Speech to the Civil Justice Conference

Rt Hon Sir Julian Flaux CHC

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The future shape of business and property litigation after the pandemic

Introduction

Good morning everyone and thank you for inviting me to speak at today's virtual conference. Some of you I know already, but it is good to meet you all and to exchange ideas about the important challenges which litigation in our respective jurisdictions faces. Of course, I speak to you as an English judge and so that is the experience that I will share. I look forward to hearing the perspective of Scottish judges and lawyers.

As the Chancellor of the High Court, I am the head of the Chancery Division which deals with the resolution of many different types of dispute ranging from business, intellectual property and competition disputes to insolvency and company law, partnerships, mortgages, land and trusts. I am also responsible, in consultation with the President of the Queen's Bench Division for the day to day running of the Business and Property Courts ("B&PCs"), which include the Commercial Court and the Technology and Construction Court, both in London in the Rolls Building and in the seven regional centres.

Today, I would like to share my thoughts about the challenges which face us in litigation in the B&PCs in the context of the global pandemic that has not recognised any land border! The future course for the resolution of disputes in the B&PCs has been irrevocably affected by our experiences over the last year or so and the rapid changes forced by the pandemic. So, before I look forward, I am briefly going to look back.

The past 15 months

New ways of working have developed. By necessity, we saw a rapid adaptation of the B&PCs to the changes required by lockdown. In the early weeks of the pandemic, 85% of B&PC work continued without any need for adjournment. And as we have developed different ways of hearing cases with a live element – or hybrid hearings – cases requiring adjournment have become increasingly rare with waiting times for listing some hearings in the Rolls Building actually decreasing.

In fact, there was a unity of approach from the start across the B&PCs in England and Wales, with work in London and in the regions continuing largely unimpeded and with a generally smooth adaptation to remote, and later hybrid, hearings guided by the early adoption of a

remote hearing protocol[1] and practice directions.[2] It is difficult to understate the seismic change that occurred, over a year ago, when almost overnight we moved from in person hearings to remote hearings and from predominantly paper bundles to electronic files. Our experience – and I am sure yours too – has been that practitioners have played a large and important part in that and in helping to maintain the provision of the highest quality of legal services in the most difficult and uncertain of circumstances. Likewise court staff who have to adapt to these changes, often at short notice.

A new etiquette has quickly emerged in hearings with a remote element. Within a few weeks, judges adapted their introductions. We acknowledged that video conferencing felt informal, but emphasised that a virtual court was still a court and that all those present should behave accordingly. Some judges continued to wear robes for the same reason. Sometimes referring to the principle of open justice, we have explained that links to the open hearing had been provided to members of the public and press but on the basis that they still comply with the rules applicable to hearings in court. Attendees are reminded that recording or taking photographs of the proceedings is prohibited. That introduction has also often become the place to ask for tolerance when faced with inevitable technical hitches.

As it has turned out, the main change in the judicial approach to B&PC hearings since those first weeks has been in our confidence that the system will work properly. In the early days, we were in uncharted territory and did not know to what extent the technology and format would work or prove sufficient. There is a higher degree of confidence now that it will. Technical glitches occur, but are relatively uncommon. And the frustrations that one encounters during a remote hearing are often similar to or the same as would have emerged in court.

However it is clear that. even if a remote hearing is a more efficient way of justly and fairly resolving a dispute, it has its price. The infrastructure – screens, bandwidth, cameras – needs to be in place, and even if it is, conducting remote hearings is more tiring for all concerned. We have, in the past, done it, and done it well, but at some personal cost. These impacts have been felt far beyond the judiciary, and I am sure we all have a story to tell of the difficulties of working remotely. I think many of us, judges and lawyers alike, have been working at a pace and intensity greater than before. I have been struck by the experience of our district and circuit judges during conversations I have had with the regional B&PC centres. The impact of the transition to remote hearings has not been felt evenly across all levels of the judiciary in England and Wales, and has further compounded the heavy workload of our district judges who are often having to manage a full day's list of hearings in family and lower-value civil work with minimal administrative support. To continue to work in that manner is unsustainable and raises important questions about well-being.

