

## THE CONDUCT OF LITIGATION DURING COVID-19

### OUTER TEMPLE CHAMBERS

*'We need to recognise that that we will be using technology to conduct business which even a month ago would have been unthinkable. Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage'* The Lord Chief Justice, Lord Burnett of Maldon in his message dated 19 March 2020<sup>1</sup>

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<sup>1</sup> Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts: <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/>.

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## INTRODUCTION

There has been a flurry of uncertainty since the shut-down of courts following government guidance as a result of the COVID-19 pandemic.

OTC has received a number of queries about how disputes will be dealt with in the courts as well as how alternative dispute resolution can proceed.

This document (which will be updated as the guidance inevitably changes) provides a summary of the main guidance provided by courts in OTC's key practice areas. It provides guidance on how to conduct round-table meetings, mediations and arbitrations. It also provides practical guidance on conducting remote hearings and expected etiquette before remote tribunals.

There is not a single 'off-the-shelf' approach being taken by courts. Each jurisdiction (and indeed each individual court) will have specific requirements and the particular guidance should be read closely. The hyperlinks in the index to this document will direct readers to the particular jurisdiction on which they seek information.

That said, currently, the Family Division's, in particular MacDonal J's guidance is the most sophisticated and detailed. Even if a case is not a family law matter or proceeding in the family courts, that guidance should be given particular attention.

Many members of chambers have already appeared in remote hearings during the pandemic or have provided advice. Should readers have any questions arising from this guidance they should contact our clerks: David Smith ([David.Smith@outertemple.com](mailto:David.Smith@outertemple.com)); Matt Sale ([Matt.Sale@outertemple.com](mailto:Matt.Sale@outertemple.com)); Paul Barton ([Paul.Barton@outertemple.com](mailto:Paul.Barton@outertemple.com)); Graham Woods ([Graham.Woods@outertemple.com](mailto:Graham.Woods@outertemple.com)) or Nick Levett ([Nicholas.Levett@outertemple.com](mailto:Nicholas.Levett@outertemple.com)).

For the avoidance of doubt, the current document is not intended to be formal legal advice, but an informal guide to navigating litigation in the current pandemic. Individual legal advice should be sought appropriately.

**Chloë Bell**  
**OTC**  
**8 April 2020**



## OVERARCHING PROTOCOLS AND GUIDANCE

- The objective of the courts is to undertake as **many hearings as possible remotely**.
- Hearings that cannot be heard by video or telephone and which cannot be delayed will be held in 157 priority court and tribunal buildings from 30 March 2020, except in exceptional circumstances. A tracker of these courts is available online.<sup>2</sup>
- A further 124 court and tribunal buildings remain closed to the public but open to HMCTS staff, the judiciary and other agencies. These staffed courts support video and telephone hearings.

*Three new practice directions and a protocol*

### PD 51ZA Extension of Time Limits<sup>3</sup>

- Effective from 2 April 2020.
- Allows parties to agree an extension up to 56 days without formally notifying the court (rather than the current 28 days) so long as it does not put a hearing at risk.
- Any extension of more than 56 days needs to be agreed by the court. The court needs to take into account the impact of the pandemic in considering such applications.
- Clarifies that under PD51Y person seeking permission to listen to or view a recording of a hearing can merely request and is not required to make a formal application under the CPR.
- Ceases to have effect on 30 October 2020.

### PD 51Y: public justice

- Clarifies when courts can exercise discretion to conduct hearings remotely in private.
- Ceases to have effect on the date on which the Coronavirus Act 2020 ceases to have effect (para 1).<sup>4</sup>
- Where court directs that proceedings are to be conducted wholly as video or audio proceedings and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing take place in private where it is necessary to do so to secure the proper administration of justice (para 2).
- Where a media representative can access proceedings remotely while they are taking place they will count as public (para 3).
- Hearings held in private under para 2 must be recorded, where that is practicable, in a manner directed by the court (para 4).

### PD 51Z: stay of possession hearings

- All proceedings for possession brought under CPR Part 55 and all proceedings seeking to enforce an order for possession by warrant or writ of possession are stayed for a period of 90 days from 27 March 2020.

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<sup>2</sup> [https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served?utm\\_medium=email&utm\\_source=](https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served?utm_medium=email&utm_source=)

<sup>3</sup> <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus>.

<sup>4</sup> See sections 89 and 98 of the Coronavirus Act 2020 for its temporal effect.

Protocol regarding Remote Hearings 26 March 2020<sup>5</sup>

- Protocol applies to hearings of all kinds, including trials, applications and those involving litigants in person. It applies to the County Court, High Court and Court of Appeal (Civil Division).
- The method by which hearings are conducted is always a matter for the judge(s), operating in accordance with applicable law, rules and PDs (para 3).
- The following legal issues must be addressed before any remote hearing can begin (i) whether the hearing is to be in public or in private; if in private, on what grounds, and (ii) how is the hearing to be recorded, or can an order properly be made to dispense with recording? (para 7).
- Remote hearings should, so far as possible, still be public. This can be achieved (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log into the remote hearing and/or (c) live streaming of the hearing over the internet where broadcasting hearings is authorised in legislation (para 8).
  - However in the exceptional circumstances of the pandemic, the impossibility of public access should not normally prevent a remote hearing taking place.
  - If any party submits that it should in the circumstances of the specific case, they should make submissions to the judge to that effect (para 22).
- Recording hearings can be achieved (a) recording the audio relayed in an open court room by the use of the court's normal recording system (b) recording the hearing on the remote communication system being used (e.g. BT MeetMe, Skype for Business or Zoom), or (c) by the court using a mobile telephone to record the hearing (para 9).
- Available methods for remote hearings include (non-exhaustively) BT conference call, Skype for Business, court video link, BT MeetMe, Zoom and ordinary telephone call. Any communication method available to the participants can be considered if appropriate (para 13).
- Judges, clerks and/or officials will, in each case, wherever possible, propose to the parties one of 3 solutions:
  - (i) A stated appropriate remote communication method for hearing;
  - (ii) That the case will proceed in court with appropriate precautions to prevent transmission of Covid-19; or
  - (iii) That the case will be adjourned because a remote hearing is not possible and the length of the hearing combined with the number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time (para 16).
- If the parties disagree with the court's proposal, they may make submissions in writing by email or CE-file, copied to the other parties, as to what other proposal would be more appropriate. On receipt of submissions from all parties, the judge(s) will make a binding determination as to the way in which the hearing will take place, and give all other necessary directions (para 17).

