
# Breaking the Backlog and overcoming the Tsunami of civil litigation in England and Wales

## An empirical view of the civil justice response to the Lockdown

**A White Paper from DisputesEfiling.com**

**by Tony N Guise**

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**About DisputesEfiling**

DisputesEfiling.com Limited (DEF) was founded in 2015 to introduce effective IT into the ADR sector and to engender and promote constructive debate about how civil justice could best work for lawyers and their clients.

DEF seeks to support change in civil jurisdictions including Scotland, Greece, the State of New York and elsewhere across the globe. DEF builds on the civil justice reform work undertaken by the author of this paper since 1995.

**About the author**

For the past 25 years Tony Guise has campaigned for many of the most significant reforms in civil justice in England and Wales. In many roles, whether As President of the London Solicitors' Litigation Association, member of the Law Society of England and Wales' Civil Justice Committee and co-founder and Founding Chairman of the Commercial Litigation Association, he has influenced thinking and introduced changes from the establishment of the Civil Justice Council (1997) through to the, now compulsory, Electronic Bill of Costs (2016).

As a practising solicitor until 2016 and founder of GUISE Solicitors in 2003 his firm led the way with new approaches to the client-solicitor relationship in terms of estimating costs and the form of the solicitor-client retainer. Many of those innovations which started life in his firm are now a compulsory feature of every civil litigator's practice.

Collaborating both with Lord Woolf and Sir Rupert Jackson he has brought about or significantly contributed to reforms ensuring that the civil justice system in E&W remains relevant and enduring.

His current focus is on the introduction of effective IT into the civil justice system.

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Any mistakes whether by oversight, ignorance or commission are and remain the author's alone.

**Terminology and law and facts stated as at 29 June 2020**

The Pandemic and the various responses by the Government during Lockdown have caused both widespread disruption in the civil justice system and rapid change. An ironic dichotomy which, given the rapidly evolving landscape, means that as soon as this White Paper is published it will be out of date.

We believe this is the first attempt to provide an empirical analysis of the causes of the rising Backlog and the coming Tsunami of Litigation.

The position is stated, to the best of the author's knowledge, as at 29 June 2020.

# Contents

# Glossary

| Word or abbreviation | Meaning |
|---|---|
| ABI | Association of British Insurers |
| ADR | The collective description for methods of resolving disputes otherwise than through the normal trial process, per the Glossary to the CPR, see below. The principal forms of ADR are: arbitration, mediation, neutral evaluation and adjudication. |
| APIL | Association of Personal Injury Lawyers |
| BPCs | Business and Property Courts |
| Civil justice system | The courts of civil and family jurisdiction and the tribunals of England and Wales |
| CPR | Civil Procedure Rules 1999, as amended |
| CCMCC | County Court Money Claims Centre (Salford) |
| CMC | Claims Management Company |
| CNF | Claims Notification Form – the online form used to start the settlement process in the Claims Portal |
| CE-File | Courts Electronic File (Thomson Reuters' C-Track product) |
| COVID-19 or the Pandemic | Coronavirus disease |
| CPRC | Civil Procedure Rules Committee |
| DCA | Department of Constitutional Affairs, previous name of the Ministry of Justice |
| DEF | DisputesEfiling.com Limited |
| E&W | England and Wales |
| EL | Employers Liability claims |
| ENE | Early Neutral Evaluation – a form of ADR |
| FT | Fast Track |
| HMCTS | Her Majesty's Courts and Tribunals Service |
| HMRC | Her Majesty's Revenue and Customs |
| HMT | Her Majesty's Treasury |
| JENE | Judicial Early Neutral Evaluation, a form of ADR |
| JSM | Joint Settlement Meeting, a form of ADR |
| CVP | Kinly Cloud Video Platform |
| LCD | Lord Chancellor's Department, previous name of the Ministry of Justice |
| LiPs | Litigants in Person – those pursuing/defending claims in the civil justice system without representation by lawyers. Sometimes called Self-Represented Litigants (SRLs) or, in the USA, Self-Drivers. |
| LSEW | The Law Society of E&W |
| MASS | Motor Accident Solicitors Society |
| MCOL | Money Claims Online |
| MIB | Motor Insurers' Bureau |
| MoJ | Ministry of Justice |

| | |
|---|---|
| OCMC | Online Civil Money Claims |
| ODR | Online Dispute Resolution |
| OICS | Official Injury Claim Service |
| PD | Practice Direction made under the CPR |
| PL | Public Liability claims |
| RCJ | Royal Courts of Justice |
| SCT | Small Claims Track |
| TfL | Transport for London |
| TUC | Trades Union Congress |

# Executive summary

During the Pandemic a number of factors began to align which, in DEF's view, will bring about a Tsunami of Litigation in the coming months. There is debate about whether this is a true reading of the position and some argue that the Courts will cope using the next 12 months to catch up with any backlog of cases much as they did following the 2008 Recession.

An empirical understanding of these issues is important both for civil litigators and for policy makers at the MoJ and HMCTS. If the wrong call is made the volume of new civil claims is likely to overwhelm the civil Courts of E&W.

This White Paper is intended to contribute to policy makers' and practitioners' planning by examining the likely levels of claims made and expected to be made during the period 2020-2022 from an empirical standpoint.

The current civil litigation market has been described as "dynamic". That is certainly the case with new issues arising and new solutions being developed on a weekly basis. We have tried to capture the latest developments in this paper in which the landscape is described as at 29 June 2020.

**This White Paper was prepared by DisputesEfiling.com Limited between March and June 2020 in response to the COVID-19 emergency.**

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## PART I - Problems

### The case for no Litigation Tsunami - the civil courts will cope

This view of the very near future proceeds as follows:

a) The forecast Tsunami of Litigation is a fiction;
b) The civil courts will cope because HMCTS has invested £1.4bn in new IT;
c) Video hearings will enable more cases to be heard more quickly than before;
d) The Pandemic was so extra-ordinary, novel even, that the talk of mass COVID-19 related civil claims will come to nothing;
e) What happened in the 2008 Recession will happen again – then the higher volumes of litigation from the Recession did not reach the Courts until 2 years later in 2010. The same will happen with the effect of the Pandemic, thus the civil courts have 2 years to catch up with the backlog, which this train of thought acknowledges already exists.

### The case for the Tsunami and why the civil courts will not cope

Modernisation

1 The IT Modernisation programme in the civil justice system stalled in late 2019. The £1.4bn to fund this Programme granted by Government under the 2015 Financial Settlement between HMT and the MoJ ran out in 2019 and further funding awaits Parliamentary approval, see the Lord Chief Justice's evidence given on 13 May to the House of Lords' Select Committee on the Constitution[1]:

*"I want to make it clear that what has happened in the last couple of months demonstrates how vital it is that the investment continues, that we do not have cheese-paring in the future, and that when, as we all hope, the time comes when things are capable of returning to something approaching normal, we will not be back in exactly the same position of having to argue for every penny in the face of a very tight budget."*

In 2015 this Financial Settlement amounted to £750m. The funding then crept up. First to £1bn, then £1.2bn and finally £1.4bn. This was expected to deliver effective IT in the courts. However, other priorities may now prevail, as the Lord Chief Justice sadly acknowledged in his evidence to the House of Commons' Justice Select Committee on 22 May[2].

2 In fact the £1.4bn has been spent. What has been provided in the civil courts comprises the CE-File system, video conferencing and some bespoke applications, such as OCMC which remains a Beta pilot but nevertheless a success for HMCTS' in-house development team. Yet even that application does not work after a defence is filed as defended cases fall back into the paper system.

[1] https://committees.parliament.uk/oralevidence/379/pdf/,: p 6, final para, final sentence.
[2] https://parliamentlive.tv/Event/Index/a80ba910-dfa5-4330-b9e7-ea0164b79543; session started at 14:33 these comments are at 15:25 that afternoon.

3 Nor is CE-File present throughout the system. CE-File is operational in the Rolls Building jurisdictions (London only), the Regional BPCs and, to varying degrees, within the RCJ. CE-File is a re-badged system created by Thomson Reuters (C-Track), a system designed for use in the USA's local County Courts where the number of claims issued is low (compared with E&W) and it can cope well with lower volumes. However by number of civil claims issued each year E&W is the largest jurisdiction in the world with claims commenced historically running at between 1.5m and 2.1m every year[3]. However, CE-File is not deployed in the lower courts, the County Courts, which remain totally dependent on paper files and staff to enable those Courts to work.

4 The County Courts in their modern form were established by the County Courts Act, 1846 which was intended to introduce faster and more effective justice for routine claims. Ironically the County Courts are now the least well placed to deliver swift justice. Being the lowest rung in the Courts hierarchy means that the County Courts manage the vast majority of each year's new cases. In 2019 2,029,258[4] new cases started in the County Court.

5 The absence of CE-File (or any modern case management solution) in the County Courts was expressly acknowledged as a problem by the Lord Chief Justice in his evidence to the Lords' Constitution Committee on 13 May:

*"I regard it almost as eccentric that in our county courts everything is still done on paper. No business operates in that way, nor has done for years."*[5]

The reasons for that situation arising are historic and do not need to be rehearsed here.

