

Litigation in Lockdown

Conducting litigation in lockdown is presenting a number of challenges for civil litigators. The shift, practically overnight, to remote working is requiring lawyers to rapidly adapt their ways of working. The word from the top is that the wheels of justice must continue to turn⁽¹⁾. The default position now is that hearings should take place remotely wherever possible⁽²⁾.

But the position on the ground suggests that there are inconsistencies between the civil courts as to whether hearings will be directed to proceed, remotely or otherwise. This inconsistency is adding to the challenges that litigators are facing, and to the stress of the situation for litigants themselves. There is also uncertainty on when extensions of time will be granted, and what reasons will be considered sufficient in these unprecedented times.

In the recent case of *Municipio De Mariana v. BHP Group Plc* [2020] EWHC 928 (TCC) ⁽³⁾, the High Court provided welcome guidance on the approach to be taken in relation to: (a) applications for an adjournment; and (b) applications for extensions of time due to the Covid-19 pandemic.

The Approach to be Taken

(a) Application to Adjourn

The starting point as always is the overriding objective with the requirement that cases are to be dealt with justly; in ways which are proportionate to the amounts involved, the importance of the case, and the complexity of the issues; and expeditiously and fairly.

In the current circumstances regard is also to be had to paragraph 4 of PD51ZA which provides that:

“In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions.”

(1) Covid-19: Message from the Lord Chief Justice to Judges in the Civil and Family Courts (19th March 2020)

(2) Covid-19: Protocol Regarding Remote Hearings (20th March 2020)

(3) *Municipio De Mariana v. (1) BHP Group plc (formerly BHP Billiton) (7) BHP Group Ltd* [2020] EWHC 928

In *Municipio De Mariana v. BHP Group Plc*, HHJ Eyre QC considered some of the previous cases dealing with the Covid-19 pandemic, and picked out the following important points:

- *National Bank of Kazakhstan v. Bank of New York Mellon* (19th March 2020, Unreported): In this case, Teare J declined to adjourn a trial fixed for the following week which could not, because of the measures required to address the pandemic, be held in the traditional face to face manner. Instead he permitted only a short adjournment of the start date so as to enable arrangements for remote conferencing to be put in place and required the parties to cooperate in this regard. Teare J considered that “*the courts exist to resolve disputes*” and that they should strive to continue to do so even when that involves doing so by way of remote hearings. In a first for the Commercial Court, the trial was live streamed and transcripts published (4).
- *Re Smith Technologies* (26th March 2020, Unreported): Insolvency and Companies Court Judge Jones noted the approach taken by Teare J and similarly rejected an application to adjourn a trial made by reference to the difficulties flowing from the consequences of the pandemic although he did leave open the possibility of adjournment for particular health reasons. Judge Jones was of the view that the difficulties arising from self-isolation and from parties and their lawyers being in different locations were to be addressed robustly and that the parties were to be expected to take proactive measures to overcome such difficulties (paragraph 7 – 13).
- *Re Blackfriars Ltd* [2020] EWHC 845 (Ch): Deputy High Court Judge John Kimbell QC addressed an application made on 1st April 2020 to adjourn a trial listed for five weeks beginning in June 2020. The Deputy Judge refused the adjournment and required the parties to cooperate in exploring the ways in which the trial could proceed by way of a remote hearing. After considering the effect of the Coronavirus Act 2020; the regulations made under it; the Lord Chief Justice’s guidance; the Remote Hearing Protocol; the decision of Teare J; and PD51Y, the Deputy Judge held at paragraph 32:

“There is ... a clear and consistent message which emerges from the material I have referred to. The message is that as many hearings as possible should continue and they should do so remotely as long as that can be done safely.”

(4) <https://www.stewartslaw.com/fl-2018-000007/>

Drawing together the authorities, protocols and guidance, HHJ Eyre QC concluded that the following principles govern the question of whether a particular hearing should be adjourned if the case cannot be heard face to face or whether instead there should be a remote hearing:

- i. Regard must be had to the importance of the continued administration of justice. Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.
- ii. There is to be a recognition of the extent to which disputes can in fact be resolved fairly by way of remote hearings.
- iii. The courts must be prepared to hold remote hearings in circumstances where such a move would have been inconceivable only a matter of weeks ago.
- iv. There is to be rigorous examination of the possibility of a remote hearing and of the ways in which such a hearing could be achieved consistent with justice before the court should accept that a just determination cannot be achieved in such a hearing.
- v. Inevitably the question of whether there can be a fair resolution is possible by way of a remote hearing will be case-specific. A multiplicity of factors will come into play and the issue of whether and if so to what extent live evidence and cross-examination will be necessary is likely to be important in many cases. There will be cases where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing.