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<sup>5</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf).

- The court may order a short remote CMC in advance of the hearing to allow for directions to be made in relation to the conduct of the hearing, the technology to be used and other relevant matters (para 18).
- The hearing itself:
  - The clerk or court official and the parties will need to log in to the dedicated facility. In a skype, Zoom or BT call, the judge(s) will then be invited in by the clerk or court official (para 19).
  - The hearing will be recorded by the judge's clerk, court official or the judge unless a recording has been dispensed with (para 21).
- Electronic bundles should be prepared for remote hearings. They can be provided in pdf or another format. They must be filed on CE-file (if available) or sent to the court by link to an online data room (preferred) or email (paras 24-26).

### *Civil Court Listing Priorities*

- Updated daily.
- HMCTS has provided a list of work that must be done (priority 1) and work that could be done (priority 2). It can be accessed online via this page: [judiciary.uk/coronavirus-covid-19-advice-and-guidance/?utm\\_source=Announcements&utm\\_medium=banner&utm\\_campaign=External%20COVID%20page](https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/?utm_source=Announcements&utm_medium=banner&utm_campaign=External%20COVID%20page)
- The lists only relate to county court hearings (the CoA, QBD and B&PC are excluded from its ambit).

## **CLOUD VIDEO PLATFORM**

A bespoke product is currently being tested by Her Majesty's Courts and Tribunal Service - the 'cloud video platform' ('CVP'). No particular software will be required to use it. HMCTS states that this platform will have increased capacity by next week.

Until the CVP is rolled out the courts are using a '*Smörgåsbord*' (to use the term of MacDonald J) of ways to continue to provide access to justice and to continue with court business where possible.

Parties should pay close attention to the CVP. It is discussed in most of the guidance and appears to be the aspirational platform of all courts for the conduct of remote hearings.

## SUPREME COURT

- The building is closed.
- The Supreme Court continues to undertake hearings remote and has continued to hand down judgments remotely.
  - E.g. HMRC v Fowler UKSC 2018/0226 which took place entirely remotely which can be viewed here:  
<https://www.supremecourt.uk/watch/uksc-2018-0226/240320-pm.html>
  - A number of cases have been adjourned at parties' requests.
- Hearings are being live streamed as usual.
- The registrar is not currently listing any new appeals.
- Full guidance in relation to UKSC hearings can be found at:  
<https://www.supremecourt.uk/news/arrangements-during-the-coronavirus-pandemic.html>



## COURT OF APPEAL (Civil)

- Only dealing with ‘urgent work’
  - Defined as ‘applications where it is essential in the interests of justice that there be a substantive decision within the next 7 days’.
- Bundles should **not** be provided electronically unless specifically requested by the Court
- All other documents should be filed electronically
- The CoA aims to provide a limited telephone service for users.
- Orders will be issued electronically for the time being.
- The Court of Appeal’s Covid-19 page is updated daily so should be consulted regularly.<sup>6</sup>

## HIGH COURT

### *General*

- The RCJ and Rolls Building are operating according to the **High Court Contingency Plan** for maintaining urgent court hearings.<sup>7</sup>
  - Business sufficiently urgent to warrant an out of hours application in normal times will be considered urgent business. This business will be given priority.
  - Business as usual will continue to be dealt with in accordance with the contingency plans put in place by the different divisions and courts.
  - At any one time during the normal working week at least one judge from each of the QBD, the Admin Court, the Commercial Court, the TCC, the CoP, the Family Division and the Chancery Division will be available to deal remotely with the business of that jurisdiction including urgent business.
  - A single duty judge from each of the QBD, Family Division and Chancery Division will be available outside normal working hours in the usual way.
- The RCJ Fees office is closed until further notice.
- Two dedicated support staff have been made available for remote High Court hearings from the week commencing 30 March 2020.

### *QBD*

Members of OTC have already appeared in remote hearings before Judges and Masters in the QBD:

**Christopher Wilson-Smith QC**

**Eliot Woolf QC**

**Sarah Crowther QC**

**Timothy Nesbitt QC**

**Elizabeth Grace**

- Certain Masters have issued particular guidance regarding the filing of bundles (Master Thornett, Master Cook, Master Fontaine).
  - This does not appear to be publicly available.
- Administrative Court hearings have been proceeding via conference calls. Dial in details were circulated in advance.
  - It was suggested in the hearing conducted by a member of chambers that live oral evidence would not be given via a remote court hearing.

### *Business and Property*

Members of OTC have already appeared/or are to appear in remote hearings before Judges and Masters in the Business and Property Courts:

**Andrew Short QC**

**Nicolas Stallworthy QC**

**Richard Hitchcock QC**

Lydia Seymour  
Elaine Palser  
Justina Stewart  
Nicholas Hill  
Saaman Pourghadiri  
Chloë Bell

- No particular public guidance issued and the overarching guidance discussed above will apply. We recommend that the Family division guidance summarised below be consulted as it is currently the most extensive and detailed.
- However, remote trials have been taking place. See for example, Commercial Court case: *National Bank of Kazakhstan and the Republic of Kazakhstan v Bank of New York Mellon, Anatolie Stati and others - Claim No. FL-2018-000007* before Teare J which was live streamed on YouTube.

### *Family*

Remote Access Family Court – extensive guidance (49 pages) by MacDonald J

**This is the most extensive guidance presently available. It is recommended that all parties, regardless of the nature of their case, read this guidance**

- Pending the introduction of Cloud Video Platform by the courts (apparently days rather than weeks away) there will not be a single off the shelf software platform which can be used (para 1.3).
- In the interim the court and parties should choose from a Suite or Smorgasbord of IT platforms (para 1.3).
- The cardinal operational principle of the Family Court and Family Division of the High Court is ‘Keep Business Going Safely’ (para 3.1). This means in a manner which ensures the safety from infection of judges, court staff, lawyers and litigants whilst at the same time ensuring procedural and substantive fairness in accordance with the imperatives of Art 6 (para 3.2).
- Live court hearings should now be confined to exceptional circumstances where a remote hearing is not possible and yet the hearing is sufficient urgent to mean that it must take place with those involved attending court (para 3.3).
- Some cases will need to be adjourned for longer periods of time because a remote hearing is not possible given the nature of the case and the length of the hearing. Combined with the number of parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time having regard to the Government guidelines regarding social distancing (para 3.4).
- Practical challenges
  - Family Division urgently working to create a version of sealing orders remotely (para 5.2.1).
    - HHJ Alison Raeside solved the question of preventing orders being sent out in PDF format from being edited by those receiving them. Adobe Acrobat programme allows a password protected restriction to be placed on further editing PDF documents before distribution (para 5.2.1).
  - ‘Wet’ signatures are no longer required for applications, consent orders and documents are not to be rejected by courts on that basis. Printed name constitutes valid electronic signature (para 5.2.2).