The Lord Chief Justice reiterated his concern a week or so later in his evidence to the Commons' Justice Committee on 22 May:

*"Had we had the ability to lodge papers online in County Courts and Family* [in lower Courts] *much more work could have been done."*[6]

<u>The Financial Settlement between HMT/MoJ in 2015</u>

6 Under the 2015 Financial Settlement the MoJ agreed a trade-off with HMT in return for making £1.4bn available to complete the digitisation of the justice system. That trade-off requires a ca 40% reduction in HMCTS' staff beginning in 2016 and to be completed by 2022[7]. The Treasury is unlikely to forget the terms of this agreement especially when £124bn (so far)[8] has been borrowed to fund Pandemic related schemes.

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[3] See table in para 45, below.

[4] https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2019 see table 1.1

[5] https://committees.parliament.uk/oralevidence/379/pdf/: page 6, final para, second sentence.

[6] See fn. 1, 15:18 onwards

[7] https://www.theguardian.com/law/2018/may/02/6500-jobs-to-be-lost-in-modernisation-of-uk-courts

[8] See National Audit Office Press Release about its report: "Overview of the Government's response to the COVID-19 pandemic", second para, second sentence: https://www.nao.org.uk/press-release/overview-of-the-uk-governments-response-to-the-covid-19-pandemic/?utm_content=&utm_medium=casaes&utm_name=&utm_source=govdelivery&utm_term=

7 A significant Court closure programme has also seen the number of court buildings reduced by over half from 2010 to 2019. County Court buildings were reduced from 240 to 150. As of 20 May 2020 HMCTS planned to close a further 25 court buildings by the end of the financial period 2021-2022[9]. The rationale for the court closure and staff reduction programmes being that civil justice would be fully digitised by 2019.

8 It is against this background that we can understand why the civil justice system was so resilient in coping with the higher than usual volume of Recession related litigation in 2010. The 2010 civil courts were very different to those we have today. Whilst the courts did not have effective IT in 2010 the courts did have the court buildings and the staff to keep civil justice running. The current trajectory for the Ministry and HMCTS leads to a limited IT civil justice system with far fewer court buildings and 40% fewer staff. All this arrives at a time when a huge increase in claims is likely to be started in the civil courts.

9 Even if the Lord Chief Justice were able to shake the Treasury's Magic Money Tree further it is unlikely the fruit of his efforts would be ready for eating for some years yet as the Modernisation Programme is already delayed, being re-scheduled to complete in 2023. Meanwhile the reduction in Staff to manage the civil justice system continues, as required under the Financial Settlement. This has an obvious effect upon case progression which is addressed in detail at paragraphs 37-43 inclusive, below.

HMCTS' successes

10 We recognise and applaud the many successes that HMCTS has achieved.

11 Online Civil Money Claims (OCMC)
OCMC is the digital platform managed by the County Court Business Centre at Northampton and is in Beta Pilot under PD51R. In para 2.1(3) of that PD the scope of OCMC is limited to claims up to £10,000 in value, where the claimant is not represented by a lawyer and the claim is not a claim for personal injury. There are other restrictions but those are the principal points for our purpose.

12 The development (in-house at HMCTS) of OCMC[10] is a great achievement: it is intuitive and effective but the online part ends at the point a defence is filed. Other HMCTS bespoke applications are beginning to have their effect on delivering access to justice. CE-File in the higher courts has helped to keep some of the Courts' business moving but those Courts only see ca 30,000 cases issued per annum and most of that is HMRC activity for unpaid taxes. Most of the cases are in the County Courts where there is no e-filing of any or any effective kind.

[9] https://www.lawsociety.org.uk/policy-campaigns/articles/court-closures---what-s-changing/

[10] OCMC remains in the pilot phase and is to be distinguished from the longer-established but similarly named MCOL which remains live; MCOL is an earlier version of the same concept but less well designed, symptomatic of the time at which MCOL was designed in the early part of the 21st century. MCOL can issue claims up to £100,000 in value and can be used by Legal professionals. HMCTS say they will close MCOL, presumably, once OCMC is fully developed, see below.

13 In June 2019 the Master of the Rolls delivered a speech[11] in which he noted the plans to develop OCMC as a complete end-to-end filing solution, see paras 18 and 19. The key points from his speech are these, at para 15:

a) OCMC went into public Beta in March 2018; and,

b) OCMC has developed since then and as at 10 June 2019 comprises the following features (para numbering is to the numbers of the paragraphs in the speech):
   i) LiPs can file claims online.
   ii) As at 31 May 2019, 69,000 claims have been filed voluntarily by LiPs.
   iii) A defence can be filed online. 16,000 defences have been filed voluntarily online.
   iv) The IT system will cater for a request for a stay to negotiate or mediate. The system also gives information to litigants as to facilities for mediation. There can be a request for judgment in default of defence. 44,000 such requests have been made.
   v) Opt-out mediation, which is a major aspect of the new digital process, will be by way of referral to the existing small claims mediation service, which is a telephone service. The MR hoped mediation management would be translated in due course into a full online mediation process.(para 20)
   vi) Looking at digital court processes in other jurisdictions, notably Canada, the US and Australia, one of the clear lessons is that we must be careful not to be overly ambitious but to proceed cautiously and incrementally, testing the functioning of the system at each stage. (para 33)

14 The Document Upload Centre (DUC)
HMCTS' response to the Pandemic has been impressive. From 18 May a solution to a problem with uploading bundles into the CE-File system is being deployed. This is called the Document Upload Centre[12]. The problem the Upload Centre seeks to remedy is that in CE-File files can only be uploaded which are no more than 50MB in size. Multiple such uploads can take place but 50MB is wholly inadequate for a court system of the scale in E&W.

15 The solution HMCTS have provided is to use Microsoft's SharePoint product which has no size restrictions and is available for any Court hearing, and crucially in the County Courts too. However that system can only upload files in PDF format so image files, for example videos, cannot be uploaded. SharePoint (being a Microsoft product) is also subject to the USA's Secure Communications Act, 1986 (SCA) as clarified by the aptly named Clarifying Lawful Overseas Use of Data (CLOUD) Act, 2018 enabling agencies of the US Government to access Office 365/SharePoint data wherever it is held in the world. This is because Microsoft is a US based communications service provider. Nevertheless it is an improvement. Perhaps the fundamental issue with the Document Upload Centre is that it introduces another software program alongside nothing in the

[11] https://www.judiciary.uk/wp-content/uploads/2019/06/mr-oxford-cpr-conference-june-19.pdf
[12] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/887109/Document_Upload_Centre_-_Professional_User.pdf?utm_medium=email&utm_source

County Courts and alongside CE-File in the few jurisdictions where that is running. It strikes us that this repeats the mistakes of the past by running civil justice on multiple platforms which are not integrated properly, or at all. This leads to inefficiencies amongst users and therefore increased costs.

16 Kinly Cloud Video Platform (CVP)
Another solution developed with admirable speed is the CVP. CVP will not of itself accelerate the delivery of access to justice: this only enables those hearings that do take place to take place remotely. This is a particular problem for the many vulnerable or digitally isolated citizens that come before the civil courts especially in housing possession cases. In any event CVP has yet to be deployed in the civil courts, the priority being the criminal courts. No doubt CVP will be rolled out in civil justice in the coming months. Anecdotal evidence of its use in the criminal courts is that it works well and is user friendly. Although as greater use is made of CVP this anecdotal evidence is becoming more mixed. From what we read this criticism appears attributable to bandwidth/latency issues rather the CVP itself.

17 CVP hosts data on the Google Cloud Platform which is also subject to the SCA as amended by the CLOUD Act. In open court hearings this is less of a concern. However, this becomes a serious issue where cases are heard in a confidential or private setting e.g. Family cases. CVP began to be rolled out to Family courts from 8 June onwards.

18 Online issuing of unspecified money claims (PD51S)
Part 51 of the CPR provides, amongst other things, for Pilot Schemes under these Rules. PD51S addresses the County Court Online Pilot which may only be used by legal professionals. From late May 2020 it is being used to enable the issue of unspecified money claims in the County Court. These typically number 145,000 of which 137,000 are for claims arising from personal injuries.

19 PD51S is another example of HMCTS working with the Judiciary and also, on this project, with APIL to find solutions to pressing issues arising from the Pandemic. Yet PF51S has its limits in terms of easing the Backlog. These are set out in a useful webinar hosted by APIL which may be found here[13]. Chief amongst them is that as soon as a Defence is filed (as with OCMC) the case falls back into the paper-based system in the County Courts. The use of this system is at least a start and the team involved have ambitious plans for developing an end-to-end solution. Whether they are ever realised depends, as we have seen above, more money is obtained from HMT. The Lord Chief Justice, for one, seems less than optimistic.

Private sector support for HMCTS

20 The Claims Portal
In 2010 the RTA Portal Limited was created as a combination of Claimant and Defendants representatives of both Claimants and Defendants. Its directors are drawn from the following representative bodies: APIL, MASS, TUC, LSEW, Insurers and the ABI.

