

COVID-19 NEWS OF INTEREST

English Civil Courts in the Time of COVID-19: A Practical Guide

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The English Civil Courts are adjusting to operating under the extraordinary circumstances created by the COVID-19 pandemic. In the words of the Lord Chief Justice; “*It is not realistic to suppose that it will be business as usual in any jurisdiction, but it is of vital importance that the administration of justice does not grind to a halt.*”¹ We set out below answers to key practical questions concerning the operation of the courts during this uncertain time based on the most recently published guidelines.

Are the courts still open?

- Yes. HM Courts and Tribunals Service (“**HCMTS**”) has confirmed that “[a] *network of priority courts will remain open during the coronavirus pandemic to make sure the justice system continues to operate effectively. The work of courts and tribunals will be consolidated into fewer buildings.*”²
- Claim Forms can still be issued and court filings continue to be processed via electronic filings received through “CE-file.”³

¹ Statement of the Lord Chief Justice, The Lord Burnett of Maldon, 17 March 2020 - <https://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/> [Last Accessed 1 April 2020].

² <https://www.gov.uk/guidance/coronavirus-covid-19-courts-and-tribunals-planning-and-preparation> [Last accessed 1 April 2020].

³ For guidance on how to use the CE file, see <https://www.gov.uk/guidance/ce-file-system-information-and-support-advice#history> [Last accessed 1 April 2020].

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- The Rolls Building and Royal Courts of Justice remain open but only for essential face-to-face hearings.⁴
- Only hearings which cannot be heard by video or telephone and which cannot be delayed will be held in a priority court and tribunal building, except in exceptional circumstances.
- HCMTS has set up a new web page which provides a daily operational summary on courts and tribunals during the pandemic.⁵

Will more matters be dealt with without the need for a hearing?

- The Lord Chief Justice has indicated that “[m]any more procedural matters may be resolved on paper within the rules.”⁶ This means that for certain applications, particularly if they are uncontroversial and uncontested, the court may make its determination based on written submissions rather than oral submissions at a hearing.

For hearings that will take place, which hearings are to be held remotely?

- Whether a hearing **must** be held in person is to be decided by a judge.
- Judges will consider issues such as the nature of the matters at stake; issues that the use of video/audio may present for participants; and issues around public access to the hearing.
- The Civil Justice in England and Wales Protocol on Remote Hearings states “[i]t will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.”⁷

⁴ A list of the court buildings that are open can be found in the Courts and Tribunals tracker: 31 March 2020: <https://www.gov.uk/government/news/priority-courts-to-make-sure-justice-is-served> [Last accessed 1 April 2020].

⁵ <https://www.gov.uk/guidance/hmcts-daily-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak> [Last Accessed 1 April 2020].

⁶ Coronavirus (COVID-19): Message from the Lord Chief Justice to judges in the Civil and Family Courts dated 19 March 2020 - <https://www.judiciary.uk/announcements/coronavirus-covid-19-message-from-the-lord-chief-justice-to-judges-in-the-civil-and-family-courts/> [Last accessed 1 April 2020].

⁷ Civil Justice in England and Wales Protocol on Remote Hearings dated 20 March 2020, para 12.

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How will remote hearings take place?

- A new [Practice Direction 51Y](#) has been introduced which provides for private hearings to be conducted remotely during the pandemic. The court can order that a remote hearing take place via video conferencing or teleconferencing.
- The Practice Direction will cease to have effect on the date on which the Coronavirus Act 2020 also ceases to have effect in accordance with section 75 of that Act.⁸
- For hearings taking place via teleconferencing, the participants will be sent conference call phone numbers and will only require a phone.
- For hearings taking place via video conferencing, participants will need the Skype meetings app and each participant will receive instructions and a link to click to join the hearing as a guest.
- Where the 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 must take place in private where it is necessary to do so to secure the proper administration of justice.
- Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings.
- Any hearing held in private must be recorded, where that is practicable, in a manner directed by the court.
- The public will have access to such recordings, with the court's permission.⁹

Will the courts adjourn trials?

- It is difficult to tell at this stage how the court will deal with complex commercial litigation cases coming up to trial. It is expected that parties may seek to delay hearings due to restraints caused by the COVID-19 pandemic. In the Chancery case, *Conversant Wireless Licensing SARL v. Huawei Technologies Co Ltd*, the Court determined that this IP licensing case could not be determined on the papers or by a “virtual” trial. The judge directed that the trial be adjourned and allowed the parties to seek a new trial date.

⁸ PD51Y(1).

⁹ PD51Y(4).

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- By contrast, the Commercial Court recently decided that the trial of *National Bank of Kazakhstan & Others v. The Bank of New York Mellon & Ors* should continue remotely. This is a complex piece of civil litigation involving parties and expert witnesses in different jurisdictions. The trial was streamed live on YouTube.
- This suggests that the courts will not automatically adjourn complex commercial cases because of the pandemic if technology can facilitate such cases progressing by alternative means.

What is “urgent business” and what is “priority”?

- The High Court Business Contingency Plan (the “**Contingency Plan**”)¹⁰ divides the High Court’s caseload into “*urgent*” business and “*business as usual*”. The High Court is currently covering work according to the Contingency Plan, whereas the Court of Appeal is only covering “*urgent work*”.¹¹
- Urgent business is business that would warrant an out of hours application and is to be determined by the duty judge. The Contingency Plan states that “*it is not appropriate to define urgent business any more closely. If the relevant duty judge [...] does not consider the application to be urgent business, it will not be dealt with.*”¹²
- The Contingency Plan states that business that is not urgent business (“*business as usual*”) will also continue to be dealt with during this period, as far as possible.
- HMCTS has published civil court listing priorities in which it categorises matters into Priority 1: work that must be done (e.g. freezing orders and injunctions); and Priority 2: work that could be done (e.g. applications for summary judgment and security for costs).¹³
- Pursuant to the Contingency Plan, the process to be followed in respect of out of hours applications remains broadly unchanged. The duty listing officer will decide what arrangements will be made to deal with any application, such as providing for a remote hearing or directing that it be dealt with on the papers.

¹⁰ High Court Business Contingency Plan for maintaining Urgent Court Hearings dated 26 March 2020.

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877240/HMCTS_RCJ_Update_Template_1_April_2020.pdf [Last accessed 1 April 2020].

¹² High Court Business Contingency Plan for maintaining Urgent Court Hearings dated 26 March 2020, para 6.

¹³ Civil work in the Court of Appeal is dealt with in separate guidance and civil work carried out within the Queen’s Bench Division and Business and Property Courts is covered by the High Court Business Contingency Plan.

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Will the civil procedure rules change?

- The Civil Procedure Rule Committee has confirmed that it is urgently considering other possible rule changes as the civil justice system seeks to adapt to the changing environment of the pandemic.

Given the ever changing response by HMCTS to the challenges posed by the pandemic, it is important to keep abreast of the most recent developments. [HMCTS](#) is a useful resource but we encourage you to reach out to us to ensure you are complying with the most up-to-date rules and procedures.

Willkie has multidisciplinary teams working with clients to address coronavirus-related matters, including, for example, contractual analysis, litigation, restructuring, financing, employee benefits, SEC and other corporate-related matters. Please click [here](#) to access our publications addressing issues raised by the coronavirus. For advice regarding the coronavirus, please do not hesitate to reach out to your primary Willkie contacts.

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