- Judicial laptops can only conduct hearings using Skype for Business or Microsoft Teams. Zoom can be used but only if the judge is invited as a guest (para 5.4).
- President of Family Division gave blanket approval to judges to approve the use of e-bundles in all remote hearing (para 5.8).
- Limited PDF functionality on judicial laptops needs to be addressed (para 5.9).
- Access to bundles may create difficulties for lay clients and LiPs
  - Interim hearings at which that party is represented and not giving evidence, it may be unnecessary for that party to have access to the bundle
  - Screen sharing on video-conferencing platforms is a method by which a party can access the bundle when required. Breakout room features will also allow instructions to be taken.
  - Specific documents may, where appropriate, be posted to that party by their representative or local authority.
  - In exceptional circumstances where no other option is available and the public health guidance permits it, it may be possible for the party to attend an open court building or other facility in order to participate in the remote hearing while having access to the bundle (para 5.9.1).
- Witnesses – information given in Appendix 1 drawing on guidance from the Australian High Court
- Maybe increased need for judge to administer oath or take affirmation from witness. Mostyn J uses short form ‘do you swear or affirm to tell the truth, the whole truth and nothing but the truth?’ (para 5.11).
- Recordings must be taken.
  - There is a problem with file corruption of recordings taken on Skype for business. They must be re-started every 30 minutes to avoid file corruption (para 5.12).
  - There is no difficult with a host who is not the judge recording the hearing provided the host is a legal representative and provides to the judge a link to the recording immediately following the hearing (para 5.12).
- Use of interpreters needs urgent resolution. Apparently Zoom may provide a solution due to the possibility of having break out functions where there can be a separate channel for the witness and interpreter (para 5.13).
- Transparency
  - Attendance by journalists at remote hearings is possible.
  - Invitation sent to the press by the lead party and the email addresses of the parties’ representatives are provided to the press (para 5.17).
  - Judgment hand down can be covered remotely as long as they are available on Bailii, HMCTS website or via email at the point of hand-down (para 5.17).
- Access for Parties and Litigants in Person
  - Participation of the lay parties continues to be a fundamental element of a fair trial where a hearing is held remotely. Within this context, it is not appropriate for courts to stipulate ‘advocates only’ remote hearings as a means of dealing with the logistical and practical difficulties caused by the current public health crisis. The current massive increase in litigants in person in the Family Court consequent upon the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 creates a particular challenge in respect of remote hearings. Within this context, the court will need to address the following potential difficulties for lay parties and/or litigants in person (para 5.19).
  - There is likely to be a not insignificant cohort of parties attending from a different location to their lawyers and litigants in person who lack access to sophisticated communication platforms. In these circumstances, if held, it is likely that significant

- numbers of private law hearings and an appreciable number of public law hearings will have to take place by means of telephone conferencing, limiting the types of hearing that can be accomplished remotely in the private law context (para 5.19.2).
- Some parties attending from a different location to their lawyers and litigants in person are likely to face difficulties in achieving any access to a remote hearing include where a party or litigant in person is homeless, does not have a mobile phone or landline, does not have a Wi-Fi connection.
  - Where video communication platforms enable an audio only connection in addition to video connection, a decision can be made on a case by case basis whether a party may join on an audio only basis if adequate for the needs of a party who is unable to join without a video connection (para 5.19.3).
  - Security and GDPR
    - Primary concern is unauthorised recordings. Skype hearings carry significant risk of being recorded by LiPs or parties participating at a separate venue/photos of judges/advocates being posted on social media. However, this is a risk that will have to be accepted (para 5.20).
    - ICO has expressed that it is content that Skype for Business, LifeSize and Zoom (provided re Zoom the host has indicated that they accept the terms and conditions specifically in relation to GDPR by ticking the correct box) (para 5.20.1).
    - The Data Protection Act 2018 Sch 2 para 14(2) states that the listed GDPR provisions do not apply to personal data processed by (a) an individual acting in a judicial capacity, or (b) a court or tribunal acting in its judicial capacity. Paragraph 14(3) of Sch 2 provides that as regards personal data not falling within para 14(2), the listed GDPR provisions do not apply to the extent that the application of those provisions would be likely to prejudice judicial independence or judicial proceedings. Sch 2 para 1 provides that 'listed GDPR provisions' includes the Articles concerned with personal data collected from the data subject and personal data collected other than from the data subject (para 5.20.2).
    - Lawyers need to exercise care to ensure that they have a separate channel of communication with clients (para 5.20.2).
    - LAA has provided guidance entitled Remote Family Hearings: updated ways of working (para 5.21).
  - Publicity
    - It is recommended that HMCTS produce online plain English digital leaflets or information pages and FAQs explaining to litigants how they can join and participate in a remote hearing, what they need to do, what support is available and how they can ask for adjustments or a face-to-face hearing (para 5.23).
    - FLBA has produced a document for public information on remote hearings (para 5.23).
  - Emphasis is put on Alternative Dispute Resolution as judicial resources are under pressure (para 5.24).
  - Outstanding issues
    - How proceedings are to be issued remotely (para 8.3(b)).
    - How capacity can be assessed remotely. How children with party status are to be facilitated to participate with appropriate privacy in remote hearings (para 8.3(j)).
    - Courts will be at different stages of modernisation. One size, in terms of remote working, will not fit all (para 8.6).
  - Draft order for remote hearing (Appendix 4).

