

Guaranteed adjournment due to Covid-19? Think again...

The coronavirus pandemic has had a profound impact on almost every aspect of our lives with the UK Government imposing a lockdown and an array of social distancing measures. The courts have not been immune from the impact, and it is clear that so long as the current situation persists (save perhaps in the rarest of occasions) trials and hearings cannot continue to operate in the conventional form of face to face public gatherings in (often) confined spaces. The recent decision of Mr John Kimbell QC, sitting as a deputy High Court Judge, in [Re One Blackfriars Ltd](#) [2020] EWHC 845 (Ch) is a salutary reminder that the Courts are not simply adjourning trials, but are requiring litigants and court users to explore the effective use technology to ensure such hearings can take place safely at the time originally listed.

In [Re One Blackfriars Ltd](#), a c. £250 million claim against the original administrators for the alleged sale of the Company's main asset at an undervalue, a five week trial had been set down for June 2020 to include 4 witnesses of fact and 13 experts. Several of the witnesses fell into the category of vulnerable persons or were caring for other members of their households. At the PTR the Claimants made an oral application to adjourn the trial in light of the Covid-19 situation and the lockdown imposed on 23 March 2020. The Respondents opposed the application on the basis that it was not appropriate or necessary, and that a properly arranged remote trial could proceed.

The Judge reviewed the [Coronavirus Act 2020](#), the [Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#), as well as the messages from Lord Chief Justice to judges of the Civil and Family Courts, the [Remote Hearings Protocol](#), and other guidance. He rejected the submission that the holding of a remote hearing would contravene the Government's imposition of the lockdown. Indeed, the holding of remote hearings has been one of the objects of the legislative response to the pandemic. As many hearings as possible should continue remotely so long as that can be done safely and effectively. (It went without saying that a conventional style hearing would have been inappropriate.)

In particular, the Judge referred to the fact that under s.71 of the Senior Courts Act 1981 the High Court could sit or conduct business "*at any place in England or Wales*", which would include (although it is perhaps hard to imagine this was what Parliament had in mind at the time) the homes of High Court Judges with counsel, witnesses and other litigants participating remotely via the internet. The Judge also commented that travel to attend a remote court hearing, for example, at a solicitor's office, would constitute a legitimate exception to the general prohibition on movement and gatherings under paragraphs 6 and 7 of the Regulations, as would attendance by an IT technician at the home of a witness in order to help connect to a remote hearing, although social distancing measures should in all cases continue to be observed. This should mean that an individual participant's inadequate home

broadband would not typically preclude a remote hearing, provided they can safely access the hearing elsewhere.

In relation to safety, the Judge was not persuaded that particular difficulties faced by participants could not be mitigated or overcome with appropriate arrangements. Further, the court expected the litigants to be flexible in the face of otherwise insurmountable challenges, for example considering split liability/quantum trials. Clearly each case will turn on its own facts. For example, where key factual witnesses are unable to participate because they have contracted COVID-19, the situation may well be different. Therefore those seeking adjournments because of COVID-19 would be well-advised not only to provide detailed evidence of the individual circumstances, but also to show that they have considered all possible forms of mitigation.

It was accepted on both sides that the holding of a 5-week remote trial posed significant technological challenges. However, the judge did not consider that for this case those were insurmountable. Remote trials with live evidence (albeit admittedly on a smaller scale) have been (and are being) conducted remotely without serious interruption. The Judge stressed the need for the parties not only to plan the technology, but also to test it robustly in advance to ensure that broadband connections had sufficient bandwidth to download and upload the audio and video feeds, and suggested that it might be appropriate for participants to gather in designated premises (ideally with IT support), such as law firms.

The Judge considered that in this case a remote hearing did not affect one party disproportionately such that a fair (remote) hearing was possible. (Clearly that might not always be the case, particularly in some cases involving litigants in person.) Finally, the judge commented that it was in neither party's interest for the matter – dating back to 2011 - to be delayed until 2021.

For those reasons the Judge rejected the application to adjourn, and listed a further PTR hearing to consider any issues relating to the use of technology for the remote trial.

While each case will turn on its own facts (and there will be cases where, for exceptional reasons, an adjournment is appropriate), the decision is an important reminder that the current judicial thinking is “business as usual, although not conducted as usual”, and the fact that a trial is substantial in length, or involves a large number of witnesses is not likely of itself to justify an adjournment in the current circumstances.

Court users will have to think carefully therefore about how to manage remote hearings. They will need to ensure all participants have sufficient broadband connections and IT support, sufficient screens to be able to see witnesses, documents, transcripts, etc., and establish a

separate, parallel channel of communication among the wider legal team so instructions can be taken without interruption to the hearing. Further, it is now essential – even more than before – that parties and their lawyers co-operate with each other in order to overcome any difficulties which are sure to arise as more hearings are conducted remotely.

It is unclear how long the current measures and restrictions will remain in place: there are no signs of them being lifted in the short term at least. While courts and their users may perhaps have been slower than other sectors to embrace the use of technology, this extraordinary situation might have changed that. Members of Maitland Chambers are quickly learning how to conduct remote hearings effectively. Who knows, when all returns to normal, it may well be that certain aspects, for example an increased use of hyperlinked, organisable and searchable e-bundles, are recognised as improvements to litigation and are here to stay.

Edward Meuli

15 April 2020

