

COVID-19 and Beyond: Remote Hearings.

On 19 March 2020 at 11:00, in response to COVID-19, the following key messages, amongst others, were posted on the Isle of Man Courts of Justice website (www.courts.im):

- Measures are being put in place to reduce the number of non-essential visits to the courts building including by witnesses and defendants.
- Technology will be used as far as practically and legislatively possible.
- Parties are being encouraged to apply to “stay” proceedings where applicable and the fee for Consent Orders is temporarily being waived.

It was expressly stated that:

“The increased use of technology will be encouraged where possible in all civil and family matters, including appeals. Matters will be dealt with on a case by case basis with the court looking favorably on parties seeking matters to be stayed.” It was also expressly stated that it was “vital...that access to services and the administration of justice continues as fully as possible.

The Emergency Powers (Coronavirus) (Courts etc) Regulations 2020 (which came into operation on 22 April 2020) modified certain legislative provisions dealing principally with criminal proceedings and tribunal matters. Express provision was made for the use of video links and live audio links for tribunal purposes.

In the Oxford Rule of Law Lecture 2017 (available at www.courts.im) the former First Deemster David Doyle, now a Senior Legal Adviser with Cains, stressed the important role that judges have in embracing change and technology. That message now more than ever is of special relevance.

It is highly likely that during COVID-19 and beyond there will be an increased use of technology to facilitate remote hearings. With the increased use of remote hearings, the courts, the parties, their advocates and the witnesses will come to an enhanced realisation that much time and money can be saved by holding remote hearings where convenient and appropriate.

The Isle of Man courts are already well-placed to hold hearings remotely using modern information technology.

- Rule 7.1(1) of the Rules of the High Court of Justice 2009 (the “Rules”) requires the court to further the overriding objective of dealing with cases justly by actively managing cases. Rule 7.1(2) of the Rules expressly provides that active case management includes dealing with the case or any aspect of it without the parties needing to attend at court (paragraph j) and making use of technology (paragraph k).
- Rule 7.2(2)(d) provides that except where the Rules provide otherwise, the court may hold a hearing and receive evidence by telephone or video link or using any other method of direct oral communication.
- Schedule 7.1 of the Rules contains provisions in respect of applications for court orders, in particular for telephone hearings and video conferencing and the recording of such proceedings.

The burden of managing the effects of COVID-19 does not rest solely with the courts. Rule 1.2(4) provides that “the parties are required to help the court to further the overriding objective” and Rule 7.1(2) confirms that active case management includes the parties co-operating in the conduct of proceedings (paragraph a). Those duties placed on advocates and parties by the Rules are a fundamental aspect of the Isle of Man judicial system. Now more than ever do those duties apply where, despite the adversarial nature of proceedings, each side should be seeking to provide as much assistance as possible to the court and each other to ensure the continuance of any case, as appropriate to its particular circumstances. This will include ensuring that the necessary technology is available so that hearings can be conducted remotely.

Deemster Corlett, the Island's present First Deemster, in *Crowd Shout v Nova Scotia* (judgment 24 August 2016) dealt with an application for an order to permit the use of video conferencing facilities and considered Rule 7.2(2)(d), Schedule 7.1 and Rule 8.3 which provides that a court may allow a witness to give evidence through a video link or by other means. Deemster Corlett noted at paragraph 13 of his judgment that the spirit of the Rules is "to encourage the use of information technology". The Deemster had also considered the provisions in an earlier judgment in the same case delivered on 21 July 2016 observing at paragraph 18 that advocates need to liaise closely with court administration to make sure that "the whole system in short will work".

On 19 March 2020 the Judicial Office in England and Wales published a message from the Lord Chief Justice to the judges of the Civil and Family Courts which indicated that the rules in both the civil and family courts were flexible enough to enable telephone and video hearings of almost everything. The default position now in all jurisdictions of the English courts must be that hearings should be conducted with one, or more than one, or all participants attending remotely. That will not always be possible and sensible precautions must be taken when people attend a hearing."

The Lord Chief Justice, the Master of the Rolls and the President of the Family Division of England and Wales circulated an undated note in mid-April 2020 to members of the English judiciary providing further guidance on listing remote hearings during COVID-19 and stating that "the judiciary has risen to the challenge of keeping the machinery of justice functioning across all jurisdictions in a remarkable way."

Mr Justice Nigel Teare (a Manxman who was a former part-time Deemster and now is an English High Court Judge) in an important and much favourably commented upon decision delivered in *National Bank of Kazakhstan v Bank of New York Mellon* (19 March 2020) in effect stressed that the wheels of justice cannot grind to a halt during COVID-19 and that remote hearings must take place, where possible.