## Family Court and Family Division Protocol for Remote Hearings<sup>8</sup>

- Applies to all types of proceedings to which the Family Procedure Rules applies and to all types of hearing in the Family Court and the Family Division of the High Court (para 2).
- Sets out the process for arranging, preparing for and holding a remote hearing (para 2).
- The precise method by which the hearing is conducted remotely is always in the discretion of the judge in the individual case operating in accordance with the applicable law, Rules and PDs (para 6).
- Parties are expected to be even more proactive and co-operative with respect to preparation for forthcoming hearings (para 7).
- Consideration of whether a remote hearing or series of remote hearings is appropriate should begin early. (para 8).
- Listing office, clerks and judges will consider as far ahead as possible how future hearings should be best undertaken. The listing office will also seek to ensure that the judge(s) and the parties are informed as early as possible of the identity of the judge hearing the case (para 9).
- There is no intention of prescribing which types of hearing will be suitable for being dealt with remotely. This will depend on the particular case and will be a matter for the judge having heard representations from the parties (para 10).
- There is no intention of prescribing the method by which a remote hearing is to be conducted or the communication platform to be used (para 12).
- Notwithstanding the default position, the court's permission is still required for all or any part of the proceedings to be dealt with by way of remote hearing (para 15).
- Where a hearing will be dealt with remotely, a preliminary hearing must be held in order to consider and settle on the identity of the platform to be used and to resolve the directions required in consequence thereof as well as the identity of the lead party (para 16).
- Where parties are represented, responsibility for making arrangements for the remote hearing will fall on the applicant or the first represented party (para 17).
- If no party is represented the court office will contact the parties to explain that the hearing will be conducted remotely and will send instructions on how this is to be achieved (para 17).
- Where one party is unable to attend a remote hearing by way of electronic communication but can attend by telephone, the remote hearing will be held by telephone conference call, to be arranged by the applicant (or first represented party) or by the court where no party is represented (para 18).
- Identified lead party must liaise with the court in advance of the hearing to deal with technical issues. The details should then be provided to all of the other parties not less than 24 hours before the hearing is to be begin. The lead party may be the party hosting the relevant hearing (para 19).
- Electronic bundles (para 20)
  - The parties must agree and the lead party must prepare and send to the court an electronic bundle of documents (and if appropriate an agreed electronic bundle of authorities) for each remote hearing which complies with para 18 of the President's COVID 19: National Guidance for the Family Court.

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<sup>8</sup> <https://www.judiciary.uk/wp-content/uploads/2020/04/The-Remote-Access-Family-Court-Version-3-Final-03.04.20.pdf>.

- Must be PDF format. All documents to be contained, if possible, within one single PDF.
- PDF must be searchable.
- Pagination must be computer generated within the PDF, not hand written.
- Each section of the bundle and each individual document referenced in the index should be separately bookmarked.
- Electronic bundle must be filed with the court on CE file (if available) or sent to the court via a cloud based link rather than series of emails. USB sticks should be avoided unless absolutely necessary. Should be provided to all other representatives and parties with the timescales provided by the relevant PD (para 21).
- Parties can also agree to use an ebundle service from a commercial provider (para 22).
- Listing
  - Cases will no longer be listed to all commence at 10:30am. Where there is more than one remote hearing in the list they will have specified times. They must commence and end on time (para 23).
- Witnesses
  - Parties should seek to agree in advance the documents to which a witness is likely to be referred (para 24).
- Responsibility for recording the hearing will fall on the party or court that has organised the remote hearing. At the conclusion of the hearing (or at such points during the hearing as is necessary) the recording of the hearing will be uploaded to cloud based storage provision and the judge will settle arrangements for how the recording files are to be transmitted and stored centrally (para 27).
- The court and the parties must give consideration to how press access to the remote hearing is to be achieved. The court must indicate on the cause list that the hearing is a remote hearing and, if possible, the particular methodology that is being used (para 29).
- Parties must be sympathetic and flexible regarding any technical difficulties that may be experienced by another party to proceedings (para 30).
- With respect to the hearing itself (para 31):
  - All participants should join the remote hearing prior to the judge (a).
  - Judge's camera and microphone should remain on at all times during the hearing (b).
  - Unless addressing the judge, or otherwise requested to do so, all other participants should have their microphones muted at all times (c).
  - Unless otherwise directed, all participants should leave their cameras turned on at all times (d).
  - At the start of the hearing the court will identify all participants to the remote hearing and give any additional directions the court wishes to make about the use of cameras and microphones (e).
  - Court will give necessary warnings including warnings to all parties regarding recording and confidentiality. Parties will be asked to turn on their microphones whilst warnings are given, and will be invited to confirm their understanding of the warnings given (f).
  - When a witness is giving evidence, that witness must keep their camera and microphone on at all times (g).
  - Advocates may need to take instructions during the course of a hearing and time should be provided to do so (h).
- Witnesses giving evidence are to be alone, in a secure room with the doors closed. The witness is to ensure that there will be no interruptions or distractions for the duration of their appearance at the remote hearing. The witness should have recently re-read all



affidavits or statements made by him or her in the proceedings and have a copy of those documents with them (para 32).

- The clerk, court official or the judge(s) must complete the order that is made at the end of the remote hearing. The wording of the order should be discussed and agreed with the parties before the link is terminated (para 33).



## COURT OF PROTECTION

OTC's **John McKendrick QC** has undertaken a final hearing before Mostyn J using Skype for Business. The final hearing involved 5 parties, 11 witnesses, including 4 expert witnesses. The hearing was conducted in the presence of the press who were able to attend remotely and report it to the public. The Law Gazette has reported on this hearing: <https://www.lawgazette.co.uk/practice/first-all-skype-trial-tests-crisis-working-at-cop-/5103541.article>.

*Court of Protection Bar Association Guidance on Effective Remote Hearings 8 April 2020<sup>9</sup>*

- This guidance has been approved by the Vice President of the Court of Protection.
- To the extent possible compromises should be made on 'peripheral issues' so that the court can concentrate on the 'fundamental issues'.
- A platform must be agreed which all participants can access.
- Agree in advance how counsel will obtain instructions during the hearing.
- Try to agree a protocol for using documents with a witness.
- Bundles
  - Consider how the bundle will be accessed by parties and how to navigate it.
  - OCR software should be used to render all documents in the bundle searchable.
- Authorities should be in a separate joint PDF bundle with each case bookmarked.
  - Relevant passages should be highlighted or have a red line in the margin.
- Consider how and when communications will take place with the other side.
- Ensure you have a 'court kit' to hand – calculator, pen, procedural texts etc.
- Succinctness of advocacy is key in remote hearings.
- Emphasis is placed on ensuring the formality of the proceedings is retained (e.g. appropriate dress).

