Part IV of the 'Staying Virtually Up-to-date' Series delivered by 3PB's Commercial Team

LOCKDOWN LESSONS FOR LITIGATORS

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THIS GUIDE

This guide is intended to act as an aide-memoire to Part IV of the 'Staying Virtually Up-to-Date' Series delivered by 3PB's Commercial Team on 19th May 2020. Thank you for joining us!

Whilst every effort has been taken to ensure the accuracy of the contents of this guide, the position in relation to Covid-19 is rapidly changing. This document should not be used as a substitute for obtaining legal advice. If you have a particular query, please contact David Fielder (Email - david.fielder@3pb.co.uk), who will be happy to direct your enquiry to the relevant person.

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LOCKDOWN LESSONS FOR LITIGATORS

ADJOURNMENTS AND EXTENSIONS OF TIME

General

1. All routes to the objective of preparing a successful application start with:

    i. a consideration of the case management powers under CPR 3.1(2)(b);

    ii. the available guidelines and materials; and

    iii. the recent authorities '*Blackfriars'* and *'Mariana'*.

Preliminary and cursory summary

2. The courts will press hard for a "*business as normal*" position, so far as is both reasonably safe and practicable, compatible with the overriding objective, and lastly which is arguably proportionate.

3. The case made for any application for adjourning, staying or vacating on account of Covid 19 is going to have to be a compelling one. This has implications going beyond any 'normal' consideration for lawyers as identified below in the concluding overall summary.

4. In passing see *Municipio De Marianna and others and BHP Group PLC and BHP Group Ltd* [2020] EWHC 928 (TCC) ["Marianna"] at paragraph 30 which referred to Daniel Alexander QC's judgment given when sitting as a Deputy Judge in *Heineken Supply Chain -v- Anheuser- Busch Inbev* where it was said "*where it can be safely done….the wheels of justice should keep turning at the pre-crisis rate*". Although the metaphor was criticised this was exactly the message given by HHJ Eyre QC.

Case Management Powers under CPR 3.1(2(b)

5. Judge Kimbell QC had, Hyde and Murphy (Joint Liquidators of One Blackfriars Ltd) -v- Nygate and the Former Joint Administrators of One Blackfriars Ltd ["*Blackfriars*"] [2020] EWHC 845 (Ch), opined that CPR 3.1(2)(b) had to be exercised "*in accordance with the overriding objective over dealing with cases justly and at proportionate cost*" [see para 13].

6. This was echoed by HHJ Eyres QC in the *Mariana* case, referring to Practise Direction 51ZA issued on 02.04.20 [see paras 4, 16, 17 and 32].

Available Guidance and Materials

7. The next stage of any exercise [of understanding the impact of Covid 19 on adjournment or extension applications is Practise Direction 51ZA which reads at paragraph 4:

> "*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*". This was issued and effective from 02.04.19.

8. Prior to this on 19th, 20th and 23rd March the judicial Office of the LCJ gave guidance expressly prescribing the use of remote hearings [see paras 25, 26, 28, 29, and 30 of the *Blackfriars case* below for terms] The footnotes 1-6 at the conclusion of Judge Kimble QC's judgement provide links to the issued guidelines and can be accessed if required.

9. Teare J in National Bank of Kazakstan and others -v- Bank of New York unreported [19.03.20] said "*the courts exist to resolve disputes and, as I noted this morning, the guidance given by the LCJ is very clear. The default position now in all jurisdictions musty be that a hearing should be conducted with one, more than one, or all participants attending remotely…it is incumbent on the parties to seek to arrange a remote hearing if at all possible*" [see *Blackfriars* para 33].

Recent authorities

The *Blackfriars* case

10. Judge Kimbell QC's position was clearly that business must go on as usual unless the contrary could be established or proved to a high degree of probability, although no specific standard of proof had been raised as an issue or ventilated. The matters will be presumed to be dealt with to the normal case management standard. That said HHJ Eyres QC referred to a "compelling" case in the *Mariana* case, almost suggesting that leaving to one side the facts of the individual case presented before him, the standard of proof was required to be higher than normal.

11. Judge Kimble QC dealt with four topics raised by way of argument in favour of vacating a trial, as follows:
    i. Governments intention,
    ii. Safety,
    iii. Technological challenge, and
    iv. potential unfairness

(i) Government intention

12. In terms of government intention the learned judge considered:
"*it seems to me clear that by making specific exemptions in this way to the two major restrictions on gatherings and on movement, for the benefit of court proceedings, the legislature is sending a very clear message that it expects the courts to continue to function so far as they [are] able to do so safely by means of the increased use of technology to facilitate remote trials*".

