



Commercial Court User Group Meeting

June Meeting Minutes

Remote Meeting via Microsoft Teams Monday 15 June 2020 at 1645

1. Introduction from Flaux LJ

Flaux LJ opened the meeting by thanking participants for attending. Whilst following the meeting agenda questions would be welcome via chat with a slot available at the end for these. **Flaux LJ** then introduced **Teare J**.

2. The Big Picture

Teare J emphasised how smooth the transition from physical to remote hearings had been with almost all the Court's work being conducted notwithstanding the Covid 19 pandemic. He expressed his gratitude as this wouldn't have been possible without the cooperation and assistance of the users.

Interlocutory hearings have continued on the dates that have been fixed, Friday lists have been just as busy as before lockdown, though the practicalities of navigating multiple remote hearings means that there is an even greater need to keep to time estimates. In court the parties in the next case can wait patiently outside court for the earlier hearing to finish - which currently is not possible.

Trials involving live witnesses are still being heard with witnesses from Kazakhstan, Belgium, United States to name a few. While video evidence from witnesses is not new, witnesses being cross-examined by reference to electronic documents is. It is important that they can navigate the documents. This means that witnesses should have access to two screens to navigate between documents, one showing the advocate questioning them and the other showing the document about which questions are being asked.

Particular care is required when it is necessary to sit in private to discuss certain matters and then return into public session. This requires the services of the judge's clerk who is able to set up a private hearing restricted to the parties and then, when appropriate, to arrange for journalists to join the public session. Where a sitting in private is contemplated the practicalities should be discussed between the parties, and then with the judge, as early as is possible so as to ensure that the remote hearing is not too disjointed or interrupted too often.

The judge's clerk has an important role in setting up the remote hearing and in ensuring that those who require access get it. Where required the clerk also arranges a test session the day before. The clerks have been excellent in doing this and it is very gratifying at the end of a hearing when counsel go out of their way to thank the judge's clerk for the assistance he or she has given.

On only 4 occasions since lockdown has a trial proved impractical. In each case that has been because of particular issues such as illness, lockdown in a remote location without reliable internet access etc.

So the result of this remarkable change of practice in coping with Covid 19 is that there is almost no backlog of work. One adjourned trial has been refixed for July. There will be some judicial time available in September to hear any other matters which are adjourned if the issues leading to adjournment in those cases are resolved by then.

3. Business Profile Issues/Stats

Has there been a fall-off in business (actions commenced and hearings)?

Cockerill J noted that there appears to have been no fall off in court business. The court appears to be doing close to 100% of expected work.

In fact, there has been a slight upturn in actions commenced. When comparing figures (looking at January – March), there were 269 in that period last year and 288 this year. Arbitration actions are down slightly but not remarkably, being 58 last year and 42 this year. The year to date figures are comparable to 2018, and slightly up from 2019, though again Admiralty claims are slightly down.

Comparing hearings is more difficult because of their varying lengths; however in April 2019 there were 52 hearings and April 2020, 60 hearings. The percentage of the total cases heard in that period was 56% in 2019 and 71% this year. The figure overall for Commercial Court hearings in 2018, was 69%. Over the longer period March to May, the Court is slightly down on last year: 70% last year and 56% this year. The court has heard 150 hearings in that period this year. So the statistics overall are comparable to last year and the year before.

There has been a lower number of trials for the period and this appears to be down to settlement rather than adjournment. As noted earlier adjournments have been low. But settlements have been high. Normally there is a 60-65% settlement rate. In the year to date it is closer to 75%. This appears to be a similar experience to that of other jurisdictions. When looking at the figures on Tomlin Orders there have been more issued between January and end of May this year than there were in the full legal year last year (13% more). There have been three times the number of Tomlin orders this year than there were over the comparable period last year. The settlement rate was not triggered by lockdown in the UK. It appears to have increased in January, potentially reflecting Covid-related uncertainty globally rather than merely reflecting the situation in the UK. That could well be a reflection of the fact that the Court's business is international.

Managing the return of live hearings

All parties for June hearings have been asked if they need or want a socially distanced hearing in a court at the Rolls building. There is no guarantee that parties will get one as some judges cannot return to court. Equally **Flaux LJ** added that there was no question of people being expected to attend court if they do not want to. At the end of the day, it is a matter for the parties to decide.

