

## Covid-19 the Next Steps in Dealing with Civil Litigation

### Introduction

1. Following careful consideration and assessment of the relevant risks and how they can safely be mitigated, HMCTS has decided to open 7 courts at the CJC from the week of 15 June 2020, 3 of those courts will be dedicated to civil hearings and 4 to family. Decisions in respect of Wigan and Stockport are expected soon.
2. There is no sign of a swift to return to normal working practices. It is likely that resources will be limited and stretched for some time. During this transitional period, as we work towards returning to business-as-usual, it will be important to use court resources as efficiently as possible.
3. High Court civil cases will be dealt with individually.

### Background

4. Since 23 March 2020 courts in Greater Manchester have been unable to deal with civil litigation (outside BPC) at anything approaching “*business as usual*” levels. Because of this, a large backlog of work has built up, comprising almost exclusively trial work and possession actions. Thanks to the hard work of staff, judges and users, most applications, including heavy CCMCs and long applications have been heard remotely and very few have been adjourned or vacated.
5. What is described above is, in effect, Stage 1 of a long process. Stage 2 (when we can safely deal with hearings in open court) will start from 15 June.
6. Since 23 March 2020 a large backlog of trials and hearings has built up. On 15<sup>th</sup> May 2020 the backlog stood at around: 511 small claims trials, 200 fast track trials, 25 Multi Track trials and 311 possession claims. Between 15 May 2020 and 28 August 2020, a further 752 fast track trials and 50 multi track trials are listed. There are a further 256 claims which are awaiting allocation to track. Between 15<sup>th</sup> May and the end of July 706 small claims trials are listed.
7. Generally speaking (and subject to any exception for urgent matters and subject to the possibility that more court space will become available) the backlog of fast track and multi-track cases will not be dealt with until the courts return to a business-as-usual footing. It may be possible to deal with some of the small claims backlog in August and, if the stay imposed by [PD51Z](#) is not extended after 25<sup>th</sup> June 2020, the present intention is to deal with those possession actions that were subject to the stay, provided they can be heard fairly, before business-as-usual is resumed. Possession work is regarded as being high priority for both Claimants and Defendants.

## Risk Assessment

8. National Guidance on how HMCTS [assess and manage Covid-19 risk](#) was published on 15 May 2020. The Civil Justice Centre in Manchester and the courts at Wigan and Stockport have been subjected to a detailed risk assessment. The risk assessment process is an ongoing one and the risk assessment itself is a “living document”. It will be continually updated as needed. Please email [Julie.webster@justice.gov.uk](mailto:Julie.webster@justice.gov.uk) or [steve.monaghan@justice.gov.uk](mailto:steve.monaghan@justice.gov.uk) if you would like to see a copy of the risk assessment.
9. The ongoing risk assessment will dictate how many courtrooms in each centre will be available for hearings at any time. Each courtroom has been risk assessed to identify the number of people (in addition to the Judge and usher or clerk) who can safely be present, whilst observing social distancing. The number of courtrooms available will vary, up or down depending on the outcome of the risk assessment. Any increase in the availability of court space is likely to be gradual. There will be no quick return to “business-as-usual”.

## Allocation and Use

10. The available courtrooms will be a shared, scarce resource. The allocation of court space to different jurisdictions has been agreed by me, the DFJ, the FDLJ, the Presiding Judges and the Vice-Chancellor of the County Palatine. The division (based on a ratio of 5:4 in favour of family) broadly reflects present need. Family will have just over half the available courtrooms and the remainder will be used for civil (see the illustrative table below). BPC, Tribunals and the Administrative Court will use court rooms out of the civil allocation. At the moment, out of BPC, Tribunals and the Administrative Court, only BPC have an immediate need for court space. The split will be kept under review. It takes account of the fact that a good deal of family work is subject to a statutory timetable and is urgent:

Out of this number of available courts	Family would use	Civil would use
7	4	3
9	5	4
13	7	6
18	10	8