13. As to (ii), (iii) and (iv) Judge Kimbell QC respectively had this to say [since these matters were addressed more fully and taken up in *Mariana* they needn't be fully summarised here]

(ii) Safety

14. Regarding safety he opined:
"*these genuine difficulties….may be mitigated by particular arrangements…..that is , it seems to me, a necessary part of the flexible case management envisaged under paragraph 18 of the Remote Hearing Protocol…….which can be done safely and without travel or gatherings in contravention of the Coronavirus Regulations*"

(iii) Technological challenge

15. In terms of technoglocial challenge, the below was a theme developed in *Mariana*:
"*In my judgement, co-operation and planning is essential if a remote trial is going to be possible, and that is why I have ordered the parties to co-operate in seeking potential remote trial platforms and document handling systems*"

(iv) Potential unfairness

16. With respect to potential unfairness, the court weighed up the impact for both parties:
"*the challenges and indeed the upsides of proceeding with a remote trial will apply to both sides equally*"

17. Mr Kimbell QC takes us to the sources of guidance in *Blackfriars,* deriving from these sources a definitive picture against which to paint the guidance, which, in the light of the approval given in *Mariana* case, should be taken at this time to be authoritative.

18. On account of this case being decided relatively early in the sequence of responses to the Covid 19 Pandemic it was a cogent and fulsome reveiw of relevant and, existing at that time, prescriptive measures and guidance.

19. The importance of this case is that the the *Mariana*, which followed, adopted much, if not all, of the reasoning, adding some elucidation and refinement.

The *Mariana* case

20. HHJ Eyre gave further and definitive guidance in the following case of *Mariana.* The following two paragraphs require scrutiny for any practitioner seeking an adjournment or adjournment.

    (i) **Paragraphs 24 – 25**

21. Paragraph 24 contains a summary of Judge Kimbell's approved observations:

    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 a 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 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 where the court cannot be satisfied that a fair resolution can be achieved by way of a remote hearing."*

vi. **Paragraph 32**

22. Paragraph 32 contained a summary of HHJ Eyre QC's own guidance:

i. *"The objective if it is achievable must be to 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 w 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 in normal circumstances and particularly is this so where there is a deadline to be met (and even more so when failing to meet the deadline will jeopardise a trial date). So the court can expect and require from lawyers a degree of readiness to put up with inconveniences: to use imaginative and innovative methods of working: and to acquire the new skills needed for the effective use of remote technology. As I have already noted metaphors may not be particularly helpful but the court can expect those involved to roll up their sleeves or to the extra mile to address the problems encountered in the current circumstances. It is not enough for those involved simply to throw up their hands and to dsya 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 (such as the production of evidence) by remote working than would be possible by more traditional methods. In the context of the present case the Defendants said that meetings conducted remotely took twice as long and achieved less than those conducted face to face. The Claimants challenged the precise calculation but accepted that such meetings would be likely to take longer and that is readily understandable particularly in a case such as the present involving large quantities of documents and requiring at least to some extent the use of interpreters.*

viii. *In the same way the court must 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 two or more sets of well equipped offices with fast internet connections and 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 being provided remotely. In addition those working from home will be working from homes where in many cases they will be caring for sick family members or for children or in circumstances where they are providing support to vulnerable relatives at another location.*

ix. *Those factors are to be considered against the general proposition 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. That remains the position in the current circumstances and 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 which is compatible with dealing fairly with the case."*

23. Each case inevitably turning on its own facts. In this matter the court was satisfied that the Defendant had shown in the present circumstances that "*even when all proper allowance is made for the use of technology and for the making of extra efforts….the*

points made by the Defendants as to the difficulties of remote working and the scale of the task to be undertaken are compelling in the circumstances here".