Trials in future

During the pandemic trials have continued in the B&PCs, albeit to a large extent remotely or on a hybrid basis, with some advocates or witnesses in Court and others via videolink or a virtual platform. As restrictions are hopefully lifted and courtrooms can return to something

[1] https://www.judiciary.uk/publications/civil-court-guidance-on-how-to-conduct-remote-hearings/

[2] http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic; https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus

resembling normality, an issue which will undoubtedly arise is the extent to which we as judges should permit evidence to be given remotely using these methods. In the B&PCs for some years, we have adopted a flexible approach and, using the powers in CPR 32.3, allowing witnesses from abroad, who could not for some good reason come to London to give evidence, to give their evidence over videolink. However, during the pandemic, this has obviously expanded to many if not most witnesses giving evidence remotely, not just from abroad but from within the UK. When restrictions have been lifted, it seems likely that there will continue to be pressure from parties for some witnesses to give evidence remotely, even when the witness in question is within the jurisdiction.

The extent to which a judge accedes to such an application will be a matter of judicial discretion, but it might be helpful to devise some criteria which judges can use to assess such applications. One possible criterion concerns the assessment of witness credibility. Before the pandemic, I would say that the generally held view and belief was that it was not easy to assess the credibility of a witness remotely, but a number of recent decisions suggest that the position may be more nuanced.

A recent example of a (five week) fully remote trial that worked well from the perspective of the judge, is found in *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) where it was said that the judge's ability to assess the reliability or credibility of the evidence was not in any way diminished during a fully remote trial[3]. The judge (a Deputy High Court Judge) noted that his view of most of the witnesses was confined to their head and shoulders. This meant he was less able to see their full body language and demeanour. However, he found that this was not a significant disadvantage. It is worth quoting what he said about this:

> "I did not feel in any way disadvantaged in my ability to assess the reliability or credibility of the oral witness evidence. If anything, the opposite was the case. The engineer host provided by Sparq not only ensured that the internet connection was sufficiently good and stable to enable remote cross-examination (well before the witness appeared) but also helped to ensure that the witness was generally positioned at a reasonable distance from the camera and in optimal light conditions. The result was in most cases as if I were sitting about 1.5 metres directly opposite both the witness and the cross-examining advocate with the trial bundle open in front of me. This permitted me to follow the ebb and flow of a cross-examination very well. If anything, I was in a better position to observe the witness's reaction to the questions and documents being put to them than if the trial had taken place in a traditional court room. In a typical Rolls Building court room, I would have been positioned behind a bench looking for the most part at the side of the witness's head from a distance of three or four metres while her or she either looked down into a paper trial bundle or at cross-examining counsel."

In *A Local Authority v Mother & Ors* [2020] EWHC 1086 (Fam) Lieven J considered whether to hold a fact-finding hearing remotely or not in light of the Covid pandemic. She said that "having considered the matter closely, my own view is that it is not possible to say as a

[3] *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) (23 March 2021) per Deputy High Court Judge John Kimbell QC at [20]

generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely."[4]

I read with interest the Outer House decision of *YI against AAW*[5], where the judge said "It was submitted on behalf of the defender that it would be particularly difficult to assess credibility of the parties and their witnesses in this case because the proof had been conducted remotely on video screens. While there were some technical difficulties from time to time with witnesses' wireless connectivity and/or sound quality, I have no hesitation in rejecting that submission."

These are examples in each of our jurisdictions of judges who are clear that their ability to assess the credibility of a witness giving evidence remotely is not impeded. However, my own view is that this is only part of the picture. Particularly in cases which involve what is sometimes called hard swearing, acute conflicts of oral evidence, or cases of fraud, it seems to me that attendance of witnesses at court remains an important aspect of the administration of justice. There is an issue here of what might be called, I hope not pompously, the authority or solemnity of the court, which also corresponds with what Lord Pentland describes in his talk as the court as "place".

