

CIVIL LITIGATION IN THE TIME OF COVID-19

EVERYTHING YOU NEED TO KNOW AND CONSIDER

A Practical Guide from 2TG

Spring 2020

This guide provides an overview of how litigation is taking place in these unprecedented times. It covers: remote hearings and preparation thereof, remote conferences and remote JSMs. This guide is intended as a flexible, non-prescriptive tool. It is not a protocol.

HEARINGS

All hearings in England and Wales are now (from 25 March 2020) to be conducted wholly as video or audio proceedings wherever possible. For civil practitioners this means that physical hearings are no longer (or rarely) occurring. This has a number of consequences. On 1 April 2020, HMCTS released a list of civil court priority listings [here](#). The message from the senior judiciary is that this list does not mean that everything else should automatically be adjourned. It is a list of priorities, but not an exclusive list of what the civil courts should deal with.

The courts are being temporarily restructured into three categories: (1) open courts (open for business including vital in person hearings which can't be done remotely), (2) staffed courts (for video and telephone hearings, to progress cases without hearings) and (3) suspended courts (no hearings of any kind). Changes are effective from Monday 30 March 2020. For specific information on which courts have been allocated to the categories, consult the spreadsheet [here](#).

It appears that across the County Courts all immediate small claims, fast track and multi-track trials have been vacated to an unknown future date. Whilst there have been no nationwide orders or measures to that effect, that is the practice seemingly being adopted by many County Courts: for example, the DCJ for Northumbria and Durham has issued a blanket direction that all Small Claims and Fast Tracks to be heard before the end of April 2020 are adjourned.



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Short interlocutory or non-witness applications, and some 'short hearings' (stage 3 hearings and approvals) are being heard remotely in courts across all levels. Officially, the High Court and the Court of Appeal are only covering urgent work. In practice, the QB Masters and the Commercial Courts are still proceeding remotely. The cause list for the QB will explicitly identify if this is by telephone or video-link.

Efforts should always be made to ascertain the position with the relevant Courts. As a practical measure, given the difficulties likely to be faced in accessing the Courts, we propose that in the absence of any clear order or direction from the relevant Court, you should endeavour to agree adjournments of any trials or substantial hearings which cannot be conducted remotely

HMCTS and Lord Chancellor Guidance ([here](#)) states that **all civil hearings are now done by telephone conference/BT Meet Me; MOJ/HMCTS Cloud Video Platform; Skype for Business; Microsoft Teams; Zoom; Lifesize and FaceTime**. Notably, the Business and Property Division also allows for "any communication method available to the participants can be considered if appropriate". The Family Courts have taken a "smorgasbord" approach, allowing judges, lawyers and litigants to choose from the suite of platforms depending on the circumstances of the court, parties and the case. This suggests that Civil Courts generally will be flexible about the platform.

There are considerations for each platform:

- **Telephone Conferencing/ BT Meet Me, also provided by Kidatu, Arkadin and Legal Connect:** Available to nearly every court and tribunal nationally. Transcripts are available in the same way as normal court hearings.
- **Skype for Business:** Has been used in the past week in multi-day, multi-party final

hearing with lay and expert evidence. Allows for document sharing and recording, but does not have a side-meeting function. **Best practice:** at the moment of writing there appear to be different 'best practices' for Skype for Business hearings. In the QB and in some County Courts judges are taking the lead in organising and inviting parties into the remote hearing themselves via the HMCTS Skype for Business account. This is in contrast to the Family Division Guidance which suggests the best practice is that legal representatives set up the remote hearing first and then invite the judge in. Skype for Business works with any skype account (no Skype for Business account is required) and also allows guests to be included via a meeting URL.

- **Microsoft Teams:** It is built into judicial laptops as part of Microsoft Office 365. No remote hearings have yet been conducted with Microsoft Teams. Concerns about whether those not part of a group subscription can have access.
- **Zoom:** Host needs to have an account, but all others can be invited through URL. It is cross-platform so works on Windows PCs and Apple Mac. Document sharing, recording and screen sharing functions. Break-out rooms away from the main hearing are also possible, allowing advocates to 'leave' the hearing room, take instructions in the 'meeting room' and re-join the hearing. There have been security and privacy concerns: The New York Attorney General launching an investigation into Zoom's privacy practices at the end of March 2020. **Best practice** is to obtain a 'premium' version (£11.99 monthly fee) which allows up to 100 participants for unlimited time. Basic version limits participation to 40 minutes.

- **Lifesize:** Allows videoconferencing and cloud-based video collaboration. Can record proceedings. Has not been used yet for a remote hearing.
- **FaceTime:** It is limited to Apple Mac products, and thus not universally available to the wider judiciary and the public.

