

Getting the Court to Hear Your Case During the Pandemic

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Introduction

1. The county court has responded rapidly to the sudden and unprecedented change to its working practices. However, the move to remote hearings has brought a marked decline in the retention of existing listings. Many litigants have found their hearings adjourned by the court even when those hearings were, on the face of it, suitable for hearing remotely.
2. This has, of course, had a negative effect on the efficient progress of civil cases through the courts. The adjournment and delay of civil cases results not only in a delay in outcome for litigants, bringing additional anxiety and frustration, but solicitors and barristers alike need cases to be heard in order to maintain their cash flow and, ultimately, their businesses.
3. This article sets out practical considerations which may assist litigants in retaining current court listings during the pandemic, and in ensuring a retained listing results in an effective hearing.
4. This article addresses listings in civil cases. The experience of the writer does not extend to listing considerations in private or public children cases.
5. This article does not deal with the procedural law governing remote hearings, nor does it say much about technical considerations relating to remote hearing platforms like BT Meet Me, Skype for Business or the Cloud Video Platform work. Such guidance is available elsewhere, for example <https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance/>.

Triage

6. County courts are triaging court lists. This means a judge sitting with the court files for a particular court list in one or two weeks' time and deciding what cases will go ahead and by what means (i.e. telephone, video hearing etc).
7. At present it seems triaging is occurring no more than one to two weeks in advance of the hearing. This is likely to be for two reasons: (1) the rapidity of the shift to remote hearings and the difficulties this has presented has not made it possible to look further ahead, and (2) the pressure of the lockdown on litigants has meant many cases become ineffective (or the court receives notice it is ineffective) shortly before the hearing date. The volatility and uncertainty has meant looking further ahead is not practicable.

Triage Considerations

8. The considerations in a judge's mind when deciding whether a hearing can or should go ahead remotely are likely to include:
 - a. Does the case fall within the civil court listing priorities such that it must be heard?¹
 - b. If not, is the case urgent?
 - c. Is there a consent order or other correspondence relevant to the triage decision on the front of the court file?
 - d. How many parties are there?
 - e. Are they represented?
 - f. Is the evidence necessary to hear the case available on the court file?
 - g. If not, will that evidence become available before the hearing? How?
 - h. How long will it take to hear the case?
 - i. Will the court need to hear live evidence?
 - j. Is the case something which the judge can deal with on paper?
 - k. What other cases are listed that day? Do those cases take priority?
 - l. Can the case be accommodated in the list, given the other cases which will be heard remotely that day.
 - m. Is it in the interests of justice, given the nature of the case and its issues, to hear the case remotely now, as opposed to adjourning to a later date?

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890345/Ops_Update_Civil_Listing_priorities_w-c_8_June_2020.pdf

Why was my case adjourned when it was suitable for remote hearing?

9. There will be cases which are urgent and/or fall within the priority listing guidance. Every effort is likely to be made by the court to hear those cases. However, once those cases have been accommodated in the list, the next issue is: how much time is there available to hear the remaining cases?
10. While a court may be able to fill the court day with a trial by video conference, it is harder when multiple short hearings are listed. Initially county courts were listing no more than about 2 ½ hours of short hearings per day, due to the time it takes to set them up and/or deal with technological hitches, and the logistical problems caused for subsequent cases if hearings overrun. Experience suggests there needs to be at least 10-20 minutes between hearings to allow for connection issues. In addition, judges still need time to read the papers before each hearing.
11. County courts are now listing around 3 ½ hours' worth of telephone hearings per court sitting day, with longer hearings and trials by video link. It is very likely the triage process is resulting in cases being marked by the triage judge as "*suitable for remote hearing but adjourn to first available date, due to lack of court time*". It may just be bad luck that yours is one of those adjourned.

Practical Issues for the Judge Conducting a Remote Hearing

12. While courts are having success with Skype for Business, and Cloud Video Platform, video platforms are not necessary for all hearings. The lower tech but arguably simpler telephone hearing is often quicker and easier to set up. The potential for technical things to go wrong is reduced. For that reason, litigants should consider whether it is really necessary to press for a video hearing, when a telephone hearing will do. The court may well prefer to list a telephone hearing if the issue is narrow and can be resolved with documents and submissions only in less than an hour. Conversely it is probably likely a court will want to hear a case by video conferencing where it requires oral evidence and cross examination.
13. Where a telephone hearing is appropriate, BT Meet Me allows the judge to dial out direct from his/her phone and add each party. For a judge, BT Meet Me has the advantage over telephone conferencing organised by a third party as the judge retains control of when the hearing starts, ends and recommences if there needs to be a break in the hearing. This gives much needed flexibility in managing the list.

