

LITIGATION COMMITTEE response to the Rapid Consultation of the Civil Justice Council on the impact of COVID-19 measures on the civil justice system in May 2020

The City of London Law Society (“CLLS”) represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response to the Rapid Consultation of the Civil Justice Council on the impact of COVID-19 measures on the civil justice system has been prepared by the CLLS Litigation Committee.

Question 1: What is working well about the current arrangements?

1. The Litigation Committee applaud the way in which the judiciary and court staff, as well as the legal profession and factual and expert witnesses, have adapted so rapidly to the sudden change in environment. In general, the judiciary and the courts have adopted an admirable “business as usual” approach, in particular by holding hearings remotely by means of video conferencing and enabling the greater use of electronic bundles. The judiciary issued a helpful Civil Justice Protocol regarding remote hearings on 26 March 2020.
2. Our members’ overall experience of recent remote hearings is very positive. The approach of most judges and court staff has been to embrace the use of video technology and electronic rather than hard copy bundles. Judges and court staff have shown admirable flexibility in terms of the conduct of hearings and willingness to accept documents by email in addition to CE-file. Navigation of the electronic bundles has generally worked well.
3. In our experience, many judges have been able to read in to the documentation prior to the hearings to a noticeably greater extent than was common before the pandemic lockdown. This has resulted in them being better prepared, which has benefited the quality of interaction with counsel during the hearing. Judges have also been more proactive in relation to case management decisions, we suspect

because they have been better prepared. In our view, there has also been an increased level of co-operation between legal practitioners.

Question 2: What is not working well about current arrangements?

4. Whilst it is appreciated that many judges have adapted well to the immediately increased use of technology, it appears that a few have been more reluctant to do so, with the result that some hearings have had to be adjourned, and on occasion (for example, for a recent Court of Appeal hearing) the judges have requested hard copy bundles. We should be grateful if all judges were strongly encouraged to hold hearings by video conference, and if the Ministry of Justice and Court Service were to ensure that the judiciary and court staff have the necessary support in terms of computer hardware and software, and training, to be able to do so. This should mean that hearings will not be adjourned, unless there is some other compelling reason to do so (as would be the case in the normal course of events).
5. Although the technology has worked well overall, difficulties have been experienced from time to time. First, Skype for Business, which in our experience is the most common platform used (we understand because this software was installed on the judges' laptops before the lockdown) is not the best technology – see paragraph 7 below. It has frozen on a number of occasions, which disrupts the hearing. We have had experience of advocates having to run on audio only. Second, the quality of broadband access for judges, legal practitioners, parties and witnesses varies, depending on the area in which they live and the type of internet access they have. Some connections cannot sustain video to an acceptable quality, or operate too slowly when the video conference, electronic bundle and other applications such as email have to be accessed and navigated simultaneously. Third, judges have not adopted a uniform approach to breaks mid-morning and mid-afternoon. In our experience, and those of the advocates we instruct, conducting a hearing remotely is more tiring than physical attendance at a hearing. We would recommend a consistent approach to provide court users with a 10 minute break during the morning and the afternoon sessions. Fourth, although the greater reading in is a good thing, judges have on occasion appeared to have largely decided the matter before hearing counsel's oral submissions. There is also inconsistency amongst the judiciary in making fair allowances for practitioners' lack of experience with the technology involved in remote hearings. Fifth, remote hearings have made communication between legal teams and their clients during the hearing more difficult (see paragraphs 9 and 11 below).

Question 3: Which types of cases are most suited to which type of hearings and why?

6. Our experience of remote hearings has mostly been in relation to interlocutory applications and, to a lesser extent, appeals. In our view, both interlocutory hearings (without live witness testimony) and appeals are more suited to remote hearings than trials. In particular, short interlocutory hearings conducted remotely will produce a proportionately greater saving of travel and

waiting time in the future, when the lockdown is lifted. In our view, once the restrictions are lifted the vast majority, if not all, trials are better suited to being conducted in a court room. This is due in particular to the better assessment of witnesses' live evidence, and to avoid the risk (if a hearing is conducted remotely) of a witness receiving assistance whilst being cross-examined. Having said that, one member's experience is that there have been some positive exceptions where live expert evidence has been provided. As a practical point, if a trial involving witness evidence is to be conducted remotely, one of our member's recent experience suggests that it would be prudent to build in some extra time when listings are arranged in order to accommodate the additional time required when witnesses provide evidence remotely, particularly if the witnesses in question are unfamiliar in giving evidence or with the technology being used.

