

Covid-19, the experience of remote hearings, and the future of litigation

Covid-19, and the lockdown, have had a clear effect on the civil justice system in England and Wales. Possession claims have been stayed, trials have been adjourned, and those hearings that happened have been by one of a number of video conferencing facilities, or by telephone. Is this just a temporary measure, or a change, imposed suddenly, that will lead to profound changes in the justice system? Two recent publications shed some light.

The first, relevant to the Chancery Division, is the text of a talk given by the Chancellor, Geoffrey Vos, to the Chancery Bar Association on 3 June. Having discussed the changes we have seen, he addressed key questions for the future: the role of remote hearings after lockdown has been lifted, and how they might fit into the shape of justice to come.

The Chancellor is for the use of remote hearings, and digital bundles. They reduce the costs, for example of travel and document copying, he said. They enable participation from overseas, so important if the English and Welsh courts are to keep competitive as a forum for disputes arising in international business, crypto-assets, and smart contracts. They will become one of the options, often used for interlocutory hearings for example, for provision of justice.

One of the options: From discussion of the role of remote hearings, the Chancellor turned to his greater theme. The courts must provide a more flexible dispute resolution. Just as the disclosure pilot scheme gives the court and litigants choices about how to manage document provision, the management of litigation should be via a menu of options, so that the steps required to resolution are best suited to the case before the court. Thus, a remote hearing or hearings might be the best use of the parties', and their representatives', time. A hybrid hearing might be preferable, with some people dialling in whilst others attend in person. Digital document filing, and digital bundles, must become the norm; an end-to-end digital case management system for all types of cases, criminal, civil, and family, is being built.

What, for the Chancellor, is key is early identification of the issues in the case, with these being used to determine the steps to resolution. His observations on that form suggest a radical change. In particular, he suggested, for Business and Property cases, cross-examination may be dispensed with: "Days of cross-examination never win cases". Pleadings too seem to be in the firing line. Covid-19, for the Chancellor, is an opportunity to bring litigation change out of disaster.

The second publication is “The impact of Covid-19 measures on the civil justice system” a report by Dr Natalie Byrom, Sarah Beardon, and Dr Abby Kendrick, as a report of the Civil Justice Council and the Legal Education Foundation. The brief was to report on the effect on court users of the changes imposed in reaction to Covid-19, but with an eye to longer term changes to the civil justice system.

Since the research was conducted rapidly, with data gathered over a two-week period in May, the report provides only a snapshot, with, as the report sets out, considerable further research needed. The overview given in the report reflects anecdotal evidence. Remote hearings have been better resourced in the higher courts than the County Court. There have been technological issues, and conducting remote hearings is more tiring than a hearing in person, with successful participation by lay clients requiring them too to have the ability to correspond easily with their representatives via a number of different technological means. Thus remote hearings are more difficult with a party who has less access to technology, and often particularly difficult for low income litigants, or litigants in person, with the preparation of and access to digital bundles an issue.

The hearings judged by participants in the study to have been most successful are less contentious matters, and some interlocutory hearings, with trials more problematic. Commensurate perhaps with access to technology, and location of lay parties, commercial firms were strong advocates of remote hearings in commercial litigation. Otherwise, the tentative conclusion of the report suggests the use more generally of remote hearings, in the future, for hearings whose outcome is less likely to be contested, for interlocutory matters, and for matters where both parties are represented. These are perhaps the factors likely to play into the menu of options suggested by the Chancellor.

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