an end. The final hearing date will be cancelled. You may apply to have your case reinstated (for which a fee is required) and if you are successful then you will be given a fresh hearing date, but it is likely that your case will be delayed. If there is a Counterclaim then it will not be struck out and the court will give further directions for it to be heard.

WHY ARE WITNESS STATEMENTS NEEDED?

You must send copies of your witness statements and documents to the Court and each other party no later than 28 days before the final hearing.

If you are a Claimant or Defendant you too must provide your written evidence in a statement, even if you have already sent documents in support of your case at an earlier stage in the case.

Witness statements are important and help in a number of ways.

Witnesses can set out what they want to say before they give evidence at Court, so that they are less likely to forget to say everything that they want the Judge to hear.

They let you know before the trial what other witnesses will say. This will help you prepare the questions you want to ask them.

They help the Judge understand the issues.

They save time, for example if the evidence of a witness is not in dispute it may be possible to agree that the witness need not come to court.

Be sure to keep the original copy for yourself and to bring it to court on the day.

WHAT SHOULD A WITNESS STATEMENT LOOK LIKE?

If possible use A4 paper and one side of each page only. Please number each page. Your statement must be legible, ideally typed and stapled together.

Try to keep the number of pages to no more than 6, but the Judge will understand if that cannot be achieved.

The Judge is not marking your spelling and punctuation, so do not let that put you off writing it down.

At the top of the first page, put the case number, the name of the person making the statement and for which party (i.e. claimant or defendant) they will appear as a witness.

The statement should start by stating the name, occupation and address of the witness.

If a witness does not want a party to know his or her address, this can be left out and the words added: 'I wish my address to be withheld'. The address of a witness cannot be withheld without a good reason and a Judge may later order that the witness's address is disclosed.

Any alteration must be initialled by the person making the statement.

At the end of the statement there must be a 'Statement of Truth'.

'I believe that the facts stated in this witness statement are true'.

The statement must be signed and dated by the maker.

WHAT SHOULD I PUT IN MY WITNESS STATEMENT?

Witness statements must be prepared with care.

A witness statement should tell the story - explain your side of the case to someone who is not familiar with the dispute.

Do try to set out events in the order in which they happened where possible. Write in paragraphs and number each paragraph.

It must be accurate and true and it should be as detailed as possible. For example, a witness may not be able to remember the date when something happened. But they can say roughly when it happened: 'In about September 2017…' or 'a few weeks after my 30th Birthday'.

Keep the statement focused on the issues.

HOW DO I DEAL WITH DOCUMENTS?

If a witness statement refers to a document, for example an email, the document must be attached to the statement and clearly marked as an exhibit. For example:

'On the 10th January the Applicant sent me an email. This is attached marked Exhibit 1.' And so on for other documents.

It may help if all documents of the same kind, e.g. letters or invoices, are contained together in a single exhibit, in which case they must be exhibited in date order and each page numbered. Do try to make sure that all copies are legible. Try not to submit multiple copies of the same text if you can avoid that.

CAN SOMEONE MAKE A STATEMENT IF THEY DO NOT READ OR WRITE ENGLISH?

If a witness statement is made by a person who cannot read or sign it, it must contain a certificate signed by an 'authorised person'. An 'authorised person' is someone who can administer oaths and take affidavits - for example a solicitor or a member of the Court staff who is allowed to take oaths.

Where the statement is in a foreign language, it must be translated by someone who is neither a party nor witness in the case. The translator must sign the translation to certify that it is accurate.

The copy statement of each witness (and any translation) must then be sent to the Court and a copy sent the other party at the same time.

WHAT HAPPENS IF I DON'T OBEY THIS ORDER?

The Civil Procedure Rules (CPR32.10) state that "If a witness statement… for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission."

This rule applies to the Claimant and the Defendant themselves, as well as to other witnesses. Failure to serve a witness statement (or late service of a witness statement) is usually considered to be a serious breach of the Court's order. *Failure to read the order is unlikely to be an acceptable excuse*.

In deciding whether to give permission to a party to give evidence, the Court must consider all the circumstances of the case, so as to enable it to deal with the case justly. The Court is required to have specific regard for the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with orders. (CPR3.9

WHAT IS MEDIATION?

Mediation is a simple process which gives you the opportunity to resolve your dispute without having to attend a court hearing. The court's mediation service is free. Mediation appointments are conducted by telephone. The appointment is limited to one hour, is confidential and can be done anytime up to ten working days before the final hearing.

