

Alert:

Yes we can.

Remote Justice. The New Norm?

3 April 2020

"The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely": Message to the Judges in the Civil and Family Courts, Lord Burnett of Maldon (19 March 2020)

"It remains the obligation of all involved and at all stages of the hearing, to continue to evaluate whether fairness to all the parties is being achieved. Fairness cannot be sacrificed to convenience": Remote Access to the Court of Protection Guidance, Mr Justice Hayden (31 March 2020)

"It's time to come together, globally, to accelerate the introduction of remote hearings by judges. We must seize the moment and come together to accelerate the development of new ways of delivering just outcomes for court users:" Professor Richard Susskind, President of the Society for Computers and Law, and an expert in online courts.

This article will (i) review the recent legislation, guidance and protocols as they apply to commercial litigation in the High Court (ii) identify some of the key practical challenges for court users and judges, and (iii) raise some (so far) unanswered questions, in particular, whether any or all of the measures that are now being introduced will continue once the pandemic subsides and the courts re-open fully.

Background

In order to make sure that the courts can continue to function, parties, court users, legal practitioners and judges have been forced to adopt an entirely new way of operating within a matter of days. Restrictions on our movement in order to safeguard our public health mean that remote access to the court is now a necessity.

The English courts' approach differs from that of other jurisdictions, for example France and Switzerland, where the courts have broadly closed save for exceptional cases and there is less reliance on technological solutions to keep them open¹. In contrast, HM Courts and Tribunals Service ("HMCTS") reported on 27 March that a 5 day hearing was completed over video in the Court of Protection and nearly 500 audio hearings have taken place. Moreover, the English courts are in favour of conducting full trials remotely, for example, and as we mentioned in our previous alert², the Business and Property Courts are hearing the *National Bank of Kazakhstan* case remotely³.

Key Contacts



Jane Colston
Partner

+44.20.7851.6059

[Email](#)



Ravinder Thukral
Partner

+44.20.7851.6063

[Email](#)

¹ For a useful guide to the practice worldwide see Remote Courts Worldwide at www.remotecourts.org (produced by SCL, HMCTS, Tech Nation, LawTech Delivery Panel). In respect of the French position see « Ordonnance n° 2020-304 du 25 mars 2020 portant adaptation des règles applicables aux juridictions de l'ordre judiciaire statuant en matière non pénale et aux contrats de syndic de copropriété » available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755577&dateTexte=20200327> (in French). The commercial tribunal of Nanterre has issued instructions that they can conduct remote hearings for urgent matters: <http://www.greffe-tc-nanterre.fr/actualites/locale/covid-19-judiciaire-lettre-numero-4-464.html>

² Brown Rudnick Alert: Coronavirus Bill: Dispute Resolution Implications, 25 March 2020

³ "High Court trial streamed on YouTube for first time": Financial Times, 29 March 2020

Alert:

Yes we can. Remote Justice. The new norm?

It is quite clear, therefore, that the UK Government, the judiciary and HMCTS are determined to ensure access to justice even if, as the Lord Chief Justice has admitted, "*undertaking numerous hearings remotely will cause teething troubles*".

While the scale of the changes that have been introduced is novel, it is worth recalling that there has been a steady movement towards the increased use of technology in the courts for some time. The current measures must be situated in their proper context. For example, in 2016, the Ministry of Justice and senior judiciary began an enormous programme of modernizing the court system in favour of the greater use of technology, moving certain cases online and introducing virtual hearings⁴. The Government agreed to spend more than £700m to implement this programme and more than £270m in addition for the criminal justice system.

In October 2019, the House of Commons Justice Committee published its report "*Court and Tribunal reforms*"⁵ on the modernization programme and stated: "*Courts service modernization, including the use of better IT to be more efficient, is long overdue*".

The Current Guidance

The legislation, guidance, protocols and rule changes of the last fortnight have been substantial and are updated every day as court users get used to operating in the new normal.