Question 4: How does the experience of remote hearings vary depending on the platform that is used?

7. The Protocol regarding remote hearings refers to BT conference call, Skype for Business, court video link, BT MeetMe and Zoom, but does not stipulate any particular platform. In our experience of the Business and Property Courts and Court of Appeal remote hearings, the most common platform used has been Skype for Business. We are not experts in information technology, but our understanding is that this is an older application, which is being phased out by Microsoft (which now owns Skype) in 2021, in favour of Microsoft Teams. Our experience with Skype for Business has been mixed. On some occasions it has worked well; but other times it has frozen, or provided a poor connection. In contrast, our experience of using Teams, Blue Jeans and Zoom has been better (although we appreciate that concerns have been publicly raised about the security of the latter). We are aware that other platforms are also available.

Question 5: What technology is needed to make remote hearings successful?

8. We recommend that the Court Service obtain expert advice as to the best quality and most reliable video conferencing systems, and to provide those to the judges with suitable training.
9. In addition, legal practitioners and their clients need to have a secure and private way of being able to communicate with each other, and be able to provide speedy instructions to their advocates, during a hearing. Some video conferencing technologies are capable of providing secure and private "break out rooms" or other secure forms of written communication outside the main hearing.

Question 6: What difference does party location make to the experience of the hearing?

10. One advantage of hearings by video conference is that it enables parties and witnesses to attend, wherever they are based in the world, without the time and cost associated with travelling to a court room. However, a party's

experience of the hearing is greatly dependent upon the quality of its internet connection.

Question 7: How do remote hearings impact on the ability of representatives to communicate with their clients?

11. As indicated above, we have experienced far greater difficulty in communications during remote hearings between counsel, solicitors and their clients. Many of our members have used email, WhatsApp messages or SMS texts to communicate, but all are more difficult than when physically in court. This is one aspect of remote hearings that needs to be given further consideration, as it is essential that parties and their solicitors are able to provide instructions to their advocate during a hearing.
12. Some clients have, however, welcomed seeing the faces of their advocates during remote hearings, compared to only being able to see their backs in the courtroom.

Question 8: How do professional court users and litigants feel about remote hearings?

13. Please see our answers to the other questions.

Question 9: How do litigants in person experience hearings that are conducted remotely?

14. We have limited experience of litigants in person, as the vast majority of our cases have legally represented parties. In one remote hearing involving a member firm the judge took a great deal of care to ensure that the litigant in person was able to operate the technology as well as having a fair opportunity to present his case.

Question 10: How do remote hearings impact on perceptions of the justice system by those who are users of it?

15. In our experience, the use of remote hearings during the lockdown has greatly enhanced the perception of the English justice system, by adopting a “business as usual” and flexible approach in order to enable hearings to take place when they would otherwise not have been able to happen at all.

Question 11: How is practice varying across different geographical regions?

16. Our experience is only of the Business and Property Courts in central London.

Question 12: What has been the impact of current arrangements on open justice?

17. The courts have rightly emphasised the continued need for open justice, and the media and other third parties have been able to access hearings. On one occasion one of our members experienced disruption to the hearing when the media had failed to mute their microphones, but generally we understand the arrangements have worked well.

Question 13: What other observations would you make about the impact of COVID-19 on the operation of the civil justice system?

18. We believe that the speed and flexibility with which the judges, court staff and legal practitioners have adapted to the widespread use of remote hearings and electronic document bundles reflects well on the court system in England. It contrasts favourably with some of the other types of tribunal, and with the court systems of some other jurisdictions, for which the pandemic lockdown has resulted in their closure for a lengthy period.
19. We also consider that the steps which have been taken through enforced circumstances during the Covid-19 outbreak should be assessed for use in the medium and long term, once the pandemic restrictions have been lifted. In particular, the greater use of technology could be used as a foundation to modernise court procedure further, for example in relation to video conferencing and electronic bundles for the court. The mechanics of how to conduct a remote hearing and the use of the technology have been left to individual judges and the parties to work out on a case by case basis. That has probably been necessary to accommodate the range of parties' circumstances and the needs of individual cases. However, as the courts build experience of remote hearings, it would be very useful for parties and lawyers if a more comprehensive framework (perhaps a future practice direction) were to be developed for remote hearings.

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**THE CITY OF LONDON LAW SOCIETY
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