The new normal in the Business and Property Courts post Covid-19

Chancery Bar Association Zoom Talk

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1. After the 1939-1945 conflict, people were often said to have had a "good war" or even a "bad war". After the terrible coronavirus pandemic, people will ask the same question. I will dare to suggest in this talk that, despite the fact that we would all have much preferred to have no war at all, the Business and Property Courts have had a "good war". Some good will perhaps come out what has otherwise been so bad.

2. The B&PCs responded rapidly to the need to undertake all kinds of hearings remotely and have managed in the 12 weeks since lockdown to undertake nearly 85% of usual business across the lists and the regions. That is quite an achievement.

3. I do not suggest that it has been smooth – the technology has been troublesome at times – and it was a bit unfair of the virus to have struck when it did. Had it given us another 6 months, the platforms being created in the HMCTS Reform Project would have been fully up and running and could have been used with higher functionality in place of Skype for Business and BT Meet-Me. But, all that said, lawyers, judges and parties have been fantastic; hearings have gone ahead remotely, and justice has been delivered.

4. None of that is what I really want to talk about this afternoon, but I should thank you all for helping to make it work. What has been needed, and what was immediately forthcoming was a "can-do" approach, which we have observed in large measure all round.

5. What I do want to talk about is the future – the now hackneyed phrase the "new normal". I do not mean in the next few weeks as lockdown eases, but in the next year or the year after that, when the virus finally ceases to be a factor in the way we do dispute resolution.

6. There are two schools of thought: those that believe we should go back exactly to where we were before Covid-19 on the premise that remote hearings are a second-class form of justice, and that we are in the business of delivering only the best. The second school of thought is that we should make long-term use of what we have learnt and devise a new way of delivering justice in Business and Property cases; a way that is quicker, more cost-effective and allows greater access to justice.

7. It will surprise none of you to hear that I am a believer in the second school of thought. As I have said in countless speeches over several years now, we cannot simply continue resolving disputes in the way we did in 1875 without making use of the extraordinary technologies that are now available to us. In this sense, I regard Covid-19 as a real opportunity. This terrible pandemic has shown us how we can use technology to deliver dispute resolution for businesses more economically, with less travel being required, and providing savings in terms of carbon footprints, and judicial and lawyers' time.

8. I am not suggesting, to be clear, that skype or telephone hearings should become the norm for all types of case. I am, however, suggesting that we should undertake a very careful review of what we have been able to achieve in an emergency with a view to having a complete re-think of the way we resolve Business and Property disputes in the 21st century.

The parameters of remote hearings during lockdown

9. What we have shown in lockdown has been that remote hearings can work perfectly well by Skype, Teams or Zoom for interlocutory hearings and even for some trials. It is slightly more problematic with some litigants in person, many

of whom are not technologically enabled, but it is not impossible even then. Lengthy hearings lasting several days or even, in one or two cases, lasting weeks have also been shown to be perfectly feasible. They require some administration, of course, but technically they work well. The press can join remote hearings. Indeed, we have heard from some journalists that they prefer them, because they can dive in and out of remote hearings far more easily than they can achieve with live ones in different locations.

10. There are obviously some hearings that work less well remotely. Perhaps it is worth identifying the factors that may point away from a remote, or at least, an entirely remote hearing. They are (a) vulnerable or technologically challenged parties or witnesses, who may have difficulty working a computer or handling digital bundles, (b) witnesses accused of dishonesty where also, for example, it may be suggested that their evidence would be subject to interference if they were not in the same room as the judge, (c) committal hearings where there is a likelihood that they will result in an immediate term of imprisonment, and (d) hearings where there is such public interest that hundreds of people may seek to join the call, and they may even in some cases seek to disrupt the hearing. Although this latter difficulty can be dealt with to some extent by live streaming, where that is appropriate. That happens in some Court of Appeal hearings and has been made lawful for all hearings by section 85A of the Courts Act 2003 added by paragraph 1 of schedule 25 to the Coronavirus Act 2020.

11. Even where a face to face element is required, it is clear that that does not mean that hearings have to be entirely remote. The judge can direct hybrid hearings where there is a part conducted in court and other parts by other methods.

12. During lockdown, the triage system that was devised at an early stage and promulgated in the Remote Hearings Protocol has been pretty successful. Judges have been able to look in advance at the precise circumstances of each listed case to decide how it should be dealt with, and whether it truly needed

to be adjourned if it could not be conducted in a face-to-face hearing. This will need to be continued after lockdown eases.

13. One thing is clear, judges and lawyers are going to need to be imaginative in the future if we are to create a system that delivers dispute resolution to match the expectations of the national and international business community.

Why should we continue using remote hearings after lockdown?