THE CONDUCT OF REMOTE HEARINGS

The remote hearing itself operates like a telephone hearing, where the court official and the parties will all need to log in or call into the dedicated facility well ahead of the start time; the judge will then be invited in by the clerk or court official. The hearing will be recorded by the judge, their clerk or a court official. Parties and legal representatives are not permitted to record the hearing.

A problem that remains is simultaneous translation during the course of a **remote hearing where an interpreter is required**. The Family Court has suggested that Zoom may be preferable for these hearings, as it allows multiple audio channels for a single user, so that the interpretation does not interrupt the course of the hearing. Issues with recording of the interpretation session still remain, as Zoom only records the original audio of the meeting, not the translations.

There has been no official **guidance for appearances** in the Civil Division. However, guidance from the Criminal Appeals Division notes that anyone appearing by way of a remote connection need not robe and need not rise; business attire should be worn by everyone, including the judiciary. Advocates should also “consider the backdrop” when they are linking remotely: backgrounds should be neutral and appropriate for a court hearing.

⁴ DCJ communication for Northumbria and Durham.

The traditional **outside-the-court-pre-trial-conference can now take place virtually**. These can be organised separately beforehand, or parties can join the skype meeting earlier than the judge to discuss matters. Setting up a WhatsApp group, or communicating through text by telephone with your solicitor can be handy for the equivalent of notes being passed during examinations or for taking instructions during the hearing.

Preparing for the remote hearing requires solicitors, barristers and their clerks to be proactive and to consider as far ahead as possible how future hearings should best be undertaken. **Electronic bundles of documents and authorities** (if required) need to be prepared, indexed and paginated. They should be sent well in advance of the hearing and certainly, at the latest, by midday one clear day before the hearing⁴ to the judge’s clerk or to the judge (if no clerk is available), and to all other representatives and parties.

BUNDLING

Electronic bundles should contain only documents and authorities that are essential to the remote hearing. Large electronic files can be slow to transmit and unwieldy to use. If the parties are in disagreement, or if the case has many potentially relevant documents, ensure that there is a Core Bundle, which should ordinarily be no more than about 200 pages, which includes a Case Summary, the pleadings, any relevant Applications (and/or witness statements) and any other essential pre-readings. Do not assume that the Judge will have access to any other bundles or indeed any other documents previously filed at court. Try to make the bundle a comprehensive compilation of all relevant documents. The courts will struggle if the bundle includes, for example, a third witness statement which says, “please refer to my second witness statement for the full chronology of the

case”, but the second witness statement is not included in the bundle

Create electronic bundles in .pdf or another format. Adobe Acrobat Pro (or other similar professional software) is recommended, as it is possible to include bookmarks so that the Judge and parties can skip through the different items on the index with ease, using the sidebar on the left-hand side. Using this software to run Text Recognition is also recommended, so that the Judge and parties can easily conduct word searches through the document. A useful step-by-step guide can be accessed [here](#).

Filing electronic bundles may differ from venue to venue, but the generally fail-safe approach is to liaise with the Judge’s clerk, if at all possible. Note that the ‘Business and Property Courts Protocol Regarding Remote Hearings’ say that electronic bundles must be filed on CE-file or sent to the court by link to an online data room (preferred), email or delivered to the court on a USB stick. For the QB, do not rely solely on electronic filing; also email all information and documents directly to the Master and their clerk. It is suggested that this should also be the practice at County Court level. **If it is thought that witnesses cannot manage electronic bundles**, it is suggested that paper bundles be sent to them. It is possible to add documents to a pre-existing electronic bundle. However, it is suggested that (to avoid confusion if judges, lawyers, parties and witnesses have to amend their own electronic bundles) that it might be easier to send through an agreed ‘additional bundle’

It is recommended that **parties should set aside time the day before the hearing** to test the technology and do a ‘dry run’ of dialling everyone (except the judge) into the virtual meeting. Additionally, witnesses and experts will need to be briefed on the procedure for giving evidence and will need to be prepared to affirm or swear on a holy book. If a witness is intending to take an oath, they will need to provide their own holy book. It will

also be worthwhile to liaise with clients and make sure they are comfortable using the e-bundle and the platform.

Paying fees can no longer be done in person, but the CE-File can still be used. If this is not possible, users will be asked for payment when the Fees Office re-opens (date unknown).

If you or a party gets sick at the last minute, normally this would not be enough to adjourn or prevent a witness from giving evidence. However, in the present circumstances, we suspect that a court may be more likely to adjourn the remote hearing; we place it no higher than that.

A [useful link is the HMCTS Coronavirus \(COVID-19\) advice and guidance page](#) as well as the [HMCTS daily operational summary on courts and tribunals](#).