This view, that there are certain categories of case where an in-person hearing with witnesses giving evidence in court is what the interests of justice require, is borne out by the recent decision of the Court of Appeal in *Bilta v TFS* [2021] EWCA Civ 221, which ruled that the key factor in deciding whether to adjourn a case because a party or major witness would not be available was whether a refusal to do so would lead to an unfair trial. The judgment described hearings concerning allegations of dishonesty as 'paradigm examples' of cases where live cross examination would assist the trial judge. The first instance decision in that case also includes helpful guidance by Marcus Smith J on the factors to be taken into account by parties seeking to agree directions for trial while social-distancing measures remain in place. They include the importance and nature of the issue (whether interim or final), whether there is a need for urgency, whether the parties are legally represented and a lay party's ability to engage with the remote process and the source of evidence such as whether it is written or oral, expert or lay and the extent to which it is contested.[6] Those all seem to me to be important factors or criteria to be considered by a judge in determining in future whether a hearing should be remote or in person.

One view which I have heard from certain judges is that enabling witnesses to give evidence remotely from home means that they are more relaxed and at ease giving their evidence, which in turn improves the quality of the evidence. That is all very well, but in a sense, it overlooks that the purpose of live evidence with cross-examination is not to make the witness feel more at ease, but, so far as possible, to arrive at the truth about the particular dispute. It also overlooks that not all witnesses come from homes where they can feel at ease. Surely the future should not involve the repetition of one instance of which I was informed, of a witness giving his evidence over his mobile phone from the street, although no doubt that problem could be addressed by ensuring that evidence was given from a solicitors' office. It is important to have in mind that, although in one sense, a witness may find giving evidence in court somewhat

[4] *A Local Authority v Mother & Ors* [2020] EWHC 1086 (Fam) (5 May 2020) per Lieven J at [27]
[5] *YI v AAW* [2020] CSOH 76 per Lady Wise at [44]
[6] *Bilta (UK) Ltd (in liquidation) v SVS Securities* [2021] EWHC 36 (Ch) at [14(3)]

daunting, the courtroom does provide a neutral location where the dispute can be heard and resolved.

Another dimension to what will undoubtedly be a continuing debate about whether witnesses should give evidence remotely is provided by what I have been told by counsel are greater difficulties in cross-examining witnesses effectively, particularly in document-heavy cases. That view is reflected in the joint statement last week from the Bar Council of England and Wales, the Faculty of Advocates, the Bar Council of Norther Ireland and the Bar of Ireland who came out firmly in favour of limiting remote hearings to short interlocutory applications and to trials being in person. They said:

> "The management of witnesses, especially in cross-examination, is far less satisfactory when conducted remotely and we are concerned that it may have an adverse impact on the quality of the evidence given."

Other hearings

As well as cases that do not suit a remote hearing, it has become apparent that there are hearings that suit them well, and where a speedier less expensive format seems more proportionate. Generally speaking, these are the shorter preparatory and interim hearings that are often to an extent a collaborative exercise between parties, like directions hearings. It does seem distinctly possible that, going forward, the default position in short interlocutory hearings of, say, two hours or less, will be that they should be dealt with remotely, but I have been at pains to emphasise when discussing these matters with the judges for whom I am responsible that ultimately, the decision as to what form any hearing should take is one for the judge, albeit taking proper account of the representations of the parties and their lawyers. In other words it is a matter of judicial discretion.

The use of technology to conduct remote hearings has undoubtedly provided the B&PCs with some additional flexibility. It has opened the possibility of specialist judges 'sitting' outside London more easily and more swiftly, being able to deal with short applications and hearings that require a High Court Judge in circumstances where those High Court Judges who are out on circuit are not free.

One area where that is now being put to good effect is the extension of Intellectual Property Enterprise Court (IPEC) multi-track hearings to the seven B&PC centres outside London. The speedy resolution of disputes before that court relies on firm case management by one of a small pool of expert judges and a short timeframe between CMC and trial by a docketed judge. The ability to conduct even just the CMC remotely will mean that those often London-based judges are more likely to be able to hear cases that have been issued in one of the regional centres – probably Manchester or Newcastle – with the same level of service whilst allowing parties to have their dispute heard in a local court.

