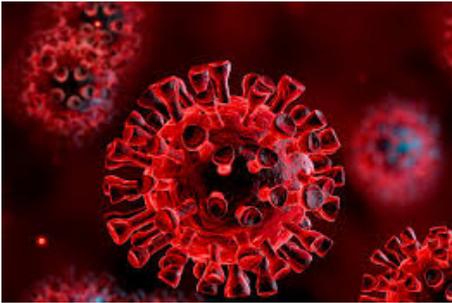


COVID-19 Guide to Litigation



Litigation in the time of Covid-19



Extraordinary circumstances have given rise to immediate steps taken by the Judiciary of England & Wales to seek to avoid the civil justice system coming to a complete standstill by cancelling all hearings, including trials, during the current pandemic.

Jury trials are off but the courts appear keen to preserve civil hearings through the use of telephone and video conferencing wherever possible.

In practice, any trials involving expert or lay witness evidence are very unlikely to be an attractive option at this time for practitioners, whereas the courts' encouragement of flexible deadlines and reflection of this in a new Practice Direction is far more likely to be taken advantage of.

Introduction

Over the last couple of weeks since restrictions were imposed, followed by full scale lockdown, we have seen both national and local court guidance in response to the latest coronavirus guidance and restrictions. This factsheet aims to provide a summary of the key court directions and contains links to the full guidance and protocols.

As a general rule, according to the Law Society Coronavirus Update of 1 April, the starting position for solicitors is not to attend court unless told otherwise. Only urgent cases are currently set to proceed.

The Lord Chief Justice announced on 23 March that all jury trials are postponed, and magistrates' courts will only hear urgent cases (overnight custody and prisoner production). Only 43% of courts remain open; there are 158 priority court and tribunals open for essential face-to-face hearings. In addition a further 124 court and tribunal buildings will remain closed to the public but open to HMCTS staff, the judiciary and those from other agencies. These 'staffed courts' will support video and telephone hearings and administrative cases without hearings.

HM Courts & Tribunals Service (HMCTS) Guidance

Guidance on how HMCTS will use telephone and video technology during the coronavirus (COVID-19) outbreak (18 March 2020 and updated 27 March).

- + Teleconferencing Parties will be sent BT MeetMe conference call telephone numbers. The capacity is being expanded urgently.
- + Videoconferencing Courts have started using Skype for Business on HMCTS and judicial systems. Participants in a hearing do not need Skype for Business to join, but will need the free Skype meetings app. Parties will be sent instructions and a link to join the hearing as a guest.
- + HMCTS do not currently support the use of other video conferencing applications. However, this may quickly be overtaken by individual judges using their discretion or out of necessity, indeed other applications are expressly endorsed by the Protocol Regarding Remote Hearings described above. Also, there has been a report of a self-isolating defendant in a fast-track personal injury claim appearing before the court via a WhatsApp video.
- + Cloud video platform (CVP): The capacity is being increased to provide video hearing capability for any courtrooms that have suitable equipment. Apparently, a five-day trial has already been completed over video in the Court of Protection and nearly 500 audio hearings completed.

Practice Direction Amendments

The New Practice Direction 51ZA (“PD 51ZA”) supplementing the Civil Procedure Rules 1998, came into force on 2 April 2020 to extend time limits and clarify Practice Direction 51Y – Coronavirus (“PD 51Y”). Until 30 October 2020, as a temporary measure during the Coronavirus pandemic to ensure that the administration of justice is carried out so as not to endanger public health, PD 51ZA:

(a) makes provision for parties to agree extensions of time to comply with procedural time limits in the CPR, Practice Directions and court orders

(b) provides guidance to the court when considering applications for extensions of time and adjournments

It also makes provision to clarify the meaning of PD 51Y, which relates predominantly to the nature of remote hearings which out of necessity are private and therefore initially inaccessible to the public, in the interests of justice. Previously telephone hearings could be attended by any person within the building, because they were dealt with in open court, which is no longer the case.

During the period in which PDZA is in force, CPR rule 3.8 has effect as if in substitution for the reference to 28 days there was a reference to 56 days¹;

Any extension of time beyond 56 days, whether agreed by the parties or on application by a party, requires the permission of the court. An application for such permission will be considered by the court on the papers. Any order made on the papers must, on application, be reconsidered at a hearing.

In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions.

+ In paragraph 4 of PD 51Y, the reference to ‘application’ in the final sentence is to be read as ‘request’. As such any person seeking permission to listen to or view a recording of a hearing is not required to make a formal application under CPR Part 23.