REMOTE CONFERENCES

Wherever possible, **a short agenda should be prepared in advance of the conference**, setting out the issues to be discussed and the running order. The agenda need not descend into the detail of each issue but should simply provide guidance as to the proposed structure of the meeting, to allow individuals efficiently to prepare.

If the conference is a complex one and/or expected to take more than 1hr 30mins, it will be appropriate to incorporate breaks into the agenda.

At the outset of the conference, it may be helpful to provide an update on the impact of the current public health situation on the conduct of the case. Whilst lawyers will be receiving regular updates from the Bar Council and SRA (amongst other organisations) lay clients will likely have an unclear picture as to how the current crisis will impact on their case, and so it may assist to address this at the outset.

Zoom (and most video conference facilities) will **allow participants to share their screen**. The individual initiating the meeting can and should use this to highlight any particular documents which are to be addressed to ensure that all parties have access to the same documents and the same part(s) of the document(s) where necessary.

If using Zoom, conferences can be set up such that the individual speaking will appear on the main screen: click on the arrow next to 'Stop Video' (bottom left of the screen) and then select 'Video Settings'. From the dropdown list next to the heading 'Meetings', select 'Spotlight my video when speaking'. If all relevant participants set up this option, it may assist other members of the conference to be able to see those individuals when they discuss a particular issue. Most other conferencing facilities have a similar option.

REMOTE JSMS

It will be important to have a bundle prepared substantially in advance of the JSM: please refer above to the preparation of e-Bundles. We suggest that parties should aim to circulate a bundle 5 business days before the JSM.

Prior to the JSM, Counsel for each party should exchange emails to ensure that they can be in consistent and frequent contact with one another. It may also be appropriate (though not essential) for Counsel to communicate via WhatsApp or by telephone to ensure regular contact throughout the day.

Prior to the JSM, you and your team should set up a WhatsApp Group unique to the conference in question. This will **allow you to communicate directly and confidentially** and provide swift updates with one another.

Prior to the official start time for the JSM, you and your team should set up and conduct a discrete

video conference, to last approximately 30mins, in which the essential issues are discussed.

In lieu of an opening session, it may be most appropriate to have an introductory meeting featuring only Counsel and solicitors for each party, for the sake of simplicity. Whilst the content of that pre-meeting cannot be prescribed, it may be appropriate for it to focus simply on the core issues which underlie each party's approach to the negotiations. Thereafter, it may be appropriate for offers to be delivered simply between Counsel to Counsel.

If, in the course of the day, there is a break of more than 1hr in communications between the parties' Counsel, Counsel are encouraged to communicate with one another to explain the 'delay' in broad terms: even simply to confirm that a client is still considering matters/giving instructions, but confirming that the JSM is continuing and the party is not 'walking away'.

If a settlement is reached, we recommend that the Claimant's Counsel draft an order or settlement agreement. A video-conference may then be set up with Counsel and solicitors in which the Claimant's Counsel can use the screen-sharing feature to allow others to comment on the draft. Alternatively, comments can be exchanged by email.

If the parties do not have the facility for electronic signatures, email should be used to confirm in writing unequivocal acceptance of a draft agreement.

Disclaimer

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Isabel has a flourishing commercial and common law practice, with a particular focus on professional negligence, product liability, property damage, travel and jurisdiction, commercial dispute resolution and commercial fraud. Isabel has appeared in the High Court, Court of Appeal and the Supreme Court and has experience of mediation. Isabel has been recommended in both legal directories for a number of years. Recently she has been described as being "*frighteningly intelligent*" (Chambers Bar UK 2020) and having "*piercing insight*" (Legal 500 2020).



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Jessica's work embraces a wide range of Chambers' specialisations: negligence, commercial, international, public and sports law. In addition, she practices in WTO and International Trade Law, offering a unique perspective as a former economist. Jessica was seconded to the Bank of England's EU Withdrawal Unit from October 2018 to March 2019, advising on international trade matters, including WTO and BIT issues. Her work at the Bank of England placed her at the forefront of Brexit and its implications. She regularly advised the Governors on EU and UK legal matters that impact Brexit, in addition to her advisory work on international trade.



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Luka is ranked as a "Leading Individual" at the Bar in Chambers UK 2020: "He is unbelievably unflappable", "very astute and confident" and "has a very impressive knowledge of foreign claims". He has also been praised as a "confident and robust advocate" who "thinks outside the box and considers matters not just legally but also tactically" (Chambers UK 2019). His practice has a significant sports commercial focus. He has represented well-known Football Clubs in multimillion pound High Court proceedings, including West Ham United (Premier League), Sheffield United (Premier League), and Stade Rennais F.C. (French Ligue One).

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