Litigating From Home

By Philip Young and Sam Roberts

Amidst everything going on in the world with the COVID-19 pandemic, the Court Service has laid out its stall: as far as possible, it's business as usual. The Lord Chief Justice has delivered a message to all Judges in the Civil Courts, namely the administration of justice must carry on, hearings and trials should proceed where possible, with some or all participating by telephone, videoconference or other remote working technology. For its part, the Commercial Court has heeded the call, with Mr. Justice Teare noting that the Court has to be optimistic, rather than pessimistic.

This outlook has received a mixed reception from the legal profession. On the one hand, videoconferencing has been around for a long time and has been used to get evidence before the Court where it was not otherwise possible. Illness, inconvenience with travel and even being in a witness protection programme historically have been good reasons to resort to these measures. However, every experienced lawyer has sat fruitlessly through hearings where the video-conferencing experience was far from satisfactory.

The Court and the profession's willingness to adapt to changing circumstances is commendable. It will, however, take more than a can-do attitude and enjoying the novelty of working at home in pyjamas to deliver hearings and trials of the same efficacy as the traditional, 'IRL' way of doing things, especially in an era of social-distancing and self-isolation. If 'litigating from home' and e-trials are going to be a viable option over the medium or long term, then issues will need carefully to be thought through, and some trade-offs will almost certainly have to be made.

Shorter hearings – for example injunctions – are less of a problem. By contrast, hearings involving live evidence will be more challenging, particularly longer ones.

In no particular order:

- **Bundles.** A huge amount of work goes into preparing hearing and especially trial bundles. For anything but the shortest trial in the Commercial Court, a chronological run of documents will be anywhere from several to scores of volumes long. These are usually compiled by teams of people working in close proximity, thoroughly going through the parties' disclosure and exhibited documents, preparing draft bundles, removing duplicates, checking for privileged documents, ensuring material is in the correct order, making last-minute inserts, sending them to the other side for checking, then sending agreed sets to reprographics and checking the final sets returned to them to ensure that they are prepared to the high standards required. It's not an easy task and it's not made any easier when communication is impeded because the team is not in close proximity or when the trusty photocopier is back in the office. Electronic bundles had their advent years ago, but use is far from universal. If the team cannot be in close proximity, preparing the bundles will inevitably be harder. Producing them

is possible but it is more time-consuming and expensive. It takes careful project management and good advance planning.

- **Witnesses.** Witnesses are usually sworn in by being passed and placing their hand on a holy book. Affirmations can be given instead, but some witnesses may insist on being sworn in. Can this be done remotely? Some advocates may also understandably feel that the unspoken elements of a witness's evidence are diluted or lost altogether unless the Judge can see any sweating and squirming in person. Indeed, the Judge and the cross-examining advocate need to be sure that the witness is genuinely self-isolated and isn't being fed information or prompted by someone else, just off-screen. And might there be other unexpected consequences of the changed milieu? Historically appellate Courts exercised restraint in second-guessing the Judge's assessment of a witness as only he or she had seen the witness in person. It's never quite the same on the transcript. In an era where testimony is being given over a screen or telephone, and is being recorded, and the appellate Court is in the same position as the first instance Judge, would there be a greater temptation to relax this rule? Perhaps to substitute the appellate Court's assessment for the Judge's?

- **Court roadies.** The invaluable cast of people who usually keep a trial ticking over seamlessly are most effective, or only effective, in situ. Interpreters and transcribers will find their jobs more difficult, and moreover, interpreters too have to be sworn and they and transcribers will need to be socially distanced. Witnesses will no longer have a paralegal sitting alongside them to make sure they are looking at the right document. Anyone who has tried to cross-examine a witness who is trying to look through bundles by himself, without assistance, will know the frustrations of this experience.

- **Taking and giving instructions.** Passing notes among a legal team and to and from clients in Court is second nature and something easily taken for granted. Private channels of communication can be deployed instead, but everyone should prepare for this to add time if messages need to be typed out or an A/V feed paused. Surprising as it may be to some Counsel, often solicitors like to ensure their Counsel are within finger-poking (or at least stage whisper) distance to ensure important points are not missed and instructions are properly understood. Likewise clients, whose trial it is, usually want to feel they understand what is happening and have a lawyer conveniently beside them to explain the mysteries of the experience. Certainly, in a socially distanced world, where instructions are passed over computer, thought should be given to whether the clients can type speedily – an even greater problem if they are not fluent in English.

