Factsheet 21: The Small Claims Track

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In 1995 the ceiling figure below which civil claims were referred automatically to the small claims procedure stood at £1,000. In January 1996 this was raised to £3,000, and in April 1999 it went up again to £5,000. This ceiling now applies to all claims, apart from those for personal injury and housing disrepair (where the limit is pegged at £1,000). Although there were proposals in 2007 to increase all of these limits, it appears that, following consultation, things are being allowed to stay as they are for the time being.

The intention behind both increases was, of course, to reduce the number of cases that had to be tried in open court. For experts, though, they have also had the unwelcome effect of discouraging the use of expert evidence in those cases that have been newly brought within the scope of the alternative procedure.

Origins

The small claims procedure has been around since 1973. It is one of the three methods by which money claims are dealt in the county courts of England and Wales[1], the other two being 'open' trials. In comparison with them, it is cheaper to invoke, more informal in conduct, more speedy and certain in achieving a result, and carries with it considerably less financial risk. For all these reasons it is much more popular with litigants. Whether the government was entitled to use this as a justification for further raising the ceiling to £5,000 is, however, another matter.

The procedure originated in a long-standing provision to refer claims of any size to arbitration if both parties agreed. In 1973 it became possible for plaintiffs claiming less than £75 to apply for this to happen, and in 1980 use of the procedure was made automatic whenever a defence was filed in claims for less than £200. Throughout the 1980s the number of disputes settled in this way steadily increased, and there was a further acceleration during the early 1990s. In 1998 there were 98,692 small claims hearings and they outnumbered open trials by more than 5 to 1.

Allocation to the small claims track

The intention behind the small claims procedure is that it should provide individuals with a relatively simple means of settling their disputes which is cheap, quick and accessible. Notwithstanding that it is also much used by companies chasing payments from consumer customers, this remains its chief function.

Although the procedure still bears some of the attributes of an arbitration, it is a judicial process like any other. This much is apparent from the reforms of the civil justice system initiated by Lord Woolf. Nowadays all claims, large and small, kick off in the same way, and no claim is assigned to the small claims track, as it is now called, save by order of a court. Before that can happen the claimant must surmount two initial hurdles. First, the particulars provided on the claim form must satisfy the procedural judge that there are reasonable grounds for bringing the claim – otherwise the judge may strike out all or part of it. Second, the claimant may find that summary judgment is entered against him on the basis that the claim has no real prospect of succeeding at a full hearing, should one be held.

In this connection it is worth noting that under the Civil Procedure Rules (CPR) 1998 it is no longer the case that claims are assigned to the small claims track solely on the basis of their monetary value. While there is a presumption, certainly, that those worth £5,000 or less (or in personal injury and disrepair cases, £1,000 or less) will be allocated to this track, other considerations may result in them being assigned elsewhere. For example, cases of harassment or unlawful eviction by a landlord will never be dealt with as small claims whatever their monetary value, and it is most unlikely that any claim alleging dishonesty would be tried that way. Conversely, there is provision for claims exceeding the financial limits to be treated as 'small' claims if the parties agree to that happening, although such claims may not be subject to the same rules on costs at their conclusion.

When allocating a case to the small claims track the procedural judge sets both a date for the hearing and the amount of time allowed for it. At this stage, too, the judge gives automatic standard directions, which include a direction as to the documents each party is to provide to the other and to the court, and these will generally need to be delivered at least 14 days before the hearing. The judge will also give such other standard directions as are from time to time prescribed by the Practice Direction (there are additional standard directions for use in cases involving building disputes, holiday and wedding claims, cost of vehicle repairs, etc.), and will consider whether the circumstances of the case require any special directions to be given.

Cases heard in the small claims track will usually proceed without a preliminary hearing. In rare cases, though, the court can order a preliminary hearing when it considers that special directions are needed to ensure a fair hearing and it appears necessary for a party to attend court to ensure that he understands what must be done to comply with those special directions.

The judge can also order a preliminary hearing to dispose of the claim on the basis that one or other of the parties has no real prospect of success, or to enable the court to strike out any pleading or part of a pleading.

If the court decides to hold a preliminary hearing it must give the parties at least 14 days notice. The court can treat a preliminary hearing as a final hearing if all parties consent.

The role of experts in the small claims track is limited. Their use will usually be prohibited by the judge on grounds of time and cost, unless natural justice demands it (see below for a fuller explanation of the application of Rule 27.5).