(b) Application for Extension

As to the correct approach to be taken to applications for an extension of time in the context of the Covid -19 pandemic, HHJ Eyre QC held that such applications are to be determined by having regard to the overriding objective; paragraph 4 of PD51ZA; and the protocols and guidance referred to above. The following principles were said to be of particular importance:

- i. The objective if it is achievable must be to be keep to existing deadlines and where that is not realistically possible to permit the minimum extension of time which is realistically practicable. The prompt administration of justice and compliance with court orders remain of great importance even in circumstances of a pandemic.
- ii. The court can expect legal professionals to make appropriate use of modern technology. Just as

- the courts are accepting that hearings can properly be heard remotely in circumstances where this would have been dismissed out of hand only a few weeks ago so the court can expect legal professionals to use methods of remote working and of remote contact with witnesses and others.
- iii. While recognising the real difficulties caused by the pandemic and by the restrictions imposed to meet it the court can expect legal professionals to seek to rise to that challenge. Lawyers can be expected to go further than they might otherwise be expected to go and particularly is this so where there is a deadline to be met (and even more so when failing to meet it will jeopardise a trial date). Crucially, the Judge said: *“It is not enough for those involved simply to throw up their hands and to say that because there are difficulties deadlines cannot be kept.”*
 - iv. The approach which is required of lawyers can also be expected from those expert witnesses who are themselves professionals. However, rather different considerations are likely to apply where the persons who will need to take particular measures are private individuals falling outside those categories.
 - v. The court should be willing to accept evidence and other material which is rather less polished and focused than would otherwise be required if that is necessary to achieve the timely production of the material.
 - vi. However, the court must also take account of the realities of the position and while requiring lawyers and other professionals to press forward care must be taken to avoid requiring compliance with deadlines which are not achievable even with proper effort.
 - vii. It is in the light of that preceding factor that the court must be conscious that it is likely to take longer and require more work to achieve a particular result by remote working than would be possible by more traditional methods.
 - viii. The court must also have regard to the consequences of the restrictions on movement and the steps by way of working from home which have been taken to address the pandemic. In current circumstances the remote dealings are not between teams located in well-equipped offices with teams of IT support staff at hand. Instead they are being conducted from a number of different locations with varying amounts of space; varying qualities of internet connection; and with such IT support as is available provided remotely. It is to be acknowledged that those working from home may also have caring responsibilities for children or others.
 - ix. Those factors are to be considered against the general position that an extension of time which requires the loss of a trial date has much more significance and will be granted much less readily

than an extension of time which does not have that effect. Even in the current circumstances, before acceding to an application for an extension of time which would cause the loss of a trial date the court must be confident that there is no alternative compatible with dealing fairly with the case.

Resolution of Application

Applying the above principles, the High Court was satisfied that the Defendants had shown that even when all proper allowance was made for the use of technology and for the making of extra efforts the exercise of preparing their evidence in reply would take significantly longer than was provided for in the existing timetable. The points made by the Defendants as to the difficulties of remote working and the scale of the task to be undertaken were considered to be compelling in their particular case. The Judge concluded that it would not be practicable for the reply evidence to be prepared in time, and that this was not due to any failing or deficiency on the part of the Defendants. He therefore granted the extension of time sought.

The granting of the extension meant that the original hearing listed in June 2020 had to be vacated. The Defendants invited the court to re-list the hearing in the Autumn where there was a far greater prospect of it being held face to face. The Claimants pressed the court to re-list the hearing in July on the basis that it would be possible to deal with it remotely. The Judge agreed with the Claimants and re-fixed the hearing to commence in July 2020. He was particularly persuaded by the fact that there would be no live evidence given that it was a jurisdictional challenge and therefore the hearing was capable of being fairly determined remotely. A longer time estimate was given to allow for any difficulties that may arise.

Justice Delayed is Justice Denied

The decision in *Municipio De Mariana v. BHP Group Plc* provides a helpful framework for parties to assess whether an application for an extension or an adjournment is likely to be granted. The decision also makes clear that it is not enough for parties to simply use Covid-19 as a reason for not being able to comply with deadlines. Good reasons must be provided to persuade the court that it is not possible for a particular direction to be complied with even when all proper allowance is made for the use of technology and for the making of extra efforts. Going forward, litigators will be expected to use imaginative and innovative methods of working; and to acquire the new skills needed for the effective

“Justice Delayed is Justice Denied”

The Covid-19 Effect Continued...

use of remote technology.

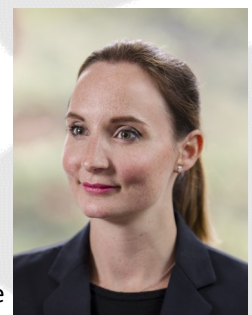
Consistent with the Statement issued by the Lord Chief Justice on 19th March 2020, a heavy emphasis was placed upon the continued administration of justice, and the need to ensure that hearings proceed wherever possible. As HHJ Eyre QC stated: *“Justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances”*.

It remains to be seen whether the robust approach to the continuation of hearings advocated by HHJ Eyre QC will filter down into the County Court lists. The experience thus far is that the High Court has been more willing to grasp the nettle and deal with cases remotely. In contrast, many cases in the County Court have simply been vacated of the court’s own motion and it is proving difficult to list trials due to the limitations of the current technology and a high absenteeism rate amongst HMCTS staff. According to a statement issued by the Leader of the Midland Circuit on 27th April 2020, the position is being reviewed on a regular basis and it is hoped that the advent of Cloud Video Platform, and the return of members of HMCTS staff, may alleviate that position and allow for the resumption of trials in the near future.

MICHELLE CANEY

ST IVES CHAMBERS

27th April 2020



Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for specific legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.