

LEGAL UPDATE: COVID-19



30 March 2020

Jane Hodgson, Millie Polimac and Tiernan Fitzgibbon of Five Paper update you on the latest information relating to remote hearings

Introduction

1. This is the second in a series of on-going briefings aimed at providing the latest information for social landlords on changes taking place within the civil justice system in response to the Covid-19 Pandemic. We aim to provide as up-to-date information as possible in a rapidly developing situation. This note is accurate as at 9am on Monday 30 March 2020.
2. In this note we consider: (i) what is likely to happen to existing hearings; (ii) what will happen if the court orders that a hearing takes place via telephone or video.

What is likely to happen to existing hearings?

3. All courts apart from priority and staffed courts are now closed. The Ministry of Justice will continue to monitor the situation as it develops and will publish a daily operational summary at 9am each morning here: www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak.
4. Priority courts will operate to hear essential face-to-face hearings. Media and members of the public will be able to attend priority court hearings in person, if safe to do so. Where this is not possible, judicial consideration will be given to them joining a hearing remotely or a transcript provided afterwards. A list of priority courts can be accessed here: www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served.

5. Staffed courts will be open only to HMCTS staff and judges and will be open for the purpose of conducting video and telephone hearings, as well as progressing cases that do not need a hearing.
6. Unless your hearing is an essential hearing it is likely to be adjourned, determined on paper or heard by video or telephone in accordance with the guidance issued in respect of such hearings. The Message from the Lord Chief Justice to judges in the Civil and Family Courts, published on 19 March 2020 (**the ‘Message from the LCJ’**)¹, states that the default position in all jurisdictions is that hearings, where possible, should be held remotely. It also invites parties whose hearings are adjourned to explore the possibility of compromise. This will be a good opportunity to take stock of your case and see if settlement is appropriate.
7. Whether a hearing is an essential hearing will be determined by a judge. It is likely that a judge will determine that a hearing is essential where it cannot be heard by video or telephone and where it cannot be delayed.
8. The Protocol Regarding Remote Hearings (**the ‘Protocol’**)² encourages the court and parties and representatives to be proactive in relation to forthcoming hearings (para 10 of the Protocol). Therefore, if you have suggestions as to how your upcoming case is to be dealt with you should write to the court with those. The Message from the LCJ states that Designated Civil Judges should work with operational staff and listing staff to establish priorities and to consider how hearings can continue to take place as safely as possible. If you consider your case merits higher priority, for example because it has previously been adjourned off once or twice, this should be highlighted in any correspondence you have with the court.
9. Ultimately the decision is up to the judge and the court and the Protocol states that parties will be contacted (by post or email) with one of three proposals:
 - i. That the case proceeds using a stated remote communication method for the hearing;
 - ii. That the case proceeds in court with appropriate precautions to prevent the transmission of Covid-19;

¹ <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>

² https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-24_03_20-1.pdf

- iii. That the case is adjourned because a remote hearing is not possible and the length of the hearing combined with the number of parties overseas/unable to attend make it undesirable to go ahead with the hearing at the current time.
10. We have heard that courts are hearing trials longer than a day, so this may not be a bar to conducting a case remotely, contrary to what is said in the Protocol. Indeed, the Court of Protection recently held the first ever trial entirely via Skype for Business. This was a four-day trial involving five parties, 8 witnesses, 3 independent expert consultants and evidence running to well over 4,000 pages. The reports from the lawyers have all been positive about their experience of the trial, speaking to how they became comfortable and familiar with the set up relatively quickly. However, the account of an observer to the proceedings supporting one of the parties was published by the Transparency Project and speaks to the added care that solicitors should take in preparing witnesses for remote hearings in circumstances where counsel will not be able to discuss protocol or allay their fears prior to the hearing. As Mr Justice Smith acknowledged recently in the remotely heard *Harrison Jalla and Others v Shell International Trading and Shipping Co Ltd & Others* [2020] EWHC 738 (TCC), “It is right that the Court should acknowledge both the achievements of and the difficulties faced by all in this who have had to confront the changed litigation and human landscape created by the virus at short notice.” While remote hearings are relatively new for users of the court system, we also believe that they will be one of the lasting effects of the Covid-19 pandemic. As such, it is better for parties to get to grips with the new reality sooner rather than later.

