

Litigation during COVID-19

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09 April 2020

Please note: the information contained in our legal updates are correct as of the original date of publication

In these unprecedented times we have seen a significant shift in the conduct of civil litigation over a very short space of time. In keeping with the developing response of the government to the COVID-19 pandemic, it has been necessary for the judiciary and practitioners to adapt swiftly to the rapidly changing situation. We consider some of the more significant developments to date.

ABI Protocol

A number of insurers and claimant firms have signed up to a protocol which is intended to represent an extension to the existing personal injury protocol. Taking effect from 24 March 2020 for a minimum of 4 weeks the protocol incorporates an agreement to freeze limitation dates, allowing claimants to navigate the current difficulties without the risk of their claim becoming statute barred. What the protocol does not do is waive any limitation defence that was available at the point the protocol came into existence and practitioners must remain mindful of that.

Court Hearings

To reflect the restrictions we all currently find ourselves under, court hearings are to be conducted remotely wherever possible through video or audio conferencing. We have already seen high-profile hearings taking place with remote court attendance and whilst a number of imminent trials have been vacated to allow the new technology to bed in, we can expect a significant majority of hearings to be conducted remotely for the foreseeable future.

There are several platforms that provide the functionality for remote hearings, to include Zoom and Skype for Business, with the preference of the courts varying. Parties will want to be proactive, liaising with opponents, the court, witnesses, experts, and where appropriate the press, to ensure there has been adequate preparation in advance of the hearing. There will be challenges, not least in cases involving litigants in person, but with a clear commitment by courts that momentum is not lost in cases it will be necessary for parties to embrace the technology – it seems increasingly likely there will remain a greater emphasis on remote hearings once the crisis has passed and with mediations, JSMs and conferences following a similar path it could well be here to stay.

Bundles

Parties should, where necessary, prepare an indexed and paginated electronic bundle of documents and authorities in advance of any remote hearing. Bundles ought to be restricted to those documents absolutely necessary to resolve the issues in dispute, allowing the parties and the court to remain focused.

Case Management

It is acknowledged that there is need for greater flexibility in case management to reflect challenges in contacting witnesses, accessing documents and maintaining expert appointments. We have therefore seen the implementation of a new Practice Direction (PD 51ZA), which came into force on 2 April 2020 and increases the period the parties are able to agree extensions of time without requiring

permission of the court from 28 days to 56 days. It also specifically recognises that additional extensions might be necessary and requires the court to take into account the impact of the pandemic when considering any application.

Whilst this is certainly a welcome addition to the CPR, there remains a very clear expectation that parties will continue to progress the litigation. It cannot be assumed that applications to extend time beyond the 56-day period will be waved through without good explanation of why the timetable cannot be complied with – every attempt to comply should be made and persuasive evidence that the pandemic made compliance impossible will be expected.

Comment

The current situation brings into sharp focus the need for parties in litigation and their legal representatives to take a pragmatic and collaborative approach to work through challenges. In a time when remote communication is necessary, greater engagement is key to ensure that cases continue to move forward to a resolution.

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