

COVID-19 ROUNDUP: IMPACT ON CIVIL PROCEDURE IN ENGLAND

MARCH 2020

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Overview

During the current phase of the government's response to the COVID-19 outbreak, it is envisaged that court and tribunal business will continue, albeit with procedural modifications encouraged.

It is worth noting that the current position is changing rapidly, so it is important to check the practice in individual courts/divisions before taking any steps.

- On 17 March, the Lord Chief Justice of England and Wales published a Coronavirus update in which he stressed that, while a "business as usual" scenario is unrealistic, "it is of vital importance that the administration of justice does not grind to a halt". On 20 March 2020 the Judiciary also published a Protocol confirming that remote hearings should be used "wherever possible".
- HMCTS is encouraging the following steps in response to the COVID-19 outbreak:
 - **Remote hearings:**
 - **Default position:** hearings should be conducted remotely wherever possible. This will not always be possible and sensible precautions should be taken when people do attend a hearing. Many more procedural matters should be resolved on paper.
 - **CPR:** The Civil Procedure Rule Committee has announced that it is likely to be necessary to publish CPR updates at short notice in response to the COVID-19 outbreak. Certain amendments have already been made to PD 51Y regarding the use of audio visual technology in civil proceedings.
 - **Insolvency:** Winding-up and bankruptcy petitions scheduled for hearing are now being adjourned generally to hearing dates in June 2020 onwards, with liberty to restore on an urgent basis.
 - **Document filing:** In the majority of commercial cases in the High Court, it should be possible to continue using the CE-Filing system, such that all documents can be submitted electronically. The Court of Appeal (Civil Division) is now also subject to provisions allowing documents to be filed electronically. Similarly, the UK Supreme Court and the Judicial Committee of the Privy Council have updated their guidelines allowing documents

to be submitted by alternative means (email, DX, courier etc), in addition to the usual electronic requirements applicable in those courts.

- **Court visiting:** Courts remain open and will sit where possible, albeit with adjusted working practices and reduced capacity. Judges will continue to have regard to open justice. Public galleries in court rooms will in theory remain open to public access (although attendance is prohibited by the Government's nationwide restrictions on movement), and dedicated press seats will continue to allow journalists to report on hearings.
- **Time limits:** In view of the COVID-19 outbreak, the Law Society is currently in discussion with HMCTS regarding the possibility of deadlines being automatically suspended or extended for two to three months, including limitation deadlines for issuing proceedings.

CPR - New Practice Direction 51Y on Video or Audio Hearings in Civil Proceedings

Effective 25 March 2020, technical amendments have been made to Practice Direction 51Y in relation to video or audio hearings during the Coronavirus pandemic. The amendments clarify the manner in which the court may exercise its discretion to conduct hearings remotely in private. It also clarifies what steps the court may make to ensure access by the public to remote hearings that have been held in private by making available audio or video recordings of those hearings.

- The PD is introduced as a pilot scheme under CPR 51. It is intended to formalise the PD through a rule amendment at the earliest opportunity. It will remain in force for no longer than the Coronavirus Act 2020 remains in force (currently unclear).
- The PD clarifies the following:
 - The court may exercise the power to hold a remote hearing in private where it is not possible for the hearing to be simultaneously broadcast in a court building. It may do so consistently with the power to derogate from the principle of open justice and may do so under the provisions of this PD in addition to the bases for doing so set out in CPR 39.2. Where such an order is made under the PD the provisions in CPR 39.2(5) do not apply.
 - The court may not conduct a remote hearing in private where arrangements can be made for

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a member of the media to access the remote hearing. In such circumstances the court will be conducting the hearing in public.

- The court may direct that where it conducts a remote hearing in private it must, where it is practicable to do so, order that the hearing is recorded. Where it has power to do so, it may order the hearing to be video recorded, otherwise where a recording is to be made it should be an audio recording. Available powers to order such hearings to be recorded, and subsequently broadcast, apply to the Court of Appeal (Civil Division) through The Court of Appeal (Recording and Broadcasting) Order 2013 and are expected to apply more generally through s.85A of the Courts Act 2003, which is intended to be inserted by the proposed Coronavirus Bill.
- Where a remote hearing is either audio or video recorded, any person may apply to the court for permission to access the recording.
- The Civil Procedure Rule Committee has announced that it is likely to be necessary to publish CPR updates at short notice in response to the COVID-19 outbreak. It is possible that further updates will be made.

Remote Hearings Should be Used Wherever Possible

Hearings requiring the physical presence of parties, their representatives and others should only take place if a remote hearing is not possible and if suitable arrangements can be made to ensure safety.

