

“The Courts and Covid: challenges and opportunities”

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It is a great pleasure to join you today at your conference. Thank you for inviting me.

Those of us involved in litigation and dispute resolution have lived through a most unusual seven months. I propose to speak about the challenges of the pandemic and the opportunities for improving our legal systems which our response to it has created.

When I think back to life in January this year, it seems like another world. I had very limited experience of using IT as a means of conducting court cases beyond taking evidence by video link and hearing appeals from overseas in the Judicial Committee of the Privy Council (JCPC). All that has changed. Since March 23 I have become used to virtual events – virtual meetings, virtual hearings, and virtual social events. I am also becoming used to virtual conferences.

When I think back to February, I recall the uncertainty about the way in which things were developing. People bumped elbows, smiling jovially, but we were hardly aware of the momentous changes which were about to occur. In early March the Supreme Court continued to sit. In the second week in March, the

work of the court continued but my diary reveals that outside lectures and other social events were being cancelled. One heard about City offices moving to an arrangement by which 50% of their staff would work from home at any one time; but the court's work continued as before and Justices sat in the courtroom in person on 17 and 18 March.

Fortunately, behind the scenes our IT department was hard at work preparing for what then occurred. On 23 March, the UK Government announced the first lock down. I returned to the Court on the following day to preside over the first virtual appeal, which was an appeal in a Revenue matter. It was strange sitting by myself in a meeting room and seeing my colleagues and counsel on screen. It was also strange to be in the court building with a skeletal staff who had kindly come in to support me and test out our technology on this new venture. There were a few glitches, but the hearing was a success.

It was an online hearing, with all participants, justices and counsel in separate locations communicating via the Cisco Webex videoconferencing platform. We had to learn by doing the job. For example, in the very first hearing I found that it was necessary to require all participants other than the counsel who was addressing the court and the presiding judge to switch their computer microphones to mute as otherwise the camera would switch from a speaker to someone who was rustling his or her papers. A Justice wishing to ask a question had to attract the attention of counsel, the presiding Justice or the IT official organising the hearing, by raising a hand to have his or her microphone unmuted. This hampered any spontaneity. But it worked. Between 24 March and the end of the legal year we heard 34 appeals via Webex and have improved our virtual courtroom skills. Last month we heard 11 appeals. From the start of

the legal year in October 2019 until the end of August we have held 114 Supreme Court or JCPC hearings and issued 108 judgments.

We have learned to do things differently. In the pre-Covid world, the Justices on a panel would meet 15 minutes before the start of an appeal hearing to discuss how the appeal was to be conducted. We also met in a conference room shortly after the appeal to discuss the hearing and express preliminary views as to the outcome. Now our court day comprises four meetings on Webex. The first is the pre-conference meeting which is confined to the Justices while our IT staff are briefing counsel in a separate meeting. We then join that meeting for the morning session. We have a third meeting for the afternoon session and, after the court has adjourned, we have another private meeting for the post-hearing discussion.

We have had to adapt our working methods to cope with the new norm. For example, it has been essential to have two computer screens available. One is used to see the other participants in the hearing while the other enables us to access the appeal documents in what is in large measure a paperless hearing. When working from home, we have learned the value of connecting to the router by ethernet to avoid disruption to the signal caused by competition within the family for use of WiFi. We have also been aware of the need to establish suitable lighting so that we are clearly visible to counsel who wish to observe our reactions to their submissions and we have had to think about sitting in front of an appropriate and sober background in order not to create a distraction.

Both the Supreme Court and the JCPC have maintained open justice by live-streaming all remote hearings on their respective websites. This has enabled members of the public to observe the hearings as they take place. It is possible to view recordings of the hearings on the websites and our IT and broadcasting teams post the recordings on those websites within a day of the completion of the hearings.

The use of the video-conferencing software has proved successful: no case has been adjourned because the court was unable to provide a hearing. Early in the lockdown we had to adjourn seven cases at the parties' request, either because their counsel was ill or because they were not able to use the videoconferencing facilities which the court offered them. We have relisted six of those appeals and in one JCPC case the parties accepted the court's offer to decide the appeal on the parties' written submissions.

