Applications to adjourn on account of COVID-19

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The courts have faced a number of applications to adjourn trials and hearings in the outbreak of COVID-19. **Jeremy Brier** suggests such applications will only be granted by the courts as a matter of last resort, on the basis of "concrete evidence" of difficulties and when the parties have shown that notwithstanding their cooperative efforts to make arrangements to meet those difficulties, they are insurmountable. Remote hearings are generally to be encouraged. They are technologically and logistically possible and do not compromise fairness.

I. The developing guidance

From around 9 or 10 March 2020, and steadily over the course of the next 3-4 days, Coronavirus became a concern of pre-eminent importance for the United Kingdom, in terms of protecting human life and enabling our important institutions of state, including the courts, to continue to enact their business.

On 16 March 2020, the Lord Chief Justice issued his first update on the subject, published online on 17 March 2020. It referred to the "vital importance that the administration of justice does not grind to a halt". He outlined the need to increase the use of telephone and video technology "immediately" and to hold remote hearings "when possible". That update was updated two days later, on 19 March, in the context of the rapidly developing spread of the virus and ensuing public concern, by way of a message to judges in the civil and family courts. The Lord Chief Justice stated that it was now "*the default position … in all jurisdictions*" that hearings should be conducted with one, more than one, or all participants attending remotely. He acknowledged, that would not always be possible.

The early recognition was thus that (1) the business of the courts would continue; (2) that such business would now commonly comprise remote hearings of all or some participants; and (3) there would be some hearings which could not be accommodated remotely and would continue as normal.

On 23 March 2020, the Prime Minister instituted what is now commonly referred to as the nationwide "lockdown", a shorthand for the instruction to stay at home save for very limited purposes. Legislation swiftly followed, which was consistent with the Lord Chief Justice's earlier guidance.

On 25 March 2020, Parliament enacted the Coronavirus Act 2020 ("**the 2020 Act**") providing emergency procedures to address the pandemic and to make arrangements to continue the business of certain national institutions in the new circumstances necessitated by the disease, such as enforced social distancing. Sections 53 to 57 of the 2020 Act provide for the expanded use of video and audio technology in criminal proceedings and provision for the public to see and hear those proceedings.

A day later, on 26 March 2020, the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 reg.6(2)(h) provided that a person could leave their home to attend court or "to participate in legal proceedings" and reg.7(b) and reg.7(d) allowed gatherings of two or more people where that was essential for work purposes or where it was reasonably necessary "to participate in legal proceedings".

There then followed a Protocol on the Conduct of Remote Hearings on 26 March and new CPR PD 51Y on video and audio hearings which provides that: "*where the court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice*". Remote hearings accessed by a media representative are public proceedings and (as stated below, Cause Lists, give details of how to gain remote access). But if an order is made under PD51Y, there is no requirement for the order to be published as under CPR Part 39.2(5).

This issue came before Mr John Kimbell QC sitting as a Deputy High Court Judge in **Hyde and Murphy v Nygate and Rayment [2020] EWHC 845 (Ch)** in the context of an application

brought by the joint liquidators of One Blackfriars Limited to adjourn the trial of their claim against their former administrators which was due to take place over five weeks in June 2020.

The contention was that adjournment was a necessary response to the restrictions introduced by the Government initially on 16 March 2020 and then on 23 March 2020 when the Prime Minister instituted the "lockdown". It was submitted that to proceed with a trial in such circumstances exposed participants and other court workers to unacceptable risks and the technological challenge posed for such a trial was too great. There was a real risk of unfairness.

The judge rejected the application. He was asked to consider arguments relating to the principle of continuation in the light of the guidance to date; safety concerns; and technological concerns. He found, in short, that none justified an adjournment of the trial and the parties were ordered to continue to prepare for the trial and to use the available time to explore the technological options available to facilitate a remote trial. His decision was consistent with the guidance to date and with other cases before and after. However, the grounds of the application raise matters which could (depending on the facts of the case) raise different issues and pose awkward questions. They are reviewed below.

II. Considerations

The judge was clearly right to find that far from being inconsistent with Government guidance in response to the pandemic, the use of video technology and electronic document handling software is precisely what the Coronavirus regulations and guidance issued by the Lord Chief Justice had in mind. In particular, the 19 March guidance note referred to above provides for a "default position". The Lord Chief Justice went on to state expressly that "final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology, otherwise there will be no hearings and access to justice will become a mirage."

The remote hearings protocol, first issued on 20 March but then re-issued on 26 March as outlined above, states clearly that the "the current pandemic necessitates the use of remote

hearings whenever possible. This protocol applies to hearings of all kinds, including trials. It should be applied flexibly".

The Practice Direction 51Y clarified the way the court may exercise its discretion in this regard.

It is now virtually unarguable, without further specific reasoning and factors, that a trial or hearing should be adjourned on the basis of COVID-19 as a matter of principle. That is not to say there may not be circumstances where an adjournment may be appropriately ordered with regard to the Practice Direction and the guidance. There is, however, no overarching principle that a trial or hearing should not go ahead because of the national lockdown or any policy principles concerned with COVID-19.