Cockerill J indicated that live hearings are not confined to any particular type of hearing. There is a live trial at the moment, but one hearing going on at the moment is purely submissions. Nevertheless, the parties and the judge agreed that it should be live.

Hybrid Hearings

Hybrid hearings are part live, part remote. However, there are a number of ways these hearings could take place.

Only a small number have taken place and although early days these hearings have been managed and have gone well.

The practice has been to accommodate people with a speaking role in court with most of the remaining teams joining remotely. So far, all hybrid hearings have been managed with external providers.

It could be difficult to manage a hybrid hearing where a remote party has a speaking role and there was no external provider.

The take up of hybrid hearings has not been enthusiastic to date, the major exception being the PCP trial which is proceeding in front of **Waksman J**.

A protocol for hybrid hearings is being developed which covers such things as staggered access times, access routes, witness bundles, managing oaths and affirmations, and the need for test runs.

All of this has involved a large amount of work from Listing, the buildings team, and the judges' clerks in addition to the normal demands of their jobs. We owe them a huge debt of gratitude.

The number of courts that can accommodate live hearings

Thirteen courts are currently available in the Rolls Building to accommodate live hearings with social distancing. They are shared between all the Rolls jurisdictions and will be shared with other parts of the High Court at need. The rest of the Courts are available if needed (subject to suitable social distancing, which may mean very limited numbers in Court).

Number of people at live hearings

Generally, the 13 courts can accommodate five or six legal representatives and three or four others at the back of the court. However, two of the larger courts (those being courts 15 and 26) can hold up to ten legal representatives. One of those is being used for the PCP trial. Court 30 can hold up to 8 legal representatives.

Picken J observed that he held a hearing in one of the smaller court rooms and it comfortably accommodated six legal representatives therefore there were unlikely to be too many issues in the modern Rolls building.

Conference Rooms

Cockerill J advised that Conference rooms are available but only a limited number of people may use them (generally 3-4). Full details are available via Listing.

Q&A on Business Profile Issues/Stats/Hybrid Hearings

Question from Andrew Baker J: Has the CC developed any understanding as to principal reasons that we are not seeing enthusiasm for using physical space? Is it to do with difficulties of teams being able to interact?

Answer: Cockerill J explained that there had been no formal feedback. Anecdotally, she had had heard i) that a return to real courts came at short notice, and planning had already been done for virtual hearings, and ii) that a return to socially distanced hearings is something different e.g. juniors cannot lean over leaders to pass notes as they do in ordinary circumstances. Therefore, the use of messaging technology was still necessary in physical hearings. Others may have more direct information.

Remote and hybrid hearings

Waksman J was going to cover this point but was unavailable owing to a diary clash. However, there is a webinar by **Waksman J** and **Teare J** on the Bar Council website which sets out some of his views.

Jacobs J noted that each will have their own experience but had heard many types of interlocutory hearings all of which had worked well remotely. As a judge the process remains the same whether remotely or in the Rolls Building. Contempt hearings had taken place but not with evidence from the alleged contemnor. **Andrew Baker J** confirmed he had conducted a contempt hearing and would have heard evidence from the alleged contemnor remotely if required.

Jacobs J indicated that the reports from witness actions were also good, and the parties may find the fact that the judge is less inclined to interrupt an advantage. He noted that the judges were very alive to potential difficulties with longer trials, particularly where there is critical witness evidence or where there is complex expert evidence (eg where large complex documents have to be explained by experts).

Particular Issues and noticeable differences

Parties are now getting used to remote hearings, notwithstanding their different approaches. So far as teething issues go there have been some concerns that these hearings are too informal. There does seem to be a loss of some of the non-verbal communication and information that is picked up in a Courtroom. The style of advocacy is different as the Judge and the advocate seem to be in 'a bubble'. Most of the counsel are now taking instructions via WhatsApp which on occasion can be somewhat distracting for those taking part in the hearing. Parties who haven't got 'speaking parts' seem to be interacting more freely amongst themselves, which again

can be distracting for others. There is a learning curve on this aspect. There have been one or two incidents where despite warnings participants have photographed proceedings, but these are hopefully being ironed out.

Which hearings will be the first to return in person?