*Remote Access to the Court of Protection Guidance: 31 March 2020<sup>10</sup>*

- Remote hearings have become a necessity. Focus on ensuring that those who lack capacity do not become more disadvantaged as a result.
- Obligation of all involved at all stages of the hearing to continue to evaluate whether fairness to all the parties is being achieved.
- Document structured to emulate the Family Court model.
- Remote hearings are the default position until further notice (para 6).
  - Notwithstanding default position the court's permission is still required for all or any part of the proceedings to be dealt with by way of remote hearing. See template order at end of guidance (para 8).
  - However an application is not required (para 10).
- No hearings which require people to attend are to take place unless there is genuine urgency and it is not possible to conduct a remote hearing.
- Remote hearings may be conducted using:
  - Email exchange between the court and parties;

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<sup>9</sup> Accessible via this link: [https://media-exp1.licdn.com/dms/document/C561FAQGivvE4ytsqLg/feedshare-document-pdf-analyzed/0?e=1586455200&v=beta&t=iBZIOEe4fXE2bWfm2QD\\_Hdzzro0eXSjhiq4YFWP7s6I](https://media-exp1.licdn.com/dms/document/C561FAQGivvE4ytsqLg/feedshare-document-pdf-analyzed/0?e=1586455200&v=beta&t=iBZIOEe4fXE2bWfm2QD_Hdzzro0eXSjhiq4YFWP7s6I).

<sup>10</sup> <https://www.judiciary.uk/wp-content/uploads/2020/03/covid-protocol-Insolvency-Court.docx>.

- Telephone using conference calling facilities;
- Court's video-link system;
- Use of Skype for Business;
- Any other appropriate means of remote communication, e.g. BT Meet Me, Zoom or FaceTime (para 2).
- There is considerable flexibility for any other effective facilities to conduct a hearing (para 3).
- Some cases will need to be adjourned because a remote hearing is not possible and an in-person hearing would not be safe or possible. These should be identified quickly. All participants are invited to look in their diaries at scheduled cases and audit their availability for settlement of issues or remote hearing (para 14).
- The particular technology platform to be used must be agreed at the outset of each case, recited and directed in the case management order (para 22).
- Basic practical principles (e.g. muting mic when others are speaking etc) are set out at para 23.
- Security of the platform for the remote hearing must be assured (para 53).
  - The ICO is content that Skype for Business, Lifesize and Zoom are GDPR compliant. The position with Microsoft Teams has to be clarified (para 69).
  - The ICO has also indicated that reasonable allowances will be made during this period (para 69).
- Transparency and the essential tenets of PD 4C (Court of Protection Rules 2017) are unworkable at present. It is disapplied in cases where a remote hearing is ordered (para 57).
  - This does amount to an interference with the rights of the press under Art 10 ECHR. But any interference with those rights is justified under Art 10(2) having regard to the public health situation and the measures taken in this guidance to ensure that any interference is minimised (para 57).
- In each case active consideration must be given to whether any part of a remote hearing can facilitate the attendance of the public. If so PD 4C may be applied and the transparency order reissued (para 59).
- Where the attendance of the press can be accommodated in the remote hearing this should be an available facility for them (para 60).
- Cause lists or lists in the Court of Protection must show that a case is being heard remotely or judgment is being handed down by email (para 61).
- Endorsement of Family Court protocol that there should be a method of communicating this information to the press and legal bloggers in advance of a hearing such as using the CopyDirect service or routing the information via the Press Association (para 62).
- The rules permit the judge to make public such information before the court, documents, judgments as s/he thinks fit. Greater use of published judgments is a means by which the public may be able to access the court during this time (para 63).
- The Coronavirus Act 2020 allows the listed courts to direct public broadcasts of the hearings (s.55, sch 25, para 1) – this provision does not apply to CoP. CoP is seeking to be included within the ambit of this provision of the Act (para 64).
- All remote hearings must be recorded. Parties cannot record without permission of the court. Responsibility for arranging the recording will be addressed on case by case basis (para 65).
- Responsibility for recording the hearing will fall on the party or court that has organised the remote hearing. At the conclusion of the hearing the recording will be uploaded to cloud based storage provision (para 66).

- There is more work to be done on the mechanism of transmission and the ultimate storage of the recordings (para 68).
- Where P lacks capacity to conduct proceedings and is represented by a litigation friend or by Rule 1.2 representative there is no necessity for the attendance of P at the remote hearing. The question of P's attendance is a matter for O's legal representatives and/or litigation friend. Must be borne in mind that the country is operating at a time of crisis and resources are being prioritised and stretched (para 71).
- Imaginative ideas are welcome to ensure that P participates in proceedings where they are able to do so safely and proportionately (e.g. setting their views out in an email, a telephone call to solicitors) (para 73). Physical letters or pictures from P should not be sent to the court to avoid virus transmission. Where created by P a photograph of them may be taken and sent to the judge (para 72).
- Consideration should be given to whether a recording of the remote hearing can be made available to P to view after it has taken place (para 72).
- Where a judicial meeting with P is necessary for a determination of the issues then remote conferencing technology to facilitate the meeting is likely to be the only possible mechanism. This meeting should be recorded and made available to the other parties (para 74).
- When physical hearings return momentum should not be lost for imaginatively bringing P into the process via other mediums rather than attendance notes and witness statements (para 75).
- Where no party is represented the court will set up the remote hearing (para 77).
- Where LiPs lack access to communication platforms then telephone conferencing is likely to be the preferred platform (para 79).
- Judges and advocates need to be alert to potential for LiPs to be left behind in a discourse which may be less apparent remotely than if they were physically present. At the start of a remote hearing a mechanism by which a litigant in person may indicate to the judge a lack of understanding or need to interrupt ought to be agreed upon and explained (para 81).
- Where remote hearing requires witness evidence, parties should try to agree in advance a list of documents to which the witness will be referred and compiled into an electronic bundle (para 83).
- Some platforms have document and screen sharing mechanism, may obviate the need for electronic bundles (para 84).
- Maybe increased need for judge to administer oath or take affirmation from witness. Mostyn uses short form 'do you swear or affirm to tell the truth, the whole truth and nothing but the truth?' (para 85).
- There is no requirement to touch any Holy Book at a remote hearing (para 86).
- The witness must be alone, in a secure room with the doors closed. The witness must ensure that there will be no interruptions (para 87).
- Electronic Bundles
  - The only potential impediment to electronic bundles is para 5 in PD 4B to the Rules.
  - The template orders will disapply this para until further notice.
  - The provisions for lodging a physical bundle are disappplied (para 90).
  - Must be PDF, single file (if possible) and paginated (para 93(a) and (b)). Pagination should be generated within the PDF, not handwritten (para 93(f)).
  - Should be prepared and filed by the lead party with the court via email (para 92 and 93(c)).

