

What does the Covid-19 crisis mean for bringing English Civil proceedings to assist fraud victims to recover losses

I Most critical phase of the crisis

a. Special Legislation

In addition to multiple pieces of guidance given by the HM Courts & Tribunals Service (“**HMCTS**”) and a protocol issued by the Lord Chief Justice, the government in March 2020 passed a major piece of legislation called the Coronavirus Act 2020.

The Coronavirus Act 2020 further expands the availability of video and audio access in court proceedings and allows the public to participate in court and tribunal proceedings through audio and video.

b) Effect on Court Hearing

The guidance from the UK Courts is changing regularly, and we would recommend speaking to one of the members or reviewing the updated guidance if proceedings are being considered.

HMCTS reported in April that the UK Courts were hearing as many as 3000 matters a day remotely. The Lord Chief Justice said recently “in just a few weeks great strides have been made in the use of technology for hearings to take place by phone, video and internet platforms”.

If a party has a hearing scheduled in one of the courts or tribunals which has closed the HMCTS will contact the party to confirm new hearing arrangements.

In general, UK judges will propose, where possible one of three solutions to ensure a hearing can take place:

- i. A hearing using an appropriate remote communication method. The courts are using Skype for Business or ‘cloud video platform’ (“**CVP**”). HMCTS does not support any other video conferencing application.
- ii. Hearings to proceed in court with appropriate precautions
- iii. If a remote hearing is not possible and it is not safe to conduct a hearing at court a case may need to be adjourned. Adjourned windows for some courts are currently beginning in Summer 2021 and will no doubt continue to push back later into the year and 2022.

A new Practice Direction (“**PD**”), PD 51 Y has been implemented. It states that even though remote hearings are in their nature private, the PD requires that any hearing that takes place privately (i.e. no in a court setting) needs to be recorded in a manner directed by the court so as to remain open to the public.

The Courts have shown themselves to be averse to granting an adjournment where not strictly necessary in order to avoid a listing congestion.

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In May 2020 the Department of Health and Social Care published the first two-month report as required by the Coronavirus Act 2020. The report states that the video and technology provisions “have allowed thousands of hearings to take place since the passing of the Act.” Approximately 90% of hearings have been carried out remotely using audio or video tools.

c) Effect on Deadlines

As will be seen in the recent case of O’Driscoll v F.I.V. E Bianchi, the Courts have been sympathetic in granting a 56 day (or longer) extension to deadlines, and this has now been codified in the new Practice Direction 51ZA which allows the parties to agree a 56 day extension between themselves. Another example is that Companies House in the UK where companies affected by COVID-19 can apply for a three-month extension for filing their annual accounts.

d) Effect on Enforcement of Judgments and Orders

The major effect of Covid-19 in relation to enforcement is that it can affect situations where personal contact is required. It therefore seems that with the exception of possession proceedings and enforcement by taking control of goods by enforcement agents or bailiffs, judgment creditors are still able and entitled to enforce judgments and orders through various methods.

e) Effect on Service of Process

The UK Courts have power to grant Orders for alternative service and have done so eg via Twitter and Facebook. In the event that the Court is satisfied that by reason of this Pandemic, service cannot be effected in the prescribed manor, they are likely to grant such Orders.

f) Effect on Court Functionality

As mentioned above in paragraph 1.b. the work of courts and tribunals is limited to fewer buildings. As of beginning of June 168 priority courts and tribunals are open to the public for essential face-to-face hearings. 109 courts are staffed but they are not open to the public and 64 courts are closed for the time being.

In more detail, the functionality of a number of courts is as follows:

Court of Appeal (Civil)

- Urgent work (applications and hearings) only; all hearings to be held remotely;
- Counter is closed – email contact available.
- Bundles should not be provided electronically unless explicitly requested by the court. Other documents should be filed electronically and all queries should be emailed.

Queens Bench Division

- Urgent work (applications and hearings) only; all hearings to be held remotely;
- Counter is closed – drop off and email contact available.
- New filings on CE-file should be limited to applications with approaching deadlines, any documentation in support of hearings which have been listed and requests for final costs certificates.

In addition the Royal Courts of Justice Fees Office reopened on 1 June 2020, three times a week.

In the Rolls building which is used by the High Court of Justice from the 1 June 2020, four types of hearings are likely to take place:

- Fully remote hearings, with the judge at home
- Remote hearings with the judge in their office or court
- Hybrid hearings, with the judge and some participants in court and some participants remotely
- Normal physical hearings, in which all participants are present in person

The decision as to which type of hearing is appropriate in each case is a judicial decision.

g) **Urgent matters**

As seen above a number of courts only deal with urgent work for the time being. “Urgent work” is understood to include applications where it is crucial, in the interest of justice, that there is a substantive decision within the next seven days. Urgent work has been defined to include, among others committals, freezing orders and injunctions.¹

h) **Effect on Insolvency Law**

A new temporary Insolvency Practice Direction came into effect on 6 April 2020 and aims to help court users navigate this time by avoiding the need for parties to attend court in person and to address some of the problems arising from the courts now operating with limited staff and resources.

Please see the related FraudNet response on UK Crime and Civil Regulation.

¹ For more information on Priority 1 and 2 work please look at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878781/Civil_court_listing_priorities_9_April_2020.pdf

i) **Functionality of Lawyers and Banks**

Generally, a large number of lawyers successfully operate remotely and conduct client meeting and Court representations either over the phone or via one of many video call platforms.

Even though a large number of bank branches have remained open banks are advising their customers to use online and mobile banking services where possible and only physically visit the branch when absolutely necessary.

2 Forecast: After the crisis and long-term effects

- a) Effect on Judicial System - Even though some believe that the pandemic could lead to modernization and digitalization of the court system, the legislations and PDs passed as a response to COVID-19 have a precise end date. For instance, the PD 51 Y states that “[the PD] ceases to have effect on the date which the Coronavirus Act 2020 ceases to have effect”. The Act, as explained above, expires in two years or earlier if the relevant authority decides so. The new PD 51 Z has an even closer end date and ceases to have effect on 30 October 2020.
- b) Effect on enforcement-in the short term, it may be that due to limited resources and strategic thinking, pursuing asset recovery projects understandably may not be prioritized. However as business activity resumes so too will be the aim to recoup stolen funds in an attempt to limit the economic losses that have been suffered. Furthermore as Warren Buffett said “Only when the tide goes out do you discover who’s been swimming naked” and it is likely that the downturn will result in commercial frauds being discovered.
- c) Given that financial restraints are likely to continue for some time, it is likely that all parties involved in the recovery process (eg victims, lawyers, litigation funders) will be more amenable to risk sharing options.

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