14. However, there is the potential for an ineffective BT Meet Me hearing if one or other party has not supplied their telephone numbers details, or if those details have not found their way to the court file. Furthermore, when the judge uses the BT Meet Me system to dial out, the call is silent during the dial out process and the only way the judge knows the call has worked is when the person he or she has dialled, joins the call. If the number the judge has dialled is engaged, or misdialled, or the wrong number, the judge will not know why the connection has failed. In a busy or overrunning list this might contribute to a case being adjourned. It is therefore vital litigants provide direct dial numbers and pick up the phone when it rings.

15. Of course, due to the potential for overrunning lists, parties may have to keep faith and simply wait for the call: there is no easy way for judges to notify parties waiting for their hearing, if the previous case overruns. There is no usher able to shuttle between the court and the parties. Even the court office is unlikely to know the previous hearing is overrunning and will not notify waiting parties. If you call the court office, they will be able to confirm whether the case remains listed and will likely simply tell you to wait.

16. While many judges are working from the court building. Many others are picking up the files from the court but conducting the hearings from home. Even when the necessary papers are on the court file, ebundles are useful for all hearings to enable flexibility for the court and help keep cases in the list. If a case is listed before a judge working in the court building, but their previous case overruns, can a different judge working at home hear it? Not if the necessary documents are in the paper file in the court building. But if those documents can be quickly emailed then it greatly increases the chances of the case getting heard. The courts are unlikely to have the administrative capacity to scan multiple documents and email them to judges working remotely. Parties must do this work in advance of the hearing and be prepared to help the court.

How to get a case listed or keep it listed?

17. In light of the above issues, what steps can litigants take to help the court and to get their cases heard? The following may assist:
 - a. Contact the other side. Discuss the logistics. Do you agree the case is suitable for remote hearing? Telephone or video hearing? What's the time estimate? Is it realistic? Can you narrow the issues?

- b. What contact details will you provide to the court? Is there an emergency number you can give the court if the technology fails? What about an email the judge can use which will go straight to the advocate and will be monitored at the time the hearing is listed, in case there are technological issues, or papers are missing?
- c. What documents are required for the judge to hear the case? Is there an electronic version of all the necessary documents? Does the case require a consolidated ebundle? Who will prepare it?
- d. Regardless whether there is to be a consolidated ebundle or you are preparing your own documents (e.g. in small cases or applications), prepare the PDF so as to assist the court. Many PDF programmes have the ability to add page numbers, and bookmark the documents. Do this for the judge – your assistance will be greatly appreciated. The file name of the pdf should be the name of the case [e.g. “Carpenters v Adventurers Bundle B”]: see the guidance from Mann J on preparing ebundles.²
- e. If your opponent is a litigant in person they may need assistance preparing their documents for the hearing. Consider preparing their documents too in a paginated and bookmarked PDF. Provide a copy for them and the judge. It will make for a smoother, quicker hearing, and increase your chances of retaining the listing.
- f. If no court order has been received from the court addressing how the case may proceed remotely, consider writing to the court office or the judge’s clerk as far in advance as practicable and tell them your preparations, for example:
 - i. We have spoken to our opponent. We agree this is suitable for BT Meet Me / Skype for Business hearing, etc. The reason we suggest BT Meet Me is:.....
 - ii. The case falls within the civil courts listing priorities as a Priority 1 case. OR this case is considered urgent because / OR this case should remain listed because
 - iii. Our contact details are:..... The person to contact is: e.g. John Smith.

² <https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f-1.pdf>

- iv. Mr Smith will be monitoring his email from 9.30am and telephone on the day of the hearing. If the court encounters any difficulty setting up the hearing and requires assistance, Mr Smith agrees to liaise with all parties to keep them updated and try to find a solution. Telephone numbers by which the court can contact the parties if the video conferencing technology fails are.....
- v. Paginated and bookmarked PDFs of the necessary documents are attached to this correspondence / OR will be emailed to the court office by 4pm on
- vi. We have agreed the time estimate for this hearing, taking into account it is now to be conducted remotely, is 30 minutes.

18. It is suggested that this correspondence may well be placed on the top of the court file by the court office and might be the first thing the court looks at when triaging the file. It might make all the difference to the triage judge when deciding whether the case can remain in the list.

Finally

19. Courts are functioning with reduced numbers of court staff due to self-isolating and/or sickness, and so on. Correspondence from parties regarding court hearings has increased. Inevitably this will lead to a reduction in capacity to deal with administration and in issuing court orders. Litigants will undoubtedly have to continue to work with the court to help with the administration of justice during the pandemic. 3PB Barristers and Clerks would be pleased to assist in preparing ebundles and liaising with opposing counsel and the court to do all we can to ensure hearings remain listed and are effective during these difficult times.

20. Useful links:

- a. Mr Justice Mann's Guidance on PDF Bundles: <https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f-1.pdf>
- b. Circuit specific guidance: <https://www.judiciary.uk/civil-circuit-guidance/>

8 June 2020



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