[13] https://www.gov.uk/guidance/civil-reform-online-event-online-personal-injuries-and-unspecified-money-claims-pd51s?utm_source=f0cc4c95-2e4d-419d-8597-5efe90a83b17&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily

21 Its introduction met with scepticism and mild controversy because the Claims Portal was financed by the insurance industry, was developed and went live in less than 6 months. Its original purpose was to manage claims in personal injury cases brought about by road traffic accidents. It has proved a success and, re-named as the Claims Portal, in July 2013 its scope was expanded to include personal injuries caused in PL cases (e.g. by the negligence of for example Local Authorities) and EL cases.

22 The Claims Portal's caseload has also collapsed in recent months due to Lockdown. From this however the Claims Portal is able to rebound relatively easily as it is online and is a platform intended to bring about settlements, not resolve disputes. The moment a claim becomes disputed the claim returns (or "exits") the Claims Portal and returns, typically, to the paper based County Courts. This is only partly mitigated by the expansion of the Pilot in PD51S, as explained in para 15 above. The effect on Lockdown on CNF numbers is shown below[14]:

| | CNFs May 2020 | CNFs May 2019 | % Change from May 2019 |
|---|---|---|---|
| RTA | 23,081 | 57,902 | -60% |
| EL | 1,616 | 3,724 | -56% |
| PL | 4,375 | 2,237 | -48% |

23 This dramatic fall is not entirely explained by the effect of Lockdown with few working or travelling by car and therefore suffering accidents. A large part of the fall is due to the fact that access to the Claims Portal is only available for legal professionals.

24 Official Injury Claim Service (OICS)
This is a platform being built by the Insurers through their delivery agent, the Motor Insurers' Bureau. It is a collaboration between MoJ and HMCTS and Insurers. Its purpose is to enable LiPs to manage personal Injury claims up to the £5,000 when implemented. Implementation has been delayed a number of times but is currently planned for April 2021.

25 The delay arises over the lack of any rules to determine the procedure within the OICS. Nevertheless the build continues apace. Compensators, Third Party Administrators and solicitors are registering as users.

[14] Thanks to Mark Hemsted at Clyde & Co: https://www.lexology.com/library/detail.aspx?g=46fff192-c4f8-4c52-8a4b-57c9558f8502&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2020-06-19&utm_term=

How does the Tsunami of Civil Litigation arise?

26 The Tsunami starts with the avalanche of cases held back in the County Courts and elsewhere within the system. For example, anecdotal evidence indicates that there are already at least 6,000 items of unanswered correspondence in Birmingham County Court. In Manchester Civil Justice Centre the delay before correspondence is answered is now 10 weeks. Apart from pre-Pandemic cases that were backlogged there are cases backlogged on account of the Pandemic itself. The Backlog has also increased as a result of the suspension of claims for possession of residential tenancies (housing possession cases) in the paper-based County Courts. All such cases are stayed (suspended) under s. 81 of the Coronavirus Act, 2020 and Schedule 29 thereto as supplemented by PD and Government Guidance. Originally the stays were due to expire on 25 June but this stay is capable of extension and was extended until 31 August 2020[15].

27 Once the Possession cases resume there will be an avalanche of activity that will not be overcome by CVP, if CVP has reached the County Courts by that time. Because CVP does not expedite case progression it just enables the same number of hearings to proceed but by a different medium. In addition to possession cases there will be the existing proceedings and other cases which have been adjourned pending the further easing of restrictions. A good indicator of the reduction in court cases commencing has been the drop in the receipt of court fees. In evidence to the Justice Select Committee on 4 May Alex Chalk, MP, a Parliamentary Under-Secretary of State at the Ministry of Justice, confirmed that civil fees receipts were down by 88% since the beginning of Lockdown[16].

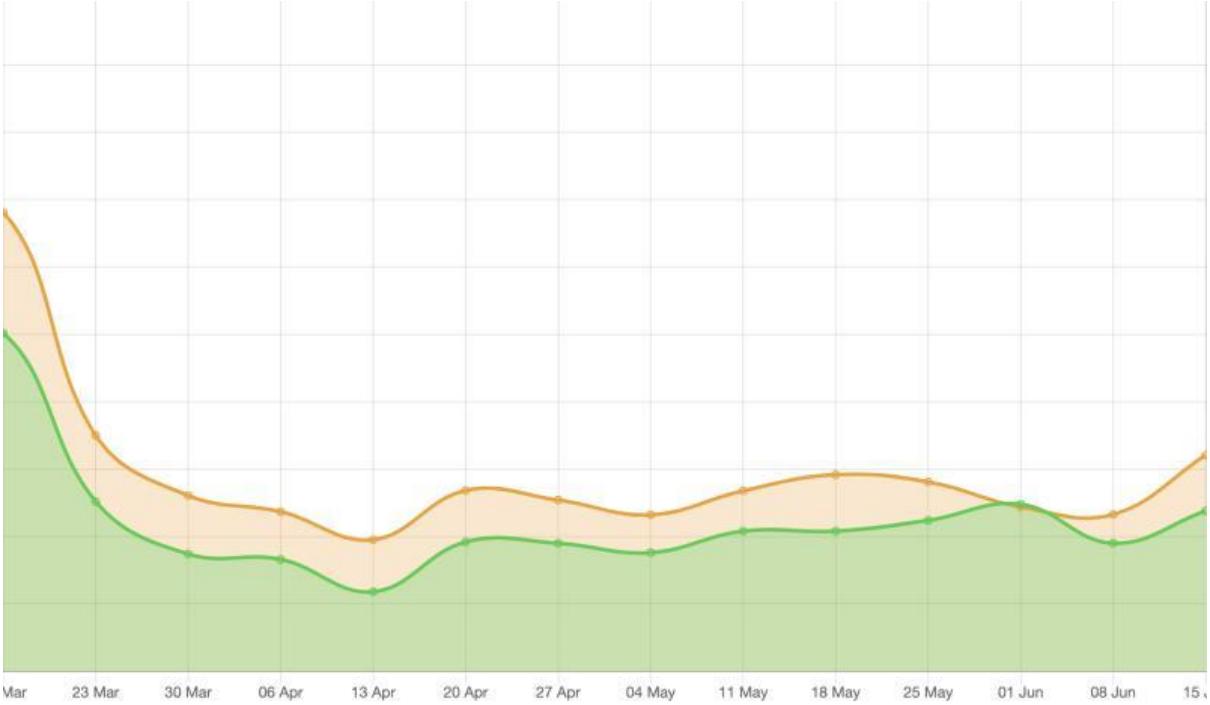
28 A really good visual representation of the effect of the Pandemic has kindly been provided by an online set of Barristers Chambers, Clerksroom[17]. This table shows the

[15] https://www.gov.uk/guidance/government-support-available-for-landlords-and-renters-reflecting-the-current-coronavirus-covid-19-outbreak

[16] https://www.parliamentlive.tv/Event/Index/af4d1d9e-2ba3-4bc8-b363-fe757e69df64: starts at 09:36, go to 11:29

[17] Our thanks to Stephen Ward of Clerksroom for kind permission to reproduce his graph.

number of hearings undertaken by Members of Clerksroom:




29 Further evidence comes from Management Information data issued by HMCTS about the effect of the Lockdown restrictions on the business of the courts which is helpful and is updated on a weekly basis[18]. There are a total of 23,732 cases adjourned because of COVID-19. The update of 11 June shows the Backlog in civil cases developing since Lockdown on 23 March:

| Period (week ending) | Workload | Hearings | |
|---|---|---|---|
| | Received | Hearings Listed | Hearings adjourned due to COVID-19 |
| ***Pre-Covid Baseline*** | ***38,521*** | ***14,815*** | ***NA*** |
| 8 March 2020 | 36,603 | 15,500 | 0 |
| 15 March 2020 | 35,683 | 15,528 | 2 |
| 22 March 2020 | 31,796 | 15,721 | 122 |
| 29 March 2020 | 13,494 | 15,589 | 2,592 |
| 05 April 2020 | 12,250 | 13,167 | 3,922 |
| 12 April 2020 | 6,656 | 10,961 | 3,360 |
| 19 April 2020 | 7,199 | 11,094 | 3,114 |
| 26 April 2020 | 8,406 | 12,904 | 3,434 |
| 03 May 2020 | 5,916 | 11,009 | 2,487 |
| 10 May 2020 | 4,626 | 8,806 | 1,631 |
| 17 May 2020 | 5,085 | 10,178 | 1,635 |

[18] https://www.gov.uk/government/statistical-data-sets/hmcts-weekly-management-information-during-coronavirus-march-to-m23,732 cases adjourned because eof COVISay-2020

| | | | |
|---|---|---|---|
| 24 May 2020 | 5,067 | 9,527 | 1,433 |

30 Another source of Pandemic related claims is likely to be issues arising from contractual claims where one or other party, or all, argue that a force majeure clause does or does not apply or that the contract should be discharged as to future obligations under the Doctrine of Frustration as a result of the effect of Lockdown restrictions and/or the Pandemic generally. Law firms across the country are readying themselves for this part of the Tsunami. See, for example, the law firm Stephens Scown's piece on these issues[19].