- Position statements/skeleton arguments should be filed separately by email in Microsoft word format (para 93(e)).
- PDF should be searchable (para 93(h))
- Index should be hyperlinked to the documents (para 93(i)).
- Orders and service
  - Electronic seals will be used for welfare orders where available, otherwise seals may be dispensed but a form of words should be expressed in the order to ensure the order takes effect although unsealed (para 103). This issue must be addressed at every remote hearing with the judge (para 103).
  - Deputyship orders which usually require embossed seals are being reviewed for practical solutions by Senior Judge Hilder
  - The court will determine how to serve a document. Email and other non-physical means are likely to be preferred (para 104).
- Legal Aid funding
  - The work undertaken for a remote hearing ought to be remunerated as closely to the position had it been an attended hearing (para 107).
  - A practitioner member of the HIVE will be allocated to directly engage with the LAA (para 107).
  - On 25 March the LAA issued updated guidance: <https://www.gov.uk/guidance/coronavirus-covid-19-legal-aid-agency-contingency-response>.
- Touchstone is proportionality – full procedural compliance may have to give way to practicality and pragmatism (para 110).
- Draft order for remote hearings attached on pp. 19 and 20.

## COUNTY COURT

### *Central London County Court; Mayors and City Court*

- Closed to the public.
- Hearings continue to be conducted remotely where possible.

### *Insolvency and Company Work Central London*

- Specific protocol in place.<sup>11</sup>
- Under a standing arrangement with HMRC, no bankruptcy order
- be made on HMRC petitions currently listed for hearing.
  - The Judge will order the petition to be relisted after 12 weeks.
  - The relisted date will be sent to HMRC and the debtor and any opposing or supporting creditors will be notified by HMRC of the relisted hearing date.
  - The only exception to the arrangement is that HMRC will continue to ask, on paper, for dismissal or withdrawal of the petition where the debt has been paid.
- The same approach will be taken to other bankruptcy petitions unless a request for a remote hearing is made by email to RCJBankCLCCDJHearings@justice.gov.uk.
- Applications in bankruptcy proceedings will be dealt with on the first occasion on paper. Any hearing directed after a consideration on paper will be a remote hearing.
- Public examinations will remain listed but only for the Judge to make an order on paper.
  - The Judge will adjourn the examination unless there is a request for rescission, conclusion or a suspension of discharge from bankruptcy.
  - Such a request should be made by email to RCJBankCLCCDJHearings@justice.gov.uk and will be considered on paper.
- Claims for extension of time to register company charges will remain listed but only for the purpose of the Judge considering the claim on paper.
  - The requirement to produce the original charge is waived in this period and evidence of solvency will be accepted by email to RCJCompGenCLCC@justice.gov.uk.
- Claims for the restoration of companies to the register will remain listed but only for the purpose of the Judge considering the claim on paper.

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<sup>11</sup> <https://www.judiciary.uk/wp-content/uploads/2020/03/covid-protocol-Insolvency-Court.docx>.

## EMPLOYMENT TRIBUNAL

Many of OTC's members have appeared or are to appear in remote ET or EAT proceedings (mainly via telephone) during the Covid-19 crisis. Many others have provided advice on conducting employment proceedings during the crisis:

Andrew Short QC  
Keith Bryant QC  
Andrew Allen QC  
Daniel Barnett  
Naomi Cunningham  
Saul Margo  
Stephen Butler  
Gus Baker  
Victoria Brown  
Elizabeth Grace  
Patrick Tomison

*Andrew Allen QC has discussed the procedural propriety of electronic hearings here:*

<https://www.outertemple.com/2020/04/hearings-by-electronic-communication-and-the-2013-et-rules-what-can-be-achieved-within-them/>.

*FAQs arising from the Covid 19 Pandemic: 3 April 2020*

- Specific questions are answered: <http://employmentlawbulletins.com/wp-content/uploads/2020/04/FAQ-final-edition-date-03-April-2020.pdf>.

*Closure of London Central Employment Tribunal: 25 March 2020 and update on 7 April 2020*

- London Central Employment Tribunal at Victory House is closed due to operational reasons. The closure is until 14 April 2020.
  - The Tribunal will re-open on 14 April 2020 to conduct telephone video case management preliminary hearings and mediations on listed cases.
  - Parties will be contacted with instructions.
  - Communication resources are limited. Those with hearings in the near future will be given priority.
- Even if a case has been listed for a telephone case management hearing on those days the parties should assume that witnesses may be stood down and that only the parties or their representatives are expected to participate in the telephone case management hearing.

*Direction issued by the Employment Tribunal Presidents: 19 March 2020 and updated on 24 March 2020<sup>12</sup>*

- From Monday 23 March 2020 all in-person hearings listed to commence on or before 26 June 2020 (hearings where the parties are expected to be in attendance at a tribunal hearing

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<sup>12</sup> [https://www.judiciary.uk/wp-content/uploads/2020/03/2020\\_03\\_19\\_ET-Covid-19-Direction.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/2020_03_19_ET-Covid-19-Direction.pdf); [https://www.judiciary.uk/wp-content/uploads/2020/03/2020\\_03\\_24\\_ET-Covid-19-Direction-Amendment.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/2020_03_24_ET-Covid-19-Direction-Amendment.pdf).

centre) will be converted to a case management hearing by telephone or other electronic means which will take place (unless parties are advised otherwise) on the first day allocated for the hearing.

- This will provide an opportunity to discuss how best to proceed in the light of the Presidential Guidance dated 18 March 2020, unless in the individual case the President, a Regional Employment Judge or the Vice-President directs otherwise.
- If the case is set down for more than one day then parties should proceed on the basis that the remainder of the days fixed have been cancelled.
- This direction also applies to any hearing that is already in progress on Monday 23 March 2020 and, if not already addressed before then, the parties may assume that the hearing on that day is converted to a case management hearing of the kind referred to above.
- The parties remain free to make any application to the Tribunal at any time.
- In person hearings listed to commence on or after 29 June 2020 will remain listed and will be subject to further directions in due course.
- The direction will be reviewed on an ongoing basis and in particular on 29 April 2020 and 29 May 2020 to take into account the contemporaneous circumstances in connection with the pandemic.

