PERSONAL INJURY LAW JOURNAL

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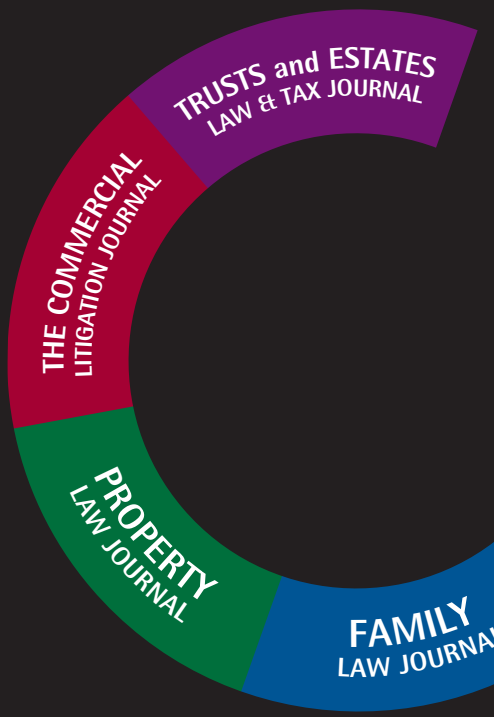

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Civil litigation in the time of Covid-19

Jessica Van der Meer, Isabel Barter and Luka Krsljanin provide an overview of how litigation is taking place in these unprecedented times

Jessica Van der Meer (top), Isabel Barter (bottom) and Luka Krsljanin are barristers at 2 Temple Garden Chambers

'In the absence of any clear order or direction from the relevant court, you should endeavour to agree adjournments of any trials or substantial hearings which cannot be conducted remotely.'

All hearings in England and Wales are now (from 25 March 2020) to be conducted wholly as video or audio proceedings wherever possible. For civil practitioners this means that physical hearings are no longer (or rarely) occurring. This has a number of consequences. On 1 April 2020, HMCTS released a list of civil court priority listings. The message from the senior judiciary is that this list does not mean that everything else should automatically be adjourned. It is a list of priorities, but not an exclusive list of what the civil courts should deal with.

The courts are being temporarily restructured into three categories: (1) open courts (open for business including vital in-person hearings which can't be done remotely), (2) staffed courts (for video and telephone hearings, to progress cases without hearings) and (3) suspended courts (no hearings of any kind). Changes are effective from Monday 30 March 2020.

It appears that across the County Courts all immediate small claims, fast-track and multi-track trials have been postponed to an unknown future date. While there have been no nationwide orders or measures to that effect, that is the practice seemingly being adopted by many County Courts: for example, the DCJ for Northumbria and Durham has issued a blanket direction that all small claims and fast tracks to be heard before the end of April 2020 are adjourned.

Short interlocutory or non-witness applications, and some 'short hearings' (stage 3 hearings and approvals) are being heard remotely in courts across all levels. Officially, the High Court and the Court of Appeal are only covering urgent work. In practice, the QB Masters and the Commercial Courts are still proceeding remotely. The cause list for the QB will explicitly identify if this is by telephone or video-link.

Efforts should always be made to ascertain the position with the relevant courts. As a practical measure, given the difficulties likely to be faced in accessing the courts, we propose that in the absence of any clear order or direction from the relevant court, you should endeavour to agree adjournments of any trials or substantial hearings which cannot be conducted remotely

HMCTS and Lord Chancellor Guidance states that all civil hearings are now done by telephone conference/ BT Meet Me; MOJ/HMCTS Cloud Video Platform; Skype for Business; Microsoft Teams; Zoom; Lifesize and FaceTime. Notably, the Business and Property Division also allows that 'any communication method available to the participants can be considered if appropriate'. The Family Courts have taken a 'smorgasbord' approach, allowing judges, lawyers and litigants to choose from the suite of platforms depending on the circumstances of the court, parties and the case. This suggests that civil courts generally will be flexible about the platform.