The documents for disclosure may include expert reports, but it is important to remember that, as with cases on the other two tracks, the permission of the court is required to adduce such evidence. Furthermore, the judge may direct that the evidence be given by a single expert. In such circumstances, if the parties cannot agree on one expert or on the arrangements for paying that expert's fee, either side can apply to the court for further directions.[2]

Lastly, if the claim is truly small, i.e. for less than £1,000, the claimant will be excused the standard £80 fee that is otherwise payable at the allocation stage.

The Lord Chancellor would, undoubtedly like to expand the use of the small claims track. In the last few years, efforts have been made to make it quicker and cheaper, and to broaden the scope of the track with the hope that this would increase the number of cases allocated to it. From July 2002 to February 2003, the Lord Chancellor implemented a pilot scheme in specified County Courts. A Practice Direction[3] was issued. The most far-reaching provision of this was to dispense with the Allocation Questionnaire altogether in cases which, under normal circumstances, would be referred to the small claims track. Instead, the pilot scheme provides that, when a defence has been filed, the court will:

- allocate the claim to the small claims track, and
- serve notice of allocation on every party.

Where there are two or more defendants, and at least one of them files a defence, the court will not allocate the claim until all the defendants have filed a defence, or the period for filing of the last defence has expired, whichever is the sooner.

When allocating a claim, the court will:

- give any necessary further directions, including, if it is appropriate, a stay for settlement
- consider whether expert evidence is necessary, and, if so, give permission for it to be given, and
- consider whether any party should be required to give additional information or clarify any matter in dispute in the proceedings and, if so, make such order as it thinks just, specifying the time within which such information or clarification is to be provided.

The Practice Direction further provided that any party may, within 7 days of receiving notice of allocation, apply to the court to re-allocate the claim to a different track. Such application was to include a justification for the re-allocation. The court would then consider whether the allocation should be set aside either without a hearing, or at a hearing, if the court considered a hearing was appropriate.

This Practice Direction has now expired and was formally withdrawn on 6 October 2003. It provides a clue, however, to the future intentions of the Lord Chancellor. Interestingly, the pilot scheme made specific provision for the judge to consider the necessity for expert evidence. If the scheme was to be implemented, however, the opportunity for parties in small claims to make representations in relation to this prior to allocation would be severely limited – they would merely have the opportunity to apply for re-allocation after the initial decision had been taken.

Hearing

Small claims hearings are intended to be characterised by their informality, at least when compared with open trials. They usually take place in the judge's room, with those involved – judge, litigants, lawyers and witnesses – seated around the same table. Like other trials, though, they are open to the public – unless, that is, special circumstances (including considerations of space) dictate otherwise.

At the hearing the judge may adopt any method of proceeding which he regards to be fair. Strict rules of evidence do not apply, and it is unusual for evidence to be taken under oath. On the other hand, witness statements and expert reports still have to be verified by a 'statement of truth', and proceedings for contempt of court may be taken against anyone who signs such a statement knowing it to be untrue.

An essential element of any small claims hearing is that of establishing the facts of the case, and the judge has wide discretion in determining how this is to be done. He may choose, for example, to cross-examine witnesses himself, and he will generally do so if one or other of the parties is not represented by a lawyer, which is often the case. At the end of the hearing, though, he must shed this inquisitorial role and reach a decision based on the law applicable to the claim, just as he would have to in any other judicial hearing. Most small claims hearings are briskly conducted and soon over. They last, on average, for less than an hour, and the judge will usually make the award straightaway.

Notwithstanding that normal rules of evidence and procedure are intended to be relaxed in small claims cases, it is the experience of many litigants in person that the hearing is not so informal as it might be. It is not unheard of for a party to attend a hearing only to find that their opponent is represented by both a barrister and a solicitor, intent on pursuing complex legal arguments and armed to the teeth with legal authorities. This has resulted in calls from some quarters for legal representation to be limited or abolished altogether in small claims cases[4]. It is difficult to see, however, that this would sit comfortably with Article 6(1) of the European Convention for Human Rights, which preserves the individual's right to a fair trial. In low value cases involving disputes of a technical nature, an argument might be made for limiting legal representation but increasing the scope for representation by expert advisors. The increasing involvement of lawyers is considered in more detail later in this factsheet.

Appealing the decision

Until recently, awards made at small claims hearings had to be regarded as final. This was because they could only be set aside on the very limited grounds of mistake of law or serious irregularity affecting the proceedings. Moreover, judges dealing with appeals against them could dispose of these by letter without a further hearing.