- **Health and safety**. The scientific position is still developing but it seems to be that our microscopic foe COVID-19 can lurk functionally on paper and other materials for some time. Great care would have to be taken to ensure no risk of infection is transmitted to anyone else involved in the case, i.e. to any of the Counsel, the Judge, witnesses, the client, etc. by the transmission of documents or other materials. Thought will need be given to the consequences of this and also the risks to the health of key participants. Perhaps for those Counsel who might still like some paper documents to

accompany the e-bundles, a complimentary (but dreadfully expensive) bottle of hand sanitiser should be provided? Similar considerations would apply if the case involves a questioned document, the original of which the Judge would doubtless wish to see personally. Insurance can be bought against the health of the Judge but this is expensive. For a long hearing perhaps it would be a good investment both for to protect against the risk of losing the Judge and also the Counsel team.

- **Time estimates**. E-trials may take longer, if only because of the practical and logistical difficulties involved in holding them. Any litigator knows there is no easier way to obtain the wrath of the Court than to be overly optimistic with estimates. The sooner extra time can be factored into the time estimate, the better.

There are also broader policy questions:

- **Open justice**. It's been suggested that hearings by telephone or video conference would not need to be open to the public. Yet this is wholly unprincipled and must be rejected. Open justice has long been a vital cornerstone of UK democracy. The proper administration of justice rests fundamentally on justice being open and transparent. The public must be able to see justice being done and the press must be able to scrutinise and report on it. As Lord Diplock said in *Attorney-General v Leveller Magazine Limited* [1979] 440 at 449H-450D:

> *"As a general rule the English system of administering justice does require that it be done in public: Scott v. Scott [1913] AC 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."*

  More recently, quoting Sir Christopher Staughton in *Ex parte P, The Times, 31 March 1998; Court of Appeal (Civil Division) Transcript No 431 of 1998*. Lord Woolf MR in *R. v Legal Air Board ex parte Kaim Todner [1999] QC 966* said:

> *"When both sides agreed that information should be kept from the public that was when the court had to be most vigilant." The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It*

> *can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve. "*

And perhaps most evocatively by Lord Judge CJ in *R (Mohamed) v. Foreign Secretary (No. 2): [2010] EWCA Civ 65*, where it was said:

> *"Justice must be done between the parties. The public must be able to enter any court to see that justice is being done in that court, by a tribunal conscientiously doing its best to do justice according to law. For that reason, every judge sitting in judgment is on trial. So it should be, and any exceptions to the principle must be closely limited."*

Put bluntly, if hearings are to move into a virtual world, the public and press still have a right to scrutinise them, and must be given access. In this respect, principle is more important than practicality.

- **Protection of the Judiciary, their clerks and support teams**. In this era where Judges' workload is excessively heavy and they have been treated shabbily in respect of their pensions, judicial recruitment is becoming worrisomely difficult. What message does it send for the MoJ potentially to be putting Judges (many of whom are in higher risk categories), their clerks and support teams potentially in harm's way? What steps can the MoJ take to ensure these key and dedicated public servants are protected? If we are going to conduct e-trials, then Judges should be given the technology and the support to be able to conduct them from home.

- **Psychological factors and mental health**. Recent events have come as a terrible shock to the populace. Many people are struggling to adapt to the sudden "crash stop" to the economy, the radical change to their lives and the personal and economic risks to them and their loved ones. The behavioural science published by the Government predicts a real and increased risk of psychological issues associated with the ongoing pandemic including having to work from home, isolated from people, for a prolonged period. These issues should not be downplayed or ignored by the legal profession. We must be alert to them and sensitive to their impact on all participants in the litigation process.

All of these issues may be surmountable in some or even most cases, but the profession and the Courts should not necessarily expect the virtual experience to replicate that in actual Court. There will be trade-offs and compromises. In the near term it may be very difficult to impossible to proceed with large hearings with live witnesses. In the longer term it will be easier.

Ultimately, what is critical is good project management: planning ahead and having the time in which to do so will be crucial in order to have the most orderly e-trial experience … and enjoy litigating from home.