Covid-19 and Court Directions

Protocol Regarding Remote Hearings 20 March 2020

- + Applies to hearings of all kinds including trials and applications in the County Court, High Court, Court of Appeal and the Business and Property Courts.
- + It should be applied flexibly and parties should be sympathetic to any IT/other difficulties.
- + The default position is that as many hearings as possible should be undertaken remotely.
- + A Chancery Division decision on 6 April 2020 refused an application to adjourn a five week trial due to start in June 2020 because of Covid-19, on the basis that the CV Protocol and new PD 51Y made it clear that as many hearings as possible should be conducted remotely during the crisis through the use of technology; in any event the situation may have changed by June (*In the matter of One Blackfriars Ltd (In liquidation) sub nom (1) Adrian Charles Hyde (2) Kevin Anthony Murphy (Joint Liquidators of One Blackfriars Ltd) v (1) Anthony David Nygate (In his capacity as Representative of the Estate of James Joseph Bannon) (2) Sarah Megan Rayment (Former Joint Administrator of*

One Blackfriars Ltd) [2020] EWHC 845 (Ch) Ch D (John Kimbell QC) 06/04/2020.

- + The Technology and Construction Court on 20 April 2020 has also given useful guidance on the approach to applications for adjournments of hearings and applications for extensions of time due to the Covid-19 pandemic in *Municipio de Mariana & Ors v (1) BHP Group PLC (formerly BHP Billiton) (7) BHP Group Ltd (Second to Sixth Defendants not part to the proceedings)*. The following principles were held to govern whether a particular hearing should be adjourned if the case could not be heard face-to face or whether there should be a remote hearing instead:
 - (i) Regard was to be had to the importance of the continued administration of justice. Justice delayed was justice denied even when the delay resulted from a response to the prevailing circumstances.
 - (ii) There was to be a recognition of the extent to which disputes could in fact be resolved fairly by way of remote hearings.
 - (iii) The courts had to be prepared to hold remote hearings in circumstances where it would have been inconceivable only weeks earlier.
 - (iv) There was to be rigorous examination of the possibility of a remote hearing, and of the ways in which such a hearing could

be achieved consistent with justice, before the court should accept that a just determination could not be achieved in such a hearing.

(v) Whether there could be a fair resolution by way of a remote hearing, and of the ways in which such a hearing could be achieved consistent with justice, before the court should accept that a just determination could be achieved in such a hearing.

(vi) Whether there could be a fair resolution by way of a remote hearing would be case-specific. A multiplicity of factors would come into play and the issue of whether and to what extent live evidence and cross-examination would be necessary was likely to be important in many cases. There would be cases where the court could not be satisfied that a fair resolution could be achieved by way of a remote hearing.

In respect of the approach to applications for extensions of time because of Covid-19, the court held:

(i) The objective, if it was achievable, was to keep to existing deadlines and where that was not realistically possible to permit the minimum extension of time which was realistically practicable. The prompt administration of justice and compliance with court orders remained of great importance even in circumstances of a pandemic.

¹ In Liverpool, however, prior to the implementation of PD 51Y, Wood J made a decision in conjunction with the district judges that 90 days would be the appropriate extension in the standard directions issued on receipt of directions questionnaires. Any extension beyond this will require the permission of the court in Liverpool cases. In other courts in the region, the automatic 56 days will apply unless directed otherwise.

(ii) The court could expect legal professionals to make appropriate use of modern technology.

(iii) The court could expect and require from lawyers a degree of readiness to put up with inconveniences; to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective use of remote technology.

(iv) The approach required of lawyers could also be expected from professional expert witnesses. However, rather different considerations were likely to apply where the persons who would need to take particular measures were private individuals falling outside those categories.

(v) The court should be willing to accept less polished evidence and other material.

(vi) However, the court had to take account of the realities of the position and while requiring lawyers and other professionals to press forward care had to be taken to avoid requiring compliance with deadlines which were not achievable even with proper effort.

(vii) The court had to have regard to the consequences of the restrictions on movement and the steps by way of working from home which had been taken to address the pandemic.

(viii) Those factors were to be considered against the general position that an extension of time which required the loss of a trial date had much more significance and would be granted much less readily than an extension of time which did not have that effect.

In this case, an extension of time for provision of reply evidence was given of 5-6 weeks on the basis that even when proper allowance was made for the use of technology and extra efforts, the exercise would take significantly longer than provided for in the timetable. Justice required that the defendants be given the extension of time. The case is a high value one regarding the collapse of a dam in Brazil, with over 200,000 claimants under Brazilian law and the present application related to an application by the first and seventh defendants challenging the English court's jurisdiction, so it is particularly complicated, and the court's approach to requests for extensions and adjournments will obviously be case/fact specific.