31 Further Pandemic related activity is the recent news that Doctors are crowd-funding for a judicial review regarding the alleged late and/or inadequate provision of PPE[20].

32 Another source of COVID-19 related claims are workplace claims whether in the Employment Tribunals or the County Courts in relation to alleged premature returns to work and/or unsafe workplaces both of which case types seem to be attracting attention from employment litigators and Claims Management Companies. By December 2019 there was already a significant backlog of cases in the Employment Tribunals and this is likely to increase in the coming months, see a Briefing Paper held in the House of Commons Library[21]. Compare this with TfL's cautious and well-considered approach to resuming front door opening on London Buses where the Unions together with researchers from University College London and TfL HR personnel have worked hard to establish safe ways of opening the front doors, receiving fare payments and keeping staff safe. Post Lockdown not many businesses can afford to resume work let alone afford that kind of approach to the issue of safe working[22].

33 The Pandemic may lead to group actions arising from the virus. For example, claims arising from clinical negligence. In a prescient move the Parliamentary drafters of the Coronavirus Act, 2020 included within section 11 express indemnities for healthcare workers dealing with Covid-19. Such provision is only likely to encourage group actions or interest from CMCs. In this respect the blog written by Nigel Poole, QC is a useful explanation of how such claims may arise[23].

34 Another aspect of clinical negligence claims which doctors face arises in the context of the re-deployment of a doctor to treat patients outside that doctor's expertise in consequence of staff resources being severely stretched during the Pandemic. Such cases may give rise to hard fought defences. Isaac Hogarth, a Barrister specialising in the

[19] https://www.stephens-scown.co.uk/covid19/getting-out-of-contracts-the-consequences-of-a-frustrating-event/
[20] https://www.bbc.co.uk/news/uk-england-beds-bucks-herts-52758517
[21] http://researchbriefings.files.parliament.uk/documents/CBP-8372/CBP-8372.pdf 16.12.19 at p9
[22] https://www.standard.co.uk/news/transport/tfl-london-buses-front-door-boarding-coronavirus-a4453926.html
[23] https://nigelpooleqc.blogspot.com/2020/04/coronavirus-and-clinical-negligence.html: see para 5 and penultimate para of the Blog.

area, considers such cases may not be defensible absent legislation addressing the issue[24].

35 In addition to the Backlog and the Force Majeure/Frustration claims there may be group actions based on, amongst other things, whether the Government locked down the country soon enough to avoid deaths and other personal injuries that might not otherwise have occurred.

36 An important indicator that such claims are coming is the news that a litigation funder has raised $450m to fund Coronavirus claims, as Bloomberg reported on 26 May[25]:

*"Litigation finance firm Parabellum Capital has raised a new fund with commitments exceeding $450 million ahead of a potential torrent of coronavirus-related lawsuits, new proof that betting on court battles remains popular with investors despite the current crisis."*

Staff reductions at HMCTS affects case progression and exacerbates the Backlog

37 A Parliamentary Briefing about Court statistics (fn. 21, above) records the erosive effect of the Treasury Settlement on Staffing at HMCTS, see para 6, above.

*"In 2018/19, there were 16,219 FTE staff at HMCTS, of which 2,042 were contractors or agency staff (13% of the total). This is the highest proportion of contract/ agency staff in any of the years for which data is available. Even taking into account the rise in the number of contract/ agency staff, the total number of employees fell by 22% between 2010/11 and 2018/19."* (para. 5.1, p.20)

38 This table, taken from the Parliamentary Briefing, illustrates the issue:

| **HM Courts and Tribunals service Staff (annual average E&W)** | |
|---|---|
| **Year** | **Permanently employed Staff** |
| 2014/15 | 16,162 |
| 2015/16 | 15,209 |
| 2016/17 | 14,269 |
| 2017/18 | 13,841 |
| 2018/19 | 14,177 |

It will be recalled that 2015 was the year in which the Financial Settlement was agreed.

39 This amounts to a reduction of 1,985 employees to the end of the 2018/19 financial period, or 12.28% of those employed in 2015/16. To compensate for the loss of employees a growing number of agency or contract personnel have been hired numbering 871 in 14/15 but by 2018/19 there were 2,042 agency/contract workers.

[24] https://clinicalnegligence.blog/2020/06/01/standard-of-care-in-a-clinical-setting-during-the-covid-19-crisis/
[25] https://news.bloomberglaw.com/business-and-practice/parabellum-capital-raises-450-million-as-virus-lawsuits-loom

40 A rolling programme of Staff cuts and the Modernisation Programme being incomplete causes a backlog to accumulate even before the Pandemic struck as the table below shows.

| **Average time between issue and trial in weeks – County Courts** | | |
|---|---|---|
| **Year (as at December)** | **Small Claims Track** | **Fast Track and Multi-Track** |
| 2015 | 31.6 | 53.9 |
| 2016 | 30.4 | 52.9 |
| 2017 | 32.2 | 58.2 |
| 2018 | 35.2 | 58.8 |
| 2019 | 37.1 | 60.9 |

Source: HMCTS' Civil Justice Statistics 2000-2019[26] updated by reference to the December 2019 Parliamentary Briefing fn. 21).

This is also reflected in the time taken to process applications at the CCMCC in Salford according to HMCTS' performance data for the CCMCC where the delay as at 1 June 2020 in the total processing (working) days from receipt of an interlocutory application to an order or comment being typed is 53 days; almost 11 working weeks or 3 working months[27].

41 A similar, if not worse, picture appears in the Tribunals system. In the Employment Tribunals (where high levels of claims may be expected post-Lockdown) the Backlog is even greater with disposals at almost 6,000 for 2019-2020 with new cases at just over 10,000[28]. The growing Backlog is not going to become smaller anytime soon.

42 The third edition (1 June 2020) of the Employment Tribunals' FAQs lays bare the damage done by the Pandemic to the Employment Tribunal[29]. The Presidents of the English and Welsh Employment Tribunals and of the Scottish Employment Tribunals make clear (p. 18) that because of the complexity of the issues faced by the Tribunals their Road Map (as they call it) to a full re-opening of the Tribunals "is, in some respects, aspirational".

43 The Presidents' Road Map envisages measures to catch up on the hearings that were postponed from March onwards and makes proposals for managing the effects of medium-term social distancing. A brief summary of the highlights from the Road Map are (one should read the entire FAQs from the Employment Tribunals' Presidents to gain a full understanding):

- July/August
    a) Attempt to catch up on the postponed hearings using CVP where suitable (see discussion of CVP at paras 16 and 17, above)

[26] https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2019
[27] https://www.gov.uk/guidance/hmcts-civil-business-centres-performance-information
[28] See Parliamentary Briefing, fn. 21 at page 9 of the Briefing
[29] https://www.judiciary.uk/wp-content/uploads/2020/06/FAQ-edition-date-1-June-2020.pdf

b) Non-legal members of Tribunal panels to be trained in the use of CVP
c) Claims for unfair dismissal begin to be heard again

- September/October
  Some hearings involving claims of discrimination, detriments for blowing the whistle and the like will begin to be heard in greater numbers.

- November/December
  The road map envisages continued social distancing and widespread use of remote hearing technology via the CVP platform. In a mark of the scale of the task of resuming business as usual these 2 months are described as a "period of consolidation".

<u>There will be a 2 year breathing space to overcome the Backlog</u>

44 This argument deserves close attention and arises from anecdotal recollection of what happened after the Recession started in 2008. Those arguing for this say that civil claims arising from the Recession did not start until 2010.

45 This is not the case however as the table below shows (figures taken from HMCTS' Civil Justice Statistics at fn. 4 at table 1.1, reproduced below):

| Year | Claims issued |
|---|---|
| 2000 | 1,943,513 |
| 2001 | 1,085,637 |
| 2002 | 1,743,339 |
| 2003 | 1,718,883 |
| 2004 | 1,723,371 |
| 2005 | 1,968,894 |
| 2006 | 2,115,141 |
| 2007 | 1,944,812 |
| 2008 | 1,933,828 |
| 2009 | 1,803,221 |
| 2010 | 1,550,626 |
| 2011 | 1,504,243 |
| 2012 | 1,394,230 |
| 2013 | 1,445,339 |
| 2014 | 1,594,596 |
| 2015 | 1,562,065 |
| 2016 | 1,802,286 |
| 2017 | 2,048,446 |
| 2018 | 2,073,957 |
| 2019 | 2,029,248 |

46 There is no gap between the onset of the Recession toward the end of 2008 and any rise in claims. That did not happen largely due to the number of company and personal insolvencies, see paras 26 and 27 below.

47 An important difference between 2008 and 2020 is that in 2008 (or in the years following) there was no Government support for the economy on the scale of the Pandemic financial aid seen in 2020.

48 The reasons for the rise and fall in the numbers of claims issued are a complex combination of factors. Changes in Court procedures account for some of those; for example, the introduction of the Pre-Action Protocol for Debt Claims[30] at the end of 2017. In April 2013 the Government implemented Part 2 of the Legal Aid, Sentencing and Punishment Act, 2012 changing the funding basis for significant numbers of personal injury and clinical negligence claims. Then there is the state of the economy: as the economy expands businesses have more money to pay court fees and lawyers. Hence the table's evidence (para 45, above) of an increase in the number of claims issued reaching (almost) an all-time high in 2019 of over 2m claims. The first time such numbers have been seen since 2006.

