

English and Welsh Courts in the Age of Covid-19

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The Coronavirus pandemic (the pandemic) has produced a rapid series of changes to the delivery of civil justice in England and Wales. Since 2016, the English and Welsh courts have been subject to a reform programme that has sought to gradually transform its processes through a digitisation process. That process had reached the stage at the start of 2020 where electronic filing had been, and was continuing to be, rolled out, where online claims processes were being piloted and where video hearings were being piloted. The pilots were at very degrees of development, with video hearings being the least developed. The pandemic changed the landscape almost overnight, with courts now operating, almost by default, remotely through the use of technology such as Skype for Business, Microsoft Teams etc, with case management hearings and, where possible, trials being held via video technology. In stark contrast to the formal video pilot scheme, these remote hearings, as there are known, have become commonplace. An outline of the main changes is set out as follows.

Remote Hearings – Legislation

In 2017, the Prison and Courts Bill was to have introduced a power to permit civil proceedings to take place remotely through enabling them to be broadcast and/or recorded via video or audio.¹ As such it would have allowed proceedings to take place via, for instance, video-link e.g., via Skype for Business or an equivalent technological means. Those proceedings could then have been broadcast either live or at a later date in a court building. Thus the provisions were intended to secure the constitutional principle of open justice. Those provisions were, however, lost when the Bill fell with the general election held that year. The Bill was not reintroduced subsequently. They were, however, introduced into law on a temporary basis via the Coronavirus Act 2020.² The provisions now permit the court to direct that civil proceedings can take place remotely, such that no participant in the proceedings is in a physical court building but takes place via an entirely online process. On 27 March 2020, civil proceedings, other than proceedings before the Court of Appeal,³ were livestreamed over the internet for the first time.⁴ Prior to the enactment of the 2020 Act,

¹ See clause 34 and schedule 5 of the Prison and Courts Bill 2017.

² See Coronavirus Act 2020, section 34 and schedule 25, which inserted new sections 85A to 85D into the Courts Act 2003 (<https://www.legislation.gov.uk/ukpga/2020/7/schedule/25/enacted>). The Act is in force from 25 March 2020 for a two year period, see sections 87 – 90 of the 2020 Act.

³ Livestreaming Court of Appeal proceedings has been authorised since 2013 under The Court of Appeal (Recording and Broadcasting) Order 2013.

⁴ *National Bank of Kazakhstan v The Bank of New York Mellon* (Claim No FL-2018-000007) in the Financial List (QBD) on 27 March 2020.

such an approach would have been a criminal offence under section 41 of the Criminal Justice Act 1925, which renders taking pictures, include video, of legal proceedings.⁵

Remote Hearings – Changes to Rules of Court

The legislation has been supplemented by changes to the Civil Procedure Rules. As the rules are secondary legislation, amendments generally have to be effected through statutory instruments. Given the short time available to make them a different approach had to be taken. Part 51 of the CPR provides a power to modify or vary rules of court via Practice Direction. Practice Directions are issued by the Master of the Rolls, who is the Head of Civil Justice for England and Wales and the most senior civil judge, with the concurrence of the Lord Chancellor. As they are not statutory instruments they do not need to go through the parliamentary process applicable to passing secondary legislation. Part 51 can, however, only be used for the purpose of pilot schemes, which are intended to test new procedures. Further to this power to make pilot schemes, a Practice Direction was introduced on a temporary basis: Practice Direction 51Y - Video or Audio Hearings Pilot during the Coronavirus Pandemic – Pilot Scheme.⁶ It is in force from 17 March 2020 until 30 October 2020.

The rationale for the Practice Direction's introduction is to test procedures, which supplement the powers introduced by the Coronavirus Act 2020 to provide for remote hearings. In particular, it is intended to ensure that those powers are exercised consistently, as far as possible, with the requirements of open justice. As such it makes clear that wholly remote hearings i.e., those authorised under the 2020 Act where no participant is in court are to be held as public hearings. The general principle of open justice must therefore apply to them. In order to secure that principle, as far as practicable, access to such hearings is to be made available, particularly to the media. The media being both members of the public, and the mean by which the public are provided with access to court proceedings.⁷ Where remote hearings are held, the Practice Direction makes clear that the court may only hold the hearing in private if doing so is justified consistently with the generally applicable test for derogating from open justice i.e., that to do so is necessary in the interests of the administration of justice. It further provides that wherever practicable such hearings must be recorded either by video or audio. Members of the public may then seek the court's permission to access i.e., listen to or watch those proceedings at a later date. While this latter is not a substitute for the requirement that the public can access a hearing while it is taking place, this is intended to provide a secondary form of scrutiny and thus democratic accountability of remote hearings.