- + When a hearing is fixed or approaching, the judge will have three options available:
 - A remote hearing by a specified communication method (BT conferencing, BT MeetMe, Skype or Zoom);
 - A face to face hearing proceeding in

court with appropriate precautions (with social distancing throughout in a sufficiently large court room to ensure this); or

- The hearing will have to be adjourned because neither of the two previous options are practicable.

- + It will normally be possible for all short, interlocutory or non-witness applications to be heard remotely.
- + Courts can fix a short CMC (remote) for directions in relation to the conduct of hearings, the technology to be used etc.
- + Available methods for remote hearings include (non-exhaustively) BT conference call, Skype for Business, court video link, BT MeetMe², Zoom and ordinary telephone call – a judge must check that suitable facilities are available.
- + The hearing will be recorded by the judge's clerk and, as per the normal court rules, the parties are not permitted to record it (although this cannot be controlled in practice).
- + Where necessary, electronic bundles (e-bundles) are to be provided to the court and other parties well in advance of the hearing; they should be indexed and paginated and should contain only documents and authorities that are essential to the remote hearing.
- + E-bundles 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.

- + Courts are expecting the full co-operation of the parties and their advocates. <https://www.judiciary.uk/wp-content/uploads/2020/03/Civil-court-guidance-on-how-to-conduct-remote-hearings.pdf>

Business and Property Courts (BCP) – Snowden J Covid-19 Update Number 1 31 March 2020

- + The aim of the BPCs in Leeds, Liverpool, Manchester and Newcastle is to continue to provide a service to court users, having regard to the overriding importance of complying with the Health Protection (Coronavirus, Restrictions) Regulations, and all further applicable government guidance.
- + The civil court centres in Leeds, Liverpool and Manchester will remain open for essential face-to-face hearings; the Newcastle centre will not open but will remain staffed.
- + Wherever possible, the BPCs will seek to make arrangements to hold hearings remotely; although a matter for judicial

discretion, if it is not possible to hold hearings remotely, it is highly likely that the hearing will be adjourned.

- + Parties and their advisers should not wait for contact from the court as regards the arrangements for listed hearings; they should cooperate well in advance of a scheduled hearing to agree a suitable means by which, subject to the court, the hearing can proceed.
 - + These arrangements can then be approved by the court on paper or at a brief, remote CMC convened for the purpose. Alternatively, the parties should agree the terms on which the hearing can be adjourned. Some applications may be suitable for determination on paper and without a hearing pursuant to CPR 23, in which case the court should be notified as soon as possible.
 - + If a remote hearing is possible, the parties should discuss and seek to agree a proposal to put to the court for the logistics, including the preferred manner of remote communication. Although practitioners and some judges have been active in trialling other systems, and the updated Civil Court guidance still mentions Zoom, the current instruction from HMCTS is only to use BT MeetMe for hearings by telephone, and Skype for Business for video conferencing. Urgent consideration is, however, being given by HMCTS and the senior judiciary to approving the use of other systems. Further guidance will be publicised as and when it is available.
 - + The parties must also address whether it will be possible for the hearing to be held in public by giving remote access to the media or members of the public pursuant to the new Practice Direction 51Y³, and whether, and by whom, a recording of the proceedings will be made and stored.
 - + The parties must seek to agree and prepare electronic bundles of documents and authorities which must be strictly limited in size and number to those which are essential to the issues to be determined.
- ### **Key Points and Links to individual court centres' guidance**
- <https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak>] – these do not apply to BPC
- + It is essential to refer to each court centre's guidance as these vary significantly from court to court due to varying technical capabilities and judicial approaches. Only key points are set out below by way of examples.

² This may well change if the concerns currently in the press regarding the security of Zoom are found to be potentially prejudicial to hearings, particularly in relation to private hearings or ones concerning sensitive information, for instance in relation to freezing injunction applications. Also, Snowden J noted (in his BPC guidance of 31 March 2020) that the HMCTS current instruction is only to use BTMeetMe and Skype for Business, but that other systems were being considered urgently.