- On 20 March 2020 the Judiciary published a **Protocol**, applicable to all hearings including trials and applications in the County Court, High Court (including the Business and Property Courts) and the Court of Appeal (Civil Division). The Protocol confirmed that remote hearings should be used “wherever possible” and that all hearings conducted in accordance with it should be treated for all purposes as hearings conducted in accordance with the CPR. In addition, The Bar Council has urged the courts to not require judges, barristers and others to attend hearings in person.
- The CPR includes many flexible provisions, including that civil hearings can be conducted remotely. Under CPR 23, the court may order, of its own initiative or at the request of the parties, that an application, or part of an application, may

be dealt with by a telephone hearing. Annex 3 to CPR 32 also provides guidance on the use of video conferencing in civil proceedings.

Judge's discretion

- Notwithstanding the above, the decision as to how a hearing in civil proceedings is to be conducted is ultimately a matter for the judge, who must determine how best to uphold the interests of justice. In considering the suitability of video/ audio technology, judges will consider issues such as: (i) the nature of the matters at stake during the hearing; (ii) any issues the use of video/audio technology may present for participants in the hearing; and (iii) any issues around public access to or participation in the hearing.
- One of three solutions will typically be proposed:
 - An appropriate remote communication method will be used for the hearing, e.g. BT conference call, Skype for Business, court video link, BT MeetMe, Zoom, ordinary telephone call or another method. Many of these systems are already widely used in civil courts and include the ability to record hearings.
 - The case will proceed in court with appropriate precautions to prevent the transmission of COVID-19.
 - The case will 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 a party disagrees with the court's proposal, submissions in writing should be made by email or CE-file, copied to the other parties, on what other proposal would be more appropriate. On receipt of submissions from all parties, the judge(s) will make a binding determination.
- The court may also fix a short remote case management conference in advance of the fixed hearing to allow for directions to be made in relation to the conduct of the hearing, the technology to be used, and/or any other relevant matters.
- Usually, short, interlocutory or non-witness applications can be heard remotely. Some witness cases may also be suitable for remote hearings.

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The listing office will seek to ensure that the judge and the parties are informed, as far in advance as possible, of the identify of the judge hearing the case.

Bundles

- The parties should, if necessary, prepare an electronic bundle of documents and an electronic bundle of authorities for each remote hearing. Each electronic bundle should be indexed and paginated and should be provided to the judge's clerk, court official or to the judge (if no official is available), and to all other representatives and parties well in advance of the hearing.
- Electronic bundles should contain only documents and authorities that are essential to the remote hearing as large electronic files can be slow to transmit and difficult to navigate, especially remotely.
- Electronic bundles can be prepared in .pdf or another format. They must be filed on CE-file (if available) or sent to the court by link to an online data room (preferred), email or delivered to the court on a USB stick.

Remote Hearings - Further Considerations

If a hearing is to be conducted remotely, parties should consider the following issues:

- **Privacy:** CPR Part 39.2(3)(g) provides that hearings can (or must) be held in private if the court is satisfied that it is, for any reason, “necessary, to secure the proper administration of justice”. During the COVID-19 outbreak, remote hearings should, as far as possible, remain public in accordance with the principles of open justice.
- Parties should consider if the remote hearing is to be in public or in private and, if in private, on what grounds (see CPR 39.2.3).
- Remote hearings may be public in a number of ways, e.g. (i) one person (judge, clerk or official) can relay the audio and (if available) video of the hearing to an open court room; (ii) accredited journalists may be allowed to log in to the remote hearing; and/or (iii) live streaming of the hearing may be available over the internet. See also PD 51Y.

- **Recording:** CPR Part 39.9 provides that “at any hearing, whether in the High Court or the County Court, the proceedings will be tape recorded or digitally recorded unless the judge directs otherwise” and that “no party or member of the public may use unofficial recording equipment in any court or judge's room without the permission of the court”.
- During the COVID-19 outbreak, hearings will be recorded if technically possible, unless the judge has dispensed with this requirement. Parties should consider how the hearing will be recorded (this may be possible by virtue of the remote system technology), or if an order dispensing with recording can be properly made.
- The recording of hearings and compliance with CPR 32.9 can be achieved in a number of ways: (i) recording the audio relayed in an open court room by the use of the court's normal recording system; (ii) recording the hearing on the remote communication programme being used (e.g. BT MeetMe, Skype for Business, or Zoom); or (iii) by the court using a telephone to record the hearing.
- It is not, however, permitted for the parties to record the hearing without the judge's permission (including where parties are joining a hearing via audio visual technology). Unofficial recording equipment must not be used.

Insolvency Hearings

Winding-up and bankruptcy petitions scheduled for hearing are now being adjourned generally to hearing dates in June 2020 onwards, with liberty to restore on an urgent basis.