This ability to hear certain cases remotely supports the move away from London-centric business and property litigation which really began with the reforms to civil justice recommended by the report by the then Lord Justice Briggs some five years ago.

Taking stock

Now that the end of restrictions is possibly in sight, we have breathing space in which to take stock of what has worked and what has not worked in the last year or so, which should inform what we want from our court system in the future. My own view is that we must seize the good things that have come out of this terrible crisis – the efficiencies and the things that we have learnt to do better – and jettison the bad, including the erosion that working from home has caused to our perception of the work/life balance. There is no doubt that we have been offered an opportunity to do things differently, and we should grasp that firmly.

It is clear that we will not be returning to the position as it was in early 2020. For example, if the relevant provisions of the Police, Crime, Sentencing and Courts Bill, pass into law in England and Wales, there will be power for the temporary provisions in the Coronavirus Act that enabled the observation of remote hearings to be made permanent. I think this could only benefit the B&PCs and make them more competitive, as it would maintain the ability of clients and witnesses to participate in hearings remotely and enable the press and members of the public to observe hearings remotely. This would give the B&PCs an opportunity to build on the better elements of this method of resolving some disputes.

In looking at how we move forward, the experiences and opinions of all B&PC practitioners and regular court users should be actively sought and taken into account as part of this process, as we know that success relies upon cooperation.

The authority of the court

Returning to the point I was making a moment ago about the authority or solemnity of the court, in considering those parts of the new way of working we have used during the pandemic, that we wish to retain, we must not lose sight of the benefits of many of the formalities attached to the system based on hearings in courtrooms that has existed for so many years.

We have all experienced the informality that can creep in when we are conducting cases from our kitchen tables or studies. We have had to become tolerant of those interruptions: bad WiFi connections, rings on the doorbell, noises from others in our family or in my case the barking dog. Counsel taking instructions via WhatsApp and parties speaking more freely among themselves or litigants in person, perhaps feeling disinhibited and behaving less appropriately,[7] or even on a more mundane level having to remind those who are not speaking to put themselves on mute to avoid feedback, can be distracting for the judge and participants.

Those informalities have been a small price to pay as we worked to keep the justice system operational and judges have been able to work with the assistance of practitioners who have an accrued sense of what is proper in a courtroom. However, as we start to think about the longer-term use of remote hearings, we need to guard against the unintended consequences of informality.

It seems to me that an element of formality in court proceedings is important, and serves to demonstrate the seriousness of the decisions being taken. Particularly in cases involving individuals and the economically disadvantaged, the outcome of a hearing can, and frequently does, have life changing consequences. When the court is making a compulsory order, it is

[7] Report and recommendations "The impact of COVID-19 measures on the civil justice system" May 2020 - para 6.21

compelling someone to do something that they do not want to do, and the person who is subject to the order needs to understand the consequences of not complying with that order. I believe that the authority of the court needs to be maintained whilst ensuring that courts are neither inaccessible nor hostile to those who are infrequent users. Indeed, that authority is the way of ensuring fairness and justice, so that in hearings that are inevitably stressful with much at stake, all can be assured of courtesy, respect and, above all, a fair hearing – and the perception of a fair hearing - of their case.

How do we maintain formality and thus the authority of the court in a more flexible future system which will undoubtedly involve an element of remote or hybrid hearings? One important aspect of this as I see it is ensuring that we have robust and efficient technology. Advocates need to know that judges have access to enough screens to allow them to have the video and audio link and multiple documents open at the same time (a point made by the judge in *In re One Blackfriars*) and that judges will have access to sufficient bandwidth to be able to access the e-bundles with which we are provided. This is only one example of the way proper formality within remote or hybrid hearings might be achieved. What is clear is that, as we start to consider how to incorporate remote and hybrid hearings more permanently, the purpose and benefits of a degree of formality should be part of the discussion.

Other unintended consequences

We must be sensitive to the fact that technology has an exclusionary angle, particularly for litigants in person. Respondents to a Civil Justice Council Report on the impact of COVID19 measures in May 2020 cautioned against the use of remote hearings involving litigants in person as it risked undermining trust in the justice system, especially for those who still want their 'day in court'.[8] It would be interesting to know if their views have changed, a year later, with the wider use of remote hearings.