Clearly, both these provisions were vulnerable to attack once the Human Rights Act 1998 came into force, and so they were revoked from the same date – 2 October 2000. Judgements in small claims cases can now be overturned for any of the reasons valid for fast-track and multi-track cases. Namely, mistake of fact, of law or in the exercise of the judge's discretion (instead of mistake of law alone), or because they are unjust on account of procedural or other irregularities that vitiate the decision even though they might not affect the result. Furthermore, appellants are guaranteed an oral hearing.

There is, however, a downside to this reform. In common now with all other litigants, those whose cases have been allocated to the small claims track need permission to appeal the decision in their case. Moreover, it seems likely that many of them will fail to obtain it. In part, this is because the Rules governing appeals lay down that permission to bring one should only be granted if the appeal has a 'real prospect' of success. In addition, though, judges dealing with applications to appeal are also expected to bear in mind the

'overriding objective' of the Rules, and in particular the requirement of proportionality. Applications arising from small claims cases would be especially vulnerable on that ground. A further consideration for those minded to appeal a small claims decision is that of expense. Not only will they have to pay more in the way of court fees but, as we shall see, they may become liable for other costs as well should their appeal then fail.

'No costs' rule

For litigants, the principal attraction of the small claims procedure must be the application to it of the 'no costs' rule. Broadly speaking, this provides that parties to litigation will be responsible for meeting their own legal costs. As with most legal 'rules', this is one that has become somewhat blurred at its edges. But it does at least ensure that litigants whose claims are for less than the limits set for the small claims track have no reason to fear being saddled with huge bills run up by the other side should the court's decision go against them. In particular, neither party can hope to recover from the other any costs they incur in being legally represented at the hearing.

Although the general principle is clear enough, the CPR do allow for some exceptions in favour of the winners in small claims actions. Thus they are entitled to be reimbursed by the losing party for:

- the court fees they have paid
- up to £260 for legal help and advice (but only for certain very limited purposes that do not include representation)
- expert fees of up to £200 per expert
- travel and overnight expenses 'reasonably incurred'
- loss of earnings of up to £50 for themselves and each of their witnesses
- their costs at an appeal hearing
- plus any further sum the judge may award if he decides that the losing side behaved unreasonably.

One final point on costs. We have already noted that claims exceeding the ceiling limits may be allocated to the small claims track if both parties are amenable. There are several reasons why the parties might wish to avail themselves of this option, but costs protection is not one of them. Rule 27.15 specifically provides that when this happens costs will be assessed *as if the claim were proceeding on the fast track*. In other words, the potential exists in those circumstances for parties to make full recovery of their legal costs in the event of their winning their case. If, then, you should ever have cause to sue someone for fees exceeding £5,000, be wary of accepting the other party's suggestion that the case be allocated to the small claims track. When the judge comes to deal with the costs of the case, you risk discovering that the judge's idea of what is proportionate is not your own![5]

Until recently, there had been some doubt as to the position when no allocation had been made. This has, to some extent, been clarified by recent case law. The Court held in 2003 that, where a defendant in a personal injury claim had settled for damages of less than £1,000 soon after issue of the defence and prior to allocation, he was entitled to have his costs assessed on the standard basis because the extent of technical and medical evidence required would probably have meant that the case would have been allocated to the fast track or multi-track[6]. Similarly, in May 2003, the Court held that an omission to allocate a case to the small claims track did not preclude the Court from considering whether it was reasonable to make an assessment of costs in accordance with the costs regime for that track[7].

Increasing involvement of lawyers

Despite the evident flexibility of the small claims procedure and its many advantages, the system is coming under increasing strain, not least because claims are getting more complex as their average value increases. Until recently, few litigants would have seen any need to pay a lawyer to represent them in a small claims hearing, or an expert to provide expert evidence. In most cases the issues were straightforward and relatively easily resolved. However this situation is changing, largely, it seems, as a result of the raising of the ceiling limit in January 1996. Whereas before then lawyers appeared in fewer than 20% of hearings, in the 12 months that followed it there was legal representation of at least one of the parties in 44% of hearings.

It is hardly surprising that, with greater sums at stake, more and more claimants should want to be legally represented. But the increase is not occurring across the board. From research[8] conducted by Professor John Baldwin of the Institute of Judicial Administration, University of Birmingham, it appears that it is largely confined to claims arising out of road traffic accidents. Many more such claims are nowadays being dealt with under the small claims procedure, and in more than 80% of them the litigants are legally represented. In other categories of case only 14% of litigants have representation. In view of this, it would be interesting to know whether road traffic accident investigators are finding that they are receiving more instructions to provide evidence for small claims hearings.