We have received generally positive feedback from counsel and other users of the remote hearings. But counsel have observed – and so have we – that virtual hearings are more tiring, and there can be difficulties in senior counsel involving junior counsel or obtaining instructions during the hearing. We have tackled these problems by a five-minute adjournment mid-morning and by informing counsel that they can seek a short adjournment to take instructions or submit short written submissions after the hearing.

We have been very fortunate in three important respects. First, as an appellate court, we do not have witness evidence or require the attendance of jurors, nor have we encountered self-represented litigants. This limits the numbers involved in an appeal. Secondly, we were able to adapt our systems quickly as

we had already offered hearings by video link in some appeals to the JCPC and it has long been our established practice to record and stream hearings live from the court building. Thirdly, we have a skilled and dedicated IT team and support staff who have the necessary experience.

During the summer and in this legal year, we have continued to hand down judgments by means of pre-recorded summaries which are published online when the judgments are released. We continue to publish written press summaries of all judgments to enhance public understanding; and we have developed a range of online learning resources and virtual tours as part of our commitment to public education and outreach.

The Court building reopened to the public on 24 August with additional measures in place to maintain social distancing. Our staff worked hard over the summer to prepare the court for a resumption of in-person hearings and to devise systems and protocols to facilitate social distancing. I wish to acknowledge their hard work. Although the resumption of in-person hearings has been delayed by the arrival of the second wave, we will be ready when the clouds part and the sun again shines.

Professor Richard Susskind writing in July 2020 in an article for Harvard Law School¹ stated:

“... the UK Supreme Court has responded more emphatically and successfully than any of its equivalents internationally. Thanks to technology, perseverance, and judicial adaptability, access to the highest court in the United Kingdom has been maintained during the crisis.”

¹ “The Future of Courts” <https://thepractice.law.harvard.edu/article/the-future-of-courts/>

Lest I appear to be blowing the court's trumpet in citing that favourable review, I readily acknowledge that the Supreme Court had the three distinct advantages which I have mentioned. Many other courts and tribunals have had to adapt from a standing start and often, initially at least, without access to the needed technology. Their success in doing so has been a significant achievement.

The Coronavirus Act 2020 has amended existing legislation to expand the powers of the courts to use video and audio links across a wide range of hearings and to give the public access to view such hearings.² When the pandemic was at its peak in late April, many courts could not sit and 90% of the hearings which did take place involved the use of either audio or video technology.

In England and Wales, the Court of Appeal (Civil Division) has been conducting remote hearings, as has the Criminal Division. The Court of Appeal has been live-streaming hearings and the HM Courts and Tribunals Service has been facilitating the media to join video and telephone hearings when appropriate, thereby maintaining the public nature of the court. The High Court has been conducting remote hearings, including trials involving witnesses who appear by video link to give evidence to a judge who is sitting in the courtroom, and other courts and tribunals dealing with civil matters have instituted similar procedures. The Lord Chief Justice in his evidence (given remotely) to the Select Committee on the Constitution in July 2020 described the courts' operations during the pandemic as "the biggest pilot project that the justice system has ever seen".³

² The relevant provisions apply to England and Wales and (in part) to Northern Ireland.

³ Transcript available at: <https://committees.parliament.uk/oralevidence/379/pdf/>

A problem, which is difficult to surmount, is that our courtrooms have not been built to allow people to do their jobs while retaining social distancing. Many commercial cases can be conducted remotely without detriment. But it has been found to be necessary in family cases to establish hybrid courts with the judge and the parties present in the courtroom court, in what are often emotionally charged proceedings, while the legal representatives address the court remotely in order to reduce the number of people in the courtroom.

Many tribunals have adopted similar initiatives to those of the High Court and some have conducted some or all of their work remotely.⁴

A major difficulty in each of the jurisdictions of the United Kingdom has been the resumption of criminal trials involving juries. Many people had to be in a court building for a jury trial to operate and that risked exposing the public to danger. The holding of trials in the Crown Court was suspended in late March but some jury trials were resumed in mid-May with special measures to ensure social distancing. Adapting existing courtrooms is a major challenge. Where it can be achieved, court buildings have been used imaginatively. Juries have been spread out in a courtroom in which the trial is heard. A separate courtroom is made available for the jurors' deliberations as jury rooms are too small for social distancing. Another courtroom is provided for the media and others to watch the proceedings by CCTV.