An overview of the key recent developments is as follows:

17 March	Lord Chief Justice: Coronavirus update ⁶
17 March	Law Society: Coronavirus advice and updates ⁷
19 March	Lord Chief Justice: Message to the judges in the Civil and Family Courts ⁸
19 March	HMCTS guidance on priorities during the COVID-19 outbreak ⁹
22 March	Civil Justice in England and Wales: Protocol Regarding Remote Hearings (" <i>Remote Hearings Protocol</i> ") ¹⁰
23 March	Lord Chief Justice: Review of court arrangements due to COVID-19 ¹¹
25 March	CPR Practice Direction 51Y - Video or Audio Hearings During Coronavirus Pandemic ¹²
25 March	QBD Information for Queen's Bench Court Users ¹³
25 March	Coronavirus Act 2020 ¹⁴
26 March	High Court Business: Contingency Plan for maintaining Urgent Court Hearings ¹⁵
27 March	Network of priority courts identified ¹⁶
27 March	HMCTS updated guidance on telephone and video hearings including re oaths and affirmations ¹⁷
2 April	HMCTS guidance on civil court listing priorities and daily operational summary on courts and tribunals during COVID-19 outbreak ¹⁸

⁴"Transforming our Justice System": statement by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, September 2016

⁵"*Court and Tribunal reforms*", Second Report of Session, 30 October 2019, House of Commons, Justice Committee

⁶<https://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/>

⁷<https://www.lawsociety.org.uk/support-services/advice/articles/coronavirus-advice-and-updates/>

⁸<https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>

⁹<https://www.gov.uk/guidance/hmcts-priorities-during-coronavirus-outbreak>

¹⁰https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-24_03_20-1.pdf

¹¹<https://www.judiciary.uk/announcements/review-of-court-arrangements-due-to-covid-19-message-from-the-lord-chief-justice/>

¹²<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic>

¹³<https://uk.practicallaw.thomsonreuters.com/Link/Document/Blob/lce54976a6f8311ea80afece799150095.pdf?targetType=PLC-multimedia&originationContext=document&transitionType=DocumentImage&uniqueId=73f6551f-9baa-4e6a-8f40-0ed56b12f2bb&contextData=%28sc.DocLink%29&comp=pluk>

¹⁴<http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted/data.htm>

¹⁵https://www.judiciary.uk/wp-content/uploads/2020/03/High-Court.Contingency.final_.26thMarch2020-002.pdf

¹⁶<https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served>

¹⁷<https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>

¹⁸<https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak>

Alert:

Yes we can. Remote Justice. The New Norm?

The Remote Hearings Protocol

The new guidance for the preparation and conduct of remote hearings is set out principally in the Remote Hearings Protocol.

General

The Remote Hearings Protocol applies to all hearings of all kinds, including trials, applications and those involving litigants in person in the County Court, High Court and the Court of Appeal (Civil Division) (paragraph 1).

The method by which remote hearings are conducted is always a matter for the judge and nothing in the Remote Hearings Protocol derogates from the judge's duty to determine these issues in accordance with the existing law and CPR. Hearings conducted in accordance with the Remote Hearings Protocol should be treated as being in accordance with the CPR (paragraph 3).

Which hearings?

It will normally be possible for all short, interlocutory or non-witness applications to be heard remotely and some cases involving witnesses will be suitable for remote hearings (paragraph 12).

When a hearing is fixed

Before ordering a hearing by video link the Judge must check with the listing office that there are suitable facilities (paragraph 14) and the parties will need to be more proactive in relation to upcoming hearings (paragraph 10).

If there are suitable facilities, and where possible, the Court will propose one of three solutions to the parties:

- a remote communications method for the hearing (e.g BT conference call, Skype for Business, court video link, BT MeetMe, Zoom, telephone call or another method);
- that the case will proceed in court with appropriate precautions to prevent transmission of COVID-19;
- adjournment "*because a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and / or witnesses make it undesirable to go ahead with a hearing in court at the current time.*"

If the parties disagree with the Court's proposal then they may make submissions in writing as to what they consider to be a more appropriate proposal following which the judge will make a binding determination and issue directions (paragraph 17) including to fix a remote CMC which would deal with the arrangements for the remote hearing (paragraph 18).