49 New company insolvencies from 2010 to 2019 reached an annual high in 2011 of 20,381 falling back to a more typical 17,197 in 2019[31].

50 New personal insolvencies[32] saw total insolvencies (all procedures) of 135,045 in 2010 falling to 79,282 in 2015. However, from 2016 the number of individual insolvencies has progressively risen year-on-year from 90,265 in 2016 to 121,898 in 2019. It is worth noting that on 6 April 2016 the process for petitioning for one's own bankruptcy was changed under the Modernisation Programme from a paper-based process to an online system. It would be revealing to investigate whether there was any connection between this increase in personal insolvencies and the introduction of online systems that simplify and render easy the commencement of court procedures; especially between 2016 and 2019 when the economy was expanding.

51 Thus a significant part of the Tsunami will be claims brought by companies and individual traders able to afford court fees due to Government COVID support measures.

52 Where does all this leave the argument that the civil justice system will be able to cope with the Tsunami of Civil Litigation because of a 2 year gap such as occurred after the Recession began in 2008. We suggest that that argument is beached.

53 In addition to there being no two year gap or "breathing space" the other factors that align to create the Backlog and the coming Tsunami are:

- Further reduction in HMCTS Staff numbers
- Stalled Modernisation Programme
- Insufficient IT
- Government loans and exhortations to resolve disputes
- Suspended possession claims

[30] https://www.justice.gov.uk/courts/procedure-rules/civil/pdf/protocols/debt-pap.pdf
[31] https://www.gov.uk/government/statistics/company-insolvency-statistics-october-to-december-2019
[32] https://www.gov.uk/government/statistics/individual-insolvency-statistics-january-to-march-2020

- 88% of all cases that might be expected to start in the past few months are likely to re-start
- No, or no effective, IT in the County Courts.

All point to an approaching Tsunami of new claims which is just over the horizon.

Conclusions of Part I

a) The reduction in court activity reveals a landscape very different to the one envisaged by Lord Woolf in The Final Report of his Access to Justice Inquiry[33]. In that report he described the New Landscape[34] as one in which cases are dealt with justly being the embodiment of several principles one of which was expedition in proceedings. That justice delayed is justice denied is axiomatic.

b) The current landscape is revealed as lacking in effective IT and in which a Backlog is followed by a Tsunami of new claims. Neither Lord Woolf nor anyone else could have envisaged how a novel virus would cause these fault lines to appear so dramatically.

c) A key recommendation made by Lord Woolf (for effective IT to underpin his recommended changes) has yet to be brought in as envisaged by him. The same strident calls for effective IT were still being made by Lord Justice Jackson, as he then was, in his 2009 Report (chapter 43) in which similar robust recommendations for effective IT were made[35].

## PART II: Finding Solutions

54 The search for effective solutions

The Pandemic and the Lockdown has challenged and continues to challenge the nations of the Earth in a way nothing has since the 'Flu Pandemic of 100 years ago.

55 This battle could not be won by Government intervention alone. It required the entire country to come together to beat the virus. So far that has worked and the UK threat level had recently been reduced from 4 to 3.

56 Yet the virus has laid the seeds of arguably greater challenges. As the Furlough scheme is withdrawn toward the end of this year jobs which have been sustained by Government funding will be seen no longer to exist. Businesses will be required to repay Government backed loans as well as making a profit to meet their overheads and bring an income for their owners.

57 The Rule of Law itself may be challenged if citizens cannot achieve swift access to what they consider approximates to justice. This applies equally to criminal law, employment disputes, consumer claims and business disputes.

[33] Access to Justice Final Report, 1996

[34] Section 1, p. 4, para 8

[35] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf, see the recommendations relating to IT at p.441 in particular at para 7.1(iv): "e-working has been introduced across the High Court in London, it should be rolled out (suitably adapted) across all county courts and district registries in E&W."

58 For solutions to be found the country must again come together. In the civil justice system money alone will not solve the issue.

59 Government guidance and leadership

The Judiciary, MoJ/HMCTS, the Legal profession, citizens and the private sector must all work together to solve the consequences of this once in a century event. As the Cabinet Office explained in a statement published on 7 May 2020 entitled: *"Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency"*[36] (the Guidance), see paragraph 11:

*"The Government is asking for an extraordinary response from everyone in the UK in their personal and work lives to overcome the emergency. An extraordinary response is also required from individuals, businesses (including funders) and public authorities in their contractual arrangements. Contractual arrangements play an important role in the functioning of our country and our economy – including providing vital works, goods, services and premises, supporting our public services and enhancing and maintaining our national infrastructure."*

60 The search is for proven solutions which can be applied with imagination and energy and, crucially, live before the end of 2020 or very early in 2021 in time to overcome the Tsunami of litigation

61 However the limitations of the Guidance should be noted before considering its detail. These limitations[37] are:

a) The Government can only lead: citizens, HMCTS and all other stakeholders in the civil justice system must, as the country did during the worst of the Lockdown, support and implement the Guidance.
b) The Guidance is limited to England and does not apply in the devolved administrations, which, so far as the author can see, have no equivalent[38].
c) It does not extend to contracts which already have:
    i) specific guidance or procurement policy notes issued by the Government (or any public or regulatory authority);
    ii) any specific support or relief available:
        - in the relevant contract (for example relief given in express provisions in the contract);
        - in law, custom or practice (including any equitable relief), or
        - from the Government in response to the Covid-19 emergency, including loans and grants, guarantees, financial support for workers and revised tax arrangements.

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36 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf

37 The Guidance, paras 6-9 inclusive

38 The Scottish Government has issued guidance to Public Authorities but there is no mention of ADR: https://www.gov.scot/publications/coronavirus-covid-19-supplier-relief/. We cannot find any advice similar to the Guidance from the devolved administrations in Wales or Northern Ireland.

iii) any other legal duties or obligations with which a party to a contract is bound to comply and any national security interests.

d) Other limitations are also applied (see paras 8 and 9) but the above are the principal exclusions from the Guidance.

62 These are important considerations and in any rush to find solutions such exclusions cannot be overlooked.

63 All that being said, the Guidance is useful and should inform the search for solutions. In particular where it is said at para 15(m), (n) and (o) of the Guidance *"that responsible and fair behaviour is strongly encouraged in relation to"*:

*(m) commencing, and continuing, formal dispute resolution procedures, including proceedings in court;*
*(n) requesting, and responding to, requests for mediation or other alternative or fast-track dispute resolution; and,*
*(o) enforcing judgments.*

64 In para 17 the Guidance sets out the response expected in the face of the Backlog:

*"It is recognised in particular that disputes, especially a "plethora of disputes", can be destructive to good contractual outcomes and the effective operation of markets. Further to paragraphs 15(m) and 15(n), the Government would strongly encourage parties to seek to resolve any emerging contractual issues responsibly – through negotiation, mediation or other alternative or fast-track dispute resolution – before these escalate into formal intractable disputes. For example, the Construction Industry Council and the Royal Institution of Chartered Surveyors (RICS) have developed the Low Value Disputes Model Adjudication Procedure. RICS also developed the Conflict Avoidance Pledge (and an associated Conflict Avoidance Procedure) for early resolution of disputes and is expected to launch a fast-track (15-day) adjudication service which will have capped fees."*

In para 25 the Cabinet Office explain the Guidance takes effect from 7 May 2020 and will be reviewed on 30 June 2020, if not before.

65 <u>What cases should be the subject of ADR in E&W?</u>

The largest number of civil cases are debt claims of one kind or another and are to be found in the procedural regimes known as the Small Claims Track and the Fast Track.

The key features of each Track are set out in the table below.

| Features /Track | Small Claims Track | Fast Track |
|---|---|---|
| Rules | CPR Part 27 and PD27[39] | CPR Part 28 and PD28[40] |
| Scope (by claim value) | All claims up to £10,000 | Claims between £10,001 and £25,000 |
| Number of cases allocated to each Track following the filing of a defence in 2019 (per the revised official statistics, rounded[41]) | 114,460 | 64,290 |
| Unique feature 1[42] | Relatively fast disposal at a hearing (37.2 weeks from issue to hearing) in a private room appointment before a District Judge | Disposal before a Circuit Judge (or equivalent) at a hearing lasting no more than 1 Court day (4.5 hours) and take 60 weeks from issue to a hearing. |
| Unique feature 2 | No costs are payable by either party to the other save in very limited circumstances e.g. travelling expenses. | Costs are payable by the losing party to the winner in accordance with a scale of fees. |

66 This table indicates that there are 178,750 defended cases that do not settle before allocation to Track. It will be noted that this is pre-Pandemic and that, see above, the Tsunami is likely to lead to much higher numbers of this category of case than seen in 2019. In addition there are the possession cases. Unfortunately HMCTS do not centrally record the number of possession cases which are defended and the majority of courts do not appear to record this data[43]. Anecdotal evidence is that fewer than half of Defendants file a defence form but this may have more to do with the questions asked in the defence form; the form using technical language and not really Defendant focused.