Alternative venues, known as Nightingale Courts, have been developed in England and Wales. These "pop-up courts" are different venues which have the

⁴ For example, the Special Educational Needs and Disability Tribunal is conducting all its cases remotely.

capacity to accommodate court hearings safely. HMCTS have identified an eclectic range of venues for these temporary courts including a town hall, a civic centre, a theatre, a hotel and cathedral premises. 13 such venues were operational by late summer and more are planned for the autumn.

In Scotland, similar provision to remove the requirement of physical attendance at court hearings has been enacted in the Coronavirus (Scotland) Act 2020. High Court jury trials in criminal cases resumed in Scotland in July with the jury sitting in a separate courtroom viewing the trial remotely; and remote jury centres have been trialled in cinemas in which the jury view the trial on the cinema screen.

In Northern Ireland, during the lockdown, court activity was consolidated into 5 key hubs to tackle urgent business while the court system adjusted to the crisis. Crown Court jury trials, which were suspended in March, resumed in August with physical measures similar to those in England and Wales being implemented to achieve social distancing. Similarly, remote hearings have been instituted in courts and tribunals.

Much has been achieved in each of our jurisdictions but there is a major backlog of criminal cases because of the problems of conducting jury trials. It will take a long time to remove this backlog.

As is well known, the disruption to parts of the court and tribunal system has caused financial difficulty for many lawyers. Legal practitioners in the civil sphere have been adversely affected by the postponement of hearings and the

unprecedented downturn in economic activity. But state-funded criminal practitioners appear to be particularly at risk.

I am aware also that life has not been easy for expert witnesses. Experts who assist by giving evidence in criminal trials have seen trials postponed and their workload reduced. For those who have been able to continue work, giving evidence at remote trials or hybrid trials may be a new experience. Making medical or psychological assessments by video or telephone has often replaced face to face assessments. Some medical assessments require physical examination of an individual, which has been made more difficult; and site visits in construction cases were not possible in the first lockdown. Clients and legal firms have had cashflow problems and I understand that some experts have had to wait longer than usual to get payment for their services. I am interested to hear of your experiences in the Q and A session which follows.

I am also concerned about young lawyers. The pandemic has reduced the opportunities for young lawyers to develop their careers by watching court cases and having easy access to more senior members of the profession from whom they can learn. Training opportunities have been seriously disrupted. It is important that the profession bears in mind these difficulties when better times return and that it acts to ensure that there is not lasting detriment.

But not all the consequences are bad. The justice system has adapted and is adapting to the pandemic. The new working practices which it has forced on us, including the online filing by the parties of applications for permission to appeal, case bundles and other papers, and the Justices having to hear and work on appeals without papers, is leading to a permanent change in the way in which

we conduct our business when we return to our courtroom. This will save money and have positive environmental benefits.

More widely, I expect that remote hearings will become an established part of the court process, particularly for incidental and case management business. At a local level, where court closures have removed the local court and have forced people to travel some distance to attend court there is surely scope for remote hearings to avoid inconvenience and expense.

It is fortunate for the legal system that the crisis occurred at a time when the UK Government had committed £ 1 billion to the modernisation of the court system and this included “digitalisation” and the increased provision of online services. The pandemic has accelerated changes which were coming over time. Increased funding to cope with the pandemic has enabled the court and tribunal system to adopt modern technology on a widespread basis much more rapidly than had initially been programmed.

But the new technology should not be used only to let us do what we do now safely. We should also take the opportunity to use the new technology and the increasing digital experience of judges and court officials as a basis for wider reforms to improve access to justice.

In this country, as in every country, there is a problem of access to justice. Legal work, if done properly, can be time consuming. Legal services are expensive for the litigant. The decline of public funding of civil claims in the past thirty years is well documented. There is a need to devise means by which people can resolve their civil disputes in ways that are fair, proportionate, cost-effective and

readily understandable to the litigating public. There will be many cases which involve complexity and novelty which will require skilled legal services and may be fought up the hierarchy of our courts. But much of a judge's work in many courts is what Lord Devlin described as "the disinterested application of known law".⁵

Can we find a proportionate way to resolve such disputes and especially low value disputes? Professor Susskind has been campaigning for many years for the creation of online courts and his latest book on the subject, "Online Courts and the Future of Justice" (November 2019) merits careful consideration. He foresees a world in which dispute resolution by online judging will largely do away with oral court hearings in court buildings in many cases. He suggests that the state should not merely provide authoritative and binding adjudication but also assist in resolving disputes without such adjudication. The justice system, he argues, should provide IT which will help unrepresented court users to understand their entitlements and obligations and provide tools to enable them to focus their evidence and formulate their arguments. It should encourage parties to settle their disputes by mediation or other forms of alternative dispute resolution, which could be provided by case officers working for the court service.