The listing office will seek to ensure that the judges and the parties are informed of the identity of the judge as soon as possible (paragraph 15).

Preparation for remote hearings

The parties should prepare an electronic paginated bundle of essential documents and authorities which should be provided to the judge's clerk, court official or judge and to all other representatives / parties in advance of the hearing (paragraph 24).

Alert:

Yes we can. Remote Justice. The New Norm?

The electronic bundle can be prepared in .pdf or other format and filed by CE-file or sent to the court by link (e.g. FTP link) or email or USB (paragraph 26).¹⁹

The remote hearing itself

Once the parties are logged into the remote communication facility, the Judge will then be invited in (paragraph 20).

CPR 39.9 provides that: "(1) At any hearing, whether in the High Court or the County Court, the proceedings will be tape recorded or digitally recorded unless the judge directs otherwise."

Unless the judge has directed that the proceedings will not be recorded, a recording will be made by a court official or, if arranged by the parties and with the court's permission, private transcribers (paragraph 21).

This can be achieved by (a) recording the audio in the open court room using the court's recording systems (b) recording the hearing on the remote communication system used for the hearing (e.g. Skype for Business, Zoom etc.) or (c) the court using a mobile telephone to record the hearing. In any event, the parties must not record the hearing without the judge's permission (paragraph 9).

Unless it is necessary for a hearing to be in private (i.e. under CPR Part 39.2(3)(g)), remote hearings should be public hearings, so far as possible. This can be achieved by (a) relaying the audio of a hearing into an open court room (b) allowing journalists to log into the remote hearing and / or (c) live streaming the hearing over the internet (paragraph 8). Exceptionally, the fact that public access is impossible should not normally prevent a remote hearing from taking place (paragraph 22).

The clerk, court office or judge must complete the order made at the end of the remote hearing. The wording of the order should be discussed and agreed with the parties (paragraph 23).

HMCTS Guidance on telephone and video hearings during coronavirus outbreak

HMCTS has produced its own further set of guidance on the operation of remote hearings which is updated periodically. The guidance deals with a variety of issues including the decision to use telephone and video hearings, using technology, open justice, media access to proceedings, how to join an audio or video hearing and oaths or affirmations.

For example, where a witness is required to take an oath or make an affirmation and wishes to do so using a Holy Book or Scripture, then the witness is relied on to provide it at the hearing. The guidance states that such a witness may take an oath without such a sacred object if he or she considers that it would still be binding.

Finally, HMCTS confirms that they are "rapidly scaling up" their audio and video capabilities and are "working hard to find solutions to problems that haven't been seen before". These include how to deal with legally privileged conversations between legal representatives and their clients. HMCTS confirms that it is in the process of producing its own "bespoke product for fully video hearings" which is currently being tested and which provides a mechanism for such consultations.

Coronavirus Act 2020

On 25 March 2020, the Coronavirus Act came into force. Section 55 of the Act is entitled "Public participation in proceedings conducted by video or audio". Schedule 25 of the Act makes amendments to the Courts Act 2003 in relation to video or audio recordings of hearings.

Under the new section 85A of the 2003 Act, where proceedings are conducted wholly as video proceedings or wholly audio proceedings then the court may direct that the proceedings are to be broadcast and may direct that recordings are to be made.

¹⁹ A helpful guide to the preparation of an e-bundle has been produced by James Turner QC. It is publicly available on the Chancery Bar Association website here: <https://www.chba.org.uk/news/ebundling-guide>

Alert:

Yes we can. Remote Justice. The New Norm?

Section 85B criminalises unauthorized recordings or transmissions of an image or sound broadcast under section 85A. In practice, this means that hearings cannot be uploaded to audio or video sharing platforms.

Section 85C criminalises the production of unauthorized recordings where there is no broadcast of any live audio or video recording, for example by one of the parties without the permission of the court.

CPR Practice Direction 51Y

Also on 25 March 2020, a new CPR PD 51Y was introduced with immediate effect in respect of audio or video hearings.

The new PD confirms that where the proceedings are to be conducted wholly by video or audio and it is not practicable for the hearing to be broadcast in a court building then, if it is "*necessary to do so to secure the proper administration of justice*" the court may direct that the hearing must take place in private.