11. Because the number of available courtrooms will (for some time) be very limited, we will need to use courtrooms as efficiently as we can. This will mean having a hearing in open court, only if there is no other suitable and fair mode of determination. In practice, courtrooms are likely to be used only for trials. When the present general stay is lifted, courts will also be used for possession hearings. Applications will generally continue to be heard remotely, because experience has shown that such hearings are going well. For the time being, a remote hearing will in practice remain the default.
12. For the time being, only a small number of civil cases will be heard in open court. This means that very many cases listed to be heard in open court will need to be heard remotely or

vacated and relisted at some point in the future (probably after 5<sup>th</sup> October 2020).

13. On Friday 29<sup>th</sup> May, Darryl Allen QC and Jeff Lewis (of Brabners solicitors) spent the afternoon at the CJC with others (including the Leader of the Circuit). I recommend that you read the [report of that visit](#), which contains a good deal of helpful advice and explanation of the work that has been going on.

## Court Orders

14. I have issued a number of orders specifically directed at SCT and FT trials listed to be heard in open court in stage 2. It is vitally important, as was set out in the guidance issued jointly by the local judiciary and the Northern Circuit taskforce, that the orders I have issued are read, considered and followed.
15. Compliance with the orders will help us to achieve a smooth transition into stage 2 and will help judges to decide how cases should be heard, and importantly, which cases can be heard in courtrooms. A smooth transition and the proper and safe operation of the courts in the early stages of stage 2 must be achieved before more courts can be opened up for hearings.
16. The Fast Track order requires the parties (whether represented or not) to communicate with each other once the order is received and to try to reach agreement about the best way forward. If they agree on a way forward the court must be notified. If there is no agreement, the competing positions should be put to the court.
17. The following specific points should be noted in respect of the fast track orders (see appendix 1):
  - a. If the parties agree that the trial can safely be heard in open court (either with all participants attending before the Judge, or with some participants before the Judge and others joining remotely) the requirements of paragraph 3(a) must be followed. The response should make clear how many people in total will be attending before the Judge. The email communicating the agreement must contain all the information set out in the order (including the general requirements at para.1(a)) and the words “**Agreed open court information**” must be in the subject line. Note that the parties should also explain if the case is one that could be heard remotely.
  - b. If the parties agree that the trial can fairly proceed remotely (with no participants in court), the requirements of para.3(b) must be complied with. The email communicating the agreement must contain all the information set out in the order (including the general requirements at para.1(a)) and the words “**Agreed remote information**” must be in the subject line.
  - c. If the parties agree the trial is neither suitable for a safe hearing in open court (with all participants attending before the Judge, or with some participants before the Judge and others joining remotely) nor for a remote hearing and they agree that the trial should be vacated, the parties must comply with para.4 of the order. The email communicating the agreement must contain all the information set out in the order

(including the general requirements at para.1(a)) and the words “**Consent to vacate**” must be in the subject line.

- d. If the parties cannot agree they must comply with para.5. Each party must email the court setting out their positions. Each parties email must contain all the information set out in the order (including the general requirements at para.1(a)) and the words “**Suitability submission**” must be in the subject line.
- e. Paras. 7 and 8 of the order deal with bundles. These are important provisions and must be complied with. If, despite the parties’ best efforts, the bundle for good reason exceeds 250 pages (see para.8(c)(x)) the parties should explain the reason in the covering email.