No less interesting is Professor Baldwin's finding that, statistically speaking, legal representation appears to have no effect on the outcome of hearings. Claimants succeed in around 87% of cases, whether or not they or the defendants are represented by lawyers. Hardly a vindication, one might think, of the advocacy skills of lawyers!

Despite this, there is now a real prospect that the further substantial rise in the ceiling limit made in April 1999 will result in yet more lawyer involvement in small claims hearings – and with it increasing formality in the proceedings and greater expense. In some jurisdictions overseas, lawyers are actually barred from appearing in small claims hearings, and in a consultation paper the Government sought views as to whether a similar ban should be imposed here. This is not something that has yet happened but there are still plans pending for a standardisation of small claims procedures throughout the member states of the EU. Such is the difference in the systems employed in the various jurisdictions, however, that it is highly unlikely that we will be seeing any imminent changes.

Expert evidence in small claims cases

Lord Woolf's original recommendations were that there should be a blanket prohibition of expert evidence in the small claims track and a prohibition against the use of oral expert evidence at final hearings in the fast track. Indeed, the CPR as drafted for initial consultation contained such prohibitions in draft rules 26.8 and 25.2(7). The opposition this prompted led to a number of proposed changes prior to adoption of the rules. It is worth reciting the relevant parts of chapter 6 of the consultation report:

- The draft rules for single experts and the absence of a bar on the use of oral expert evidence prompted comments as to the inconsistency of the provisions regarding experts in the small claims and fast tracks.
- The general principle regarding disapplication of the strict rules of evidence leads us to propose a change in the draft rules regarding use of expert evidence in the small claims track.
- We propose to delete [the] rule… (small claims: experts) as presently drafted and replace it with a simple statement regarding the right, subject to any contrary court order, of the party to bring with him someone having relevant technical knowledge of the matter in dispute.
- The proposal for an absolute ban on using oral evidence by experts in fast track cases should not be maintained. Where oral expert evidence could be heard within the 1 day maximum trial period prescribed for fast track cases, the potential power of the court to permit oral expert evidence in a fast track case will be retained.

It appears, then, that the CPR rather fudged the whole issue of expert evidence in the small claims track. Despite the early intentions and subsequent proposal that a party simply be allowed to bring someone with them with 'relevant technical knowledge', the court ultimately decided that no expert evidence would be allowed 'save with the permission of the court'. Clearly there was recognition that expertise would be needed to assist the court in some cases, but this did not sit easily with the general intention to make the small claims track quick, simple and inexpensive. However, since the permission of the court is needed to call expert evidence in all cases (whether or not they are in the small claims track), the rules, as they currently stand, make only a modest distinction between the admissibility of expert evidence in the small claims and fast tracks, and fall a long way short of Lord Woolf's blueprint.

Even if lawyers were to be banned from representing clients at small claims hearings, it remains the case that expert evidence would still be needed for some of them. Unfortunately, though, the operation of the 'no costs' rule tends to discourage litigants from obtaining expert evidence. If the most that litigants can hope to recover from the other side is £200 per expert plus travelling and overnight expenses, the likelihood is that, even if they were to win, they would still have to meet the larger part of their expert's fees and expenses themselves.

While, however, the 'no costs' rule may be a major feature of the small claims track, it is not the only one that distinguishes it from the fast track and multi-track. Thus, in the interest of keeping small claims hearings as informal and straightforward as possible, a whole raft of CPR provisions are specifically *disapplied* in their case. These include the rules relating to disclosure (Part 31), evidence (Parts 32 and 33) and – most significantly for our purpose – the majority of those concerning experts.

Indeed, until recently, the only Part 35 rules that applied to small claims were:

- **35.1** – the duty to restrict expert evidence to that which is reasonably required
- **35.3** – an expert's overriding duty to the court, and
- **35.8** – concerning instructions to a single joint expert.

But to these have now been added:

- **35.7** – court's power to direct that evidence be given by a single joint expert.

Since the latter is clearly essential to the operation of Rule 35.8, its previous omission can only have been by oversight – possibly due to the blanket prohibition against expert evidence as contained in the original draft rules.

For those familiar with the provisions of CPR Part 35 it might seem that the continued disapplication of Rule 35.4 (the court's power to restrict expert evidence) allows litigants with small claims to adduce expert evidence whenever they like. Unfortunately that possibility is knocked on the head by one of the rules governing the conduct of small claims litigation, namely Rule 27.5. This states, quite unequivocally, '*No expert may give evidence, whether written or oral, at a hearing without the permission of the court*'. Furthermore, while there is no rule debarring experts from giving their evidence in person, permission to adduce it is normally confined to a written report. In any event, expert evidence is one of those categories that would require special directions in the small claims court and would normally be dealt with by a preliminary hearing. At that point the judge would be able to make such provision or limitation as might be appropriate.