Some steps have been taken in that direction. In a significant joint statement in September 2016, entitled "Transforming our Justice system", the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals committed themselves to exploiting the opportunities which IT has created to modernise the court and tribunal systems. Initiatives have been undertaken to

⁵ Patrick Devlin, "The Judge" (1979) p 4.

create digital case management generally in court proceedings and to test online proceedings in certain fields.⁶

Since 2017 and running until 2021 there has been a pilot project in the County Court of “Online Money Claims”, a procedure which enables people to pursue and defend money claims of less than £10,000 online. It seeks to assist people by using non-technical language. It may be able to avoid the expense of oral hearings in many cases.

For an initiative which seeks to give legal guidance to unrepresented parties we must look to the Civil Courts Structure Review, which took place in 2015 and 2016, and was chaired by my colleague, Lord Briggs. The Review drew on the work of the charity, Justice, and of Sir Stanley Burnton in proposing a new “Online Solutions Court” for cases of a value under £25,000.

The Online Solutions Court which the review proposed is a virtual court alongside the County Court and the High Court. If it comes into being, it will involve three stages:

The first is an automated online investigative stage. This comprises software involving sets of sequential screens, which are free of legal jargon, which are designed to tease out the relevant components of a party’s claim or defence. The aim is to help the party making a claim to identify the nature of his or her grievance and draw out the elements that will create the legal case. It will also

⁶ The fields are family law (including divorce and probate), in social security and child support appeals. This year family public law and certain immigration and asylum proceedings were added.

provide a facility for the parties to upload their main evidence in the form of documents and statements.

Stage 2 involves a legally qualified Case Officer who will select the most appropriate means of resolving the dispute. This may be telephone or online mediation, or third-party resolution, including early neutral evaluation by a district judge in a hearing centre.

Turning to stage 3, if resolution is not achieved at stage 2, the dispute will be determined by a judge. There will be various options for this determination. It may be online, by telephone or video, or face to face. Selection of the appropriate means of determination will be subject to a test of proportionality: party must justify more expensive types.

There is a fundamental difference between this proposal and the uses of IT which the pandemic has promoted. The latter involves us doing our normal job in the same way as before but remotely and without papers. But virtual courts do not begin to tackle the problem of access to justice for those who cannot afford legal representation or whose claims are small or uncomplicated so that the engagement of a legal team would involve disproportionate expense.

One great attraction of the Online Solutions Court is the assistance which the software can give to the unrepresented claimant. If the software at stage 1 is good enough, it will save the parties much of the cost of litigation as they,

rather than lawyers will do the donkey work of building up their case, prompted by the questions which the software will pose. Accessing that support at the vital stage 1 of the process will require assistance to those who find working on the computer intimidating or who do not have ready access to a computer. The development of that support is part of the proposed package.

Unfortunately, an attempt in 2019 to legislate to facilitate the establishment of such a court failed. The Courts and Tribunals (Online Procedure) Bill, which has its inevitable acronym “CTOP”, was debated in the House of Lords in the early summer but did not complete its passage in the House of Commons in July before the parliamentary session ended and the Bill fell. The Bill proposed that there be online procedures in civil and family courts in England and Wales and in the First-tier Tribunal and Upper Tribunal, and throughout Great Britain in the Employment Tribunal and the EAT. It aimed to establish an Online Procedure Rule Committee to formulate the necessary rules.

In his evidence to the Select Committee on the Constitution on the impact of Covid on the courts, the Lord Chancellor gave an account of the changes which the pandemic had prompted and described the prospect of a return to the status quo as “a massively missed opportunity”. I don’t know if he had in mind the need to promote the Online Solutions Court and similar initiatives as a means of promoting access to justice. But if (as I would like to think) he did, I agree.

Thank you.