67 The numbers in the SCT and FT Tracks can be compared with those cases allocated to the Multi Track which is for claims valued at more than £25,001 and of which in 2019 there were 13,000 claims.

68 If the Backlog is to be found anywhere then it is in the Employment Tribunals, SCT, FT and possession claims primarily dealt with in the County Courts being those courts worst affected by the lack of any or any effective IT.

[39] Part 27: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27

[40] Part 28: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part28

[41] See table 1.3 in the Excel reached via https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2020

[42] For the waiting times before hearing see link in fn. 41 and table 1.5 in the Excel. Waiting times have been steadily increasing pre-Pandemic.

[43] Information, Advice & Representation in Housing Possession Cases (April 2014) University of Oxford and University of Hull at page 38, fn. 113 https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf

69 The parties in those cases are of course already encouraged by written notices to participate in ADR, typically mediation. Although as we saw in the case review above, in the Court of Appeal decision of Lomax (see para 90 below) a form of ADR, JENE, can be compelled. Sir Geoffrey Vos has recently suggested in McParland, see para 92 below, that the same provision in the CPR that enables parties to be compelled to participate in JENE could apply equally to mediation, despite Halsey.

70 Looking again at the official statistics it is difficult to understand (from table 1.5 in the Official Statistics) how many SCT and FT cases do not settle before trial. This is because the number of trials in the FT and the MT is combined. What can be seen from table 1.5 is that the total number of trials is 64,754, including MT trials. For the purposes of this White Paper we will assume that of the 64,754 trials only a small proportion of those are MT trials as that Track sees much lower cases than the SCT and FT. We assume therefore that of the 178,750 cases allocated in 2019 say 5,000 of those are MT cases and that therefore approximately 60,000 in the SCT and FT do not settle and proceed to a hearing.

71 That leaves almost 120,000 of the allocated cases that do settle. But so far as we can see there is no data available to explain why those cases settle. We therefore cannot determine how well the present procedure for encouraging parties to engage in ADR is working to bring about settlement as opposed to negotiated settlements at the door of the court, as it were, and with much greater expense incurred by that point. This data is relevant to understanding whether a system of presumptive ADR or some other ADR mechanism at the point a Defence is filed would serve to reduce demand on Judicial time[44].

72 Fortunately we have found some data, see the link in fn. 44. This was provided by HMCTS to the author of the CJC ODR Advisory Group's paper on policy issues, this is reproduced in the table below:

| **Small Claims Mediation – April to October 2013** | | |
|---|---|---|
| Total no. of referrals | Total number of mediations | % successfully settled at mediation |
| 26,670 | 5,792 | 65% |

73 One must bear in mind the following in relation to that data:

a) It represents only a 6 month period
b) That is, nevertheless, a significant period in terms of the cases subject to that study. Because at the outset of that study, on 1 April 2013, due to a policy change, the maximum claim value for cases allocated to the SCT increased from £5,000 to £10,000.

[44] The same criticism of lack of data as to the efficacy of ADR was made by the CJC's ODR Advisory Group (Dr Sue Prince) in a paper on policy issues in this respect published in July 2014. https://www.judiciary.uk/wp-content/uploads/2015/02/ODR-policy-paper-2014SP-Jan2015.pdf See p.7, para 3.2: *"We are not aware of any assessment as to whether this approach is operating effectively as there is little published research in this respect."*

c) The reference period took place over 7 years ago and the public are now more aware of ADR. In addition, the Legal profession and Judiciary are more positive toward the use of ADR
d) Each mediation is conducted by telephone
e) The mediator was a civil servant employed by HMCTS and trained for the purpose
f) Each mediation lasts an hour

74 Data from the NHS Resolution Mediation Programme Evaluation Report
Since 2016 the NHS Agency which manages, inter alia, clinical negligence claims against NHS Trusts has developed a mediation programme. On 20 February 2020 the agency (NHS Resolution) published a report evaluating the programme which can be found here[45].

75 Key findings from the report were as to the time when mediation was most successful. On page 10 the report notes:

*"The analysis of the mediation outcomes indicates that cases settled at the pre-action letter of response stage are more likely to settle on the day of the mediation, with a 71.1% success rate, than at any other stage in the life cycle of the claim."*

The second most successful stage is at directions when 69.9% of mediations settled on the day. The key conclusion from this report appears to be that the sooner mediation is attempted the more likely settlement will be achieved.

76 The experience of participants in the NHS Resolution mediation programme was also surveyed and is set out in detail on p 14, one of the principal intangible benefits of mediations was found to be the capacity of mediation as a form of ADR to:
*"[Give] the opportunity to injured claimants, patients or relatives of deceased patients to speak to trusts/healthcare professionals to explain what changes, if any, have been made, and to offer direct apologies. These non-tangible benefits and the impact of the mediator are frequently described by the participants of mediation as the positive benefits of the process that cannot be replicated with other forms of ADR, such as a round table meeting with lawyers."*

77 Mediation is offered for all claim values from £1 upwards.

78 606 cases were mediated from December 2016 until 31 March 2019.

79 Of the 390 cases mediated during 2018-2019 only 72 did not settle giving a success rate of 81.54% clearly showing that ADR, in this case, mediation works. The saving in terms of legal fees, disbursements and other expenses together with Judicial time would be very significant.

80 During the same period DEF supported the NHS Resolution Mediation programme by providing a Platform for the management of those mediations. The responses of the

[45] https://resolution.nhs.uk/wp-content/uploads/2020/02/NHS-Resolution-Mediation-in-healthcare-claims-an-evaluation.pdf

various parties were mixed and efforts to progress were hindered by various factors. A full report was prepared in December 2019 and accompanies this White Paper and considered the issues that arose in detail. Its conclusions were:

a. The Claimant community has shown a wish to rely on a multiplicity of platforms to manage these mediations but this is not universal. There are exceptions and Slater + Gordon and DAC Beachcroft are perhaps the leading exceptions. However they are not alone and another Claimant firm, Morrisons Solicitors, will be joining the Platform in January 2020 and intend to use DEF for bringing ADR to clinical negligence claims.

b. The difference between these law firms and most others is, we believe, a recognition of the Law as a business and the need to work efficiently from start to finish.

c. The mediation that used DEF illustrates how the system accelerates ADR cycle times. That mediation commenced on the Platform on 21.11.19 and was heard just 13 days later on 04.12.19. The faster cycle times enable ADR providers to manage larger volumes of ADR. This is also a feature of all other ADR proceedings managed by DEF.

d. To maximise the business advantages of DEF it is, in our view, important to integrate the Platform within the entire process as an end-to-end solution. Hence our commitment to supporting claims managers working for NHS Resolution (see below).

e. There could be a case for deploying DEF at an earlier stage using DEF's Pre-Action module. Seamless data transfer is possible using DEF's Convert function to transfer data from Pre-Action to Mediation thereby enabling further efficiencies to be achieved as cases develop into mediation or settle in Pre-Action. The Platform drives parties' behaviour and that seems to be toward settlement. Using Pre-Action may therefore be a significant gain for NHS Resolution. The cost of the Pre-Action module is charged by DEF to the commencing solicitor. This approach strikes us as similar in approach to the connected use of data by an initiative called Connect Care being used in a number of NHS contexts in the south-east of London, see appendix 8.

f. DEF is capable of generating anonymised data feeds. This is a feature which was not utilised in the 2019 Pilot and may be of interest to NHS Resolution. If there are a plethora of other platforms a bespoke anonymised data feed would not be available.

g. DEF notes the approach proposed by TM, supported by DAC Beachcroft, to extend the Pilot. We are willing to support an extension of the 2019 Pilot if NHS Resolution were so minded. Some of the issues raised by participants in the 2019 Pilot would need to be addressed. Nevertheless we do not believe any of the issues raised are insurmountable. For example, we are

willing to train claims managers at NHS Resolution and indeed other of the Panel firms, free of charge, if this will assist.

81 The advantage of using DEF at the pre-action stage is borne out by the NHS Resolution Evaluation report which shows that 71.1% of the mediations settled on the day if they took place when or shortly after a Letter of Response was served. This makes common sense: bring the quarrelling parties together before they dig their heels in.

82 The big lesson from the NHS Resolution Online Pilot is, that left to their own devices, parties will use a wide range of platforms (in truth their firms' extranets) leading to inefficiencies and extra costs causing delay in the management of bulk volumes of mediation work. In the end only mediation service providers (Schemes) can introduce efficient working via a single platform but given the relatively low numbers of mediations at present Schemes are unlikely to need such a platform until volumes increase significantly and the commercial necessity for efficient working takes over.

83 The current state of policy and the Common Law

In the 8 years since 2012 there have been some 10 consultation responses, reports or reviews recommending greater use of ADR and technology. Very little has been done to implement their recommendations.

84 In contrast to the static response by Government to policy proposals, during the same period the Courts have been very active in requiring parties to engage in ADR.

