

Webinar

Virtual Hearings: the future of dispute resolution?

28 May 2020

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Today's Agenda

- The effect of Covid-19 on the Courts and Hearings
- The trends and the issues
 - Issues of fairness?
 - Factual Witnesses and Experts
 - Adjudication Enforcements
- Top tips for advocates and the parties
- What is arbitral and mediation world doing?
- The future of litigation hearings in June 2020 and beyond.
 - A TCC Judge's view
 - A Solicitor's view

The effect of Covid-19 on the Courts and Hearings



The Effect of Covid-19

- The context: status of the Courts and technology pre Covid-19
- The principle of open justice is paramount.
- The week lockdown began:
 - 23 March 2020: Lord Chief Justice's message
 - 25 March 2020: Coronavirus Act 2020
 - 25 March 2020: New Practice Direction 51Y
 - 26 March 2020: Coronavirus Regulations 2020
 - 26 March 2020: Protocol Regarding Remote Hearings

The Effect of Covid-19

- The court's approach: keep calm and carry on
- The court's use of Skype for Business and other technology
- The current status of the courts
 - 159 open courts (open to the public for essential hearings)
 - 115 staffed courts
- Protocol Regarding Remote Hearings
- <https://www.tecsa.org.uk/news/tcc-adjustments-for-hearings-to-take-account-of-coronavirus/>

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The trends and the issues



Issues of fairness?

- Consultation on the use of remote hearings in the family court (Nuffield Family Justice Observatory) raises significant concerns of fairness in certain cases.
- Any issues in the TCC?
- Are all cases appropriate for remote hearings/trials?
 - New Practice Direction 51ZA: allows parties, up to 30 October 2020, to agree time extensions to 56 days in certain circumstances (2 April 2020)
 - Intended to assess modifications to the rules and PDs that may be necessary as a temporary measure during the C-19 pandemic to ensure that the administration of justice is carried out so as not to endanger public health.

Factual Witnesses and Experts

- ***One Blackfriars Limited*** [2020] EWHC 845 (Ch): Judge John Kimbell QC refused the Claimant's application to adjourn a 5-week trial, scheduled to commence the week beginning 8 June 2020
 - 4 witnesses of fact
 - 13 expert witnesses
- Any issues regarding examination / cross examination?
- Federal Court of Australia?

Adjudication Enforcements

- Generally submission-only hearings
- Are virtual hearings the way forward for Adjudication Enforcements?
- The Technology and Construction Court (TCC) has published a document adapting both the standard directions for adjudication enforcement, and for trials, to accommodate remote hearings. Click [here](#) for further details.

TCC adjustments for hearings to take account of coronavirus

Mrs Justice O'Farrell has adapted the standard directions for adjudication enforcement, and for trials, to accommodate remote hearings.

These documents can be seen here:

[TCC template for remote hearings order - existing case \[PDF\]](#)

[TCC template for remote hearings - existing case example order \[WORD FOR DOWNLOAD\]](#)

[TCC template for adjudication enforcement remote hearings \[WORD FOR DOWNLOAD\]](#)

[TCC template for adjudication enforcement remote hearings order \[PDF\]](#)

Top tips for advocates and the parties



Top tips

- Be prepared
- Technology testing in advance
- Hearing and Trial Bundles
- Communication with your client during the proceedings
- Comply with the Order

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Arbitrations and mediations



Arbitrations and mediations

- Arbitrations
 - Many Arbitration Rules already allowed the possibility for video conferencing and recently have been supplemented with additional guidance and protocols.
 - ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic
 - CIArb Guidance Note on Remote Dispute Resolution Proceedings
 - Seoul Protocol on Video Conferencing in International Arbitration
- Mediations
 - The use of break-out rooms
 - Other technology needed in addition to the VC to communicate

- Modern technology makes virtual mediation as accessible and effective as its real-life form, mediators and advisors need go the extra mile to familiarise themselves with necessary protocols and guarantee a smooth transition. **Zoom, Star Leaf, GoToMeeting, WebinarJam, CiscoWebex**, etc
- The skills honed in using more traditional forms of ADR in a physical environment will need to adapt as digitisation presents new opportunities.
- Understanding how the technology works and developing systems to draw users into the process is crucial.
- The pre-mediation approach must be geared towards ensuring that all parties are comfortable dealing in a new context.
- Security and confidentiality must be considered closely, given potential for novice users inadvertently revealing sensitive information which is shared wider than intended.
- *Int Arb Arbitrators & Mediators* and *IAC Online* have combined to provide a mediator specific protocol and offering for virtual mediation, others like **ADRg** and **JAMS** (Judicial Arbitration and Mediation Service)

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The future of litigation in June 2020 and beyond



- **A Judge's View**

- Success of co-operation and agility of the legal profession to adapt to new circumstances
- Need for evolution of legal processes to serve the interests of justice
- Use of technology to improve the efficiency and cost of legal proceedings without compromising justice
- Value of retaining physical hearings where appropriate

The future of litigation

- **A Solicitor's View**

- An opportunity
- The new normal
- Using the power of big data and artificial intelligence (AI), it may be possible in future to determine what ifs in litigation – Richard Susskind *Online Courts and the Future of Justice*, argues that technology is going to bring about a fascinating decade of change in the legal sector and transform our court system
- For now....Trial bundles require careful thought, not just about construction but also presentation and accessibility.
- Client Management - virtual hearings are a new phenomenon for many practitioners
- Skeles: the skeleton argument is now more important than ever before, with counsel placing greater reliance upon the skeleton for development of submissions.
- Testing prior to the hearing - carry out a full dummy run test with your client. This could be in the form of a pre-trial conference with counsel artificially created for testing purposes only.
- Managing communications - ensure that communication channels with both the client, counsel and experts are open. Management of these channels will be important for the trial process.

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Questions?



Webinar

Watch | Listen | Discuss

Next week:

**On demand bonds and performance guarantees: things to consider
in light of COVID-19**

Thursday, June 04 2020

12pm (30mins + 10mins Q&A)



Tony Francis
Managing Partner



Anneliese Day QC
Barrister, Arbitrator & Adjudicator



Claire King
Partner

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