

Remote trials: can you avoid them?

The COVID-19 pandemic has brought difficulties and changes to all areas of life and court proceedings are no exception. In particular, the perceived limitations of advocacy and witness handling through a screen are causing some parties to consider whether an adjournment would be more attractive than a remote hearing. Two June 2020 cases – one in the Court of Appeal and the other in the High Court – shed some light on how the courts currently view remote hearings for witness actions and are approaching applications to adjourn in the age of Coronavirus.

Here are the main takeaways:

- Some trials can now take place in person. If it is safe and practical for this to happen, then the entire premise for an application to adjourn may fall away.
- If a participant cannot safely make it to court, hybrid proceedings are likely.
- There are cases that the courts will not want to hear remotely. These will typically be multi-week hearings involving complicated or serious allegations.

C (Children : Covid-19: Representation) [2020] EWCA Civ 734

C (Children: Covid-19: Representation) [2020] EWCA Civ 734 involves facts that would be challenging enough without the pandemic. Following the death of a three-year-old child from cocaine ingestion the High Court was conducting care proceedings involving that child's four siblings. By 1 May 2020 the High Court had heard evidence remotely from seven expert witnesses but there remained four witnesses of fact – the children's mother, father and two grandparents – who would be giving evidence in person on matters such as drug dealing, drug use and domestic violence.

The mother's leading counsel had to shield herself from the Coronavirus and could not be in court to cross-examine witnesses. The High Court needed to decide whether to continue to hear the witnesses of fact – as the local authority and the children's guardian wanted – or to grant the adjournment

sought by the mother until later in the year when, all being well, her leading counsel would be able to attend court.

The High Court rejected an adjournment and ruled that there should be what is known as a 'hybrid hearing' with the mother's leading counsel attending remotely and other advocates being able to attend court in person. The mother appealed against this decision and the Court of Appeal had to wrestle with whether or not it was unfair, and a breach of the mother's Article 6 right to a fair trial, for her leading counsel not to be physically in court when, if they wanted, other advocates could be.

Delivering the judgment of the Court of Appeal Peter Jackson LJ noted that *"the means by which an individual case may be heard is a case management decision over which the first instance court will have a wide discretion"*. Whilst a 'short and certain adjournment' might be appropriate to secure the attendance of counsel, here the adjournment sought was neither short nor certain, contingent as it was on changes to the shielding regime. The Court of Appeal robustly defended remote hearings in witness actions, noting that *"the mother's corner will be fought in a way that fully upholds her rights [...] There is no reason to downplay the effectiveness of remote examination and cross-examination"*. Rejecting the appeal Peter Jackson LJ said that *"these are becoming routine decisions, and as time goes on a careful evaluation of the kind made in this case is no more likely to be the stuff of a successful appeal than any other case management decision"*.

SC v University Hospital Southampton NHS Foundation Trust [2020] EWHC 1445 (QB)

SC v University Hospital Southampton NHS Foundation Trust [2020] EWHC 1445 (QB) was handed down on the day the Court of Appeal heard *Re C*. In this case the court was asked by the Defendant to adjourn a clinical negligence trial on the basis that conducting the trial remotely would be unfair. The Defendant had three submissions to support its application. First, that the advocates would not be able *"visually to assess witness demeanour, judicial approach to evidence as it is given and the reactions of others at the same time as questioning in a way that occurs in a physical courtroom."* Secondly, that communications between legal representatives and the client and/or expert witnesses

would not be possible in the course of evidence being given. Thirdly, that its leading counsel and the witnesses had no experience of a virtual trial.

Notwithstanding these submissions, the court rejected the application for an adjournment. Attention was drawn to the fact that the court's caseload and the availability of the parties and witnesses meant that there was no certainty that a hearing would be able to take place for another 12 months. In the context of this litigation, where a damages award would be used to fund the ongoing costs of the Claimant's education, such a delay was particularly unattractive.

Foretelling the view the Court of Appeal would take a few days later, the court noted that careful case management can allow hearings to take place remotely in a fair manner and that witness trials had taken place remotely. Importantly, all the witnesses in this case had access to the requisite technology to allow a remote hearing to take place and therefore any disadvantage would impact both parties, such that it would not be unfair on one.

Having held that a remote hearing would, in principle, be fair, the court then examined whether such a hearing should in fact take place. It held that it should not. The court acknowledged that:

“the complex multi-layered human communications and observations that take place during a substantial witness trial are significantly impeded when the hearing is conducted remotely. A video-conference is necessarily two-dimensional and permissive only of bilateral communication and observation”.

This is quite a contrast with the Court of Appeal in *Re C* but here the likely length of the trial, the nature of the issues – including a concern that one of the Defendant clinicians believed their professional reputation was on the line when they did not feel they could give an effective account via video-link – and the volume and complexity of the evidence pointed to a remote trial being undesirable.

Having held that the trial should neither be adjourned nor take place remotely the court had to consider whether it should take place in person taking into account issues relating to the legality,

safety, and practicality of such a hearing. Given (a) there is no legal prohibition on hearings taking place in court or people staying overnight away from home in order to attend court, (b) the published commitment of HMCTS to maintain the safety of all in the courts in line with public health advice and (c) the fact that jury trials were already taking place the High Court concluded that there should be an in person hearing in this case.

What should parties do if they do not want a remote trial?

Advisors should not see the Coronavirus pandemic as throwing open the doors for adjournment applications. On the contrary, the courts appear keen to preserve hearing dates and keep the wheels of justice turning. Just one manifestation of this is the way in which the Court of Appeal has endorsed the use of remote or hybrid hearings for the kind of witness actions which, a few months ago, one might never have expected to be anything other than in-person hearings. There also appears to be limited sympathy for parties' reluctance to attend large indoor gatherings of people in courtrooms. If a remote hearing is inevitable, then advisors might consider asking witnesses to undertake witness familiarisation training in advance of the hearing in order to reduce the uncertainty associated with giving evidence via a screen.

The key to avoiding a remote trial may well be to show that (a) a remote or hybrid hearing is not appropriate by reference to the kind of long, complex trial seen in *University Hospital Southampton* and (b) it is practical and safe for participants to attend court in person. Advisors may wish to liaise early on with the court to assess the practicality of in-person hearings and associated safety measures in order to bolster their arguments under limb (b).

When advising on the merits of appealing against a direction that there be a remote hearing it is also worth noting that, whilst these might be extraordinary times, the Court of Appeal is adopting an entirely familiar approach when asked to interfere with case management decisions.