Jacobs J explained that this would be very much down to the parties however, more than likely, larger trials and hearings with key witness evidence will be the first to return. **Jacobs J** also expressed the view that interlocutory hearings were more likely to be carried out remotely for some time and noting the Chancellor's recent speech to Chancery Bar Association we should probably assume that we will not be going back to exactly where we were before.

4. View from the LCCC

HHJ Pelling informed the CCUG that LCCC had been working remotely since 23 March 2020 and all cases had been listed on a business as usual basis. The period from 22 March to 22 May, there have been 44 applications listed and 24 heard. In the same period the previous year there were 35 applications listed and 21 heard. In the same period 8 trials had been listed with 4 being heard in comparison to 7 listed and 3 heard last year. These trials were all conducted via Skype. **HHJ Pelling** also said there was only 1 Covid-related adjournment. At the LCCC user meeting the view amongst most was that when things return to normal, short hearings are conducted remotely. This will be particularly valuable to parties who are abroad.

Practical Points for trials from HHJ Pelling

- All witnesses on trial in LCCC are being affirmed by Judges rather than the court clerks or judges clerks;
- Barristers must check that witnesses are alone when giving evidence and have an unmarked hearing bundle they can refer to.
- As there is a delay with remote hearings, barristers who anticipate an objection to a question are to delay witnesses from answering to avoid inadmissible answers.
- Witnesses whom allege dishonesty is being made have been directed that evidence is given by the witness attended only by a trainee provided by the other side's solicitors. This seems to work to everyone's satisfaction.

5. The Platform issue:

Question: Is the court wedded to Skype? Parties expressing strong view to using different platforms?

Jacobs J explained that the suggestion that there was a reluctance amongst CC judges to use the Zoom platform were somewhat mistaken. At an early stage there were concerns about the Zoom platform concerning MOJ data security. There is also a concern that other platforms give parties the ability to record the proceedings. As a result the only platform currently approved by MOJ for use on judicial computers is Skype. However parties can agree another platform if suitable arrangements can be

made (eg. for the judge to have access to a separate device running that platform). This has been done on a number of occasions, perfectly successfully.

Flaux LJ observed that Common Video Platform (CVP) was to be rolled and should be made available in the not too distant future. Court users should presume that the default position is that hearings will be conducted using Skype for Business going forward until CVP is available.

Cockerill J addressed the point that parties are invited to request to use other platforms however, in depth preparations must be arranged. Concern had been expressed that approvals for this were not coming through fast enough. The solution is that Listings office must be made aware of the situation surrounding platforms as soon as possible. Regardless of whether a judge has been assigned to the case there are always two judges on paper applications who are able to deal with platform issues.

Baker J noted that he had recently used WebEx as it is Opus2's preferred platform if they are asked to provide their full presentation service. That also means that Opus2 have charge of the recordings and the judge's clerk must be sure to get a copy.

6. Question: What is happening regards urgent business?

Answer:

Cockerill J observed that business continues as usual. The court has heard a number of urgent matters, freezing and anti-suit injunctions and injunctions to assist in the enforcement of awards. There were also judges "on call" over the Easter and Whitsun breaks which has extended the ability of the Court to hear urgent applications. During the Easter period 3 urgent hearings had taken place.

7. Question: Are Covid related cases appearing? How are they being dealt with?

Answer: Yes there are a small number of Covid related cases appearing but as yet it is too early to give numbers. **Flaux LJ** explained that there was a covid-related insurance coverage dispute before the Court. There is an agreement in place to litigate those in the CC through the Financial List Test Case scheme. That case will be tried in July.

Teare J The court has been able to deal with these matters by making use of the judicial resources available at this time, when we have had more Commercial Court judges sitting in court than we would usually do. One Covid case was heard in May which required an urgent solution that month. Another will be heard this month. It is likely that a third such case will be heard in July. Obviously there is not unlimited judicial capacity but so far urgent Covid cases have been and are being heard.

Cockerill J noted that there were two further cases seeking expedited hearings which will be found slots this term or early next if appropriate.

8. Planning for the Future

Cockerill J said that the judges, court staff and users were actively thinking about whether to keep remote (or even hybrid) hearings as a default position or at least an often used option for some types of hearings post Covid. Birss J and Master Clark from Chancery Division are also looking at what to do whilst the QBD has a couple of

groups looking at this with a view to getting insight from a wider range of HC hearings.