Conclusions

24. There are a number of considerations for litigators during lockdown that arise from these judgments:

    i. Having regard to the dicta of HHJ Eyres Q.C it will be harder to vacate a trial dater than obtain an extension of time for CPR directions compliance.

    ii. There are two burdens now placed on applicants; legal teams; solicitors and counsel. The first is to make the alternative arrangements ("the Administrative burden") and the second is preparing the legal argument ("the Evidential burden").

    iii. Both burdens potentially involve significant work. Prior to making the application, resources will be expended on not only the legal arguments but now also all the practical steps taken by way of exploration of the particular issues arising in each specific case and their solution. However, whose task will this be, solicitors or counsel and who will pay for this time?

    iv. The administrative burden will be a testing process because it appears that the clear presumption is that the problem can be solved, and if it isn't that is the fault of the solicitor; counsel or legal team.

    v. So far as any evidential burden is concerned, teams will therefore now apparently have to prove a negative. The bar appears to be set high, requiring the applicant to demonstrate a compelling argument as to why the application should be granted, itself requiring substantial non-legal research.

    vi. This now involves far, far more than preparing bundles and service of the same but now requires the spending of doubtless significant amounts of time and effort in arriving at these alternative solutions. One problem so far left unexplored therefore is a real question, at what and whose cost? Is it not unreasonable to suppose that this time and effort will need to be reflected in higher fees charged to clients?

    vii. It won't be sufficient to say that the costs involved are unmanageable for the client, or will it?

viii. Where does this leave the litigant in person?

ix. Due preparation for applications for adjournments will involve / has involved the acquisition of IT skills and resources not required before. The question is at what and whose cost, as aforesaid?

x. Will it now be expected that counsel's clerks will be diverted to deal with this or does someone in either or both solicitors and counsels offices have to be gainfully employed as the newly created job of "*Covid Technician*", so bringing into being, alongside the *IT team*, the *CT team* in chambers or offices of solicitors?

Joseph Giret QC

RELIEF FROM SANCTIONS

Introduction

1. The Corona Virus Pandemic has resulted in nationwide court closures and thousands of hearings being vacated. However, existing litigation remains active leaving many firms with continuing obligations despite working from home with much of their supporting staff furloughed. The always prevalent issue of Relief From Sanctions is therefore even more pivotal in the current climate.

The Coronavirus Practice Direction

2. Practice Direction 51ZA – Extension Of Time Limits And Clarification Of Practice Direction 51Y – Coronavirus.

3. This Practice Direction supplements Part 51. It states: *'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.'*

4. The Practice Direction, unless extended, applies until 30 October 2020.

Heathfield v Axiom

5. The Senior Courts have had limited opportunity to assess **CPR 3.9** discretion in the context of the Corona outbreak. The first and only decision at the date of this paper came on 4 May 2020: *Heathfield International LLC v Axiom Stone (London) Limited & Medecall Limited* [2020] EWHC 1075 (Ch).

6. In *Heathfield* the Claim concerned a contractual debt for medico-legal services exceeding £260,000. The Second Defendant failed to provide a costs budget before the CCMC and did not seek an extension of time. The other parties filed and exchanged budgets. The CCMC originally listed for 10 December 2019 was adjourned until 30 April 2020.

7. On 20 April 2020 a Directions Order was made listing the hearing to be conducted remotely in light of the Covid outbreak. Further directions were given on the mandatory inclusion of budgets and budget discussion reports.

The Application

8. On 28 April 2020 the Second Defendant sent an 80 page supplemental electronic bundle by email to C's and D1's solicitor and to the court. This bundle included an application for relief from sanctions and a supporting witness statement of Mr Hussain. This was obviously too late for inclusion in the hearing bundle and left the other parties only 1 day to consider any response.

9. The Second Defendant failed to serve its Precedent H on time and never filed or served a Precedent R.

10. The supporting witness statement to the application for relief was verified by an out of date Statement of Truth.

11. In his statement, the Second Defendant's solicitor contended that the breach should not be viewed as serious or significant because it did not have an impact on the litigation or cause C inconvenience, all other directions had been complied with and C had filed a Precedent R report in response to D1's budget.

12. As to why the default occurred and whether there was a good reason, he accepted responsibility and said that "the incorrect date [had been] diarised in my calendar". With regards to all the circumstances, he said that the conduct of the litigation had not been affected, and the case involved a lot of money, was not straight forward and required a lot of time and cost. He further argued that they had otherwise conducted the litigation efficiently and at proportionate cost. On enforcement and compliance, he contended that compliance is not an end in itself nor does it take precedence over the interests of justice.