18. The following general points should be noted. :

- a. How the trial proceeds, or if the fixture is to be vacated, is (as it has always been) a matter for a Judge. The judge will carefully consider any agreement the parties have reached, but will not be bound by that agreement. The Judge may invite the parties to attend a short telephone hearing. This is set out at para.6 of the order.
- b. It is important that emails comply with the requirements set out in the order. They must be sent to [manchestercivil@justice.gov.uk](mailto:manchestercivil@justice.gov.uk) with the case number, name of the case and date of the hearing in the subject line. The subject line of the email should also contain the key words required by the order (see above). Failure to comply will mean that your email will take longer to process and it may well mean that important information does not reach the Judge before a decision is made.
- c. The 8 principles set out in the [Inns of Court College of Advocacy Principles for Remote Advocacy](#) should be followed as should the advice set out in the Northern Circuit’s guide to the Northern Circuit’s [Civil Trial by Video: Do's and Don'ts](#) should be followed where appropriate.
- d. Before agreeing to a partly remote hearing (with some participants before the Judge and others joining remotely) the Court will consider the question of balance and appearance. For example, a hearing at which one side’s legal team and witnesses want to appear in court, but the other side’s legal team and witnesses want to join the hearing remotely is unlikely to go ahead in that way. Generally, the Court will look for balance. The ideal partly remote hearing is likely to be one where both sides advocates are in court.
- e. In order to reduce the footfall in court buildings in Greater Manchester cases will not be over-listed. It will not be possible to block list and float trials.
- f. Cases may be given a reduced time estimate when listed for hearing in open court. Expect Judges to manage cases robustly. The Judge giving any such direction is likely to bear in mind the parties’ considered estimate of the length of hearing and trial timetable (as required by para.3(a) of the fast track order) and will have in mind the

powers set out below at para.20(d).

## Small Claims

19. Separate orders have been issued for small claims track trials:

- a. where both sides are represented, the default position will be the small claims trials will be heard remotely and generally listed before full-time District Judges.
- b. Where at least one party is unrepresented, the matter will be triaged by a full-time District Judge with a view to identifying cases that can be heard in open Court, cases that need to be re-listed and cases that might be determined on paper. Open Court Hearings will generally be listed before Deputy District Judges.

## Practicalities

20. Please bear the following points in mind:

- a. Footfall in the building should be kept to a sensible minimum. The decision to open up 7 courts and allocate 3 to civil is based on an assessment of the likely total footfall. The Claimant should tell the court how many people (in addition to the Judge and clerk or usher) will be coming into the building to attend the trial (see para.17(a) above and para.3(a) of the Fast Track order). If more than 5 people are likely to attend in person, the court may (depending on how busy the court building will be on that day) vacate the trial or direct that one or more witnesses give evidence remotely. I expect that very few Fast Track cases will require the physical attendance of more than 5 people.
- b. I propose to direct that counsel need not robe during stage 2. This will mean that passage through security will be quicker (there will be fewer bags to check) and advocates will have less baggage to transport.
- c. A scheme to speed up [access to the court building](#) for lawyers was already in the pipeline before March this year. Efforts are being made to speed up its introduction in Greater Manchester. Please ensure that the passage through security is as smooth as possible by thinking ahead.
- d. There will be no food or drinking facilities in the court building. Water fountains will not be available and the café will be closed. The Prayer Room is likely to be closed. Conference facilities will be available, but limited. The aim is to reduce the amount of space being used so that HMCTS can dedicate cleaning resources where they are needed.
- e. There may be staggered start times for hearings to avoid “hot-spots” on the run up to 10am and 10.30am. For those courts with a later start time, the lunch adjournment is likely to be later. Normal finishing times will be respected. There is no plan for any court to sit after 4.30pm. The aim will be to make the most we can of

the scarce courtroom facilities, but in usual working hours.

- f. Available courtrooms will not necessarily be the courtrooms usually used for civil cases.

