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Covid-19 and the courts

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Jeremy Cousins QC
Call: 1977, Silk: 1999
Barrister

Jeremy Cousins QC specialises in substantial commercial, commercial chancery (including trusts), banking and professional negligence disputes.

He has appeared in numerous leading cases, including the very important and well-known banking and solicitors' breach of trust case AIB v Redler in the Supreme Court.

Introduction

Jeremy Cousins QC

Covid-19 has posed a major challenge to courts around the world in maintaining the proper administration of justice. We can be very proud that the courts in the UK have already been innovative in making use of technology, using facilities such as Skype and Zoom to conduct not only contentious non-witness hearings, but even trials. This has enabled court business, at least in civil cases, to operate as close to normal as is possible. The UK courts, together with Australia and some US jurisdictions, have led the way in this respect. Even some major litigation centres, such as Hong Kong, are only now beginning to make use of technology to overcome the challenges posed by the virus.

The "can do" attitude in our courts was demonstrated by the decision of Mr John Kimbell QC, sitting as a deputy High Court judge in the Chancery Division on 6th April 2020 in *The Matter of One Blackfriars Ltd* [2020] EWHC 845 Ch when he refused to adjourn a trial listed for June. He referred to the Coronavirus Act 2020 and its wide range of powers under s.53 to s.56 for the courts to extend use of video and audio links, and for the public to see and hear proceedings. He mentioned the Lord Chief Justice's guidance on Covid-19, the protocol regarding remote hearings issued on 26th March, and emphasised that CPR PD 51Y on video and audio hearings provided that as many technology-facilitated hearings as possible should be conducted during the crisis. He drew attention to the absence of detailed evidence as to difficulties of the participants that might be presented by the trial, and how those might be addressed. He also pointed out that trials had recently taken place in the Commercial Court and the Court of Protection which required witnesses and experts. The judgment highlights the kinds of considerations that may influence decisions by the courts to proceed with trials or other hearings when remote hearings would be required.

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The message is that business will be going ahead at every stage in litigation, unless very good reason to the contrary can be demonstrated. For lawyers and their clients involved in existing cases, they need to prepare accordingly, and work out how to overcome any problems posed by Covid-19, and if they are unable to overcome these, then the reasons must be demonstrated, along with an account of the steps taken attempting to tackle the situation. Equally, anyone keen to get on with issuing proceedings and progressing a claim should not be concerned that the courts will fail to assist in making time and facilities available.

The most popular videoconferencing software being used for hearings seems to be Skype for Business, Microsoft Teams, Kinly and Zoom. BTMeetMe is also being used for telephone hearings, especially for hearings taking place at the County Court at Central London. It is also recommended that lawyers try to familiarise themselves with the various platforms the courts are using, perhaps by conducting a dry run with others in their legal team.

In terms of preparation for the hearing, electronic bundles are now essential. Adobe Acrobat Pro DC, PDF Expert, and PowerPDF are some of the popular bundling softwares available, but there are other (potentially free or cheaper) options. Lawyers will find useful advice regarding electronic bundling in the following sources:

- The Protocol regarding Remote Hearings
- The Protocol For Remote Hearings in the Family Court and Family Division of the High Court
- Guidelines for electronic bundles in the Supreme Court.

For now, it is very much a case of business, almost, as usual. In light of this, we would like to share the experiences of and tips from some of our members for conducting hearings remotely.

Andrew Brown

Call: 2014

Barrister

Andrew Brown's practice covers a broad range of chancery work, including: insolvency, commercial disputes, private client, and charities. Andrew regularly appears as sole advocate in the High Court and County Court, and has twice appeared as junior counsel before the Privy Council. He holds a D.Phil in Ancient Greek History from the University of Oxford.

Advocacy in a Changed World

Andrew Brown

The impact of the current Covid-19 outbreak on the Courts is of obvious import for all those seeking to access the justice system in civil and criminal cases. The general effect has been stated elsewhere far more eloquently than it is possible for me to express, but in the past few weeks I have had the opportunity to experience both small hearings in the County Court via telephone and full trials in the High Court via virtual video-link, and what follows is my advice and experience for how best to deal with these situations. To my mind, there are two aspects of how one approaches remote trials and hearings: the pre-hearing preparation phase, and the conduct of the hearing itself.