The Decision

13. HHJ Simon Barker QC did not share the Second Defendant's application of CPR 3.9 setting out his reasons as follows **[my own emphasis added]:**

14. The First Limb: *'**I regard the breach as serious, both in its own right and as a continuing demonstration of D2's lack of engagement with costs budgeting**. I also disagree with their contention that D2's failure has not affected the efficient progress of the litigation.*

15. ***It placed an unreasonable burden on C in preparing for the CCMC and also on the court.** Even before D2's supplemental bundle, the bundle for the CCMC ran to 220*

pages and the bundle for D1's and D2's security for costs applications added a further 600 pages. D2's supplemental bundle and other consequential and late documents added a further 125 pages to the bundle. ***As to the burden on the court it is relevant in this case that there was direct email dialogue between the parties' solicitors and the judge (me) prior to the 20.4.20 directions order. This was necessitated by the impact of Covid-19 and lockdown.***

16. ***The important point is that it provided ample opportunity for D2's solicitor to raise relief from CPR 3.14 as an agenda item for the CCMC*** *and have timetabled by directions for evidence and/or submissions an application under CPR 3.14 and/or CPR 3.9. But for the parties' agreement with my suggestion that D2's application could be dealt with as an on paper application, there would inevitably have been further disruption of this litigation by extension of the hearing time.* ***Of course, whether as an on paper determination or a determination at a remote hearing, the time required to be devoted to this application is time diverting judicial attention from other litigation and thereby affecting other court users.'***

17. The Second Limb*: '****I do not regard D2's reason as explained by Mr Hussain as a good reason****. Disregarding for the moment the apparent original failure to engage with budgeting in November 2019,* ***it is striking that there was an email exchange between Mr Hussain and Mr Garland on 8.4.20 about service of budgets by email and almost a full further week passed before D2's costs budget finally surfaced****. Mr Hussain's* ***evidence in support of the application for relief is perfunctory*** *as to the reason for the failure. I regard it as at least inadequate.*

18. *The absence of any challenge to Mr Garland's account of the facts in his 23.4.20 letter to Mr Hussain and* ***the content of the documents on the court file relevant to the November 2019 deadline point to a real possibility that Mr Hussain's evidence lacks candour.***

19. *That said, it is not appropriate or necessary for the purposes of this application to make such a finding, and anyway such a finding should not be made without providing an express opportunity to answer. For present purposes the relevance of the possibility is that it puts in the spotlight the actual explanation given and its brevity and vagueness and that is unquestionably less than complete.'*

20. The Third Limb: *'I keep in mind that it is D1's response to C's claim that has caused C to include D2 as a defendant on a secondary alternative basis, but that does not entitle D2 to take a more relaxed or casual approach to participation as a party in this litigation.*

21. ***I also keep in mind that the sum of money claimed is not small*** *(circa £260k plus £100k for interest and statutory penalty at the time of issue in 2018)* ***but not that large either.*** *This is relevant in at least two ways.* ***First, this is the sort of litigation where each party's costs may easily become disproportionate to the sum in issue*** *and efficient conduct of the litigation is of paramount importance.* ***Secondly, it follows that cost control and costs budgeting are all the more important.***

22. *The chronology set out in the first part of this judgment demonstrates an abysmal approach on D2's part to conducting this litigation efficiently including, but also going well beyond, costs budgeting. D2's apparent failure to engage with costs budgeting in November 2019 is not adequately explained by Mr Hussain's evidence. Four further matters are also relevant:*

    a) ***D2's costs budget is not in the required form,*** *at least in relation to CCMC costs;*

    b) *Secondly,* ***Mr Hussain's recent witness statements … are also non-compliant in that they adopt an out of date version of the statement of truth;***

    c) *Thirdly,* ***Counsel for the Second Defendant had to explain the extreme lateness of her skeleton argument and had no alternative but to report that she received her instructions very late****; and*

    d) *Fourthly****, far from setting a tripwire for D2, C alerted D2 to the fact of the 8.4.20 deadline for costs budgeting****. **A further 6 days passed before a budget was served on C.** Placed in context, Mr Hussain's explanation that "the incorrect date [had been] diarised in my calendar" leaves a lot unexplained.'*

23. Finally the Court considered the possibility of some form of 'hybrid relief' whereby the applicant would be granted partial costs either on a limited period or in relation to more restricted trial window. The Judge concluded that:

    'In the end I have decided against so doing in part because of the additional burden it will place on C and the court, and the knock-on effect on other court users, but mainly because I consider both the attitude and the conduct apparent from the evidence and chronology in this case to be outstandingly bad.'