There are considerations for each platform:

- **Telephone Conferencing/BT Meet Me, also provided by Kidatu, Arkadin and Legal Connect:** available to nearly every court and tribunal nationally. Transcripts are

available in the same way as normal court hearings.

- **Skype for Business:** has been used in the past week in a multi-day, multi-party final hearing with lay and expert evidence. It allows for document sharing and recording, but does not have a side-meeting function. Best practice: at the moment of writing there appear to be different 'best practices' for Skype for Business hearings. In the QB and in some County Courts judges are taking the lead in organising and inviting parties into the remote hearing themselves via the HMCTS Skype for Business account. This is in contrast to the Family Division Guidance which suggests the best practice is that legal representatives set up the remote hearing first and then invite the judge in. Skype for Business works with any skype account (no Skype for Business account is required) and also allows guests to be included via a meeting URL.

- **Microsoft Teams:** built into judicial laptops as part of Microsoft Office 365. No remote hearings have yet been conducted with Microsoft Teams. There are concerns about whether those not part of a group subscription can have access.

- **Zoom:** Host needs to have an account, but all others can be invited through a URL. It is cross-platform so works on Windows PCs and Apple Mac. Document sharing, recording and screen sharing functions. Break-out rooms away from the main hearing are also possible, allowing advocates to 'leave' the hearing room, take instructions in the 'meeting room' and re-join the hearing. There have been security and privacy concerns: the New York Attorney General launched an investigation into Zoom's privacy practices at the end of March 2020. Best practice is to obtain a 'premium' version (£11.99 monthly fee) which allows up to 100 participants for unlimited time. The basic version limits participation to 40 minutes.

- **Lifesize:** allows videoconferencing and cloud-based video collaboration. Can record proceedings. Has not been used yet for a remote hearing.

- **FaceTime:** it is limited to Apple Mac products, and thus not universally available to the wider judiciary and the public.

Preparing for a remote hearing requires solicitors, barristers and their clerks to be proactive and to consider as far ahead as possible how future hearings should best be undertaken.

The conduct of remote hearings

The remote hearing itself operates like a telephone hearing, where the court official and the parties will all need to log in or call into the dedicated facility well ahead of the start time; the judge will then be invited in by the clerk or court official. The hearing will be recorded by the judge, their clerk or a court official. Parties and legal representatives are not permitted to record the hearing.

A problem that remains is simultaneous translation during the course of a remote hearing where an interpreter is required. The Family Court has suggested that Zoom may be preferable for these hearings, as it allows multiple audio channels for a single user, so that the interpretation does not interrupt the course of the hearing. Issues with recording of the interpretation session still remain, as Zoom only records the original audio of the meeting, not the translations.

There has been no official guidance for appearances in the Civil Division. However, guidance from the Criminal Appeals Division notes that anyone appearing by way of a remote connection need not robe and need not rise; business attire should be worn by everyone, including the judiciary. Advocates should also 'consider the backdrop' when they are linking remotely: backgrounds should be neutral and appropriate for a court hearing.

The traditional outside-the-court pre-trial-conference can now take place virtually. These can be organised separately beforehand, or parties can join the skype meeting earlier than the judge to discuss matters. Setting up a WhatsApp group, or communicating through text by telephone with your solicitor can be handy for the equivalent of notes being passed during examinations or for taking instructions during the hearing.

Preparing for the remote hearing requires solicitors, barristers and their clerks to be proactive and to consider as far ahead as possible how future hearings should best be undertaken. Electronic bundles of documents and authorities (if required) need to be prepared, indexed and paginated. They should be sent well in advance of the hearing and certainly, at the latest, by midday one clear day before the hearing to the judge's clerk or to the judge (if no clerk is available), and to all other representatives and parties.

Bundling

Electronic bundles should contain only documents and authorities that are essential to the remote hearing. Large electronic files can be slow to transmit and unwieldy to use. If the parties are in disagreement, or if the case has many potentially relevant documents, ensure that there is a core bundle, which should ordinarily be no more than about 200 pages, which includes a case summary, the pleadings, any relevant applications (and/or witness statements) and any other essential pre-readings. Do not assume that the judge will have access to any other bundles or indeed any other documents previously filed at court. Try to make the bundle a comprehensive compilation of all relevant documents. The courts will struggle if the bundle includes, for example, a third witness statement which says, 'please refer to my second witness statement for the full chronology of the case', but the second witness statement is not included in the bundle.