21. I would ask all court users to consider the content of this note carefully at all stages of litigation. In addition to the specific and general points I have made, I would specifically invite consideration of the following points:

- a. If the case has any possibility of settlement, or if there any prospect that the issues can be narrowed, please take that opportunity well in advance of the trial. Parties will be expected to make all sensible efforts to avoid trial. This is not new. If it is possible to reach agreement, parties must ensure that the court is made aware of any reduced time estimate or settlement at the earliest possible time. It is important to save court time where that is possible. Settling the case on the day of the hearing means that valuable court space and valuable court time are not used and other cases are not heard.
- b. Arrangements should be made, if possible, for conferences and pre-trial discussions to take place outside of the court building and as far in advance of the trial date as possible. That will ensure that the use of court space is limited to what is necessary.
- c. A short skeleton argument may save time spent on closing submissions and help to draw attention to key points. If written arguments would be of assistance, they should be included in the electronic bundle (see para.8(c)(iii) of the order). If there is a skeleton argument it would be sensible to draw attention to it in the succinct reading list directed at para.8(a).
- d. The court will take positive steps to ensure that resources are used effectively and will actively encourage parties to focus on issues that are of real relevance during the trial. Parties should expect the court to manage cases robustly. By way of example, the following powers may be used:
  - i. CPR 3.4(2)(c) to strike out a statement of case if there has been a failure to comply with a court order or procedural rule
  - ii. CPR 1.1(2)(c) to ensure that each case is dealt with proportionately, using only an appropriate share of the court's (limited) resources whilst taking account of the need to allocate resources to other cases
  - iii. CPR 32.1 to limit cross examination
  - iv. CPR 3.1(2)(e), (i) and (j) to direct that any part of proceedings (for example, issues on quantum) should be dealt with separately
  - v. CPR 44.2(4)(a) to take account, when considering a costs award, of the receiving party's compliance with any court order

- vi. CPR 44.15(c) to disapply QOCS provisions if relevant conduct is likely to obstruct the just disposal of the proceedings

## Final Word

- 22. As Government guidelines change and as the present situation develops there is likely to be a need to adapt and change some of the principles set out in this Note. Orders issued by the Court may also change. Users will be kept informed of substantial changes. If there are any comments or suggestions you would like to make, please let me know by using the email address [manchester.dcj@justice.gov.uk](mailto:manchester.dcj@justice.gov.uk)
- 23. The health and well-being of all court users (including legal representatives, the staff and judges) is of paramount importance. Judges will take steps to ensure that all hearings are conducted safely and sensibly. If that proves not to be possible hearings may be adjourned.
- 24. These have not been easy times for court users or court staff. I hope (and am confident) that we can all continue to work together to achieve our common goal of dealing with cases justly and efficiently.

*Nigel Bird*

DCJ Greater Manchester

1 June 2020

## Appendix 1

### FT in stage 2

Before His Honour Judge Bird the Designated Civil Judge for Greater Manchester

UPON IT BEING RECORDED that the manner in which a trial proceeds is a matter for the Court

AND UPON it being recorded that where it is safe to proceed in that way where it is appropriate to do so and where the Court is able to accommodate it the Court will consider listing the trial of this matter to proceed in open court

AND UPON the term “remote hearing” in this order meaning a hearing listed to take place with no person attending before the Judge in person and at which one or more participants communicates with the Judge by means of a video link

AND UPON the Court having considered matters on the papers

AND WITHOUT A HEARING AND ON THE COURT’S OWN INITIATIVE

IT IS ORDERED THAT:

1. Where this order:
  - a) requires a party to send an email to the court such email shall be sent to [manchestercivil@justice.gov.uk](mailto:manchestercivil@justice.gov.uk) with the case number, name of the case and date of the hearing in the subject line the subject line of the email must also comply with the terms of this order
  - b) requires the Claimant to take a step but the Claimant is a litigant in person the step shall be taken by the first represented party. If no party is represented the step shall be taken by the Claimant.
2. The time for compliance with paragraphs 3, 4, 5 and 12 of this order is 7 days from the date on which this order is served on the parties.
3. If the parties agree that the trial is suitable for determination:



a) **In open court** the Claimant shall email the court with the following information. The subject line of the email shall include the words “AGREED OPEN COURT INFORMATION”:

