

Technology keeps the court wheels turning

Barristers **Chris Bryden** and **Georgia Whiting** of **4 King's Bench Walk** examine the impact of changes made to court procedure in the COVID-19 age. Early thoughts that complex construction cases would be subject to lengthy adjournment have been laid to rest as judges prove happy to expand the use of technology.

KEY POINTS

- *Conversant Wireless Licensing SARL v Huawei Technologies Co. Ltd and other companies [2020] EWHC 741 (Pat)*- High Court allows application to adjourn complex trial in light of COVID-19. In particular, there was no provision within the CPR to allow such a trial to be conducted on the papers, and it was not appropriate to do so in the circumstances.
- *Re One Blackfriars Ltd (in liquidation) [2020] EWHC 845 (Ch) (06 April 2020)*- High Court rejects application to adjourn a trial, which was to proceed remotely even with a number of expert witnesses in addition to witnesses of fact. It was held that, to do so, was not to proceed in a manner incompatible with current government guidance.
- *MillChris Developments Ltd v Waters (2020)*- The TCC (remotely) rejected an application to injunct on-going adjudication proceedings on the basis of COVID-19.
- In the absence of clear and causally linked evidence, it appears as though parties seeking to restrain on-going adjudication proceedings on the basis of COVID-19, will find little favour from the Courts.
- The situation and guidance is fast-paced and frequently changing and it is clear that the workings of the justice system are having to (and with a degree of success) adapt quickly.
- Preparation is paramount, and parties will need to ensure that they and their legal advisors are taking steps to ensure that the remote process runs as smoothly as it can.

The recent pandemic has caused worldwide disruption to the economy and workings of society at all levels, and the justice system has been shown to be by no means immune. The importance of the justice system, however, has meant that courts, lawyers and litigants have been required to adapt in a very short period to the maintenance of the justice system in very difficult times.

To Adjourn?

One of the earlier prominent decisions in this regard is found in the case of *Conversant Wireless Licensing SARL v Huawei Technologies Co. Ltd and other companies [2020] EWHC 741 (Pat)*.

This case concerned an application by the defendants to adjourn a trial in a FRAND matter. The claimant, whilst objecting to the proposed adjournment, accepted that it was not practical to conduct the trial in the usual way in light of the global pandemic of Coronavirus. In broad terms, Conversant sought that the trial should be conducted broadly on paper. It was suggested that focused hearings on particular issues could be held remotely, and there would be full written submissions, and any cross-examination allowed by the Court would be focused and time limited.

Counsel for Huawei raised several objections to this proposal. First, it was pointed out that nowhere in the recent guidance from the Lord Chancellor issued in response to the current health crisis was there any mention of trials being conducted on paper (as opposed to interim hearings being decided on paper). It was submitted that there was good reason for this absence of guidance, referring to the judgment of the Supreme Court in *Al Rawi v Security Service [2011] UKSC 34*, in which Lord Dyson said:

'There are certain features of a common law trial which are fundamental to our system of justice (both criminal and civil). First, subject to certain established and limited exceptions, trials should be conducted and judgments given in public'.

It was argued that the points made by Lord Dyson in *Al Rawi* held good now as they did when the judgment was given, notwithstanding the public health crisis.

The Judge held that there were formidable barriers in the way of Conversant's proposal to deal with the trial, for the most part, on paper. Since the start of the health crisis developments in the guidance given to courts in respect of the conduct of trials and hearings had been rapid. However, so far, these had not included any change in the Civil Procedure Rules which would make it appropriate for the conduct of a FRAND trial to go forward largely on paper.

Given that there was also a pending appeal in the Supreme Court, a good deal of time and costs may well be wasted if the trial proceeded in the ignorance of the same. The Judge accordingly vacated the trial date but gave the parties permission to re-apply after Judgment from the Supreme Court. If any further application was to be made, it would be dealt with in line with the guidance in force at that stage.

Or not to Adjourn?

For a brief period, it appeared as though complex trials such as in the construction sector would be likely subject to lengthy adjournments in the current climate. However, a different conclusion was subsequently reached in the case of *Re One Blackfriars Ltd (in liquidation) [2020] EWHC 845 (Ch) (06 April 2020)*.

At a pre-trial review of this matter, the Applicants applied to adjourn the trial of their claim against the former administrators of the company. 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 trial had been listed as long ago as November 2018 and involved four live witnesses and 13 expert witnesses. 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.

The Judge first considered that the Prime Minister's instruction had also been translated into enforceable legal provisions in the *Coronavirus Act 2020*. Sections 53 to 56 contain specific provisions in respect of the operation of courts and tribunals. Unlike many other restrictive sections in that Act, these sections 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 argument that these provisions of the Act were a strong indication that the legislature intended the work of the civil courts to continue 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, 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 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. The Judge 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 objections 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.

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. Whilst no doubt there would be technological challenges, these were not sufficient to warrant an adjournment at that point in time, and the parties would be expected to co-operate and plan in trialling 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.

Adjudication

Adjudication has also shown to have its own unique challenges in the current climate, and the recent case of *MillChris Developments Ltd v Waters (2020)* demonstrates this neatly.

In September 2017, the applicant undertook construction works to the respondent's property and it was subsequently alleged by the respondent that these works were defective and that they had been overcharged by some £45,000. The respondent commenced adjudication. The referral was accepted, but the deadline for submissions and the intended site visit were within the current pandemic and associated 'lock-down'. It was alleged by the applicant that the timetable in question was no longer feasible in light of Government advice and that the adjudication should be postponed. Shortly thereafter, the applicant applied for an interim injunction in order to prevent the respondent from proceeding with the adjudication.

The TCC rejected (remotely) the application for an injunction, applying the well-versed test in *American Cyanamid Co v Ethicom Ltd [1975] AC 396*. It was emphasised that the court would

only grant an injunction in order to restrain an on-going adjudication in very rare circumstances. This was not such a case, and it was noted that parties to an adjudication would always be faced with short-time scales and associated difficulties. There had been no good reason put forward as to why the applicant or its solicitor could not deal with or access the relevant material remotely. Furthermore, parties to the adjudication did not have a fundamental right to be present at a site visit; the adjudicator in question was perfectly able to conduct that site visit on his own. This was not one of the rare cases in which an on-going adjudication would be restrained, and the application was accordingly dismissed.

However, the Court also took the opportunity to outline the circumstances in which it may well be appropriate to restrain an on-going adjudication in the current crisis. One such example was where an adjudicator would only hear one party in a case where the other had truly been unable to obtain evidence as a direct result of COVID-19. In the absence of very clear and causally linked evidence, it appears as though parties seeking to restrain on-going adjudication proceedings on the basis of COVID-19 will find little favour from the courts. The safest course of action in the absence of very clear and connected evidence will be for a responding party to reserve any procedural or natural justice arguments until the enforcement stage.

Conclusion

Following the recent extension of the Government lockdown the Courts and the legal industry are continuing to adapt to these unprecedented times. What, to some, may have been an impossibility in the past, has now become a reality; lengthy trials involving numerous witnesses of both fact and expert giving their evidence remotely. Where such trials are to take place, it is clear that preparation is paramount if such a hearing is to proceed with (as much as possible) limited disruption. That is also the case in the field of adjudication, where clear evidence would be required that COVID-19 has directly caused prejudice to the responding party, in the event that an injunction is sought. Whilst not quite 'business as usual' we are slowly but shortly, making progress, such progress which will no doubt continue to shape the construction industry and litigation in general when the restrictions lift and life resumes as normal. **CL**