What principles will be used to determine what happens to a hearing

11. The judge will consider the suitability of video/audio (Para 14 of the Protocol), the nature of the matters at stake, the type of hearing, any issues the use of video/audio technology may present for participants in the hearing, having regard to individuals’ needs; and any issues around public access to or participation in the hearing (see the Guidance published by the HMCTS for telephone and video hearings during coronavirus outbreak (**the ‘HMCTS Guidance’**)³).

³ <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>

12. The Protocol states it is of application to hearings of all kinds, including trials, applications and those in which litigants in person are involved. The Protocol makes clear that it will usually be possible for short, interlocutory and non-witness applications to be heard remotely. Procedural issues are increasingly likely to be resolved on paper, which is not likely to cause many problems.
13. However, it also states that some witness cases will be suitable for remote hearings. Indeed, the Message from the LCJ indicates that final hearings and hearings with contested evidence will increasingly and inevitably need to be conducted using technology, to decrease the backlog and delays that will inevitably arise out of the current situation if too much court business is simply adjourned. Parties may find this difficult given the usual preference for trials to be conducted in person so that the tone and body language of witnesses can be ascertained.
14. Telephone and video hearings may be appropriate notwithstanding the fact that a litigant in person is involved. The Protocol makes clear that it applies to conduct of cases concerning litigants in person. However, the Message from the LCJ states that unrepresented parties may have difficulty with telephone hearings and that sensitivity may be required in those cases. He says that it is “very unlikely” that a telephone hearing would work if a litigant in person is homeless; chaotic because of alcohol or drug use; has learning disabilities; has significant mental health issues or has other needs or disabilities which would militate against telephone hearings.

If you disagree

15. If parties disagree with the proposal put forward by the court they may make written representations (para 17 of the Protocol). The court may also fix a short remote hearing dealing with case management issues in relation to the conduct of the hearing (para 18 of the Protocol).
16. Below, we consider the practical effects of the proposals outlined above on the type of hearings that our social housing clients are most likely to face.

Possession hearings

17. From 27 March 2020 all housing possession proceedings brought under CPR Part 55 and all proceedings seeking to enforce an order for possession are stayed for 90 days (see new Practice Direction 51Z issued on 27 March 2020).
18. The Practice Direction will have effect until 30 October 2020.

Injunction hearings

19. However, Practice Direction 51Z makes clear that claims for injunctive relief are not subject to the stay.
20. Indeed, the Independent reported on 29 March 2020 that on 27 March 2020 Mossclare St Vincent's Housing Association obtained an injunction against a tenant who was reported to be holding a house party with more than 20 guests, in breach of the Government's guidance on social distancing.

Committal hearings

21. The Message from the Lord Chief Justice states that applications for committal are likely to be urgent and such work will need to be prioritised.
22. He further states that applications for breach of injunction or undertaking are unlikely to be suitable for telephone hearings. They are likely to be urgent and to require priority.

Appeal hearings

23. The Message from the Lord Chief Justice states that most applications for permission to appeal, including oral reconsiderations, are likely to be suitable for telephone hearing, subject to practical arrangements and the observations above as to litigants in person.