Create electronic bundles in PDF or another format. Adobe Acrobat Pro (or other similar professional software) is recommended, as it is possible to include bookmarks so that

the judge and parties can skip through the different items on the index with ease, using the sidebar on the left-hand side. Using this software to run text recognition is also recommended, so that the judge and parties can easily conduct word searches through the document.

Filing electronic bundles may differ from venue to venue, but the generally fail-safe approach is to liaise with the judge's clerk, if at all possible. Note that the 'Business and Property Courts Protocol Regarding Remote Hearings' says that electronic bundles must be filed on CE-file or sent to the court by link to an online data room (preferred), email or delivered to the court on a USB stick. For the QB, do not rely solely on electronic filing; also email all information and documents directly to the Master and their clerk. It is suggested that this should also be the practice at County Court level. If it is thought that witnesses cannot manage electronic bundles, it is suggested that paper bundles be sent to them. It is possible to add documents to a pre-existing electronic bundle. However, it is suggested that (to avoid confusion if judges, lawyers, parties and witnesses have to amend their own electronic bundles) it might be easier to send through an agreed 'additional bundle'.

It is recommended that parties should set aside time the day before the hearing to test the technology and do a 'dry run' of dialling everyone (except the judge) into the virtual meeting. Additionally, witnesses and experts will need to be briefed on the procedure for giving evidence and will need to be prepared to affirm or swear on a holy book. If a witness is intending to take an oath, they will need to provide their own holy book. It will also be worthwhile to liaise with clients and make sure they are comfortable using the e-bundle and the platform.

Paying fees can no longer be done in person, but the CE-File can still be used. If this is not possible, users will be asked for payment when the Fees Office re-opens (date unknown).

If you or a party gets sick at the last minute, normally this would not be enough to adjourn or prevent a witness from giving evidence. However, in the present circumstances, we suspect that a court may be more likely to adjourn the remote hearing; we place it no higher than that.

A useful resource is the HMCTS Coronavirus (COVID-19) advice and guidance page as well as the HMCTS daily operational summary on courts and tribunals.

Remote conferences

Wherever possible, a short agenda should be prepared in advance of the conference, setting out the issues to be discussed and the running order. The agenda need not descend into the detail of each issue but should simply provide guidance as to the proposed structure of the meeting, to allow individuals efficiently to prepare.

If the conference is a complex one and/or expected to take more than 1hr 30mins, it will be appropriate to incorporate breaks into the agenda.

At the outset of the conference, it may be helpful to provide an update on the impact of the current public health situation on the conduct of the case. While lawyers will be receiving regular updates from the Bar Council and SRA (among other organisations) lay clients will likely have an unclear picture as to how the current crisis will impact on their case, and so it may assist to address this at the outset.

Zoom (and most video conference facilities) will allow participants to share their screen. The individual initiating the meeting can and should use this to highlight any particular documents which are to be addressed to ensure that all parties have access to the same documents and the same part(s) of the document(s) where necessary.

If using Zoom, conferences can be set up such that the individual speaking will appear on the main screen: click on the arrow next to 'Stop Video' (bottom left of the screen) and then select 'Video Settings'. From the dropdown list next to the heading 'Meetings', select 'Spotlight my video when speaking'. If all relevant participants set up this option, it may assist other members of the conference to be able to see those individuals when they discuss a particular issue. Most other conferencing facilities have a similar option.

Remote JSMs

It will be important to have a bundle prepared substantially in advance of the JSM: please refer above to the preparation of e-Bundles. We suggest that parties should aim to circulate a bundle five business days before the JSM.

