Business as usual? High Court to hear five-week trial remotely in light of the coronavirus (COVID-19) pandemic (Re One Blackfriars Ltd)

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Dispute Resolution analysis: This case involved an opposed application to adjourn a five-week trial listed in June 2020 in light of the coronavirus (COVID-19) pandemic. The application to adjourn was dismissed, and the judge gave helpful guidance in terms of how best parties can prepare for such a hearing to be heard remotely. It also provides guidance in terms of the health and safety considerations, the heightened duty for parties to cooperate, and the compatibility of such hearings taking place in light of the Prime Minister's instructions to the nation to stay at home.

The judge also referred to two recent complex trials which had, for the most part, proceeded remotely without significant issue. The guidance and advice in the current climate is fast paced and frequently evolving but it seems as though courts are adapting well to these challenges, and multi-party complex cases may still well proceed. In the instant case, if the application to adjourn had been successful, the trial would not have been re-listed for a year. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

Re One Blackfriars Ltd (in liquidation) [2020] EWHC 845 (Ch) (06 April 2020)

What are the practical implications of this case?

This case provides a clear summary in terms of the principles guiding judges when faced with an application to adjourn a lengthy trial, and the nature of the guidance provided by the Prime Minister as supported by recently enacted legislation.

It also provides an outline of the necessary steps to be taken by parties when such a trial is to be conducted remotely. The judge emphasised that co-operation and planning would be essential if such an approach were to succeed, and that the parties should co-operate in seeking potential remote trial platforms and document handling systems. The judge confirmed that he expected any proposed system to be subject to robust testing from as many of the locations from which participants were likely to be giving evidence (or making submissions), not only to ensure adequate video and audio quality, but also to ensure that documents can be displayed quickly. Careful attention must be paid to the internet bandwidth available at the locations from which witnesses intend to give evidence. The judge opined that it would be preferable for witnesses to travel to a few locations as close as possible to their homes, such as solicitors' offices, with dedicated servers and IT staff on hand, rather than to dial in at home without any assistance. This would also alleviate the anxiety that many people suffer from, including judges, when it comes to the moment of being dialed into proceedings and to being interrupted in the course of proceedings by unexpected household events.

Where the parties to a case are sophisticated and both represented by legal teams, it now appears as though all efforts will be made by the court to ensure that even a lengthy and complex trial will be heard remotely, if at all possible.

What was the background?

At a pre-trial review of this matter, the applicants, who are the joint liquidators of One Blackfriars Limited (OBL) (the joint liquidators), applied to adjourn the trial of their claim against the former administrators of the company (the former administrators). The trial was listed for early June 2020 and, if the application to adjourn was successful, the earliest that the trial could be re-listed was in June 2021.

The joint liquidators claimed damages in excess of £250m in respect of the alleged mishandling of the administration of OBL between October 2010, when the former administrators were appointed, and December 2011, when the sale of OBL's main asset was completed. It was alleged that the sale of that asset had been at an undervalue and that, had the former administrators complied with their duties, a corporate rescue of OBL may have been achieved.

The trial had been listed as long ago as November 2018 and involved four live witnesses of fact and 13 expert witnesses. The application to adjourn was not supported by an application notice and supporting witness statement, which meant that a great deal of the evidence in support of the application was given informally by way of skeleton argument and oral submissions at the pre-trial review. The joint liquidators relied upon four key arguments in support of the application to adjourn. Firstly, that to proceed with the trial would be inconsistent with the Prime Minister's instructions to stay at home except for very limited purposes. Secondly, that the trial could not proceed, even remotely, without exposing participants and others working behind the scenes to an unacceptable risk to their health and safety. Thirdly, it was said that the technological challenge posed by a five-week trial was too great and, finally, it was said that there was a real risk of unfairness or potential unfairness in conducting a remote trial of the claim.

What did the court decide?

The judge first considered the argument that, to proceed with the trial would be inconsistent with the Prime Minister's advice, including that all but essential travel was prohibited. The Prime Minister's instruction had also been translated into enforceable legal provisions in the Coronavirus Act 2020 (CA 2020). CA 2020, ss 53 to 56 contain specific provisions in respect of the operation of courts and tribunals. Unlike many other sections in that act, which give the Government power to suspend or postpone a particular area of activity, these sections instead provide for an expansion of the use of live links in criminal proceedings and, in relation to civil proceedings, for public participation in proceedings conducted remotely by audio or video. The judge accepted the respondents' argument that these provisions were a strong indication that the legislature intended that the work of the civil courts continued with the aid or greater use of video and audio technology. This submission was further supported by reference to the Health Protection (Coronavirus Restrictions) (England) Regulations 2020, SI 2020/350 (the Coronavirus Regulations) which provide that a reasonable excuse for individuals to leave their residence includes fulfilling a legal obligation, such as attending court or to participate in legal proceedings. The judge accordingly had no hesitation in concluding that proceeding with the trial would not be contrary to the Prime Minister's instructions to the nation, nor the applicable guidance.

The second argument in favour of an adjournment was that there was an unacceptable risk to health and safety in proceeding even with a remote trial. In particular, two or three of the individuals who would be involved with the trial fell within the category of 'vulnerable persons', as defined in the Coronavirus Regulations. Further, two of the expert witnesses could be responsible for looking after other members of their household and would struggle to participate even if conducted in a location close to their home.

In responding to this argument, the judge firstly considered that the matters raised were highly relevant to the court's case management powers, however, as things stood, the arguments raised fell very far short of justifying a wholesale adjournment of the trial. In particular, the trial was not listed until 8 June 2020, and the Government would no doubt review the situation on many occasions prior to the start of the trial.

Secondly, the court had very little concrete evidence as to the potential difficulties of the participants in the trial, and the extent to which any such risks could be mitigated by particular arrangements. Thirdly, if immovable obstacles did exist in respect of such participants, the judge would expect the parties to co-operate and propose ways in which the trial could proceed in the absence of those witnesses. Fourthly, the judge considered that there were steps which could be taken over the coming weeks to prepare for the trial, such as exchanging short supplemental expert reports and agreeing the trial bundle, which would be necessary in any event. The argument that the trial should be adjourned on safety grounds was accordingly rejected.

In terms of the argument that the technology was not available to conduct a five-week trial remotely, the judge also rejected this as a ground upon which to adjourn the trial. The judge noted two examples of fully remote trials having taken place in the current climate. These had successfully proceeded, on one occasion, involving multiple parties and in excess of 10 witnesses. While no doubt there would be technological challenges, these were not sufficient to warrant an adjournment at this point in time, and the parties would be expected to co-operate and plan in trialing the various options.

Finally, in terms of an argument that a failure to adjourn the trial would cause prejudice, the judge held that the challenges and, indeed, the upsides of proceeding with a remote trial would apply to both parties equally. This was litigation involving well-resourced, sophisticated parties, both represented by

excellent legal teams, and there was an equality of arms. The application to adjourn was accordingly dismissed.

Case details

- Court: High Court, Business and Property Courts, Insolvency and Companies List
- Judge: Mr John Kimbell QC sitting as a Deputy High Court Judge
- Date of judgment: 06 April 2020

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