



# Open for business: conducting trials and assessing witness evidence remotely

It is inevitable that for the next few months trials will continue to be conducted remotely, whilst we await completion of a nationwide vaccination programme. In the longer term, it seems likely that litigators and judges, now familiar with conducting litigation via a screen, will embrace opportunities for remote witness evidence with more vigour than we might have done previously.

The Courts have been robust in recent months in facilitating the continuance of normal business insofar as practicably possible, whilst at the same time being mindful of the paramount importance of ensuring a fair trial. Three authorities in particular make the general principles clear:

- in ***Re One Blackfriars Ltd (In Liquidation)*** [2020] EWHC 845 (Ch), John Kimbell QC sitting as a Deputy High Court Judge on 6 April 2020 refused an application by joint liquidators to adjourn a 5-week trial due to take place in June 2020 (i.e. during full lockdown). The trial involved the oral evidence of 4 witnesses of fact and 13 expert witness. The Deputy Judge considered the overriding objective and referred to the relevant 2020 legislation, and said at para 23 that *'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 safely by means of the increased use of technology to facilitate remote*



*trials'*. He noted that from the experience of the courts so far in conducting remote trials, on the whole they had been successful even when the proceedings involved multiple parties and in excess of ten witnesses. It was clear from that decision fairly early on during the pandemic that the Courts expect litigants to be proactive, creative and co-operative in overcoming any practical or technological difficulties so as to enable trials to take place even during full lockdown.

- In ***Municipio de Mariana v BHP Group plc*** [2020] EWHC 928 (TCC), HHJ Eyre QC on 20 April 2020 adjourned a hearing listed on 8 June 2020, and directed that it be listed instead on 20 July 2020, possibly remotely. He noted that the whole reason for remote hearings was to achieve protection for those who are vulnerable, and vulnerability was not a reason to adjourn a hearing. Having considered several authorities, he set out the applicable principles as to how a case might be heard, including:

- the importance of the continued administration of justice



- a recognition of the extent to which disputes can fairly be resolved by remote hearings
- the courts must be prepared to hold remote hearings in circumstances which would not have been considered previously
- but there is also to be a rigorous and fact-specific examination of the possibility of a remote hearing, and whether a remote hearing can be fair

- A party resisting a remote hearing may argue that witnesses' credibility cannot be properly assessed where they give oral evidence by video-link. Whilst this argument may reflect previously views held by some towards such means of giving evidence, the comprehensive decision of Lieven J handed down on 5 May 2020 in ***A Local Authority v Mother and Father and SX*** [2020] EWHC 1086 (Fam) on this very point presents a complete answer in rebuttal to such an argument. Lieven J refused an application to adjourn a part-heard application for a care order in respect of a 4-year-old boy after hearing expert

evidence via Zoom and prior to hearing the lay witness evidence. A key issue in that case was whether there was a disadvantage to a trial judge in hearing oral evidence remotely rather than in a courtroom.

Lieven J quoted at length from an important judgment as to the correct approach to witnesses' demeanour by Leggatt LJ in ***R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department*** [2018] EWCA Civ 1391. Lieven J found that the giving of factual evidence remotely '*does not undermine the fairness of the process either for the individuals concerned or other parties*'. The only note of caution she injected was in relation to vulnerable witnesses, who she said would need an assistant to enable them to manage documents if there were a large number of documents. She also noted that '*it may also be the case that the vulnerable witness is more likely to give truthful and complete evidence if allowed to give it remotely, rather than in the witness box. So the benefit is not simply to the witness, but also potentially to the judicial process*'.

In stating her conclusion on the question of whether to adjourn the hearing part-heard, Lieven J said at paras 27-29:

"Having considered the matter closely, my own view is that **[it] is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely**. [...] I agree with Leggatt LJ that **demeanour will often not be a good guide** to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court.

Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating.

28. I was concerned that a witness might be more likely to tell the truth if they are in the witness box and feel the pressure of the courtroom, but .. **I do now accept that this could work the other way round.** [...]

29. [...] **I do not think that it is possible to say as a generality that a remote hearing is less good at getting to the truth than one in a courtroom.**" [emphasis supplied]

These three authorities were considered most recently by HHJ Jarman QC in ***Lucas v Gatward*** [2020] EWHC 3040 (Ch). In that case the claimant sought an adjournment of a trial commencing in November 2020. Her application was heard about 6 weeks before the start of the trial. The case was a family dispute about whether the claimant had an interest in the valuable family home pursuant to proprietary estoppel or a constructive trust. There were 16 witnesses of fact, several of whom were elderly or (including the claimant) vulnerable due to pre-existing health conditions. The defendants opposed adjournment; the case was ready for trial and there was a serious risk of prejudice if their witnesses became unable to give evidence at an adjourned trial in 2022. The Judge said that the principles from the three authorities referred to above reflected his own recent experience of conducting remote and hybrid

hearings, including where there were issues of honesty. In refusing the claimant's application to adjourn, the Judge considered the overriding objective and took into account that some of the witnesses were elderly, the strain of a 'bitter' family dispute upon all the parties and their elderly parents, and the likelihood of further costs caused by an adjournment.

***Constance McDonnell QC acted for the Defendants in Lucas v Gatward before HHJ Jarman QC on 16 October 2020. The case has since settled.***