

Remote Hearings

The End of the Affair.....?

The beginning

- CPR PD 23A para.6: the following hearings will be conducted by telephone unless the court otherwise orders “*interim applications, case management conferences and pre-trial reviews with a time estimate of no more than one hour*” unless the hearing is of an application made without notice to the other party; all the parties are unrepresented; or more than four parties wish to make representations at the hearing. A legal representative will be responsible “for arranging the telephone conference for precisely the time fixed by the court.”
- CPR PD 23A para.7 permits use of “video conferencing facilities” and app.3 of PD 32.
- CPR 51V – the video hearings pilot scheme 2.3.20 to 31.3.21 to “test a procedure for applications to set aside default judgments entered under Part 12 of the CPR to be heard by the court via an internet-enabled video link (“a video hearing”).”

The ability to change

- CPR 1.1 overriding objective of enabling the court to deal with cases justly and at proportionate cost.
- CPR 1.4(2)(k) active case management includes “making use of technology”
- CPR 3.1(2)(d) the court has the power to: “hold a hearing and receive evidence by telephone or by using any other method of direct oral communication”
- CPR 51.3 “Practice directions may modify or disapply any provision of these rules (a) for specified periods; and (b) in relation to proceedings in specified courts, in order to address issues for the work of the courts arising from the coronavirus (SARS-CoV-2) outbreak or any other public emergency.

Coronavirus Act 2020

- Sect.55 and schedule 25 amendments to the Courts Act 2003 sect.85A: If the court directs that proceedings are to be conducted wholly as video proceedings, the court (a) may direct that the proceedings are to be broadcast (in the manner specified in the direction) for the purpose of enabling members of the public to see and hear the proceedings;(b) may direct that a recording of the proceedings is to be made (in the manner specified in the direction) for the purpose of enabling the court to keep an audio-visual record of the proceedings.
- Sect.89 in force until midnight on 24.3.22

CPR 51Y

- (2) During the period in which this Direction is in force, 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.
- (3) Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings. In such circumstances it will not be necessary to make an order under paragraph 2 and such an order may not be made.
- Ceases to have effect when sect.89 of the Coronavirus Act expires

The early days

- Early embrace of technology
- CoP Mostyn J (17.3.20): “The hearing was conducted almost like any other. Each witness was asked to swear/affirm their evidence. I ensured the witness could be clearly seen on everyone’s devices. Each counsel could introduce themselves, so the witness knew who was asking the questions, and expert witnesses were dealt with in the same way. Using Skype allowed parties to share video evidence, and documents could be shared on screen and discussed. The hearing was recorded and shared with all parties.”

Same case....

A solicitor who took part in the hearing commented:

- “The judicial leadership in the areas of family and civil justice has embraced the need for virtual technology to ensure justice continues. It goes without saying this is hugely necessary in a democratic society.”
- Counsel: For them, “it felt comfortable and familiar relatively quickly” and they thought witnesses might feel “less intimidated”, pointing out that “many wore casual attire and sat in their homes, responding to the questions, but not having the full glare of the court on them.” Although they acknowledge some technical glitches, they conclude: “what did we miss? In truth, nothing that mattered.”

Celia Kitzinger, co-director of the Coma and Disorders of Consciousness Research Centre and Honorary Professor, Cardiff University School of Law and Politics writing for and quoting the applicant

- “I’m left wondering whether I should have waited and insisted on a face-to-face hearing. It just felt like a second-rate hearing.”
- “Skype took away from me the ability to look these people in the eyes – these people who have their opinions about my Dad and only knew him through third-hand notes. I wanted to look them in the eyes and make them hear the truth but I was looking at a computer screen”
- “It felt like a second-best option. It didn’t feel professional. It didn’t feel like justice. It felt like a stop gap to ensure a box was ticked – rather than a serious and engaged attempt to make decisions about my Dad.”

Should we?

- Advantages.....
 - Improved access
 - Better open justice
 - Allows best evidence?
- Disadvantages.....
 - second rate justice?
 - Practicalities
 - Visibility

Principled approach

- Interests of justice
- Safety and comfort
- Parties not lawyers
- Justice not convenience
- Judges?
- Administration documents
DUC/PDF/pages
- Recording
- Open justice

Options

- Hybrid
- Video platforms
- Telephone hearings
- Equality of arms

Conclusion

- Versatility is welcome
- Need clear principled approach
- Court is the ideal place for the administration of justice
- The fact that we can does not mean that we should.....