Speaking to B&PC judges who do conduct cases involving litigants in person, they often describe how litigants in person can struggle with the technology and are sometimes faced with a combination of inadequate technology and the daunting prospect of a court hearing which is unfamiliar territory. In such cases, the only fair way of proceeding may well be to have an in-person hearing.

One possible consequence of remote hearings which concerned both judges and practitioners at the outset of the pandemic when we embarked on remote hearings was the potential impact on the junior Bar who practice in the business and property field. The concern was that a solicitor who could conduct the advocacy remotely from the office would be much less likely to instruct a junior barrister than they would be if the hearing were in a court room, possibly in another city. From the feedback I have had recently from both the Chancery Bar Association and the Commercial Bar Association, it appears that the concern may have been unwarranted. Early indications have been that there has not been a downturn in work at the junior bar as a result of the pandemic.

However, there does remain a concern, not specifically pandemic related, about how much advocacy junior barristers at the Chancery and Commercial bars are getting. It has become very much the norm, even in relatively straightforward case management conferences, to instruct

[8] Report and recommendations "The impact of COVID-19 measures on the civil justice system" May 2020 – paras 6.6, 6.22 and 8.7

leading counsel, so that junior counsel do not get the advocacy experience from interlocutory hearings which was available thirty years ago. If, like me, you consider that oral advocacy is an essential bulwark of our justice system, it is important to encourage the junior Bar, as they are the advocates of the future and thus an integral part of the justice system of the future.

Whilst there can be no question of judges dictating how parties wish to present their cases or by whom, in the Commercial Court at least the judges are encouraging parties and solicitors to use junior counsel more to do the advocacy in interlocutory hearings. Another way in which the B&PCs are able to help junior barristers, albeit not financially, and at the same time provide legal assistance to litigants in person is through the so-called CLIPS scheme under which in the Chancery Division interim applications court, junior barristers act pro bono for litigants in person. This gives the barristers advocacy experience, helps the litigants in person to present their case and also helps the judges to deal with matters more efficiently and fairly through having arguments presented cogently and clearly. A similar scheme is available in the Commercial Court.

Open justice

Looking forward, an important factor in relation to remote hearings is how to achieve open justice. This is an issue on which opinions differ. The judge in *Re One Blackfriars*[9] recorded that the remote hearing proved to be "more than a second-best work around in the face of the Covid 19 pandemic". His overall assessment was that not only were the inevitable challenges overcome by appropriate and mutually agreed adjustments on the part of counsel, the parties and court but that the trial was conducted more efficiently and far more conveniently as a fully remote trial. It was also more accessible to the public than it would have been had it taken place in a traditional court room in the Rolls Building.

On the other hand, the provision of access to remote hearings to members of the public from the comfort of their own homes can present challenges if that access is abused. It is important that access is only given on the same basis as would be the case if the persons in question were sitting in court. Thus, at the outset of every remote hearing the judge or the judge's clerk states expressly that unauthorised recording of the proceedings is a contempt of court. However there have been cases where abuse has arisen, with access to proceedings being given to persons abroad who have not complied with limitations imposed by the Court. We are all concerned that, whilst open justice is essential, remote and hybrid hearings should not lead to the court losing control over the proper conduct of its process.

Conclusion

We cannot know what the immediate future or the medium term will bring. Departure from the EU and the continuing impact of Covid are both bound to have an impact on our work, with an increase in work in some areas. As the times change, so too must the legal system adapt to remain fit for purpose. This cannot be achieved by simply returning to where we were before the pandemic but requires fresh thinking on flexible ways of working.

Thank you for inviting me to speak and for your attention. I look forward to hearing more about the challenges you have faced and how we might solve problems which I am sure we share.

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[9] *Re One Blackfriars Ltd* [2021] EWHC 684 (Ch) (23 March 2021) per Deputy High Court Judge John Kimbell QC at [25]