

## The Remote Working of Business and Property Courts<sup>1</sup>

Sir Geoffrey Vos - June 2020

1. The Business and Property Courts responded rapidly to the need to undertake all kinds of hearings remotely and have managed in the 12 weeks since lockdown to undertake nearly 85% of usual business across the lists and the regions. Lawyers, judges and parties have been fantastic; hearings have gone ahead remotely, and justice has continued to be delivered.
2. This terrible pandemic has shown us how we can use technology to deliver dispute resolution for businesses more economically, with less travel being required, and providing savings in terms of carbon footprints, and judicial and lawyers' time. In many ways, it has been a real opportunity. I am not suggesting, to be clear, that Skype or telephone hearings should become the norm for all types of case. I am, however, suggesting that we should undertake a very careful review of what we have been able to achieve in an emergency with a view to having a complete re-think of the way we resolve Business and Property disputes in the 21<sup>st</sup> century.
3. What we have shown in lockdown has been that remote hearings can work perfectly well by Skype, Teams or Zoom for interlocutory hearings and even for some trials. It is slightly more difficult for some litigants in person, many of whom are not technologically enabled, but it is not impossible even then. Lengthy hearings lasting several days or even, in one or two cases, lasting weeks have also been shown to be perfectly feasible. They require some administration, of course, but technically they work well. The press can join remote hearings. Indeed, we have heard from some journalists that they prefer them, because they can dive in and out of remote hearings far more easily than they can achieve with live ones in different locations.
4. There are obviously some hearings that work less well remotely. Perhaps it is worth identifying the factors that may point away from a remote, or at least, an entirely remote hearing. They are (a) vulnerable or technologically challenged parties or witnesses, who may have difficulty working a computer or handling digital bundles, (b) witnesses accused of dishonesty where it may be also, for example, be suggested that their evidence would be subject to interference if they were not in the same room as the judge, (c) committal hearings where there is a likelihood that they will result in an immediate term of imprisonment, and (d) hearings where there is such public interest that hundreds of people may seek to join the call, and they may even in some cases seek to disrupt the hearing. Although cases with a large audience can be accommodated to some extent, and as long as the provisions of the Coronavirus Act 2020 remain in force, by live streaming, where that is appropriate. That happens in some Court of Appeal hearings and has been made lawful for all hearings by section 85A of the Courts Act 2003 added by paragraph 1 of schedule 25 to the Coronavirus Act 2020.

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<sup>1</sup> An abbreviated version of a talk delivered by the CHC to the Chancery Bar Association on 3<sup>rd</sup> June 2020.

5. Even where a face to face element is required, it is clear that that does not mean that hearings have to be entirely in person. The judge can direct hybrid hearings where there is a part conducted in court and other parts by other methods.
6. During lockdown, the triage system that was devised at an early stage and promulgated in the Remote Hearings Protocol at <https://www.judiciary.uk/publications/civil-court-guidance-on-how-to-conduct-remote-hearings/> has been pretty successful. Judges have been able to look in advance at the precise circumstances of each listed case to decide how it should be dealt with, and whether it truly needed to be adjourned if it could not be conducted in a face-to-face hearing. This will need to be continued after lockdown eases.
7. So, all said, we have demonstrated that we can hear a large number of cases remotely without any detriment to the quality of the hearing. There are a number of reasons why we should consider continuing to use remote hearings after lockdown has ended.
8. First, as I have already said, remote hearings avoid the costs of extensive travelling. In Business and Property cases, parties, witnesses, experts, and lawyers have routinely travelled long distances to attend hearings in the Rolls Building. Remote hearings reduce hotel bills, airfares, and many other incidental costs of litigation.
9. Secondly, I am hearing that overseas parties have been very satisfied with the way the Business and Property Courts have embraced the use of remote hearings. They enable people to participate from overseas locations without additional cost or unnecessary adjournments. In reality, the option of a remote hearing has made our courts far more attractive than those in other jurisdictions where an insistence on face to face hearings has created large backlogs.
10. Thirdly, some hearings simply do not justify everyone gathering in one place. This is particularly true of interlocutory and case management hearings, where nothing substantive is likely to be decided.
11. The fourth benefit of our being forced to use remote hearings has been the accompanying necessity to use digital bundles. I have been amazed how quickly judges and lawyers have taken to them. It goes without saying that they are much more convenient and less cumbersome.
12. Fifthly, our courts and English law should provide a leading centre for the resolution of disputes arising from the use of cryptoassets and smart contracts. Remote hearings will be an essential part of the offering of the English courts in that context.
13. Sixthly, it is now clear that much (although certainly not all) international arbitration is being conducted remotely. Practitioners' experience is that remote hearings save a vast amount of time, travel and money, and are attractive to hard-pressed commercial parties.
14. It is important to acknowledge that observers have pointed to many supposed disadvantages of remote hearings. It is said that they are slower, more tiring for participants, allow for less immediacy of oral communication, and are more troublesome in terms of administration and set-up.

15. All of these points have, of course, a measure of truth. But we are judging remote hearings during a time of national emergency, when staff levels have been much reduced, and there has been no preparation for the change. In the future, staff will be available to set up these hearings, the software will be much improved, and hopefully many of the participants will be in their offices rather than under the restrictions of home-working.
16. Some individuals, whether parties to litigation, lawyers or judges, have been adversely affected by lockdown in unpredictable and disparate ways. Most of these problems will disappear once we are all able to work in our offices. They do not amount to a good reason to dismiss remote hearings once lockdown is a distant memory.
17. My feeling is also that we need to change the presumptions under which we operate. In future, I think we should consider making it normal for interlocutory hearings in Business and Property cases, at least, to take place remotely, unless there are compelling reasons for a face-face-hearing in a particular case or to resolve a particular issue. For trials, there might still be a presumption that a face-to-face hearing will be appropriate, especially where there is much live evidence and, even more so, where the credibility of a particular witness is in issue. But even then, there is no reason why the whole trial has to be undertaken in court, or why every issue has to be resolved at the same time. We need, as I have already said, to be far more flexible in our approach to dispute resolution.
18. Covid-19 has been an appalling catastrophe for the UK and Europe and an ordeal for tens of millions of people, but it has inadvertently provided the stage to encourage us to try out new ways of doing things. Remote hearings have been remarkably successful, not perfect, but remarkably successful. We have shown that we can make a far less physical process work for many parts of the Business and Property litigation process. We will now be able to capitalise on what we have learnt.