Comment

24. The primary lessons that can be taken from this case should include:

a) The importance of recognising the seriousness and significance of a breach in the supporting witness statement. Most applications rest upon the third limb in any event and any attempt to diminish the original error can prove inflammatory and disrespectful to the Court;

b) Any consideration of an application for relief from sanctions can, in and of itself, be regarded as a diversion of judicial attention and court resources from both other court users and the overall case. This should not be disregarded in an attempt to suggest the breach was free of consequence;

c) Making the application as promptly as possible remains essential even in during Covid outbreak. Last minute applications allow for no reasonable period of consideration for the respondents nor does it allow sufficient time for Counsel to submit skeleton arguments;

d) The significance of prompting from both the parties' perspective. The defaulting party should act immediately when prompted by the other side as a failure to do so will be deemed woefully inadequate. The other parties should be aware of the Court's understanding of the 'tripwire' approach. An application for relief is more likely to be opposed when a breach has been highlighted by the other side as opposed to tacitly endorsed in the hope of a windfall;

e) Satellite correspondence can be referenced and exhibited in such applications so it is essential to consider this when drafting such correspondence and when making assertions on conduct of litigation in a statement supporting or opposing an application for relief;

f) Minor procedural failures can be considered cumulatively to assess conduct under the third limb. Any party in breach should meticulously ensure compliance with all new measures including the formatting of a Costs Budget and the new Statement of Truth;

g) Any assumption that a party can simply point to the current climate and excessively punitive nature of **CPR 3.14** can be met with judicial indifference if the Applicant's conduct fails to accord with the rules and principles of civil procedure. **Alexander Whatley**

URGENT BUSINESS

1. One important consideration for litigators tackling live litigation is how in practice the courts can be accessed at this time to obtain urgent relief. Urgent relief in this context means matters where the client require some form of remedy within 24 – 48 hours.

2. This can encompass a range of applications such as:
   a. Interim injunctions;
   b. Freezing orders;
   c. Susisted service applications;
   d. Extension of time and adjournment applications;
   e. Applications to restrain the use of confidential/priviledged material;
   f. Non-disclosure applications;
   g. Variations and discharge of undertakings; and
   h. Applications to satay execution of judgments and/or orders.

3. The webinar has not focused on how to succeed in making the applications respectively identified above. Instead it has focused on the common practical considerations applicable where urgent relief is sought at this time. Whilst most litigators will be familiar with the provisions of the CPR as they pertain to urgent litigation, it can often be difficult to obtain practical information about how to actually secure a hearing in exceptionally urgent circumstances (e.g. to obtain a hearing before a High Court Judge on the phone/in Chambers at 2:00AM). Further, the practicalities of where to go, who to call and which office to go to often prove elusive or difficult to ascertain.

Where?

4. In our discussion, we generally considered the conduct of urgent litigation in the Rolls Building and the Royal Courts of Justice. With the exception of applications intended to be heard on-Notice on an interim basis, it is likely that any application which needs to be made with greater urgency (e.g. same-day or out of hours) will have to be issued in London regardless of the location of the Parties.

5. London is unique in the ability of parties to obtain orders at extremely short-notice. Whilst most locations in which the newly-formed Business and Property Court sits will accommodate a weekly interim applications list, it is only London which has provision for same day and out of hours hearings as a matter of course.

The concept of urgency

6. When the Court hears an urgent application, it will first expect a cogent explanation as to why the Application could not be made in the usual way (by giving 3 days notice and allowing the Court to set a date). This explanation must be supported by evidence in a Witness Statement which specifically deals with this question. On occasion the reason will be self-evident - for example in the case of an urgent freezing order where there is an immediate risk of dissipation. In other cases, however, a detailed and logical explanation will be required.

7. The starting point is to look at the Client's conduct. The Court will be most interested in when the Client became aware of the circumstances giving rise to the need for the Application. As a general rule, a Client should be taking action immediately in relation to potential threats, and a delay of more than 5 days is likely to be frowned upon if the Application is made same-day. In the case of Freezing Orders, an Application should be made immediately after the Client becomes aware of the risk of dissipation.

8. If a Client instructs Solicitors to make an urgent Application (say, the next day) but has delayed for several days since he or she became aware of the need to make the Application, the Witness Statement will need to explain in detail why action could not have been taken earlier.