*Presidential Guidance in Connection with the Conduct of Employment Tribunal Proceedings during the Covid-19 Pandemic: 18 March 2020<sup>13</sup>*

- ETs must have regard to the guidance but are not bound by it.
- During the pandemic ETs, seeking to apply the overriding objective in rule 2 of the ET Rules of Procedure 2013 need to take into account the impact of the pandemic (para 2).
- Number of constraints on what can realistically be done in the ET context:
  - Not all ET offices have ready access to video conferencing equipment
  - EJs may require access to scanned documents and case management applications which will depend on there being sufficient staff and equipment available in those offices to carry out those tasks.
  - Not all hard copy documents are capable of being transformed into digital format
  - Secure delivery services will need to be available to deliver hard copy documents which cannot be converted into digital format
  - The need for hearings to be conducted in public will limit what can be done from private locations (para 3).
- Rule 46 permits a hearing of any kind to be conducted in whole or in part by use of electronic communication provided the tribunal considers it just and equitable to do so. This rule should be in the forefront of parties' minds when considering how best to further the overriding objective (para 4).
- Rule 56 already permits preliminary hearings to take place via telephone. It is likely that in person case management hearings will be able to take place with relatively small changes in practice (para 5).
- There may be scope for the tribunal to issue written orders and directions to gather information about some of the issues as well as judges providing written information about the process to LiPs. It may assist for parties to formulate questions they may have for a judge and prepare responses to any orders issued in draft prior to a case management conference (para 6).

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<sup>13</sup> <https://www.judiciary.uk/wp-content/uploads/2015/03/Presidential-Guidance-ET-Covid19.pdf>.



- During the pandemic parties and EJs should start from the premise that case management PHs should take place by telephone or other electronic means unless this would be contrary to the overriding objective (para 7).
  - Parties are expected to co-operate to ensure an already listed in-person PH can be converted to one which takes place by electronic means (para 9).
- Tribunals and parties should give consideration as to whether there are any steps that could be taken to facilitate a substantive PH or final hearing taking place by electronic means as long as this is in-keeping with the overriding objective (para 10).
  - For example, narrowing the facts that need to be determined by oral evidence.
- Hearings for the purpose of delivering legal arguments/submissions – EJs and parties should start from the premise that it would be appropriate for written submissions to be used with each party having the opportunity to comment on the other side’s submissions.
  - If a party considers this would be contrary to the overriding objective they should make their position clear in writing as soon as it becomes evident that arrangements are going to have to be made for submissions to be delivered (para 11).
- For remedy EJs should start from the premise that they should normally gather the information they need to determine remedy by means of a telephone hearing and/or by sending written questions to a claimant (para 12).
- Judicial mediation may be able to take place by video or telephone conference call (para 13).
- Where parties consider that an in person hearing of any kind, which is already fixed, could be converted to a telephone hearing or hearing by other electronic means they should notify the tribunal office as soon as that becomes clear so that the request can be placed before a judge (para 14).
- Where a hearing in public is not possible due to the pandemic the hearing can be converted to a remote case management hearing so that progress can still be made on the case (e.g. to narrow the issues, promote understanding of the law that will be applied to the facts and exploration of ADR) (para 15).
- REJs and the VP should consider whether other hearings can be substituted into the lists where a hearing has been postponed (para 16).
- EJs should explore whether parties may consent to the conversion of three panel hearings to be heard by an EJ alone, where this is permitted under the relevant statute or an EJ and one member rather than 2 (s. 4 Employment Tribunals Act 1996).
- Where a party requests postponement, extensions of time or variation to an existing order, EJs will expect to see evidence which shows that the reason put forward is a valid Covid-19 one (para 18).
- Parties should ensure that all requests for case management orders or other correspondence is sent to the tribunal electronically to ensure it can be dealt with expeditiously (para 19).
- Attention is drawn to the following procedural rules during the pandemic: rule 41, 47, 60 and 64.



## EMPLOYMENT APPEAL TRIBUNAL

*Provisional Arrangements Announcement: 25 March 2020<sup>14</sup>*

- All hearings listed to take place up to and including 15 April 2020 are postponed.
- This applies to all types of hearings (para 1).
- The President or a judge of the EAT may issue directions via remote communication in respect of a particular case should it be deemed necessary for reasons of urgency (para 1).
- Time limits for instituting appeals remain as set out in the rules and PD (para 2). But they must be sent by email in all cases (para 2).
- Further announcement anticipated before 10 April 2020 including whether these restrictions will continue (para 4).
- When hearings resume, they will initially be conducted exclusively by telephone, Skype or some other form of video link. Parties should anticipate that the EAT staff may request remote contact details, or other assistance, to enable the relisting of hearings by these methods to be facilitated wherever possible (para 5).

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<sup>14</sup> <https://www.judiciary.uk/wp-content/uploads/2020/03/EAT-Covid-19-Announcement-25.3.20.pdf>.

## MEDIATION AND ROUNDTABLES

OTC members of chambers have already conducted roundtables and mediations on a virtual/remote basis

**Christopher Wilson-Smith QC**

**Gerard MacDermott QC**

**Eliot Woolf QC**

**Nathan Tavares QC**

**Ben Bradley**

- Zoom has been lauded as the best platform. It features break out rooms which allow for private conversations between the legal team and between lawyers and clients.
- Taking ownership of setting up the platform and the organisation of the mediation or RTM allows for greater general control over the conduct of the proceedings.
- Client communication and trusting relationships are more difficult to foster remotely. It is therefore recommended that solicitors and counsel have a preparatory conference with the client to discuss their aspirations and concerns about the forthcoming mediation or RTM.
- Similarly, a separate de-briefing session after the mediation or RTM is recommended to properly engage with the client.
- It goes without saying that trying the technology out the day before is recommended.
- Members of chambers have found that there may be a tendency to approach virtual mediations and RTMs more casually:
  - It is important to remember the seriousness and importance of the proceedings, particularly from the viewpoint of the lay client.
  - Appropriate decorum and etiquette should be retained. See further on acceptable court etiquette below, much of which will be laterally applicable in the context of mediations.