85 In two appeals heard by the Court of Appeal in 2004 and commonly known by the name of the first of those appeals (Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576) Lord Justice Dyson held that ADR was to be left to the parties with only gentle encouragement by Courts, in these famous words he said, giving the judgment of the Court (at para 9):

*"We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see Deweer v Belgium (1980) 2 EHRR 439, para 49."*

86 However mediation does not preclude access to the courts because if parties do not wish to settle during mediation they can opt to continue to trial before a court. This point has taken some 16 years to be recognised in case law.

87 Subsequently Sir Alan Ward, one of the other two Judges in the Court of Appeal deciding Halsey, opined on a later occasion:

*"You may be able to drag the horse (a mule offers a better metaphor) to water, but you cannot force the wretched animal to drink if it stubbornly resists. I suppose you can make it run around the litigation course so vigorously that in a muck sweat it will find the mediation trough more friendly and desirable. But none of that provides the real answer. Perhaps, therefore, it is time to review the rule in Halsey v Milton Keynes General NHS Trust…Perhaps some bold judge will accede to an invitation to rule on these questions so that the court can have another look at Halsey in the light of the past 10 years of developments in this field."* Per Sir Alan Ward at para 3 of Wright v Michael Wright Supplies Ltd [2013] EWCA Civ 234.

88 Since Halsey there have been cases taking a stronger line toward the robust encouragement of ADR. For example, Garritt-Critchley v Ronnan & Anor. [2014] EWHC 1774 (Ch)

*"This gets back to the point about parties being too far apart. Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience."* per HHJ Waksman, at para 22 of his judgment.

89 In the past 10 months there has been an explosion of Judicial activity in this arena with no less than 5 decisions being handed down in the space of the first five months of 2020. These cases are summarised below.

90 **Lomax v Lomax [2019] EWCA Civ. 1467**
Judgment 06.08.19: compulsory Neutral Evaluation under CPR 3.1(2)(m)

91 **EAXB v University Hospitals of Leicester NHS Trust [2020] (D96YJ039 – Kings Chambers' website)** Judgment 06.01.20: D refused costs for failing to make any offer at a JSM (see Counsels' note)

92 **McParland v Whitehead [2020] EWHC 298 (Ch.)**
Judgment 14.02.20: Lomax may apply to mediation despite Halsey, Sir Geoffrey Vos at para 42

93 **BXB v Watch Tower and Bible Tract Society of Pennsylvania & Ors [2020] EWHC 656 (Admin.)** Costs judgment 11.03.20: indemnity costs against D for period after D's refusal to engage in ADR

94 **DSN V Blackpool FC [2020] EWHC 595 (QB)**
Costs judgment 20.03.20: indemnity costs against D from point Court ordered ADR

95 **Wales v CBRE and Aviva [2020] EWHC 1050 (Comm.)**
Costs judgment 30.04.20: Ds recovered reduced costs from C because Ds refused to mediate

96 The Judiciary are showing a greater appetite for the use of ADR than previously. With the exception of Sir Geoffrey Vos' obiter in McParland and the Court of Appeal in Lomax,

some would argue that the other cases simply apply the full letter of the judgment in Halsey; be that ratio or obiter.

97 ADR in the civil justice system

We have identified the greatest need being in the Employment Tribunals, SCT, the FT and residential possession claims. In 2019 the SCT, FT and residential possession claims accounted for 315,236 cases. Some reduction may be required to take into account specified and unspecified claims for personal injury and clinical negligence.

98 In order to manage those cases it will be necessary for most, if not all, to be diverted out of the Courts and into ADR of one type or another.

99 This is not a novel solution. In the Medieval period the Courts of Pied Poudre were set up by merchants trading in market towns as a quick and cheap way of resolving their differences. In the 20th century the Tribunal system developed as another quick and cheap solution to the need to find a dispute resolution forum for social security benefit issues, employment disputes and a whole swathe of other issues arising from the growth of State provision in education and social security benefits.

100 The only question remaining is how to provide a credible and well-managed ADR system which commands the respect of Government, Judiciary and the citizen.

101 When considering whether such schemes can be viable (and we consider, below, ADR schemes that failed or have yet to attract custom) at its heart is this question posed to the author by Kerry Calahane, an Associate at Browne Jacobson[46]:

"*What are your views on refusing to mediate defendable cases where the costs of mediation will exceed the value of the claim/costs of proceeding to trial?*"

102 The current state of the law seems to be that parties cannot refuse to mediate and the words of Griffiths, J. in BXB (see para 93 above) are apt to re-quote:
*"The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant "continues to believe that it has a strong defence". No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution."*

103 An analysis of the current direction of travel in Judicial thinking can be found in the author's article published in the Law Society's Gazette in November 2019[47].

104 The optimum moments for diverting cases out of the civil courts and into ADR would appear, from the statistics we have presented (see, NHS Resolution's Evaluation Report at paras 74-82 inclusive, above), to be:

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46 https://www.linkedin.com/feed/update/urn:li:activity:6666496415566573568?commentUrn=urn%3Ali%3Acomment%3A%28activity%3A6666496415566573568%2C6671067270447415296%29

47 https://www.lawgazette.co.uk/practice-points/adr-the-time-has-come/5102074.article

a) At the close of the Pre-Action stage;
b) When a Defence is served;
c) At the directions stage; and,
d) In the period of 28 days before trial.

105 However, mere diversion of cases into ADR will not be enough. The only way to manage these cases is to streamline the entire process from start to finish. In short, to deploy a platform and use it to expedite cases by using online management of ADR.

106 This approach drove the successful transformation of the global freight shipping industry from relatively small freight handling companies stowing barrels and the like in the holds of ships to an efficient and effective system using containers of (almost) uniform size from the ships to the dockside and beyond on rail carriages designed for the purpose.

107 The benefits of technology continue to transform the shipping industry today. Managing trade on paper with manual handling of documents, even when sent by email, fax or post, slows down logistics and facilitation of trade. There are also significant cyber-security risks attendant upon these methods of transacting business.

108 In 2017, Maersk and IBM developed the supply chain called TradeLens, which is run using blockchain. Some of the largest carriers, port operators and industry actors in the global shipping supply chain have joined this digital shipping network. In March 2020, Standard Chartered joined TradeLens as the first banking and financial services institution, which demonstrates confidence in this blockchain-enabled digital container logistics platform.

109 IBM stated that the TradeLens platform will reduce the cost and complexity of trading. IBM and Maersk want the blockchain technology to manage and track the trail of millions of containers in the world. It is a neutral platform, accessible to all stakeholders, which moves the technology and the shipping industry forward by cooperative data-sharing.

110 In 2019 there were 113,654 personal injury claims for a specified sum of money, see the Official Civil Justice Statistics referred to earlier in this White Paper. In accordance with the policy of HM Government the level of the SCT for these claims has been increased from £1,000 to £5,000[48]. It is not clear how many of the 113,654 cases from 2019 fall into the increased jurisdiction of the SCT.

111 That reform (part of the Whiplash Reform Programme) has not yet been implemented because the Government decided that it would manage those claims using an online platform called the OICS which has been built by the MIB. The development has been funded by Insurers as one of the major stakeholders in the personal injury sector. Due to be launched in April 2019 it has been delayed because:

a) the rules governing the OICS have not yet been drafted by the CPRC;
b) issues relating to the platform (largely overcome now); and,

[48] Currently it is planned to implement this increase in April 2021

c) the need to recruit mediators to support an opt-out ADR scheme for which a competitive tender was run in 2019.

This was not the first time an opt-out ADR scheme has been planned. As we have seen (para 13(b)(v), above) the intention was that ADR via opt-out should be introduced in the SCT for claims up to £300 from April 2019. Unfortunately the introduction of this ADR system was postponed to December 2019 and then postponed again for reasons connected with providing the legal profession with access; as the CEO of HMCTS explained to the Chair of the Public Accounts Committee in a letter dated 31 July 2019:

*"Four of the commitments we made have not been met on time. First, we said that 'The Civil Money Claims mediation pilot will launch with an "opt out approach" for defended claims up to £300 in value. The pilot is expected to last for six months.' While this pilot is technically ready for deployment, we have decided to launch it at the same time as another piece of work, allowing legal advisers to support the work of the civil court, which is not yet ready; both will be launched together when the second part is ready."*[49]

The opt-out approach does show however, a commitment on the part of the Judiciary (see the Master of the Rolls' speech of June 2019 at fn. 11), HMCTS and Ministers to divert cases out of the civil courts to ADR (namely, via an ADR opt-out) which is not compulsion. The opt-out approach nevertheless makes more likely that ADR will be used in most, if not all, cases.

112 OCMC was intended to become an end-to-end solution by June 2020[50] but that clearly has not happened; probably due to the failure to secure further funding for the Modernisation Programme. What happened instead are sensible but relatively minor adjustments to procedure that came in an update to PD51R dated 15 April 2020[51].