- (i) The number of witnesses who will give evidence in the case
- (ii) Whether it is intended that any party or witness will attend at the trial by way of video link and if so identifying that person or persons
- (iii) If any party will act as a litigant in person at the trial
- (iv) A carefully considered agreed estimate of the length of hearing of the trial including time for judgment
- (v) An agreed trial timetable
- (vi) A case summary
- (vii) The parties should also explain if the case would be suitable for remote hearing in the event that a court room is not allocated to it and if it is providing the information required at paragraph 3(b)(i) to (iv)

b) **a remote hearing** the Claimant shall email the court with the following information. The subject line of the email shall include the words “AGREED REMOTE INFORMATION”:

- (i) A succinct summary of the features of the case that make it suitable for a remote hearing, including (but not limited to) a brief case summary and the total number of witnesses to be called
- (ii) An email contact address and telephone number for each party (or legal representative) the court will use this address to contact the parties to ensure that arrangements are in place for the smooth running of the hearing
- (iii) The contact details to be used for connection to the relevant video platform for each participant including any witness
- (iv) The chosen video platform (bearing in mind that all judges have access to Skype for Business but that not all judges will have access to other video platforms)
- (v) The parties should also explain if the case would be suitable for hearing in open court in the event that the court feels that a remote hearing is not appropriate and if it is providing the information required at paragraph 3(a)(i) to (vi)

4. If the parties agree that the trial of this matter [listed on [ ] 2020] is not suitable or ready for trial on that date the Claimant shall email the court explaining why that is the case and attaching a signed consent order to vacate the trial which shall contain agreed directions for the subsequent re-listing of the trial including a proposed trial window of 3 months commencing on a date after 5 October 2020 with dates of availability within that window. The subject line of the email shall include the words "CONSENT TO VACATE"
5. In the event that the parties fail to reach agreement each shall send an email to the court setting out that party's position on the suitability of the trial for remote determination or for hearing in open court. Such submission shall be succinct and focused and drafted so as to allow directions to be given without the need to consider the court file. The subject line of the email shall include the words "SUITABILITY SUBMISSION":
6. The court will consider any consent order, information or submission provided in accordance with paragraph 3, 4 or 5 of this order and will make an appropriate order which may include the requirement for the parties to attend a brief telephone directions hearing.
7. If the court orders that the trial should proceed:
  - a) by way of remote hearing the directions set out at paragraph 8 of this order shall unless varied by any subsequent order apply.
  - b) in open court the parties shall ensure that a paper trial bundle is lodged at court not more than 7 nor less than 3 days before the hearing
8. Where the hearing proceeds by way of a remote hearing, any directions already given as to the filing of a trial bundle or skeleton argument are varied as follows. Not more than 7 and not less than 3 days before the hearing the Claimant shall send an email to the court which shall contain in its subject line the words "BUNDLE FOR TRIAL"
  - a) Setting out in its body (not as an attachment) a succinct reading list of documents for the Judge who will conduct the hearing together with an agreed estimate of the time it will take the Judge to read the documents. The list should refer only to those sections of a document the Judge is invited to pre-read and must provide relevant page references within the electronic bundle. Where possible material included in the reading list should be bookmarked within the bundle. The parties should endeavour to agree the list.
  - b) Containing a link to the electronic trial bundle and if required to an electronic authorities bundle at an online data room. If access to the bundle is password protected, it is the responsibility of the party filing it to ensure that the judge hearing the application has been provided with the password and has access to the bundle.

c) The electronic bundle:

- (i) Should be agreed
- (ii) Must only contain the documents referred to in the reading list, which should only be those documents which are necessary and will be referred to at trial
- (iii) Should include skeleton arguments if ordered or appropriate
- (iv) Wherever appropriate, should contain extracts of documents rather than the entirety of documents
- (v) Be prepared in a single pdf format
- (vi) Must be indexed and paginated in ascending order, to include index pages and necessary authorities
- (vii) Must always have a default display view for all pages of 100%
- (viii) Must allow text on all pages to be selectable and to facilitate electronic annotation
- (ix) Must have a resolution reduced to about 200 to 300 dpi to prevent delays whilst scrolling from one page to another
- (x) Shall not exceed 250 pages

d) The electronic authorities bundle

- (i) Should be agreed
- (ii) Should be prepared in a single pdf format
- (iii) Must be tabbed so that each authority or extract is easily located
- (iv) Must be indexed and paginated in ascending order, to include index pages
- (v) Must always have a default display view for all pages of 100%
- (vi) Must allow text on all pages to be selectable and to facilitate electronic annotation
- (vii) Must have a resolution reduced to about 200 to 300 dpi to prevent delays whilst scrolling from one page to another

e) The parties should prepare the focussed reading list and electronic trial bundle on the basis that the Judge dealing with the matter may have no previous knowledge of the case and will not have access to the court file.

f) For the avoidance of doubt, this paragraph and the provision of electronic bundles must be complied with even if the parties have already filed a paper bundle.

9. Save insofar as they are varied or superseded by this order, directions already given in respect of the preparation for trial shall continue to apply.

10. All parties shall assist the court in furthering the overriding objective and ensuring that any remote trial is conducted fairly and proportionately

11. At an appropriate stage, the Court will consider whether any remote hearing should take place in public or private having regard to CPR 39.2
12. Because this order has been made without a hearing a party may apply to set it aside or to vary its terms. Such an application:
  - a) may be made by sending an email to the court copied to all parties
  - b) must include in the subject line of the email the words "APPLICATION TO VARY"
  - c) must attach a draft of the order the court is invited to make and
  - d) must set out in the body of the email on what grounds the proposed order is sought and
  - e) will be dealt with on paper without a hearing.

#### Reasons

- a) Until it is safe and appropriate to open the court building fully the court will be operating with a limited number of open court rooms available for civil trials. The court will continue to list some cases to be heard remotely
- b) Parties should actively consider if their trial can be fairly heard by way of a remote video hearing. If a trial is vacated it is likely that there will be a substantial delay (by reason of the general expected backlog of work caused by the Covid-19 situation) before it can be heard. In particular the parties should consider if the trial might take place in open court with legal representatives physically in attendance before the Judge (with or without the parties) but witnesses giving evidence remotely.
- c) In order to ensure a level playing field the court is likely not to approve an arrangement which allows for an unfair imbalance of legal representatives attending in person before the Judge
- d) Remote hearings will not be appropriate for every Fast Track trial and the decision on how the matter proceeds is ultimately one for the Judge. If the parties agree that the trial is not suitable for determination at a remote hearing the court will regard that as a very powerful factor in not proceeding with a remote hearing. Equally, the parties' agreement that the trial should take place remotely may not be accepted by the Judge.
- e) Parties should bear in mind that trials involving litigants in person, or those for whom English is not their first language may not be suitable for remote determination and trials likely to involve allegations of fundamental dishonesty or fraud may require the presence in court of the relevant party.

- f) In order to assist the court in furthering the overriding objective and ensuring that any remote trial is conducted fairly and proportionately legal representatives should familiarise themselves with “Principles for Remote Advocacy” published by the Inns of Court College of Advocacy (<https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-version-2.pdf> ) in particular principles 6 and 7 and should consider guidance published by the Northern Circuit entitled “civil trial by video” available at [https://www.dropbox.com/s/ncuibl8r8bsbkuh/NC VIDEO HEARINGS GUIDE %5BFINAL%5D.pdf?dl=0](https://www.dropbox.com/s/ncuibl8r8bsbkuh/NC%20VIDEO%20HEARINGS%20GUIDE%5BFINAL%5D.pdf?dl=0)
  
- g) The order removes the option of submitting an e-bundle as attachments to an email. Online data vaults are freely available and easier to use.