Prior to the JSM, counsel for each party should exchange emails to ensure that they can be in consistent and frequent contact with one another. It may also be appropriate (though not essential) for counsel to communicate via WhatsApp or by telephone to ensure regular contact throughout the day.

Prior to the JSM, you and your team should set up a WhatsApp group unique to the conference in question. This will allow you to communicate directly and confidentially and provide swift updates with one another.

Prior to the official start time for the JSM, you and your team should set up and conduct a discrete video conference, to last approximately 30mins, in which the essential issues are discussed.

In lieu of an opening session, it may be most appropriate to have an introductory meeting featuring only counsel and solicitors for each party, for the sake of simplicity. While the content of that pre-meeting cannot be prescribed, it may be appropriate for it to focus simply on the core issues which underlie each party's approach to the negotiations. Thereafter, it may be appropriate for offers to be delivered simply counsel to counsel.

If, in the course of the day, there is a break of more than 1hr in communications between the parties' counsel, counsel are encouraged to communicate with one another to explain the 'delay' in broad terms: even simply to confirm that a client is still considering matters/giving instructions, but confirming that the JSM is continuing and the party is not 'walking away'.

If a settlement is reached, we recommend that the claimant's counsel draft an order or settlement agreement. A video-conference may then be set up with counsel and solicitors in which the claimant's counsel can use the screen-sharing feature to allow others to comment on the draft. Alternatively, comments can be exchanged by email.

If the parties do not have the facility for electronic signatures, email should be used to confirm in writing unequivocal acceptance of a draft agreement. ■

Cashflow and the importance of payments on account of costs

Stephen Innes discusses the possibility of obtaining some money in advance of final assessments

Stephen Innes a barrister at 4 New Square

With the upheaval and uncertainty caused by the coronavirus pandemic, it seems inevitable that there will be increased delays in the civil courts. Many lawyers are going to be under financial pressure, and this may make for a timely update about payments on account of costs

CPR 44.2(8) states:

> 'Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is a good reason not to do so.'

Thus the court is required to consider whether to order a payment on account, and it does not have an entirely free hand: the starting point is that it should order one.

A payment on account has two particular advantages for the receiving party:

(a) most obviously, from a cashflow perspective, some money will be received sooner. A detailed assessment might take a year to complete, whereas a typical order requires a payment on account to be made within 28 days;

(b) sometimes there may be a concern that the paying party may not be good for the money; going to detailed assessment can be expensive in itself and carries the risk that it could prove to be an exercise in throwing good money after bad. If an order for a payment on account is made, the receiving party can wait to see whether the order is complied with before deciding whether or not to press ahead with detailed assessment: if the payment is made, that may give confidence that detailed assessment is more likely to be worthwhile; if it is not paid, that may indicate that the detailed assessment would be futile, but at least enforcement action can be considered in respect of the payment on account: for example a charging order can be sought for that amount against a property in which the paying party has an interest.

On a practical level, thought should be given in advance of the hearing as to the amount of the payment on account of costs which will be sought if successful, and as to how the court can be satisfied as to the amount of costs. If a Schedule of Costs in form N260 has been served, that can obviously be used. Otherwise, some details of costs can be provided in different form, for example in a witness statement indicating the total amount of costs which have been incurred and giving broad details of how that figure is made up, for example the totals of counsel's fees or other disbursements and the amount of the solicitor's profit costs.

No formal application for a payment on account needs to be made in advance, it can be made orally at the hearing. Nevertheless, it is good practice to give the other side some advance warning that a payment will be sought, and as to the level of payment which will be requested. That is particularly so where the other side is not legally represented.

What level of payment is likely to be awarded? A distinction needs to be

'Thought should be given in advance of the hearing as to the amount of the payment on account of costs which will be sought if successful.'

made here between cases where a costs management order has been made (ie where a budget has been agreed or has been approved by the court) and one where no such order has been made.