14. There are a number of reasons why we should consider continuing to use remote hearings after lockdown has ended.

15. First, as I have already said, remote hearings avoid the costs of extensive travelling. In Business and Property cases, parties, witnesses, experts, and lawyers have routinely travelled long distances to attend hearings in the Rolls Building. Remote hearings reduce hotel bills, airfares, and many other incidental costs of litigation.

16. Secondly, I am hearing that overseas parties have been very satisfied with the way the Business and Property Courts have embraced the use of remote hearings. They enable people to participate from overseas locations without additional cost or unnecessary adjournments. In reality, the option of a remote hearing has made our courts far more attractive than those in other jurisdictions where an insistence on face to face hearings has created large backlogs. One example of particularly favourable feedback came from a hearing in the Business List before Birss J where there were parties participating remotely from the Democratic Republic of the Congo. But there are many more such examples.

17. Thirdly, some hearings simply do not justify everyone gathering in one place. This is particularly true of interlocutory and case management hearings, where nothing substantive is likely to be decided.

18. The fourth benefit of our being forced to use remote hearings has been the accompanying necessity to use digital bundles. I

have been amazed how quickly judges and lawyers have taken to them. It goes without saying that they are much more convenient and less cumbersome. Some have found them awkward to navigate, but even that problem is ameliorated by the newest software. In fact, I have personally become almost completely paperless, and I find that I can hear the argument and write judgments in even the most complex of cases without looking at a single sheet of paper.

19. Fifthly, I am, as you will know, extremely concerned to maintain the competitive position of the business courts of England and Wales internationally. I am keen, as you all know, for our courts and English law to provide a leading centre for the resolution of disputes arising from the use of cryptoassets and smart contracts. Remote hearings will be an essential part of the offering of the English courts in that context.

20. Sixthly, it is now clear that much (although certainly not all) international arbitration is being conducted remotely. Practitioners' experience is that remote hearings save a vast amount of time, travel and money, and are attractive to hard-pressed commercial parties. It would be nothing short of disastrous if we set our face against offering a similar service for those who would otherwise arbitrate or litigate their disputes outside the UK.

<u>What are the downsides?</u>

21. It is important to acknowledge that observers have pointed to many supposed disadvantages of remote hearings. It is said that they are slower, more tiring for participants, allow for less immediacy of oral communication, and are more troublesome in terms of administration and set-up.

22. All of these points have, of course, a measure of truth. But we are judging remote hearings during a time of national emergency, when staff levels have been much reduced, and there has been no preparation for the change. In the future, staff will be available to set up these hearings, the software

will be much improved, and hopefully many of the participants will be in their offices rather than under the restrictions of home-working.

23. I also understand that some individuals, whether parties to litigation, lawyers or judges, have been adversely affected by lockdown in unpredictable and disparate ways. I intervened at an early stage to make sure that judges in the Business and Property Courts were being sensitive to the different conditions under which people were working, including caring responsibilities and shared accommodation. Some of the difficulties were unseen and hard to communicate. Most of these problems will disappear once we are all able to work in our offices. They do not amount to a good reason to dismiss remote hearings once lockdown is a distant memory.

The new normal?

24. What then should the new normal look like in the Business and Property Courts?

25. The first thing to say is that the new normal, to which we should aspire, must provide a far more flexible dispute resolution process than has historically been the case. The menu of options offered by the disclosure pilot is a good example of the way I see the future. One size does not fit all – even in a Business and Property context.

26. I have already alluded to hybrid hearings where some participants are in court and others take part remotely. This is in addition to a situation in which some stages of the case are conducted remotely and some of them face-to-face. Both are valuable tools for saving time and costs. I also believe that we need to be more adept at providing flexible ways of resolving complex disputes. I have always been a proponent of identifying the issues in every case at the earliest possible stage. Only then can one hope to see the most effective route to resolve the dispute.

27. The new normal is going to have to involve more attention to the identification of the real issues in dispute, agreement as to what precisely divides the parties and identification of the best and most cost-effective ways of resolving those issues – without any presumption that a lengthy in-court hearing attended by everyone involved in the case at every stage is necessarily going to be the best way of achieving a final satisfactory resolution.

28. The new normal is going to involve focusing on a variety of methods of alternative dispute resolution. This may not arise directly from the pandemic, but it creates an opportunity for constructive change. It has always seemed to me that the issue of court proceedings should not signal the end of ADR. The reverse is the case. What happens at the moment is that vast sums are spent on legal fees after proceedings are issued before the parties eventually think they are ready to undertake a mediation. Whilst mediation is often successful, it should not be the only resort for out-of-court resolution. There needs to be a closer focus on early neutral evaluation, much earlier mediation, identification of real and preliminary issues and judge-led negotiation.