Further, the PD states it is not necessary to make such a direction where a representative of the media is able to access the proceedings remotely while they are taking place. Finally, and where a private hearing takes place, such a hearing must be recorded either by video or audio. With the Court's permission, the public may have access to such a recording.

Contingency Plan for maintaining Urgent Court Hearings and Civil court listing priorities

On 26 March 2020, the judiciary produced a plan which differentiates between "*urgent business*" and "*business as usual*" and explains how these two types of work are to be dealt with.

The plan explains that any business that is sufficiently urgent to warrant an out of hours application in normal times will be considered urgent business for the purposes of the Contingency Plan. Business that is not urgent (i.e. "*business as usual*") will continue to be dealt with as far as possible in accordance with the contingency plans put in place by the different Divisions and Courts. However, urgent business will be given priority.

The Contingency Plan also states that where applications are to be made during normal court hours they are to be sent to the relevant email addresses and referred to the listing officer of the relevant Division or Court.

On 2 April 2020, HMCTS identified listing priorities in the civil courts according to "*work that must be done*" (Priority 1) and "*work that could be done*" (Priority 2).

So far as commercial litigation is concerned, Priority 1 cases are as follows:

- i. Committals
- ii. Freezing Order
- iii. Injunctions (and return days for ex parte injunctions)
- iv. Enforcement work that does not involve bailiffs, e.g. third party debt orders
- v. Any applications in cases listed for trial in the next three months
- vi. Any application where there is a substantial hearing listed in the next month
- vii. Appeals in these cases

Relevant Priority 2 cases are as follows:

- i. Applications for summary judgment for a specified sum
- ii. Applications to set aside judgment in default
- iii. Applications for security for costs
- iv. Preliminary assessment of cost

Alert:

Yes we can. Remote Justice. The New Norm?

The guidance in practice

Various reports have emerged about how the guidance is operating in practice. In general, the view is that while the guidance ought not to affect adversely the conduct of applications or short hearings, even where they are fixed in the near future, there is concern about conducting witness actions in a remote court. For example, barristers at Falcon Chambers identified some of the challenges of an upcoming trial including²⁰:

- providing lever arch file bundles to witnesses where it was unrealistic to produce e-bundles in time for a trial;
- witnesses required to navigate documents without assistance placing them under undue pressure;
- lack of a solicitor present to ensure witness probity;
- the risk of interruptions to internet service or failure of the technology altogether.

The authors stated:

"Our conclusion is that a much longer lead time will be required in order to establish robust communications, familiarity amongst participants with preparing and navigating e-bundles, and answers to the difficulties of ensuring witness probity. Only then will parties be able to conduct fully remote witness actions, confident that due process will ensure, and lead to a just result."

Of their experience, they also explain that:

"Since seeking and being granted the adjournment, the Chancery Division has built up some hands on experience of hearing applications remotely. It is beginning to standardise procedures for remote dialling in, as well as for e-bundles and core bundles, and has signalled that it will be able to conduct not merely applications but witness trials involving cross examination in the near future. Provided the trial in question has a long enough lead time to make adequate preparations for a fully remote hearing, it should in future be possible to conduct this within the listed time slot."

Others have not followed the new protocols. For example, in *Conversant Wireless Licensing Sarl v Huawei Technologies & Ors*²¹, Judge Hacon vacated a trial date and adjourned a trial concerning FRAND licences in light of COVID-19. The judge commended the claimant's legal team for suggesting that the trial could be conducted on the papers but refused the application as neither the CPR nor the LCJ's guidance permitted a trial to be conducted in that way.

Some outstanding questions

It is inevitable that these wholesale changes in our way of conducting hearings, trials and appeals will throw up lots of different problems to which the Government, HMCTS and the judiciary will need to address, for example, the following.