If you wish to undertake mediation, you must contact the Small Claims Mediation Service by telephone on 0300 123 4593 or email at scmreferrals@justice.gov.uk within 7 days of receipt of this order. If you email please ensure you include a return telephone number, and the case number.

If both parties confirm they wish to undertake mediation, the Service will contact you to arrange an appointment. If they are unable to offer you an appointment before your court hearing, you may wish to consider another mediation provider. Details of mediators are available online at http://civilmediation.justice.gov.uk/

ANNEXE 3 (PART A) – LITIGANTS IN PERSON FACT SHEET (8) – WITNESS STATEMENTS

HM Courts & Tribunals Service

Litigants in Person Fact Sheet (8)
Witness Statements

Key Points

- Evidence at the trial will be given orally by witnesses, but only those witnesses whose evidence is set out in a witness statement which has been shown to the opposing party will normally be allowed to give evidence.
- Every witness statement must comply with the formal requirements of Civil Procedure Rule 32 PD17-20.
- The witness statement should "tell the story", that is cover all the facts that the witness is able to speak to in chronological order. It should set out with numbered paragraphs in a legible (typed) form.
- If you have prepared a chronology (as you are strongly advised to do) it will be helpful to have this to hand as you prepare your witness statements.
- It is important you make sure that your witness statements deal with all the factual issues in the case. You should have a list of issues which will help with this exercise.
- It is vital the statement contains the truth and only the truth. The maker of the witness statement must 'verify' it with a 'Statement of Truth' in the form: *"**I believe the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement truth without an honest belief in its truth**."* If the maker of the witness statement makes a false statement he is guilty of a contempt of court and may be punished accordingly.
- Witness statements are statements of fact. They should never include statements of opinion.
- The Court will almost invariably order that witness statements are exchanged by the parties by a particular date. This prevents a party from seeking an advantage by delaying his statements until he has his opponent's statements.
- Where you are unable to provide a formal witness statement for one of your witnesses for a good reason (e.g. reluctance to give evidence, illness or absence abroad) you should provide a 'witness summary' setting out the evidence that you expect the witness to give if brought to Court.

- If your case has been listed for an attended hearing (ie at court), evidence can usually be given by video where a witness cannot reasonably be expected to travel to Court. If you wish to use a video link you must give the Court good notice (at least four weeks) and you should explain why a video link is necessary.

For more information see **Advicenow.org.uk** - https://www.advicenow.org.uk/know-hows/witness-statements-and-expert-reports

ANNEXE 3 (PART B) – LITIGANTS IN PERSON FACT SHEET (9) – EXPERT EVIDENCE

Litigants in Person Fact Sheet (9)
Expert Evidence

Key Points

- Expert evidence is opinion evidence and should be given by someone with a high degree of skill, knowledge and experience in the relevant field.
- Expert evidence may be given over a wide range of subjects. Common examples of experts who give evidence before the courts are doctors (usually consultants) in injury cases, surveyors and engineers in construction cases, valuers in property cases, and accident reconstruction experts in difficult road traffic cases.
- Permission must always be obtained from the court before expert evidence is admissible. The court will react unfavourably to 'expert shopping' and where one party has consulted more than one expert the court will usually require that party to disclose all expert opinions obtained, even though the party concerned may wish to rely (and may only be permitted to rely) on one expert only.
- An expert witness will always be required to produce a written report and will only be permitted to give oral evidence where this is absolutely necessary – usually this will be where experts on opposing sides are in significant disagreement.
- Wherever possible the parties should agree to instruct a single expert jointly to express an opinion on the issues in the proceedings requiring expertise. In small value claims the court will almost always insist that there is a 'Single Joint Expert' instructed by both parties jointly.
- Although an expert witness will be instructed and paid by one party, or by both parties where he is a Single Joint Expert, the expert owes a duty to the court which overrides any duty he may owe to the party or parties instructing him.
- There are detailed provisions in the Rules governing the content of an expert report, and the report must end with a statement that the expert understands and has complied with his duty to the court. Most professionals offering to act as experts will be aware of these provisions; a litigant in person should not instruct an expert who is not familiar with the relevant rules unless there is no alternative.
- Where opposing parties each instruct an expert the respective experts will be ordered to hold without prejudice discussions with a view to reaching agreement on as many matters as possible and to define the areas in which there is no agreement, setting out their competing views.
- A litigant may put written questions to an expert to be answered in writing. The answers will form part of the expert's evidence.

- Where one litigant has access to in-house expertise not available to his opponent, the court may require that litigant to provide expert information for the use of his opponent in the proceedings.

For more information see **Advicenow.org** - https://www.advicenow.org.uk/know-hows/witness-statements-and-expert-reports