113 In contrast to the approach to the OCMC Government has decided not to introduce any ADR into the OICS[52]. The Lord Chancellor, Robert Buckland, explained in the Written Statement:
*"…in the event, no practicable solution which gave sufficient coverage of ADR for claims could be found. As a result, ADR will no longer be part of the online Service. Instead, we will ensure access to justice by developing bespoke processes to enable litigants to go to court to establish liability."*

We understand that the reason for this changed approach is that there are not enough mediators to support the ADR opt-out. My correspondence[53] with Ministers (Lord Keen, MoJ spokesperson in the House of Lords) was unable to change their stance. This

[49] Letter from CEO of HMCTS to the Chair of the PAC 31 July 2019 at: https://www.parliament.uk/documents/commons-committees/public-accounts/Correspondence/2017-19/HM-Courts-and-Tribunals-Service-190731.pdf
[50] See para 19 of a speech by the Master of the Rolls in June 2019: https://www.judiciary.uk/wp-content/uploads/2019/06/mr-oxford-cpr-conference-june-19.pdf
[51] https://www.judiciary.uk/announcements/119th-practice-direction-update-to-the-civil-procedure-rules-online-civil-money-claims-in-support-of-the-covid-19-effort/
[52] See the Written Statement to the House of Commons by the Lord Chancellor on 27 February 2020: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-02-27/HCWS133
[53] See this correspondence reproduced in an appendix to this White Paper.

exchange of correspondence obviously took place before Lockdown and the issue should be revisited urgently.

114 Conclusions of Part II

a) Without ADR firmly in the centre of the civil justice system and managed online the civil courts will be overwhelmed. The Tsunami will begin to interrupt the civil justice system from September 2020 with successive waves arriving from that month onwards as Lockdown measures concerned with civil justice are progressively removed.

b) Our enquiries of the ADR service providers working with DEF have found that there are sufficient ADR providers able and ready to provide ADR in the OICS. More ADR neutrals have been and continue to be trained during Lockdown and not only in face-to-face ADR processes but also in managing ADR hearings online use video conferencing platforms managed via the DEF platform.

c) A change in Government policy toward the ADR element in the OICS is urgently required.

## PART III – what can we learn from overseas experience?

115 As with the medical treatment of COVID-19 there is much that this country can learn from the approach of overseas jurisdictions toward Backlog clearance.

116 COVID-19 and large pre-Pandemic backlogs are common to many civil courts around the world. Years of under-investment cannot be caught up quickly.

117 The response of 13 countries to ADR in civil claims is set out below:

| Country\Approach | Voluntary | Exhortation | Presumed | Compulsion | Comments |
|---|---|---|---|---|---|
| **Brazil** | x | | | | Limited take-up |
| **British Columbia** | x | | | | Online: Civil Resolution Tribunal – non-binding adjudication – limited to cases up to £3,000 in value. |
| **California** | | | x | x | Different counties of the State of California taking different approaches |
| **China** | x | | | | Predisposition toward negotiated settlement is a big part of Chinese culture |
| **England & Wales** | x | x | | x | In civil litigation: voluntary and by exhortation, at present although JENE can be compelled under the |

| | | | | | |
|---|---|---|---|---|---|
| | | | | | CPR[54]. Compulsory in Family and commercial construction. |
| **EU** | x | | | | Low take-up, UK is leaving the EU on 31.12.2020 thus no longer available |
| **Greece** | | | | x | Too early to say |
| **Holland** | x | | | | Failed due to low take-up |
| **India** | | | | x | Commercial litigation only |
| **New York State** | | | x | | On the verge of failure |
| **Ontario** | | | | x | |
| **Scotland** | | | | x | Considering compulsion by way of pre-mediation assessment in cases less than £3,000 in value (Simple Procedure) |
| **Turkey** | | | | x | Managed online – State built its own ADR management platform |

118 Not all of these schemes have been successful. Notably those which are not integrated in some way into the civil justice system of the country in question and/or which do not have robust gateways into the platform are seen to fail, e.g. Holland's Rechtwijzer. These are not the only reasons for the Rechtwijzer's failure but these are, perhaps, key issues to consider when designing a successful ADR scheme.

119 Despite having robust gateways other schemes fail as they do not have the resources/infrastructure to maintain success. New York State's presumptive mediation approach (increasingly seen in other States of the USA too) can be seen as an example of a scheme which is collapsing under the weight of its own success. In New York State the neutrals were working pro bono and unable to commit the time to manage the increasing volume of mediations. In addition the mediations were conducted off line. Consequently NY State is in the process of finding the budget to pay the neutrals and exploring the design of an online ADR management platform.

120 Conclusions of Part III

a) The lessons from overseas are invaluable whether positive or negative.

b) In developing a system to manage ADR in the OICS the key determinants of success are seen from this analysis to be:
   - Robust gateways e.g. an opt-out system proposed for the SCT and OICS;
   - A sufficient number of neutrals;
   - Neutrals paid by the State; and,
   - Online management of the ADR process.

[54] It was recently suggested, obiter, by Sir Geoffrey Vos in McParland v Whitehead (see para 92, above) that mediation might be capable of compulsion under the CPR.

## PART IV – Recommendations for action

The following would, we believe, do much to avoid the courts being overwhelmed.

a) Increasing the use of ADR in the civil justice system.

b) Appointing more neutrals. A blended mix of HMCTS employed neutrals and private providers may work best.

c) Training more neutrals.

d) Putting all ADR online in a way that complements and integrates with existing platforms e.g. OICS.

e) Signposting the wide range of online resources available to users via an intuitive Solution Finder.

f) Taking into account the learning from overseas jurisdictions: gateways must be robust and integrated with the civil justice system.

g) Aiming to have the solution Go Live by January 2021.

h) Anonymised data must be captured and a programme of empirical research designed before the solution goes live to enable debate.

## PART V – Further reading

121 For those wishing to explore these issues further we recommend the following further reading.

122 These studies are in some respects dated but remain worth reading for the analysis of ADR schemes based on empirical data. Some of the conclusions have been overtaken, and in some instances contradicted, by more recent empirical studies such as the HNS Resolution Evaluation Report, see above.

123 The date at which the reports were prepared (early 21st century) means that some of the recommendations (e.g. better prepared information leaflets) would now be realised via an intuitive web site or Solution Finder.

124 All the reports in this selection use very small datasets drawn from a limited number of cases.

**Evaluation of the Birmingham court-based civil (non-family) mediation scheme** [2006]

Lisa Webley, Professor of Empirical Studies, University of Westminster

Pamela Abrams, University of Westminster

Sylvie Bacquet, Lecturer, University of Westminster

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349874

This scheme focused on FT case but had a very small source of information, ca 250 cases.

This report is a detailed examination of how this scheme operated and the experiences of neutrals, lawyers, parties and Court staff. Commissioned by the Department of Constitutional Affairs (DCA, as the MoJ was then called) the report highlights issues such as the resistance of lawyers to advise clients to use mediation for fear of losing fees (p.81).

In this scheme each party paid the Court £75-£250 on a sliding scale to have their mediation.

6.4.1 p. 154: fees in SCT would have to be ca £110 or £50 per party

**Institutionalising mediation? An evaluation of the Exeter Court small claims mediation pilot** [2007]

Professor Sue Prince, Exeter University

https://core.ac.uk/download/pdf/12826099.pdf

This scheme operated in the SCT with, again, a small number of cases, ca 255 referrals of which 136 proceed through mediation.

This paper explores the experiences of users and mediators in a small mediation pilot commissioned by the DCA and makes a number of salient points. It has a useful analysis about

the Judicial time saved through ADR. In this scheme, during 2005, the DCA paid each mediator ca £83 for each mediation undertaken.

There are also useful insights about the issue around gateways to mediation. On p. 11 it is said that because of the Court of Appeal's decision in Halsey (see above):

*"….the DCA requested that court documentation be rewritten to make it more apparent that the mediation service is voluntary. The difficulty was that this emphasis led to problems which impacted directly on the take-up of the mediation scheme. Previously it had been an independent decision of the judge at allocation as to whether the case was suitable for mediation, at which time an order was sent to the parties requiring them to attend a mediation session. With a more voluntary approach parties were invited, rather than ordered, to attend a mediation. The nature of the invitation led to a high rate for parties who had been referred not turning up to the mediation and not telling the court beforehand that they were not going to attend.*

**Evaluation of the Small Claims Online Dispute Resolution Pilot** [2008]

Professor Avrom Sherr, University of London and the Institute of Advanced Legal Studies

Marc Mason, Lecturer, University of Westminster

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407631

This reviewed 25 cases that used a pilot of online dispute resolution which was commissioned by HMCS (as HMCTS was then known) findings included:

Gateways are considered on pages 11 and 12.

The conclusions (p.2) include:

- Users reported finding the system fairly easy to use, however the mediator noted a number of parties faced difficulty. Specific problems included the system timing out, the registration process, spam filtering, a lack of transparency and parties who had insufficient IT ability.
- Solutions might include selection and training of mediators, screening of parties, information resource and fine tuning of the system to remove technical problems. The system might be considered as part of a range of tools available to the mediator rather than a standalone solution.
- Any future evaluation would need to consider a larger number of cases and would benefit from inclusion of usability testing of the system.
- Future research would also be more fruitful if data capturing was considered at an early stage particularly given the richness and reliability of data potentially available.

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