Mr Justice Teare stated that the courts exist to resolve disputes. A remote hearing was possible in that case using one or more forms of video conferencing facilities and the proceedings could be streamed so that those with an interest in the case would be able to follow the proceedings if they so wished. Mr Justice Teare stated that it was the duty of all parties and their legal advisers to cooperate to ensure that a remote hearing was possible. There was a need to keep the service of public resolution of disputes going during COVID-19. The substantive hearing proceeded remotely and smoothly the following week and justice was done.

The messages from the Lord Chief Justice and Mr Justice Teare have been reinforced in a number of subsequent cases including *Blackfriars Limited* [2020] EWHC 845 (Ch). In the *Blackfriars* case the English High Court had, on 1 April 2020, refused an application for an adjournment and ordered the parties to cooperate to explore ways in which a remote trial (scheduled to last some 5 weeks), involving an internet based video communications platform and an electronic bundle, might proceed. In a judgment delivered on 6 April 2020 the court in *Blackfriars* followed Teare J's decision in the *National Bank of Kazakhstan* case.

Courts around the world are issuing directions in respect of the increased use of remote hearings. Cains recently received instructions to provide expert evidence in a high profile commercial case in Australia. Beginning at 07:40 on 8 April 2020 David Doyle of Cains gave expert evidence on Manx company and contractual law in proceedings before the Supreme Court of New South Wales in Sydney, Australia. The evidence was given from the expert witness' home by the use of technology (basically two screens, one video audio screen and another screen for reference to the relevant paginated court bundle).

The Isle of Man's administration of justice is no stranger to hearings being conducted with the use of technology. Deemster Moran sat in Singapore, his home jurisdiction at the time, and dealt remotely with many hearings in *Bitel /Altimo* recently described by Deemster Corlett at paragraph 86 of his judgment in *Leonteq* (delivered 27 February 2020) as "probably one of the most complex cases heard anywhere in the common law world in the recent past". Robert Colquitt of Cains was significantly involved in both *Bitel* and *Leonteq*.

Closer to home, the Appeal Division (Judge of Appeal Tattersall QC and Deemster Sullivan) in *Woodrow v Pogue* (judgment 20 April 2006) heard submissions from an appellant via a telephone in Scotland. Peter Clucas of Cains acted for the successful respondent in respect of that appeal which was duly dismissed. The court, with cautious conservatism, at paragraph 19 of the judgment stated: "Notwithstanding the inherent difficulties of telephonic communications we are satisfied that the Appellant had a full opportunity to put his case to the court."

The Appeal Division (Judge of Appeal Tattersall QC and Deemster Rosen QC) in *Oakley v Osiris Trustees Limited* (judgment 17 July 2014) at paragraph 36 noted that the court had been willing, albeit without "creating any precedent", to allow an appellant to attend and participate in the appeal hearing by telephone.

It is important that remote justice also remains open justice and that members of the media and the public can have access to the proceedings which are taking place before the courts, albeit remotely. It is understood that the *National Bank of Kazakhstan* proceedings were streamed. Moreover, the proceedings should be recorded and transcripts can be made available. Section 27(3) of the High Court Act 1991 provides that rules of court may make provision with respect to the method and manner in which records of any proceedings in the High Court may be kept. Section 27(4) provides that audio recordings should be made of the substantive hearings of all actions and matters in the High Court in accordance with the Rules.

Part 9 of the Rules deals with trials and hearings. The general and fundamental rule is that hearings and trials should be in public. Rule 9.8 provides that an audio recording of a hearing which is required to be made under section 27(4) of the High Court Act 1991 shall be kept by the court office for a period of not less than 3 years following the conclusion of the claim to which the hearing relates.

It is important that respect for and confidence in the rule of law remains and that justice, during COVID-19 and beyond, is continued to be administered effectively without compromising the health and safety of the judiciary, court administration, advocates, other court users and the public.

This will involve a careful balancing exercise on the part of all persons involved in the administration of justice in order that an ideal balance can be struck between “business as usual” (which is not possible) and the wheels of justice grinding to a halt (which, as Mr Justice Teare stressed, cannot be allowed to happen). As noted above, there will be cases where it may not be possible or appropriate for a hearing to be conducted remotely but in the vast majority of cases matters can progress. Each case needs to be dealt with on its own merit and in accordance with its own circumstances and the Isle of Man judicial system is well placed to do that.

The Manx courts and the Manx legal profession (including Cains) will continue to play their roles in ensuring that Manx justice continues to be promptly and fairly delivered throughout COVID-19 and beyond.

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