

COVID-19: What does it mean for the Civil Court User?

Introduction

This article aims to summarise the operational changes to the Civil Justice system in response to the Coronavirus (COVID-19) pandemic (HM Courts and Tribunal Services (HMCTS) updates their operational summary weekly, which can be [found here](#)) while also outlining the advice and guidance published from the judiciary in relation to the use of remote hearings. It should be recognised at the outset that given the situation is fast moving, the published guidance referred to throughout this article has continually had to adapt to this evolving situation. These sources should therefore be checked regularly for updates.

Operational Changes

A key part of HMCTS' operational response to the pandemic is the priority court system, where there is a categorisation exercise to determine which Courts in the network will remain open to ensure that there is continued access to justice. "Open courts" are those that are open for the public for essential face to face hearings; "staffed courts" are those open for staff and judges to continue Court work with no public access; "suspended courts" are those which are closed. The up to date tracking list of the status of each Court is found [here](#). The present data suggests that over half of Courts are "open courts" and just over 20% are closed.

HMCTS has also adapted the Court's listing practises to prioritise certain work; current listing priorities are now categorised into "work which must be done" and "work which could be done" ([Guidance can be seen here](#))

Work that must be done includes, but is not limited to, committals, freezing orders and injunctions; other matters that are urgent or of time sensitive are also seen in this category.

Work that could be done includes CPR 21 applications and approvals, Stage 3 disposals, security for costs and Small and Fast Track trials, where the parties agree the trial is urgent and subject to triage. The Court of Appeal, Queens Bench Division and District Registries are excluded from this list and the Business and Property Court prioritising on a case by case triage system. Similarly, [guidance for High Court business](#) is that they are prioritising “urgent work” and distinguishing this from “business as usual” work. The definition of “urgent business” being work which would be sufficiently urgent to warrant an out of hours application in normal times.

Remote Hearings

Since HMCTS announcement that all hearings in England and Wales are to be conducted wholly as video or audio wherever possible, remote hearings have now become the “new normal”. Although prior to advent of COVID-19 it would have been unthinkable to conduct substantive hearings and trials on a fully remote basis, practically speaking, English courts and tribunals have always had the power to hold such hearings remotely by audio only or by video (CPR 3.1(2)(d)).

Given the restrictions implemented by the government because of COVID-19, the general position as set out by HMCTS is that physical hearings continue to be avoided in favour of remote hearings wherever possible. This is consistent with the [comments made by the Lord Chief Justice](#) who has recognised that a failure to embrace technology during these unprecedented times would result in there being,

“...no hearings and access to justice will become a mirage. Even now we have to be thinking about the inevitable backlogs and delays that are building in the system and will build to an intolerable level if too much court business is simply adjourned.”

There has therefore been a concerted attempt to ensure that access to justice is maintained and that there are clearly defined principles that all parties can adhere to when navigating their position during these times.

The Protocol Regarding Remote Hearings

At the time of writing, the [Protocol Regarding Remote Hearings](#) (the “Protocol”) remains the central guide parties should follow and be familiar with when embarking on remote hearing during the COVID-19 pandemic. Put simply, the Protocol seeks to provide basic guidance as to the conduct of remote hearings of all kinds including trials, applications and those involving litigants in person in the County Court, High Court and Court of Appeal (Civil Division).

Unsurprisingly, the Protocol encourages the court, the parties and their representatives to be more proactive in relation to forthcoming hearings (Protocol 10). Regarding the hearings themselves, the Protocol starts from premise that it will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely and that some witness cases will also be suitable for remote hearings (Protocol 12).

The method by which all hearings, including remote hearings, are conducted is always a matter for the judge(s), operating in accordance with applicable law, Rules and Practice Directions. Parties are not however completely excluded from the process as it is anticipated that Judges, clerks, and/or officials will, in each case, wherever possible, propose to the parties one of three solutions:-

- (i) a stated appropriate remote communication method (BT conference call, Skype for Business, court video link, BT MeetMe, Zoom, ordinary telephone call or another method) for the hearing;
- (ii) that the case will proceed in court with appropriate precautions to prevent the transmission of Covid-19; or
- (iii) that the case will need to be adjourned, because a remote hearing is not possible **and** the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time.

If the parties disagree with the court's proposal, they may make submissions in writing by email as to what other proposal would be more appropriate. On receipt of submissions from all parties, the judge(s) will make a binding determination as to the way in which the hearing will take place and give all other necessary directions (Protocol 17).

The Conduct of Hearings

If a hearing is to proceed through an appropriate remote communication method, at the time of writing, the [standard practice](#) appears to be that hearing notices will state whether the hearing will take place by phone or video and whether it will be by Cloud Video Platform (CVP), Skype or BT MeetMe. If your hearing is conducted via BT MeetMe, you will receive a call from an unknown number at the time of the hearing. If your hearing is conducted via CVP or Skype for Business, you will need to inform HMCTS of your preferred contact details and you will receive an email with a website link and sign in details.

It is [understood that HMCTS preferred platform](#) is CVP as it represents HMCTS bespoke video hearing facility which has greatly increased capacity and is expected to offer better quality all round and should therefore enhance HMCTS ability to conduct remote hearings.

It should be noted that the Protocol is intended to be applied flexibly and just because a hearing can be heard remotely does not always mean that it should be. On 15 April 2020 the Lord Chief Justice, Master of the Rolls and President of the Family Division published a message for Circuit and District Judges sitting in Civil and Family setting out some broad practical parameters within which they should operate with regard to remote hearings. Off the back of collective responses from the judiciary dealing using technology, Circuit and [District Judges are reminded](#) that

"...doing as much as possible remotely does not mean, and cannot mean, trying to do everything remotely. It is important that the listing of cases, which is a matter for judges, takes account of the reality that long hours in front of a screen or on the phone concentrating hard are more tiring than sitting in a court room with all the participants present."

In light of the above, the Lord Chief Justice, Master of the Rolls and President of the Family Division gave the following general observations for not just Circuit and District Judges but for all parties to bear in mind:-

1. If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing; if parties agree, or appear to agree, to a remotely conducted final hearing, this should not necessarily be treated as the 'green light' to conduct a hearing in this way;
2. Where the final hearing is conducted on the basis of submissions only and no evidence, it could be conducted remotely;
3. Video/Skype hearings are likely to be more effective than telephone. Unless the case is an emergency, court staff should set up the remote hearing.
4. Parties should be told in plain terms at the start of the hearing that it is a court hearing and they must behave accordingly.

Conclusion

Both the Courts and parties are having to adapt to a new way of working. It is anticipated that this "new normal" will have teething troubles however, the guidance above should provide parties with enough information to feel confident that the justice system remains open for business. If you require any advice as to the best way forward for your case, you may contact one of our barristers or clerks at 25 Canada Square Chambers, who will be happy to discuss your matter.

This article is accurate as at 01 May 2020.

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