29. We have an opportunity now to introduce tech-friendly rules and processes. I have long been concerned about the length and complexity of the Civil Procedure Rules and the White Book. When I started as Editor-in-Chief of the White Book, three or more years ago, I suggested that volume 1 should be half the length, and that much more of the non-essential material should be moved online. It is a slow process. I cannot say that my proposal has been universally acclaimed, but the editorial notes are being dramatically shortened, and the process is ongoing. That said, the move towards online dispute resolution ("ODR") for small value money claims and social security tribunal determinations creates an ideal foundation for what I am suggesting. A vast proportion of the White Book is still taken up with rules about physical locations, rooms and offices, when the whole process, save for physical court hearings, can and should be online.

30. Judges, lawyers and clients all communicate online whether by email, WhatsApp, or Teams, and yet, by way of a small example, when I ask for a document at a remote hearing, there is no single accepted method of providing it digitally and instantaneously to the court. That must change.

31. Until Covid-19, judgments were handed down in court, even when no hearing was to follow. We cannot go back to the needlessly wasteful process of setting up such hearings involving the physical presence of clerks, judges and ushers for no good purpose. Judgments handed down remotely can be made available to anyone who wants them online and without delay.

32. Digital bundles of documents are another Covid-19 innovation that should be perpetuated in the future. Paper-free hearings will become the norm. I understand that some judges and lawyers still find them challenging, but the number of those who do so will decline dramatically.

33. CE-file as an entirely electronic filing system was advanced and controversial when made compulsory in Rolls Building proceedings in April 2017. It now seems clunky and old-fashioned. But it is nonetheless still serviceable and has proved to have been a very good start for electronic filing. For the future, and in the context of the HMCTS's Reform Programme, we can expect an end-to-end digital case management system for criminal, civil, B&PC, family and tribunal cases. That system is being built as we speak. It will revolutionise the way our court-based dispute resolution process operates. It is important that we are sufficiently adventurous in its design, whilst acknowledging the needs of the Litigants in Person and the digitally challenged.

34. The triaging of hearings that I have already mentioned should, as I have said, be continued. It is a very good way of ensuring that the costs of arranging a hearing are not wasted, and that the process adopted, whether remote, hybrid or face-to-face is truly appropriate for the issue that is being considered by the court.

35. I have been speaking for some years now about a ‘new way’ of resolving major Business and Property disputes. I have always said, at the same time, that I do not pretend to have all the answers. Many of the things I have mentioned this afternoon already will undoubtedly be part of this new litigation world. I am sure that live hearings and live discourse between Bar and Bench will survive. But what I think is less justifiable in the modern world is the lengthy trial, with lawyers allowed to ask questions in cross-examination that can go on seemingly forever, so long as they have given a reliable estimate in advance. Days of cross-examination never win cases. Rather the reverse. It allows the witnesses to develop the sympathy of the judge.

36. My thinking at the moment involves the far more committed use of all the technologies I have mentioned, and more hands-on judicial case management. There are still judges that allow the parties to set the timetable for a trial and then sit back to enjoy the show. I think we need to analyse the issues in every case at the earliest possible stage. We need then to devise the most cost-effective and efficient way of resolving each of those issues. The process should involve a careful consideration of whether the (perhaps archaic) process of written pleadings is really required for every, or any, aspect of the case.

37. My feeling is also that we need to change the presumptions under which we operate. In future, I think we should consider making it normal for interlocutory hearings in Business and Property cases, at least, to take place remotely, unless there are compelling reasons for a face-face-hearing in a particular case or to resolve a particular issue. For trials, there might still be a presumption that a face-to-face hearing will be appropriate, especially where there is much live evidence and, even more so, where the credibility of a particular witness is in issue. But even then, there is no reason why the whole trial has to be undertaken in court, or why every issue has to be resolved at the same time. We need, as I have already said, to be far more flexible in our approach to dispute resolution.

Conclusions

38. Covid-19 has been an appalling catastrophe for the UK and Europe and an ordeal for tens of millions of people, but it has, at least, provided the stage to encourage us to try out new ways of doing things. Remote hearings have been remarkably successful, not perfect, but remarkably successful. We have shown that we can make a far less physical process work for many parts of the Business and Property litigation process. We will now be able to capitalise on what we have learnt in slightly slower time. All of you will, I am sure, be involved in the process of ensuring that justice, access to justice, and open justice are not lost or damaged in our enthusiasm for reform.

39. But I think that we should harness that enthusiasm to create a much-reformed Business justice and arbitration system that can be the envy of the world. One thing is for sure, the Covid-19 pandemic will create much work for lawyers and judges to do. Businesses have suffered unprecedented losses and we are already seeing cases being issued that arise directly from the effects of the pandemic.

40. I think they will say in years to come that Covid-19 was the catalyst for technological uptake that had been needed for some time. I think, in that sense, the B&PCs have a had a 'good war', just as some enlightened thinking emerged from World War II. We shall see how things develop.

41. I will happily answer any questions you may have in the time available.

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