## ARBITRATION

OTC members of chambers have already conducted a commercial arbitration on a virtual/remote basis:

**John McKendrick QC**

**Alex Haines**

- The arbitration was conducted via Blue Jeans.
  - There will be greater flexibility on the choice of platform available for arbitrations.
- Much of the court guidance on remote hearings will be applicable in this context, although a specific discussion should be had with the arbitrator or panel of arbitrators to verify how the proceedings will operate.
- A preliminary case management hearing would be advisable to ensure the smooth operation of the substantive arbitration.

*LCIA*

- Since 19 March 2020 LCIA's staff is working remotely. LCIA is only corresponding with parties and arbitrators via email. Guidance has been provided on their website: <https://www.lcia.org/lcia-services-update-covid-19.aspx>.
- New or pending cases
  - Parties should file all Requests through the [online filing system](#) or by [email](#) (with payment of registration fees to LCIA's bank account or by credit card).
  - If the Request is filed as a PDF, parties are asked also to provide a word version of the Request (without attachments) to assist LCIA's team in registering the case.
  - If a party intends to make an application under LCIA Article 9 they must notify LCIA in advance to [casework@lcia.org](mailto:casework@lcia.org) so that any necessary arrangements can be made.
  - Parties and arbitrators should send all other questions, documents and correspondence to the LCIA by email only to [casework@lcia.org](mailto:casework@lcia.org) or to [accounts@lcia.org](mailto:accounts@lcia.org) (as appropriate), and should avoid contact by telephone.
- Awards
  - Arbitrators are requested to deliver their awards by email to [casework@lcia.org](mailto:casework@lcia.org), and should notify the same email address if for any reason this is not possible.
  - The LCIA will, in all but exceptional cases, transmit awards to parties electronically, with originals and certified copies to follow, once the LCIA office has re-opened.

*ICC*

- The ICC has issued an urgent communications to users, arbitrators and other neutrals: <https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/>
- All offices of the secretariat, ICC court and ICC ADR Centre are operational
- Hearings scheduled to take place at the ICC hearing centre in Paris have been suspended until 13 April.
  - Future bookings need to be arranged via this address: [infohearingcentre@iccwbo.org](mailto:infohearingcentre@iccwbo.org).
- Communication by email is strongly advised
- Requests for arbitration should be filed by email to [arb@iccwbo.org](mailto:arb@iccwbo.org)
- Applications for emergency arbitrations should also be filed by email at the Secretariat using the following address: [emergencyarbitrator@iccwbo.org](mailto:emergencyarbitrator@iccwbo.org).

## COURT ETIQUETTE

- The below is taken from MacDonald J's 'Remote Access Family Court' (Annex 1, para 30) (discussed above) but we consider that the points will be generally applicable.
- Professional decorum should be maintained at all times.
- Advocates should dress as if they were attending court but advocates are not required to robe for any remote hearings.
- Background visible on screen should be appropriate for a court hearing and adequately lit so faces can be seen.
- Participants must ensure they will not be interrupted or distracted during the course of a hearing.
- Participants should not move away from the screen without permission of the judge during the course of the remote hearing.
- Usual restrictions on eating and drinking in a court room apply.
- All reasonable steps must be taken to preserve the confidentiality of the proceedings.
- Use of earphones is permitted and encouraged if it will assist in preserving the confidentiality of proceedings.
- The judiciary and other advocates should be addressed as if they were in a physical courtroom.
- It is not necessary to stand when the judge joins the hearing or when addressing the judge.

## PRACTICAL ISSUES

- HMCTS has produced a 3-page guide on joining court hearings by video call or phone: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/876566/Guide\\_on\\_joining\\_court\\_hearings\\_by\\_video\\_call\\_or\\_phone\\_27\\_March\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876566/Guide_on_joining_court_hearings_by_video_call_or_phone_27_March_2020.pdf)
  - HMCTS guidance confirms that participants do not need Skype for Business to join Skype video conferences. However, they do need the free Skype meetings app.<sup>15</sup>
  - Each participant will receive instructions and a link to click to join the hearing as a guest. Once users click on the link they should follow the browser's instructions for installing the Skype Meetings App.
  - At the time of the hearing users go to the Skype Meetings App sign-in page, enter their name and select 'join'
  - HMCTS confirms that at the moment they only support Skype for Business for video conferencing.
- Audio hearings
  - Normally take place via BT MeetMe
  - All parties will receive a notice of hearing containing joining instructions. These will include a request to provide the court with a preferred contact number by which participants can join the hearing.
  - A member of HMCTS staff will facilitate the joining of all parties to the hearing and will ensure it is recorded and stored appropriately.
- Conversations between legal professionals and clients
  - Members of chambers have used Whatsapp, Telegram or other instant messenger services to communicate with the legal team. Having a separate platform helps to avoid committing faux-pas and messaging the wrong party or the judge.
  - The forthcoming CVP apparently does provide for private consultations
- Two screens are recommended – one for the hearing and one for notes.
  - Indeed a third might be recommended for the bundle.
- **Mute** your microphone when you are not speaking – this is a recurring issue and has a serious impact on the smooth running of proceedings if not observed
- During the hearing you cannot 'pass up' extra authorities, where required. Members of chambers have found judges more amenable to looking at materials directly on Westlaw.
  - For the avoidance of stress, this should be clarified at the outset of any hearing.
- Preparation of bundles does need to be done further in advance and more meticulously. It is not possible to just 'slot' pages into an electronic bundle.
  - There have been issues in the size of electronic files which have to be sent to judges and the court email servers. Liaising with the court clerks well in advance will assist in making the hearing and bundle organisation as straightforward as possible.
- Think in advance about how the proceedings are to be recorded, particularly if the hearing is to be conducted by telephone and online recording is not an option.

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<sup>15</sup> <https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>.

- Members of chambers have in this circumstance had a solicitor listening in to take a note, which is then sent to the judge for approval after the hearing.
- Careful regard should be paid to the interests of the lay client and the impact remote hearings have on those. Issues of social and economic inequality can prevent lay clients participating in remote hearings and must be considered and dealt with well in advance of any hearing. It may be that an adjournment is necessary in order to maintain proper access to justice.
- Do engage with the other side as early as possible to find out what their technological capacities are, particularly for their lay client. This may indicate practical limitations on what can realistically be achieved remotely.