Remote Hearings – Guidance

Legislation and rule changes via Practice Direction have also been supplemented via a variety of guidance issued by the senior judiciary and Her Majesty's Court and Tribunals Service. The former provides, amongst other things, detailed guidance to courts and parties

⁵ *R. (on the application of Spurrier) v Secretary of State for Transport* [2019] E.M.L.R. 16.

⁶ See <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>

⁷ See *R (Mohamed) v SoS for Foreign & Commonwealth Affairs* [2011] QB 218 at [38].

on the approach to be taken to proceedings where they are held remotely,⁸ the most important of which in terms of providing guidance to parties on how to operate in the new digital era was again focused on how to ensure effective access to the courts and how remote hearings would take place.⁹ The guidance generally stressed the judiciary's ability and intention to ensure that the courts would continue to administer justice, and to do so remotely. As the Lord Chief Justice put it in the first of such guidance to be issued,

'The rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything. Any legal impediments will be dealt with. . .

*The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely.'*¹⁰

The latter, HMCTS guidance, is updated on a daily basis and focuses on practical operational guidance to litigants, such as how to issue claims, pay court fees and which courts are open.¹¹ Guidance was also issued by the Inns of Court College of Advocacy, to assist barristers and solicitor-advocates in approaching advocacy in remote hearings.¹²

Steps to Manage Proceedings

In addition to taking steps to facilitate remote hearings, the courts have also taken a number of steps to manage proceedings to take account of both the need to minimise the risk of harm to the health of judges, court staff, litigants and the public, while taking account of the reductions in their numbers due to the pandemic on the administration of justice. As such orders of general application, previously practically unheard of in England and Wales, have been issued staying certain types of proceedings, such as those relating to the taking of evidence in other jurisdictions.¹³ Furthermore, the Master of the Rolls issued three further pilot scheme Practice Directions under CPR Pt 51, which stayed for 90 days from 25 March all possession proceedings, with limited exceptions, in order to secure public health and further secure the effective administration of justice,¹⁴ and also varied the CPR to

⁸ See <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/>

⁹ Civil Justice In England and Wales Protocol Regarding Remote Hearings (https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf)

¹⁰ Coronavirus (Covid-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts (<https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>).

¹¹ See <https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak>. Also see <https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation>; <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>

¹² Principles of Remote Advocacy (<https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf>).

¹³ See Order of the Senior Master, dated 25 March 2020, IN THE MATTER OF the Evidence (Proceedings in Other Jurisdictions) Act 1975 and the Taking of Evidence Regulation (Council Regulation (EC) 1206/2001) and IN THE MATTER OF the Coronavirus Act 2020.

¹⁴ Practice Direction 51ZA - Stay of Possession Proceedings and Extension of Time Limits—Coronavirus – Pilot Scheme (<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51z-stay-of->

enable litigants to agree case management directions to vary procedural time limits by way of extending them for 56 days without the need to obtain the court's consent to the variation.¹⁵

Conclusion

The English and Welsh courts have responded rapidly to the coronavirus pandemic. In doing so they have, via action taken by the senior judiciary, the Ministry of Justice and Her Majesty's Courts and Tribunals Service (which is operated as a partnership by the judiciary and government) embraced the use of available online technology. Changes have been implemented at a rapid pace.¹⁶ Undoubtedly there will be a period of critical reflection and review of the changes that have been implemented both during the ongoing pandemic situation, and afterwards. It is likely that what has been done now will form the basis of lessons to be learnt for the more permanent changes that will flow from those made now in response to the crisis, and will shape the ongoing and longstanding digitising programme. Undoubtedly some of the steps taken will be subject to criticism, albeit it will be the critical analysis that comes with the benefit of hindsight and a time for reflection that was not always available during an emergency situation. What is certain, however, is that the current pandemic will have a profound and undoubtedly enduring effect on the future evolution of the English and Welsh civil justice system.

[possession-proceedings,-coronavirus](#)), as amended by Practice Direction – 120th Update (<http://www.justice.gov.uk/courts/procedure-rules/civil/pdf/update/civil-120-pd-making.pdf>).

¹⁵ Practice Direction 51ZA – Extension Of Time Limits And Clarification Of Practice Direction 51Y – Coronavirus (<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus>).

¹⁶ Also see <http://remotecourts.org> for comparative approaches in other jurisdictions.