With regard to pre-hearing preparation:

- The Courts are now relying on electronic bundles that can be disseminated to judges remotely. PDF bundles produced by Adobe Acrobat Pro DC allow an ease of navigation as they can be 'bookmarked' with individual tabs prior to being sent. Prior to trial, counsel can insert further electronic bookmarks for important documents for ease of reference: for instance, a contract can be bookmarked in a bundle of hundreds of pages for easy reference if submissions will address it regularly.
- Further, at the PTR, it is helpful to walk the judge through any added bookmarks to familiarise them with that aspect of navigation, and explain how they can add further bookmarks themselves during judicial reading.
- Written submissions via skeleton argument are all the more important. I have found that oral submissions have a tendency to drag out via video or telephone, and without the ability to keep parties engaged through in-person advocacy technical points often cause listeners to disengage. A full written submission setting out in detail a party's position and argument is more invaluable than ever.
- In a recent trial in the Insolvency and Companies Court, the judge requested that I pre-record my opening statement to be sent to the Court and other party the day before the trial. As openings are typically free from intervention, the ability of all parties to view the opening prior to the hearing allowed for a more efficient use of the hearing. This could be suggested at the PTR, and can be of particular use when litigants in person are involved as they will have longer to grapple with any issues raised in the opening.
- Finally, I have found that if using Microsoft Teams or Skype for Business, then it is useful to sign into the virtual meeting ten or fifteen-minutes prior to the start of the hearing with one's instructing solicitors. This allows for troubleshooting of any technical issues such as cameras or microphones not working.

As to the hearings themselves:

- As a result of our personal experience of speaking on phones or video chats for casual use, I have found there

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to be a drift when making submissions away from our usual practiced advocacy. I have found parties have a tendency to trail off their submissions without being as punchy or focused on conclusions. An awareness of this, and a concerted effort to remain efficient with language is essential.

- As counsel, we all enjoy gesticulating when making oral arguments in court, but when dealing with a static microphone and limited video camera, that can prejudice one's advocacy. Moving backwards and forwards can raise and lower the volume of one's voice, and the other party and judge might lose track of what is being submitted.
- In cross-examination, there is a certain flow and structure we strive for, which can be curtailed by video link. In my limited experience, I have found a more methodical approach that relies less on a rhythm to be useful, as any breaks due to technical issues will not derail the cross-examination. This might be considered more boring in a live trial, but being aware of the natural breaks and technical difficulties of video-link and strained internet service necessitates a structure that can be stopped and restarted easily.
- Multiple electronic screens are essential. Having the ability to have the trial bundle open on one screen, one's notes on another, and the video link on a third (or phone screen), allows easy reference to documents without having to click around. If one has a phone, iPad, and laptop / desktop, then this will greatly assist smooth advocacy.
- Finally, while many of us are fans of the comedies of Leslie Nielsen and the Naked Gun series of films, when the Court invites parties to take a five-minute break but keeps the virtual meeting running, then before making a cup of tea, or playing with the dog, a participant should make sure to leave their headset on their desk or mute the microphone to avoid inappropriate and embarrassing noises.

Poppy Rimington-Pounder

Call: 2018

Barrister

Poppy joined Radcliffe Chambers as a tenant in October 2019, following the successful completion of her pupillage. She has developed a busy practice of her own, and is regularly instructed to appear in the both the County Court and the High Court. She accepts instructions across chambers' core practice areas.

Poppy recently returned from a three-month secondment at a leading offshore law firm in Jersey, working in their BVI dispute resolution team. In 2019 she was called to the Bar of the Eastern Caribbean Supreme Court (BVI).

Coping with Multiple Application Lists

Poppy Rimington-Pounder

Clearly a courtroom packed with some 50 people would have been a social distancing disaster, and so initially it seemed that all winding up petitions would be adjourned off until the summer. However, the courts have admirably navigated a way through: the winders list has now been split into one HMRC list and several non-HMRC lists of approximately 20 petitions each, all being heard by video or telephone conferencing technology.

Here follow some of my practical tips for dealing with the virtual winders, which would also apply more generally to hearings with large numbers of parties.

Prior to the hearing:

- If you are the petitioning creditor, contact the court to inform them of the name and number of the petition, and the contact details of all those intending to appear on the hearing. This should ideally be done by the day before the hearing.
- If you are not the petitioning creditor and intend to appear on the hearing, give notice of intention to appear in accordance with Rule 7.14 of the Insolvency (England & Wales) Rules 2016, providing an email address and telephone number (Temporary Practice Direction supporting the Insolvency Practice Direction, paragraph 7.4). It is also advisable to contact the court yourself, to inform them of the name and number of the petition, and yours and/or counsel's contact details.
- Conduct negotiations and agree adjournments. While it is always good practice to do so beforehand, there is now no opportunity before the list begins for counsel to stand up and say: "Anyone here for…?"

During the hearing:

- Switch off your video when it is not your petition. Apparently streaming multiple videos can affect the bandwidth and speed of the video.
- Switch off your microphone when it is not your petition. As many will have appreciated already, it is rather frustrating when the judge is inaudible because someone is spring-cleaning in the background.
- If you do have some technical issues and your petition is heard without you, ask the judge to recall the petition as soon as you can (and ideally before your opponent leaves the hearing!). Everyone should understand.

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