9. An example of this can be seen in *Biggar and Others v Persons Unknown* [2017] EWHC 3835 (QB). In that case a group of financial services companies were set to list a NewCo on various international markets in May 2017. In around April 2017, an online financial services publication made various allegations of fraud and criminality on the part of the Directors behind the listing (which were demonstrably baseless). Clients and investors had been contacting the Claimant's Solicitors in droves to complain about the allegations made and the potential impact they may have had on the listing. Armed with evidence of real prejudice, the Claimants instructed Solicitors on 5 May 2019 to make a application without notice the next day in Court 37. The Court noted that the Claimants had known about the article, and the potential for prejudice, for some 20 days before making the application. This was fatal to the attempt to obtain same-day relief. The Judge instead gave permission for abridged service of the Application two days later (at which time the Injunction was granted).

10. As such, even though the Client may have a prima facie strong and meritorious case, if they have delayed this can be fatal to an attempt to obtain same day/next day relief. Whilst litigators are used to thinking in terms of "promptness" and "delay", the expectations of the Court are markedly of a different order when it comes to same

day/next day urgent relief. A delay of more than a couple of days may cause real problems. Whilst a Court may understand a delay of one or two days between "knowledge" and "application" (particularly where there is an intervening weekend or public holiday) it is less likely to be sympathetic in the case of a delay much longer than this. The reason for this is obvious - it is only in the most exceptional cases that the Court is prepared to grant out of hours relief. In a case where a Client, during the delay, could have made an on notice application in the usual way, a Court is likely to reject the attempt to obtain same-day/short notice relief.

11. The Court may, however, be more flexible when an Application is made in relation to a time-specific threat. For example, if a Defendant is planning on releasing confidential information on a certain date, and application the day before may be tolerated even where there has been a delay of a few days (although steps should be taken to explain why the delay has happened, or perhaps explain that the Application required complex preparation).

12. The requirement for lightening speed sometimes forces litigants to make a choice between speed and quality. If an Application is truly urgent, a Court is likely to forgive an Applicant who attends court promptly with a very cursory Witness Statement- provided it deals with the basics, the Client is better placed outlining their basic case with the most necessary evidence than taking the time to put together a beautifully prepared set of papers. The witness statement can explain the ways in which the Applicant would have liked to improved their evidence/statement and ask for permission to file a more comprehensive statement within 7 days. On no account should an application be delayed to allow for the careful pagination /cross referencing of exhibits/ presentation of the papers (although this is desirable, it is not strictly necessary).

13. It goes without saying that an out of hours application will only be entertained in the most exceptional circumstances. A High Court Judge is unlikely to be roused to deal with a matter which could reasonably have been dealt with in-hours or the next day. The instances where it will be acceptable to use the out of hours service are usually where the Client has only learned of the need to make the application late in the day (say, after 2/3 PM) and the Order is immediately needed for the next morning. This is usually the case in urgent freezing Order/non disclosure cases. For example, a Client may have learned at 4PM that the intended Respondent plans to dispose of funds held on trust the next day. This might justify an application being made at, say, 8/9PM (although a Judge may be displeased if the Client waits until 3AM).

14. Other examples may involve non-disclosure orders. Perhaps an opponent intends to disclose privileged material the next day, and only informs your Client the night before. Alternatively, perhaps a transactional lawyer working on a market-sensitive deal learns of a threat to disclose information the next day (this would likely justify out of hours relief).

15. A litigation-based example might be the threat by an opposing litigant to use privileged information in a Trial due to start tomorrow. *Popely v Drukkers Solicitors* [2019] EWHC 561 (QB) dealt with an application made to Court 37 the day before a five day Trial in the Chancery Division. The Respondent had already tried and failed, the month before the application, to obtain a Disclosure Order against the Application for his personal emails. The Application was refused, but the Respondents stole the Applicant's emails in any event, for use at the Trial. An application with informal Notice the day before was held to be justified (albeit the Order was refused because the Court held that the information was not confidential in any event, despite the covert means by which the emails had been obtained).

16. Had the application in *Popely* been made out of hours, however, it is likely that the Judge would have refused to hear it on the basis that it could reasonably be dealt with on the first day of the Trial.

17. The judgment call as to how "urgent" a matter is can be difficult with cases which operate at the margins. Notwithstanding, if it is not immediately obvious why an application needs to be heard the same day/out of hours, then such a course should be reconsidered. If there is or was any other reasonable alternative, a Judge is likely to dismiss the attempt to obtain short notice relief.