Court of Protection hearings

24. In the message from the Honourable Mr Justice Hayden dated 24 March 2020⁴ concerning hearings before the Court of Protection, Hayden J stated that no hearings which require people to attend are to take place unless there is a genuine urgency and it is not possible to conduct a remote hearing.
25. In his message, Hayden J recognises that, perhaps more than any other court, the Court of Protection is required to hear cases which can properly be described as “genuinely urgent” and sometimes involve decisions concerning life and death.
26. For now, the existing procedures will continue to apply. Thus, the application will be issued at First Avenue House and then transferred to Tier 3 (the Royal Courts of Justice) via the generic email. A judge will then be allocated to hear the case. Though most of the staff are presently working remotely the system is continuing to work effectively.
27. If there is any difficulty in issuing or processing these applications, Hayden J’s clerk may be emailed directly and he will ensure that a judge is identified (Debra.Cooper1@justice.gov.uk). Hayden J however urges that this is a backup arrangement to be followed only if there are difficulties in processing the case through the usual channels.
28. In relation to other hearings the (Additional Guidance for Judges and Practitioners arising from Covid-19 dated 18 March 2020 (the ‘**Additional Guidance**’)⁵ states that:
- i. Hearings with time estimates of 2 hours or less will be conducted by telephone. The applicant should make necessary arrangements as set out in COPGN5;
 - ii. Hearings over 2 hours will proceed unless and until further guidance or specific application in the case.
29. Paragraphs 7 and 9 of the Additional Guidance have some very useful practical solutions to matters that may arise in Court of Protection proceedings that will be heard remotely.

⁴ <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/family-law-courts/court-of-protection-guidance-covid-19/>

⁵ <https://www.judiciary.uk/wp-content/uploads/2020/03/COP-Covid-19-Additional-Guidance.pdf>

High Court hearings

30. The High Court Contingency Plan made on 26 March 2020 distinguishes between urgent and non-urgent business (**the ‘HCCP’**)⁶. Urgent business is defined as anything that may warrant an out of hours application in any of the courts covered (Queen’s Bench Division, the Administrative Court, the Court of Protection, the Business and Property Court and the Family Division). For providers of social housing this is likely to cover homelessness cases.
31. The process to be followed in urgent business cases will be similar to that already in place. Applicants should email the relevant address in the HCCP. Their case will then be referred to the duty listings officer who will decide the appropriate arrangements.
32. High Court hearings which are not in the urgent business list will continue to be heard remotely, with reference to the Protocol. This is the experience of barristers at Five Paper where recently a two-day substantive judicial review hearing was fixed to be heard by BT conferencing.

Conduct of hearings via telephone and video conference

On what platform will the hearing be conducted?

33. The Judge will determine the mode of the hearing. The Protocol, by way of example, includes a non-exhaustive list of possible platforms such as Skype for Business, BT MeetMe, Zoom, Court video link or even by conference call.
34. In our experience all remote hearings conducted by barristers at Five Paper to date have taken place by telephone rather than video.
35. However, it seems to us that if a trial with live evidence is to take place, a video facility will be better. This will enable the judge and legal representatives to ascertain the demeanour of the witness, as well as being able to see if they are being prompted to give specific answers.

⁶ https://www.judiciary.uk/wp-content/uploads/2020/03/High-Court.Contingency.final_.26thMarch2020-002.pdf

How will parties be informed of the hearing?

36. For hearings taking place via teleconference using BT MeetMe, parties will receive a notice of hearing informing them of the joining instructions. This includes a request to provide the court with a preferred contact number by which they can join the hearing (see the HMCTS Guidance).
37. For hearings taking place by video, the court or tribunal will write by post or email with information about preparing for your hearing.
38. Where the hearing is to be held remotely, it will be shown in the cause list by what method and platform the hearing is taking place.

Interpreters

39. If interpreters are required the court must be informed of this using the contact details in the hearing notice so that this can be arranged.

Bundles

40. Timely preparation of bundles will be of paramount importance. Paragraph 24 of the Protocol provides that an electronic, indexed and paginated bundle of the documents and authorities to be used in the remote hearing should be prepared by the parties and provided to the Court in advance. The Protocol notes that only those documents and authorities which are essential to the remote hearing should be included. As documents will no longer be able to be handed up in person, such as Statements of Costs, it will be necessary to ensure that all documents required at a hearing are included in the bundle and evidenced by statements of truth to satisfy the CPR's evidential requirements.
41. In our experience, electronic bundles should be regarded as essential for all hearings in order to be able to take the Judge quickly and efficiently through the documents needed to establish the case. Programmes such as Adobe Pro which allow pdf documents to be re-arranged and tabbed up would be useful in creating an easy-to-use electronic bundle.

42. The Protocol states in paragraph 26 that electronic bundles must be filed on CE-file (if available) or sent to the court by link to an online data room, email or delivered to the court on a USB stick.