- **Security of the technology:** press reports in recent days have raised questions about the integrity of Zoom, a hugely popular video conferencing application which is being used to conduct remote hearings²² (and which is reported to have experienced a 535% rise in daily traffic in the past month) albeit the Government has confirmed that it is secure enough for cabinet video conferences²³. Brown Rudnick has a platform that we have road tested to have security embedded deeply in it. Which online platform to use is fraught with difficulties and judgment calls. Preserving confidentiality given the highly sensitive nature of some court hearings is paramount. Liaising with your firm's IT experts to weigh the pros and cons of each online platform is key. Blind reliance on what the other side offer is not advisable.

²⁰ <https://www.falcon-chambers.com/publications/articles/witness-actions-press-on-or-pause-for-breath>

²¹ Lawtel, 25 March 2020

²² "Zoom is malware: why experts worry about the video conferencing platform": The Guardian, 2 April 2020

²³ "UK Government defends PM's use of Zoom", 1 April 2020

Alert:

Yes we can. Remote Justice. The New Norm?

- **Open justice:** some commentators have suggested that the new provisions may require further elaboration and standardization to ensure compliance with the constitutional principle of open justice (i.e. "*participation*", "*observation*" and "*accessibility*")²⁴.
- **Access to justice:** the Justice Committee was particularly concerned about how "*poor digital skills, limited access to technology and low levels of literacy and legal knowledge*" might raise barriers to access to new digital services. Those concerns apply even more forcefully under the new guidance.
- **International parties and witnesses:** the logistics of arranging fully remote hearings with witnesses based abroad raises another set of considerations e.g. use of e-bundles, restricted access to internet and certain audio/video conferencing facilities.
- **The lessons of international arbitration:** the practice of remote hearings is familiar to many arbitration practitioners and various soft law guidance has been published²⁵. The judiciary and HMCTS could usefully consider how arbitral tribunals have dealt with similar issues of concern.

In our view, it is almost inevitable that remote courts in England and Wales are here to stay in some form or other. The current pandemic offers up a real opportunity for courts to offer justice online thereby making it more accessible. Using technology to conduct more hearings also suits our now much more global, mobile, and connected society, saving clients from having to jet in from different parts of the world, in turn mitigating the impact on the environment.

²⁴ see the excellent article "*Coronavirus and Public Civil Hearings*" Thomas de le Mare QC, available at www.blackstonechambers.com

²⁵ see for example, Hague Conference Draft Guide to Good Practice on the Use of Video-Links Under the Evidence Convention, March 2019; ICC Commission Report on Information Technology in International Arbitration, October 2017 and the Seoul Protocol on Video Conferencing in International Arbitration

© 2020 Brown Rudnick LLP

Prior results do not guarantee a similar outcome.

The views expressed herein are solely the views of the authors and do not represent the views of Brown Rudnick LLP, those parties represented by the authors, or those parties represented by Brown Rudnick LLP. Specific legal advice depends on the facts of each situation and may vary from situation to situation. Information contained in this article is not intended to constitute legal advice by the authors or the lawyers at Brown Rudnick LLP, and it does not establish a lawyer-client relationship

Brown Rudnick is a tradename of both Brown Rudnick LLP, a limited liability partnership organized under the laws of the Commonwealth of Massachusetts ("BR-USA"), and its affiliate Brown Rudnick LLP, a limited liability partnership registered in England and Wales with registered number OC300611 ("BR-UK"). BR-UK is a law firm of Solicitors and Registered Foreign Lawyers authorized and regulated by the Solicitors Regulation Authority of England and Wales, and registered with the Paris Bar pursuant to the 98/5/EC Directive. A full list of members of BR-UK, who are either Solicitors, European lawyers or Registered Foreign Lawyers, is open to inspection at its registered office, 8 Clifford Street, London W1S 2LQ, England (tel. +44.20.7851.6000; fax. +44.20.7851.6100).

Information contained in this Alert is not intended to constitute legal advice by the author or the lawyers at Brown Rudnick LLP, and they expressly disclaim any such interpretation by any party. Specific legal advice depends on the facts of each situation and may vary from situation to situation.

Distribution of this Alert to interested parties does not establish a lawyer-client relationship. The views expressed herein are solely the views of the authors and do not represent the views of Brown Rudnick LLP, those parties represented by the authors, or those parties represented by Brown Rudnick LLP.