Such reasoning is consistent with the decision of Mr Justice Teare on 19 March 2020, before some of the abovementioned guidance appeared, in **National Bank of Kazakhstan and Others v Bank of New York Mellon and Others** in which an application had been made to adjourn the trial. Teare J held:

> "The courts exist to resolve disputes and, as I noted this morning, the guidance given by the Lord Chief Justice is very clear. The default position now in all jurisdictions must be that a hearing should be conducted with one, more than one, or all participants attending remotely. I accept that for various reasons, in particular the geographical location of the expert witnesses, this exercise will have particular challenges. But it seems to me that having regard to the need to keep the service of public resolution of disputes going, it is incumbent on the parties to seek to arrange a remote hearing if at all possible."

(2) Health and wellbeing

In any consideration of an application to adjourn, the safety of participants will be a critical concern. While the principle of attempting to make arrangements for a remote trial is clear, it

was also recognised by John Kimbell QC (at paragraph 38) that such arrangements must not endanger the health of participants or court workers.

While primary health issues (such as exposure COVID-19) are the obvious risks, the courts have also faced recent applications which require a consideration of how far the "safety" principle might extend. For example, it has been suggested that the court's consideration must extend beyond direct court users and to the families of participants, such as a situation where there is no direct threat to health such as the 'virus', but an issue consequential on the 'lockdown', such as a lack of childcare leaving minors unsupervised during a hearing; or a lack of space in a home compromising a family's wellbeing whilst a witness gives evidence in a particular location in the home. A number of issues have been raised by the closure of schools and the implications that has for lawyers' preparation time, when they have childcare responsibilities. Such concerns engage considerations of fairness (insofar as they impacted on the ability to prepare properly and be ready for trial) as well as health and wellbeing. They are self-evidently difficult for a court to assess and accommodate, although I make some suggestions below for how this might be approached.

In **Hyde and Murphy**, John Kimbell QC held that the safety concerns raised "fall very far short of justifying a wholesaled adjournment" (paragraph 39). He gave four reasons, which bear further comment.

(1) First, the trial was some way off and it was a "very fast-moving situation". This reflects the fact that to adjourn is a binary and final choice, whereas to continue with bespoke arrangements at least allows for the possibility of the hearing progressing, dependent on the latest circumstances. This is a prudent position for the court to adopt in view of the "default" position.
(2) Second, the judge referred to a lack of "concrete evidence of the particular difficulties". Any application to adjourn would need to be justified by detailed witness evidence rather than assertion in court. Such statements would set out specific circumstances, signed by statements of truth. I have heard of some being accompanied by applications to hear the issues raised "in private" given that they pertain to personal circumstances.

This evidence is not evidence which the other side should attempt to "counter", but rather it is the basis for the other side to begin to work out the necessary adjustments to deal with the issues raised.

(3) Third, and relatedly, the judge referred to the need to co-operate and to propose ways in which issues can be tried, in that case without the involvement of certain witnesses. I suggest that this might be done efficiency by one party drafting a list of concerns in the form of a schedule and the other party seeking to suggest solutions (and vice versa if needed). It would assist the court to be presented on an application to adjourn with the narrow areas where resolution was difficult, rather than generalised submissions about how hard "everything" is.

(4) Further, and related to (2) and (3), the judge referred to steps which could be taken to make things easier such as "agreeing the trial bundle" and "completing outstanding expert memoranda". I do not entirely see how these issues go to meeting directly any points about safety or wellbeing. They seem just to be steps aimed at making things easier for the parties. Steps that I would expect parties to take to meet safety concerns might include: adjustments to trial timetables to take into account childcare times; dispensing with oral closing submissions to allow for evidence to be given over a longer period but in fewer hours per day; whether a particular witness needed improvements to his internet connection or IT set up to ensure remote communication was possible (see further below); or adding personnel to legal teams to ensure that where preparation had to be spread more thinly, it could still be completed.

In any event, it appears that pre-requisites to a (potentially) successful application to adjourn on the basis of safety are: (1) the parties have reached out and co-operated with one another in a genuine attempt to find common ground and keep the trial/hearing going; (2) the parties have sought to identify their areas of concern about safety and wellbeing with concrete evidence; and (3) the parties cannot agree a solution.

The court can then be presented with the specific unresolvable areas of concern and the question will be whether a proportionate arrangement or accommodation can be found. An adjournment will and should only be a last resort.

(3) Technological

It may seem counterintuitive but technological challenges is probably the least promising avenue for finding a basis of adjournment. The development and increased testing of the various platforms available (about which more below) and the prevalence of reliable broadband means that subject to other concerns (e.g. fairness, logistics) the argument that the technology in and of itself is not sufficiently developed to host a remote trial is unsustainable.

