



## ENGLISH COURTS REMAIN OPEN FOR BUSINESS IN THE FACE OF COVID-19

Covid-19 is challenging every aspect of our lives, including how we litigate in the English courts. This briefing offers an update on recent guidance and some practical workarounds, which we hope will be helpful.

*“The rule of law is absolutely fundamental to our democracy. We are, though facing an unprecedented public health emergency, and that means that though justice must continue, it cannot continue as if nothing has changed.”*

<sup>1</sup> <https://www.barcouncil.org.uk/resource/guest-blog-susan-acland-hood-ceo-hm-courts-tribunals-service-unprecedented-times.html>

# “The English courts have always been in favour of a transparent justice system, unless the circumstances are such that this is not just for those involved.”

## What does this then mean for organisations who are party to litigation in the English courts, or will be?

Our court system has seen a significant investment in recent years, undoubtedly there is more to be done, and court users, the judiciary, and court staff are likely all wishing that we were further into the technology journey than we are. That said, we have a court system, which for the majority of commercial litigation in which most clients are involved, will cope. It is therefore very much a case of business as usual.

## How will the courts operate?

The Business and Property Courts (including the Commercial Court, Chancery, Technology and Construction, Admiralty etc) already operate an online claim form and application issue system, avoiding the necessity of physical filings and have the capacity to conduct hearings over the telephone or by video link. Other courts are similarly well placed.

## What guidance is being given?

Over the last few days the guidance has changed and evolved on an almost daily basis as the wider situation unfolds and the true picture of what we are all facing becomes clearer. The technology

is already there, in a form that will cope to a degree, however due to the rapid spread of Covid-19, the most uncertain element is whether the human interaction needed to make all of the virtual elements work will be possible.

Hearings will only be postponed where absolutely necessary is the message being given by the Lord Chief Justice of England and Wales, in his recent guidance<sup>2</sup>, which states that *“the default position now, in all jurisdictions, must be that hearings should be conducted with one, more than one or all participants attending remotely”*, and echoed by the Judge in Charge of the London Commercial Court, Mr Justice Teare in recent hearings, and set out in the Business and Property Court remote hearings protocol (20 March 2020)<sup>3</sup>, and also the Civil Justice In England And Wales Protocol Regarding Remote Hearings (20 March 2020)<sup>4</sup>

Set out below is a summary of the current guidance and approach being taken by the courts, with specific stages looked at in more detail.

## Issue of proceedings

In terms of issuing proceedings the court’s online issue systems provides a system that is already well used,

as long as there is a court staffer to process the documents, the system will operate as it has since it was introduced a few years’ ago.

A difficulty may arise if the courts find that due to illness they are unable to adequately staff the system, which may lead to delays in claim forms etc being issued.

If parties are considering commencing an action, they may be best advised to issue and serve the claim form now, to avoid the possibility for any later delay, and of course the nearer to any time limit (contractual or statutory) you are, the more likely it is that you would wish to issue to preserve the position.

## Case Management Conferences and Directions Hearings

There really should be no issue with these hearings being held via telephone or video link.

We are all now well used to conference calls involving multiple parties and whilst the courts are set up to use one particular system, we expect there to be flexibility to enable those on other systems to participate. What will be needed is an element of planning to ensure that the judge, their clerk, and all parties are aware of what is needed – a high level of co-operation will be required (as

<sup>2</sup> <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>

<sup>3</sup> <https://i6n7b4g7.stackpathcdn.com/litigation/wp-content/uploads/sites/7/2020/03/Remote-hearings.Protocol.Revised.1.pdf>

<sup>4</sup> <https://www.judiciary.uk/publications/civil-court-guidance-on-how-to-conduct-remote-hearings/>

required by the Civil Procedure Rules, in any event).

Neither remote hearings nor electronic bundles (eBundles) are new concepts. However, the courts have had to act quickly to ensure that the judiciary and those who support them have the technology needed to enable hearings via video link to take place, and patience may be needed for the first few applications.

### **Urgent applications, such as injunctions**

The court guidance is that if resourcing becomes an issue, priority will be given to urgent applications, such as injunctions, and these will be heard remotely via video link and the use of eBundles.

Again, as mentioned above, neither remote hearings nor eBundles are new concepts. However, patience may be needed in setting up the technology, and the greater the forward planning the smoother the process will be - parties should therefore seek to give their lawyers instructions as early as possible.

### **Trials**

Whether parties wish to proceed with their trials or seek a postponement, assuming the court is willing to give it (which will be resisted in all, but the most persuasive of circumstances, see below) will depend upon the circumstances of course - for example, if the matter is likely to be resolved on the basis of documentary rather than witness or even expert evidence, then it is likely that the parties and also the court will be keen to see the matter proceed.

The challenge will come where witness or expert evidence are pivotal to the outcome of the case, and whether there are multiple witnesses/experts all of whom are needed to give oral evidence, of course location of witnesses is a relevant factor, in most of the cases on which we are instructed, witnesses, and indeed the clients, are based outside of the jurisdiction, and even in the most IT sophisticated jurisdictions linking several parties and their legal teams, plus witnesses, and the court, will create a logistical challenge- live

stream has a lag, cross-examination etc is more difficult, witness credibility is harder to gauge when evidence is given remotely, to mention just a few of the challenges. In these circumstances, and in order for justice to prevail, postponing might be the better course - it will however come down to the circumstances of each matter.

In terms of whether trials proceed in court (still being offered), via remote links, or adjourned, it is clear from all of the guidance being issued that the English courts will be flexible and adapt to the needs of the parties and the matter.

Given the nature of Covid-19, there is the potential for those involved in litigation- whether clients, lawyers, witnesses, or the judge, to become ill. This is the most unpredictable challenge. Clearly, in the event of a matter being unable to proceed due to illness, an adjournment may be ordered.

### **Transparency**

The English courts have always been in favour of a transparent justice system, unless the circumstances are such that this is not just for those involved. Therefore, it is no surprise to see that the official line from the Her Majesty's Courts and Tribunal Service (HMCTS) is that trials will be open to the public, wherever possible (via video link or similar) and that the hearings will be recorded by the court, unless ordered otherwise - recording by the parties is prohibited.

### **Conclusion**

In summary, going forward at least for the next few months, a greater degree of planning is needed, the parties must co-operate now even more than before, but the message is clear - the English courts and the lawyers that serve them remain open for business.

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