How will the hearing start

43. All parties will need to log in or call the dedicated facility in good time for the stated start time of the hearing (Protocol para 20). In our experience, parties should be careful about dialling in too early. By way of example, Clerkenwell & Shoreditch County Court only has one dialling code for telephone hearings and so if parties dial in early then they may intrude on the tail end of the hearing listed immediately prior to theirs.
44. In a Skype, Zoom or BT MeetMe call, once the parties have connected to the hearing then the judge will then be invited in by the clerk or court official (Protocol para 20).

Oaths and affirmations

45. Witnesses will still be able to choose whether to give an oath or affirmation. The HMCTS Guidance states that those who wish to take an oath will need to provide the holy book or scripture to do so. It may be worth reminding your clients of this if they are going to give evidence in a trial. However, if you forget to do so the Guidance states that witnesses can also take an oath without a sacred object, as long as the person giving the oath considers it will still be binding on them.
46. In our experience witnesses giving evidence will be sworn in, asked to confirm their statement, asked to confirm that there is no-one else in the room with them, and that they are not recording the hearing.

Communications between legal professionals and clients

47. Pre-trial conferences that are usually in person will be more difficult. Parties may seek to set up their own video conference or telephone conference separate from the hearing in order to discuss any issues before the trial takes place. It is also worth noting that the Ministry of Justice is in the process of setting up and testing video hearings to

facilitate private consultations so that legally privileged conversations with clients can take place where required.

48. There may also be difficulty in asking for and/or receiving instructions during the course of remote hearings and arrangements will need to be put in place to deal with this issue e.g. by arranging for clients/witnesses to be available to communicate by email during the hearing. In cases where Zoom is used there is a private messaging facility which can make taking instructions easier, although parties will need to be careful to ensure that any such messages are not accidentally sent to all participants.

Principle of open justice

49. Courts usually adhere to the principle of open justice by having hearings in public, but the prospect of remote hearings in courts not open to the public pose a difficulty for HMCTS in this regard.
50. Where the Court is determining a case by telephone or video link it will need to determine: (i) whether the hearing will be held in private or public, (ii) if in private on what basis, (iii) how the proceedings will be recorded, or (iv) whether it is possible to dispense with recording.
51. Paragraph 8 of the Protocol clarifies that remote hearings should, as far as possible, remain public hearings as the principles of open justice remain paramount. In our experience to date, this has been achieved by having the Judge appear in open court while the parties appear remotely. This also facilitates the recording of hearings in compliance with Rule 39.9.
52. Where it is not possible that the Judge sit in open court, Paragraph 9 of the Protocol envisages that the hearing may be recorded either using any recording capability of the platform facilitating the remote hearing or by the Judge recording it on a mobile telephone. It remains the case, however, that parties may not record the hearing without the express permission of the Judge.
53. Practice Direction 51Y has been introduced to deal with the principle of open justice in cases which are heard by audio or video hearings. It will have effect for the duration of the Coronavirus Act 2020.
54. In cases where it is practicable for a hearing to be broadcast in a court building this will be done. If this is not possible but where a media representative is able to access

proceedings remotely while they are taking place, these will amount to public proceedings.

55. If it is not possible for the hearing to be held in public, 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.
56. Any hearing held in private must be recorded, where practicable, in a manner directed by the court. Any person may apply to access any recording, which will be made available with the consent of the court, to be accessed in a court building.

Concluding remarks

57. It should also be recognised that, practically, the Courts are still adapting to this new way of working and there will be teething difficulties while they are getting up to speed.
58. Whilst the prospect of conducting fully contested trials remotely seems particularly challenging, some courts are already doing so. It may be in your client's interest to have a case determined in this way, to avoid long and/or indefinite adjournments.
59. As paragraph 4 of the Protocol notes, it is inevitable that undertaking numerous hearings remotely will cause teething troubles. All parties are urged to be sympathetic to the technological and other difficulties experienced by others.
60. If you are concerned about the best way of disposing of a case you are currently involved in, you may contact one of the barristers or clerks at Five Paper, who will be happy to discuss the available options with you.

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