18. The incidence of CoVid and the lockdown (such as it is) in England specifically is likely to bear on the question of urgency. Courts 10 and 37 are still open using digital software to conduct hearings, which necessarily complicates matters and leads to Judges having less time to deal with applications. As such, the Court is likely to be more selective about what is and is not urgent.

Time Limits

19. If an Application is likely to take more than 2 hours, a Judge will not hear it in Court 10 and will usually set down directions. Where relief is urgently required, especially without

notice relief, there are very few instances in which a hearing of up to/over 2 hours will be required.

Choice of Venue

20. Commercial and Chancery Litigation will for the most part take place in either the Chancery Division or Queen's Bench Division. The vast majority of matters will be suitable for Court 10 in the Rolls Building. Court 10 deals with the unified "Business and Property Courts" so is suitable for Chancery Division, Commercial Court and TCC Business. If there are pre-existing proceedings, the application should be made in the Court of those proceedings.

21. There can be a great degree of overlap. A Claim with its roots in Contract/Negligence is more likely to be suitable for the Queen's Bench Division. If a matter is destined for the Commercial Court/TCC (which are still QBD Courts despite sitting in the Rolls Building) then Court 10 will be more suitable.

22. Matters which relate to Commercial Contracts/Business Relationships can, in theory, be brought in either Court 10 or QBD. Notwithstanding, for matters likely to be worth less than £1,000,000, Court 10 should only be chosen when there is some "Chancery" element to the dispute.

Specialist Courts

23. Litigators should be aware that some specialist courts have their own applications list. For example, the Insolvency and Companies Court has an Interim Applications List for certain applications (see below). Chapter 25 of the Chancery Guide provides:
25.28 The ICC Interim Applications Court takes place on Thursdays, Fridays and every other Monday. The ICC Judges' listing officer (Claire Prosser) should be contacted in the event that an urgent application needs to be heard on any other day. She will seek to accommodate a hearing. The ICC Interim Applications Court will run in the same way as the High Court Judges' Interim Applications Court, which is not affected by the introduction of this list. It is intended that the list will be used to hear applications for:

- *an injunction to restrain presentation of a petition to wind up a company or to restrain advertisement of such a petition*
- *an administration order*
- *an appointment of a provisional liquidator*

- *search and seizure orders pursuant to section 365 of the Insolvency Act 1986*
- *an appointment of an interim receiver pursuant to section 286 of the Insolvency Act*
- *validation orders*
- *other applications that are urgent, such as those made pursuant to section 125 of the Companies Act 2006.*

Practical considerations

Obtaining a listing	Seek advice regarding how to obtain a listing. Counsel or Counsel's clerk can normally arrange this.
Notice	Consider whether to give notice. Remember to provide login details for the hearing to the other side, even if only informal notice is being given.
Instructions to counsel	You should make clear how you anticipate the hearing taking place. For example, if your Firm is ordinarily the one to organise digital hearings, make that clear to avoid duplication.
Documentation	Court 10 and 37 are supported by the relevant Judge's clerk. Counsel can assist with this.
How to attend	• Court 10 – Skype for business • Court 37 - choice of the Judge (Zoom or Skype)
Attendance	There is a need for counsel and at least once member of the firm of those instructing to attend by video/telephone to assist with any queries regarding bundling and most importantly make an accurate attendance note.
Undertakings	Ensure clear instructions from the client in advance of the hearing in written form.
Form of order	Needs to be practical for the current climate.

Oliver Ingham
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Informalities - Execution of documents in the time of Covid-19.

In recent years, the courts and the Law Commission have been grappling with the formality requirements for documents (especially deeds). In the age of virtual meetings and the rise of electronic communications, 3PB commercial barristers Cheryl Jones, Charles Irvine and Christopher Edwards are hosting a timely webinar on those issues, covering:

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- Electronic signatures and attesting in light of *Wood v Commercial First Business Ltd (in liquidation)* [2019], *Yuen v Wong* [2020] and the Law Commission's report;
- The consequences of when things go wrong: *Signature Living Hotel Ltd v Sulyok* [2020];
- The latest developments from HM Land Registry in light of the Covid-19 lockdown;
- The Companies Act 2006 formalities and the meaning of "documents"; and
- The future areas of litigation which practitioners should be addressing with their clients.

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