From my recent personal experience of remote trials, I find it helpful to have access to 4-5 screens to facilitate the necessary platforms. I fully recognise that not everyone will have a set up which accommodates this many individual screens and it is possible to achieve the same (or similar) effect by splitting screens or having a number of windows open on one screen which can be flicked between.

(1) On one screen, the bundles can be electronically hosted on a platform such as Magnum Opus.
(2) On the central one or two screens, there will need to be one of the numerous tried and tested audio/video platforms, such as WebEx, Skype and Zoom. They all work on the principles of a "grid view" of participants who can all speak communally, one-at-a-time and "mute" their audio when not participating. It is for obvious reasons convenient to have the "webcam" screen and the central visual portal on the central screen.
(3) A platform such as RingCentral can be used to flash up the relevant document in the bundles being referred to by the judge or advocate so that everyone in the virtual court is (literally) on the same page. I prefer to have this on a separate ipad which allows me to hold it close and move it to one side, as necessary.

(4) Live transcription can come onto a further screen or can be combined (and pushed forward or behind as necessary) the evidence or bundle screen.
(5) Finally, it can be very helpful to have a mobile phone open for a "chat channel" amongst the legal team – e.g. What's App. This can also be downloaded on a desktop platform or another ipad.

There is no doubt problems can arise. Everyone is familiar with some teething troubles or difficulties with dialling in and this is why it is always advisable to arrange one or two "test calls" (usually only one with the judge's clerk) prior to the hearing. And it is always sensible to allow access to the virtual court at least 30 minutes and probably an hour before the hearing to allow parties' the chance to connect and address any last-minute difficulties.

Such a problem evidently arose in **Invista Textiles UK Ltd v Botes [2019]** EWHC 58 (Ch), where Birss J. noted that the document presentation did not seem to be "worth the trouble it involved" (at [72]). His particular criticisms and preference for a trial bundle was in the context of a normal courtroom trial. There is no doubt that there can and may be glitches. But this needs to be set against the fact that, as Mr Kimbell QC noted, there have been at least two examples of fully remote trials taking place since 16 March 2020, one of which is the **National Bank of Kazakhstan** case described above. On balance, there has been considerable success, both reported and anecdotal.

There are two further points worth bearing in mind. First, the technological proficiency of all court users is increasing daily with experience. Second, the technological improvements of the platforms are becoming increasingly adapted to user requirements. COVID-19 has forced the courts to test rapidly remote solutions which it otherwise may only have tried out by way of small 'pilot schemes'. This largescale forensic experiment is enhancing the skill and expertise of the legal profession exponentially. It all makes the argument that it is too hard technologically have something of the desperate ring of the party who is trying to avoid a hearing.

There is perhaps one key exception to this: that is the issue of bandwidth at certain witnesses' locations. This can be a very difficult issue: what to do if the key witness is in the proverbial middle of nowhere? I suggest two key ways around this problem, although of course there may be others. First, to find a way (depending on local rules to do with movement) for the witness to travel to a local solicitor's office to give evidence. This should normally be possible whilst respecting the need for social isolation, if careful provision is made. Second, to see if technological solutions such as "dongles" can be couriered out to allow a connection via 4G rather than through the local internet. Any party relying on this difficulty will again have to find a way of making good this point with evidence rather than bald assertion.

III. Ensuring fairness

As I wrote in my first article on this topic on 28 March in the *Sunday Telegraph*, it possible to have a trial which is both fair and efficient and does not require any participant leaving his or her own home. To ensure that fairness, a remote trial will have to make a number of adaptations from the norm in order to accommodate the above concerns about health, wellbeing and technological infrastructure. These should be based on concrete evidence in witness statements and co-operatively discussed between the parties, if possible, prior to any court hearing on the issue. It should also be borne in mind that substantial unfairness can arise from adjournments, not least in terms of delayed outcomes, time and costs and the need to change counsel.

Open justice can also be ensured. The Commercial Court's Daily Cause list includes email addresses for all cases that are in open court such that interested viewers can follow the case via a Skype for Business access link (e.g. "The hearing will be available to representatives of the media, on their request, and therefore will be a hearing conducted in public in accordance with CPR PD51Y. It will be organised and conducted using Skype for Business. Any media representative (or any other member of the public) wishing to witness the hearing will need

to do so over the internet and provide an email address at which to be sent an appropriate link for access.")

The courts have shown that the fairest outcome, to both court users and to the demands on the court system itself, is to use appropriate adaptions to keep the show on the road. There is no doubt that this needs flexibility. In terms of hearing hours, dates; perhaps even the way we prepare and interact as legal 'teams'. Judges too will need to be mindful of the pressures of remote parties – accepting the need to use mobile phones to take instructions quickly; or asking for a short pause to have a private discussion in lieu of post it notes and whispers. But it can be done. And with a body of knowledge building daily, there is every reason to suppose that hearings will soon be conducted remotely not just out of necessity, but also out of choice.

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