- The judiciary has concluded that the general winding-up and bankruptcy list cannot be conducted remotely, and that no satisfactory safety arrangements are available to allow physical hearings.
- On 23 March 2020, Insolvency and Companies Court (ICC) Judge Mullen adjourned generally all cases in the general winding-up list which had been scheduled for hearing from 25 March 2020 onwards to dates in June 2020. Blocks of 20 winding-up petitions will be heard each week commencing 17 June 2020.

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- On 25 March 2020, the Daily Cause list stated that Chief ICC Judge Briggs had adjourned all cases in the Insolvency and Companies List that day with liberty to restore on an urgent basis only. For context, only two winding-up applications were to be heard on 25 March 2020 as a result (by telephone hearing and Skype) and no bankruptcy petitions. All bankruptcy petitions scheduled for 25 March 2020 were adjourned generally with liberty to restore after 18 June 2020.
- Any cases that are restored should take place remotely by Skype and in accordance with the Protocol for Remote Hearings and the Review of Court Arrangements due to COVID-19.
- If a hearing is urgent, parties should e-mail Rolls.ICL.Hearings1@justice.gov.uk with case details, reasons for urgency, a time estimate for reading and the hearing, together with essential documents for the judge's consideration at the hearing. The court will also require all parties' e-mail addresses in order that a Skype hearing can be arranged.
- Although Skype is the current preference, if Skype is not available, a telephone hearing can be set up. It is the responsibility of parties to arrange this with their telephone provider. Once the telephone hearing has been arranged (after agreeing the date and time for hearing with the court) the dial in number should be provided so that this can be passed on to the judge assigned to the hearing.

Other Procedural and Practical Issues

- **Document filing:** In the majority of commercial cases in the High Court, the CE-Filing system will continue to permit the electronic filing of documents. As to the key regimes applicable to commercial cases:
 - **Business and Property Courts (Rolls Building Courts), QBD:** an electronic filing and case management system (CE-File) is in use. The electronic filing capability enables users to file documents at court electronically and pay court fees online.
 - **Court of Appeal:** it was expected that by the end of 2019 the use of CE-File would have been extended to the CoA (Civil Division), however this has not happened yet. The CoA has no electronic filing system and all papers must be lodged in person. However, the Protocol (detailed in

previous slides) applies to the Court of Appeal (Civil Division), and sets out details for remote hearings and electronic bundles. It is possible that further modifications in respect of the COVID-19 outbreak may be published in due course.

- **UK Supreme Court (UKSC) and the Judicial Committee of the Privy Council (JCPC):** in response to COVID-19, parties who prefer not to travel to the court to file their papers should instead email their documents to the UKSC Registry (registry@supremecourt.uk) and the JCPC Registry (registry@jcpc.uk), specifying the means by which they propose to file (i.e. by post, DX or courier). If this method is used, the document will be treated as having been filed on the next business day.
- **Time limits:** In view of the COVID-19 outbreak, the Law Society is currently in discussion with HMCTS regarding the possibility of deadlines being automatically suspended or extended for two to three months, including limitation deadlines for issuing proceedings. The UKSC and JCPC also announced that, while time limits will be applied flexibly, parties should bear in mind the provision of the overriding objective that unnecessary disputes over procedural matters are to be discouraged.
- **Court visiting:** Notwithstanding moves to increase the use of remote hearings wherever possible, courts remain open and will sit where possible, albeit with adjusted working practices and reduced capacity. Judges will continue to have regard to open justice and public galleries in court rooms will remain open to public access (although access will be restricted in reality in line with the Government's lockdown measures), and dedicated press seats will continue to allow journalists to report on hearings.

Coronavirus Act 2020 – Dispute Resolution Considerations

The Coronavirus Act 2020 includes measures to safeguard the administration of justice amidst the outbreak of COVID-19.

- Although the measures contemplated by the Act will have most impact on criminal proceedings and the criminal courts, they mirror ongoing modifications to the workings of the civil courts intended to promote use of audio visual technology.

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- The measures contemplated include expanding availability of video and audio link in court proceedings, in particular by:
 - Allowing certain hearings in the courts to take place by phone or by video, including if any party is subject to restriction of movement due to quarantine measures.
 - Expansion of the availability of video and audio link in various criminal proceedings, including full video and audio hearings in certain circumstances. Allowing public participation in relation to court and tribunal proceedings to be conducted by audio and video.
- The legislation is time-limited for 2 years and not all of its measures will come into force immediately. The Act allows the Government to switch on these new powers when they are needed and to switch them off again once they are no longer necessary, based on the advice of chief medical officers.
- CPR PD 51Y will cease to have effect on the date on which the Coronavirus Act 2020 ceases to be effective.

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below.

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