³ The new Practice Direction 51Y – Video or audio hearings during Coronavirus pandemic – came into force on 25 March 2020 and clarifies the manner in which the court may exercise its discretion to conduct hearings remotely in private as described above

Manchester County Court – HHJ Bird guidance published 20 March 2020

Key points:

- + From 25 March all interim applications, costs and CMCs and pre-trial reviews will take place by telephone/video where all parties consent. Arrangements are to be made by the claimant or, if the claimant is a litigant in person (LiP), by the first named represented party.
- + Parties can agree between themselves extensions of time of up to 56 days without a judge's consent, beyond 56 days any agreed extension must be submitted to the court by email including a brief explanation of the reasons, confirmation that it will not prejudice any hearing date and with a draft Consent Order;
- + Judges are likely to have access to Skype for Business in the near future.
- + HHJ Bird has asked the listing staff to apply PD23A para 6.1 (and onwards) strictly where both/all sides are represented, all parties consent and where the conferences will be arranged by the parties – this will include cases where the hearing may last more than the one hour suggested under para 6.2. This is intended to promote the listing of cases by phone by court staff without requiring judicial input and to expand the approach to hearings lasting more than one hour. Relevant hearings under para 6.2 should therefore by default take place by telephone (in open court) subject to the conditions in PD23A being met.
- + This applies to allocation hearings, listing hearings, interim applications, CMCs and pre-trial reviews.

Merseyside/Chester County Courts guidance 21 March 2020 – applying to Liverpool and Chester and expected that Birkenhead, St Helens and Crewe will follow

Key points:

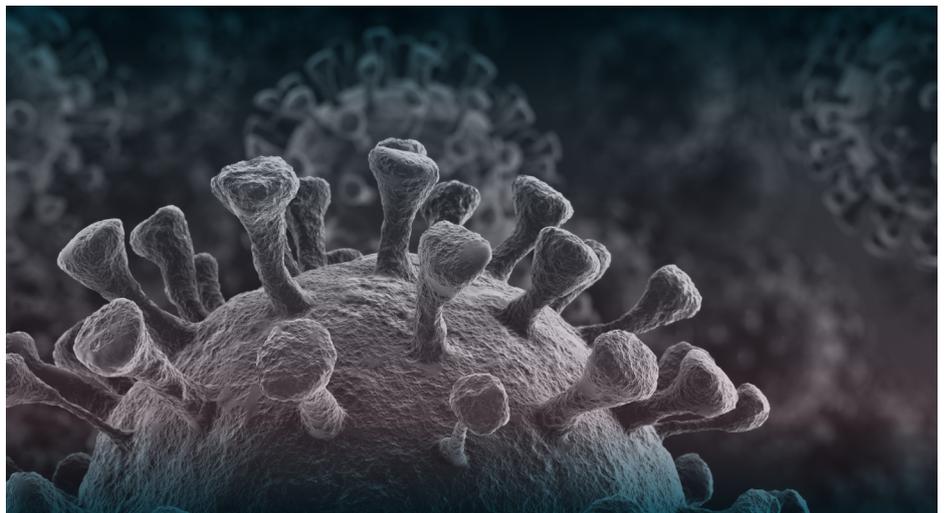
- + Audio conferencing will be used by default as video technology is lacking in NW courts e.g. external Skype video calls are not possible.
- + Claimant is to make the necessary arrangements unless an LiP, in which case, the first named represented party should do so.
- + It is not practicable to hold SCT trials remotely with LiPs so they are to be vacated until after 4 May 2020.
- + All fast track and multi-track trials will be vacated for a minimum of four weeks from 25 March initially, however, parties can apply to vary/reinstate if social distancing can be preserved and the application has the consent of all parties and advocates.
- + All trials listed within a window up to 1 June will be vacated.

North and West Yorkshire County Courts and Leeds District Registry – 23 March 2020

- + All hearings by telephone, Skype, BT MeetMe or some other mutually convenient method.
- + In fast track and multi-track trials, parties will be contacted and given the options of a remote hearing, a face to face hearing with appropriate precautions or an adjournment.
- + HHJ Mark Gosnell, Designated Civil Judge for North and West Yorkshire, has published a Civil Update for North and West Yorkshire on 6 April 2020. Initially all multi-track trials were vacated but the court is now giving parties the option of a trial conducted on paper only or remotely by any or the three methods mentioned; it is not anticipated that many such trials will take place but this gives the parties an option of a timely hearing by remote

means. The court is prepared to consider face to face hearings with appropriate social distancing but only in a very limited class of case, for example to prevent physical harm, serious financial consequences or involving the liberty of the subject and again, it is expected that very few such trials will take place. Initially small claims trials were also vacated but from 1 May 2020 the court is going to attempt to list some for remote hearings where the parties consent and are capable of fairly taking part. They will again be given the option of a decision on paper only or a remote hearing.

- + CCMCs and chambers lists will be dealt with remotely; parties are encouraged to cooperate and agree a mode of hearing – if BT conferencing is to be used then one party will organise it, if Skype or BT MeetMe is used, the organization and recording will be controlled by the courts.