Prior to costs budgeting, a body of caselaw developed in which the courts awarded a relatively conservative proportion of the overall costs, typically 40 or 50%. The rationale is that the costs will be reduced on detailed assessment, and the court should not order more for a payment on account than the sum likely to be determined at the final assessment. The best known case is *Mars UK Ltd v Teknowledge* [1999], in which an order for a payment on account of 40% of the total was ordered. It is less often noted that the percentage was based on specific features of that case suggesting that the costs claimed were excessive, and arguably does not justify a figure as low as 40% in more routine cases. Nevertheless, in my experience it is very difficult to achieve a payment on account of costs of more than 50%.

Where a costs management order has been made, the courts have taken a different approach, and have been prepared to order payments on account of 80% or even 90%. That is because when the costs have been set according to a budget, on a detailed assessment the court will not depart from the budget except for good reason, hence the court can be confident that the amount allowed on assessment is likely to be close to the budgeted sums: see *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014]. However, an important argument for the paying party is that the costs management process only dealt with the estimated (ie future costs) and did not set the incurred costs; thus it can be argued that while 80 or 90% may be the appropriate percentage for costs which were estimated in the budget, 40 or 50% would be the appropriate figure for costs which were shown on the budget as incurred. This was the approach adopted in *Cleveland Bridge UK Ltd v Sarens (UK) Ltd* [2018].

There has been some uncertainty as to whether an application for a payment on account can be made after the hearing where the order for costs is made. In *Ashman v Thomas* [2016] Master Matthews found that the order could be made after the costs order was made, but before the cost order had been sealed. However, in *Culliford v Thorpe* [2018] HHJ Paul Matthews held that there was no rule that an application for a payment on account could not be made after the costs order had been sealed.

In Culliford v Thorpe *[2018] HHJ Paul Matthews held that there was no rule that an application for a payment on account could not be made after the costs order had been sealed.*

Nevertheless, the receiving party would be well advised to be prepared to make the application at the costs hearing, to avoid the delay which may be caused by the need for a separate application to be listed, and the risk of the court taking that into account either in declining to exercise its discretion on the application or not allowing the costs of the separate hearing.

In *Bank St Petersburg PJSC v Arkhangelsky* [2018], the judge rejected the defendant's submission that their inability to pay could constitute good reason for not making an interim payment order under rule 44.2(8).

The court has jurisdiction to order a payment on account of costs where a costs order is deemed to have been made under the provisions of rule 44.9 on discontinuance of a claim: *Barnsley v Noble* [2012].

It had been held that where a deemed costs order is made following acceptance of a Part 36 offer, the court had no jurisdiction to order a payment on account of costs: *J P Finnegan v Frank Spiers* [2018]. However, that was held recently to have been wrongly decided by the Court of Appeal in *Global Assets Advisory Services Ltd v Grandlane Developments Ltd* [2019], as it saw no difference between the deemed order made on discontinuance and the deemed order on acceptance of a Part 36 offer.

If an application for a payment on account under CPR 44.2(8) is not made, it is possible to seek an interim payment in the detailed assessment process, under CPR 47.16, which provides for the court to issue an interim costs certificate. However, that power only arises once a request for a hearing has been filed, which in turn is after the Bill and Points of Dispute have been served: thus it may be necessary to wait several months – although in one case in which I was involved we were able to save some time by making the application shortly before filing the request for the detailed assessment hearing – the request had been filed by the time the application for the interim costs certificate had been listed. ■

Ashman v Thomas
[2016] EWHC 1810 (Ch)
Bank St Petersburg PJSC v Arkhangelsky
[2018] EWHC 2817 (Ch)
Barnsley v Noble
[2012] EWHC 3822 (Ch)
Cleveland Bridge UK Ltd v Sarens (UK) Ltd
[2018] EWHC 827 (TCC)
Culliford v Thorpe
[2018] EWHC 2532 (Ch)
Global Assets Advisory Services Ltd v Grandlane Developments Ltd
[2019] EWCA Civ 1764
J P Finnegan v Frank Spiers
[2018] EWHC 3064 (Ch)
Mars UK Ltd v Teknowledge
[1999] EWHC 226 (Pat)
Thomas Pink Ltd v Victoria's Secret UK Ltd
[2014] EWHC 3258

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