When permission to adduce expert evidence is *refused* by a district judge, it could be on the grounds that the evidence sought is not proportionate to the value of the claim, or that it will incur needless cost or threaten delay. On the other hand, permission to file an expert's report is being granted almost routinely in cases, such as those involving computers or defective goods, where the issue in dispute is technical. Furthermore, no permission at all is required for medical evidence in support of personal injury claims, for the reason that in such cases a medical report has to be filed with the particulars of claim. Since, however, the injuries complained of in a claim for less than £1,000 are hardly likely to be serious, a letter from the claimant's general practitioner will usually satisfy that requirement. It is only if damages are being sought for future pain and suffering that a more thoroughgoing report will be needed.

Report requirements

In general, then, what are the requirements for reports in small claims cases? Well, for one thing, they are considerably less exacting than for those submitted in fast track and multi-track cases. Since rule 35.10 (on the content of experts' reports) is one of those that remains disapplied, so too is the long list of requirements on form and content set out in the Part 35 practice direction. Specifically, there is no need to detail the literature relied upon in preparing the report, to identify and give the qualifications of those who carried out the tests on which it is based, or to summarise the range of opinion on matters dealt with in the report, should there be any.

All this, of course, is keeping with the essentially informal nature of small claims proceedings. Nonetheless, experts instructed in such cases, perhaps by the parties direct, should still bear in mind that their overriding duty is to the court, to help it make a just decision on matters within their expertise. It follows that any report an expert prepares for a small claims case should:

- be addressed to the court

- give just those details of the expert's qualifications and experience to enable the court to assess the report's authority
- provide a brief summary of the history of the matter, the investigations carried out and the facts ascertained
- outline the reasons for any inferences drawn from the facts
- give a clear summary of the expert's conclusions, and
- end with a declaration to the effect that he fully understands the duty an expert owes to the court and has complied with that duty in preparing the report.

Future for expert evidence in small claims cases

Despite the inhibiting effect of the 'no costs' rule, then, all need not be doom and gloom. Raising the ceiling for automatic transfer of cases to the small claims track has brought within scope many more cases of a technical nature for which the damages sought are far from negligible. At the same time, the less exacting nature of the requirements governing reports for cases on this track offers at least some prospect that experts may be able to tailor the service they provide to match the lower value of the claims and the (possibly more limited) resources of the litigants bringing them.

One other factor that should favour the increased use of expert evidence in small claims cases is the trend towards greater involvement of the part of lawyers (although, as we have seen, that may be yet be curbed). With larger sums at stake, litigants are showing greater willingness to seek (and pay for) legal advice before initiating proceedings or filing a defence. In addition, more of them are opting to have lawyers present their cases for them at the subsequent hearing. Indeed, this is fast becoming the norm for claims arising from road traffic accidents.

In theory, at any rate, greater lawyer involvement in small claims cases ought also to mean more experts being instructed to provide evidence for them. Whether that happens, though, may well depend on individual experts making it known to the firms that regularly employ them that they are prepared to be instructed in small claims cases and are willing to tailor their fee rates accordingly. It seems inevitable, if they want the business, that this is what more and more experts will have to do in any case.

Footnotes

[1]Small claims are dealt with differently in Scotland and there are different financial limits in Northern Ireland.

[2]For further details of the new procedure for dealing with small claims see Part 27 of the Civil Procedure Rules 1999 and its associated Practice Direction. Both may be consulted on, and downloaded from, the Ministry of Justice's web site at http://www.justice.gov.uk.

[3]Practice Direction (PD 27B): Pilot Scheme for Small Claims (2002).

[4]*The Times*, 13 August 2002, Supplement Page 23.

[5]Those readers who are considering using the procedure to recover debts owed by their clients may like to know that the Courts Service has published a series of seven leaflets detailing the steps that need to be taken. Copies are available from the Registry of any County Court.

[6]*Woodings and others -v- British Telecommunications Plc* (2003) Lawtel.

[7]*Voice and Script International Ltd -v- Ashraf Alghafar* (2003) *EWCA Civ* 736.

[8]Baldwin, J. (December 1997) *Monitoring the Rise of the Small Claims Limit*. The Lord Chancellor's Department (now the Ministry of Justice), London.

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