APIL and FOIL recommended Best Practices for Personal Injury Claims – 31 March 2020

- + As many offices have now closed, practitioners should engage with their counterparts by telephone and/or email with a view to resolving disputes effectively and efficiently; email signatures should be updated to indicate the correct contact numbers and email addresses if they have changed.
- + It is in the best interests of clients to agree to accept service by email temporarily and it is reasonable to seek confirmation from a counterpart that this covers service of the claim form where appropriate (where solicitors have been given as the address for service).
- + Practitioners should consider using a dedicated email address for the receipt of service for documents and proceedings, making it clear that service is subject to strict compliance with defined terms which limit your agreement to accept service by email for the purposes of paragraph 4.2 PD 6A CPR.
- + Where a firm has declined to accept service by email the best course is likely to be to serve in any event, having made an application for an order under Part 6.15(1).
- + Face-to-face medical examinations are now difficult to arrange and it will often be in the client's best interests to agree to use some form of video conferencing for experts' "examinations" of the injured person. The BMA has issued guidance to medics indicating that the NHS is turning to remote consultations in order to minimise the risk of infection for staff and patients. <https://beta.bma.org.uk/advice-and-support/covid-19/practical-guidance/covid-19-remote-consultations-and-homeworking>. Medco has agreed that the current ban on the use of remote examinations will be lifted. Conditions and other factors which users will need to consider are set out in a separate notice <https://www.medco.org.uk/media/1186/remote-examination-guidelines.pdf>
- + Inevitably, some appointments with experts will have to be postponed or rescheduled and practitioners should try to adopt a consensual approach to the impact this will have on case timetables.
- + Parties should try to agree to the exchange of witness and expert evidence by email, via a password protected pdf document.
- + It is likely that both parties will face challenges in complying with existing court directions and timetables and there is new case law to support extensions by consent of up to 56 days (O'Driscoll v F.I.V.E Bianchi S.p.A where the court has held that the normal 28 day rule under CPR 3.8(4) will be relaxed in appropriate circumstances by granting a 56 day extension by consent⁴. A consensual approach is recommended.
- + HMCTS has issued guidance on the wider use of remote hearings, by telephone or Skype and it is recommended that parties adopt this guidance (see above).
- + A consensual approach to seeking adjournments of interlocutory hearings or trials due to non-availability of clients, witnesses or experts is also recommended.

- + Where the effects of Covid-19 will mean that limitation becomes an urgent issue, then best practice is that, subject to any general deferment of deadlines, parties should (1) enter into a standstill agreement to extend the limitation period; or (2) issue and serve the claim form, in personal injury cases asking the defendant to agree an extension of time for medical evidence.
- + The ABI and Thompsons Solicitors have agreed an extension to the Personal Injury Protocol regarding limitation, which APIL has endorsed. A list of insurers and law firms who have signed up to the protocol is available on the ABI website <https://www.abi.org.uk/products-and-issues/choosing-the-right-insurance/motor-insurance/coronavirus-protocol/>. The protocol, in effect immediately, involves an agreement that all limitation dates in personal injury cases are frozen and claimants undertake to respond constructively to defendants' requests for extensions of time to serve a defence. This Personal Injury Protocol has been extended to at least 20 May 2020 and as at 20 April 2020 some 335 law firms and 105 insurance companies had signed up to it.

New Legislation

The Coronavirus Act 2020 expands the availability of video and audio link in court proceedings, to include allowing specific civil applications (relating to infectious diseases/coronavirus) in the magistrate's court to take place by telephone or video; expanding the availability of video/audio links in various criminal proceedings; and allowing the public to participate in court and tribunal proceedings through audio/video.

Conclusion

It is essential to check for updates from the relevant court centre and not to presume that courts will have "caught up" with the perhaps overly ambitious Protocol in respect of the use of different technology for hearings. The aim of the Protocol is to limit the huge backlog of hearings and trials by encouraging the use of technology, but the HMCTS guidance reflects the limits on this and perhaps also caution regarding the security of Zoom and other video conferencing methods. Advisers are also likely to be less than enthusiastic in many cases to consenting to certain hearings/trials by video. If the technology (and it must) catches up in the meantime, however, by the time the Covid-19 crisis ends, we might be witnessing a complete revolution in the way courts work from now on. The use of technology and encouragement of cooperation between parties is surely going to be required to assist in clearing up the inevitable backlog for a long time to come.

⁴This has now been formalised by the new PD 51ZA as described above

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