Cockerill J noted that there will be a remote seminar on this issue in partnership with LIDW on 7 September as part of the Court's 125th anniversary programme and asked the CCUG to put this date in the diary. **Cockerill J** went on to say that as part of the 7 September seminar three areas would be covered. One of those being what we have learnt from the remote and hybrid hearing perspective but with a particular view to thinking about what we may want to incorporate into the Guide as part of the Courts regular practice. The other two will be the Disclosure Pilot and the Witness Statement review. The Court expects changes of practice for the future from all of these, and the seminar is an opportunity for users to feed into those changes.

9. Disclosure Pilot

Flaux LJ commented on the disclosure pilot, noting that it has been extended by a year. Extensive feedback has been received and will be analysed by Professor Rachael Mulheron of Queen Mary University of London in a third interim report. The senior judiciary is committed to the pilot. **Flaux LJ** recognised that certain aspects of the pilot have attracted criticism and explained that part of the reason for extending it is to have as good a set of data as possible, – including cases that have operated according to the pilot from beginning to end. **Ed Crosse** noted the benefit of getting feedback of 75 different people which was very detailed and very helpful. He explained that those running the pilot were trying to fix areas of uncertainty quickly.

10. Witness Statements

Baker J provided an update on witness statements. The main report produced by **Poplewell J** contained recommendations which were endorsed in principle by the Business and Property Courts Board in November. A report to the full working group will be discussed at its meeting next Thursday. The recommendations will be considered at the seminar in September potentially with a view to rules committee action, at the end of this calendar year or the beginning of 2021.

11. Q&A

Question: Will there be more guidance on e-bundles?

Answer: This is unlikely. There is enough guidance available both from the HC and via COMBAR. There has been a discussion that directions for bundles are being discussed and agreed between parties – this is causing costs to be raised which should not be necessary in light of the available guidance. Users were referred to the judiciary general guidance at <https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f-1.pdf>. This website includes links to very good material on creating PDF bundles. Reference was also made to the very helpful COMBAR guidance. The Judges would find it very helpful if the users followed the guidance i.e. bookmarking, ensuring bundle numbering matches the PDF pages.

Question: Is It acceptable for witnesses to give evidence from the solicitor's office to assist with technical difficulties?

Answer: It can be but the presence of a solicitor for the other party may need to be accommodated. This should be raised in advance of a trial to ensure acceptable arrangements have been agreed/determined. **Andrew Baker J** summarised by saying the best practice would be think, plan, notify. **Duncan Matthews** pointed out that this was routinely happening in arbitration. Most people would take the view that it would be obvious if witness were being coached. He said that simple measures such as a well placed camera would allow the judge and other side to see the whole of the witness's room on video.

Question from Baker J: Is there any issue with the public accessing the hearing via mobile phone?

Answer: Flaux LJ said that this was an issue but it does not seem to have arisen much in practice. For the most part, members of the public who identified themselves would simply be allowed as the clerks will know the details of all those sitting in, which is a safeguard against unauthorised recording/photography. However, **Flaux LJ** noted that there may be particular issues in public law proceedings.

Question from Popplewell LJ: Is there any restriction on phones being used in court?

Answer: Cockerill J, Flaux LJ and Baker J agreed that the assumption has been, correctly, that it is permissible to use phones turned to silent in both physical and remote hearings.

Question from Sonia Tolaney QC: What is the etiquette with remote hearings? There were concerns that advocates were conducting conversations with their teams while on mute and that that could be distracting for the judge and the other side.

Answer: All participants were to be reminded of the need to observe court etiquette in remote hearings.

Question from Helen Davies QC: How are things going to look in October if the social distancing rules are changed?

Answer: Cockerill J explained that there are no firm plans because we do not know what the situation will be then. The current court capacities were determined by court staff measuring court rooms according to current standards. **Cockerill J** also noted the abiding question about length of exposure and whether parties would want to spend hours in close quarters even should the social distancing guidance be changed.

Question from Carr LJ: Would there be a level playing field if one party was in person and the other side was being heard remotely. She suggested it would not.

Answer: It was generally agreed that it would not, however, **Baker J** pointed out that that might be the case in some matters in the Court of Appeal Criminal Division.

12. AOB

Bruce Harris asked that this meeting would commemorate the life of the late Simon Kverndal QC who passed away on 14 June 2020.

Flaux LJ and **Cockerill J** thanked the CCUG participants for attending.