Speech to the Chancery Bar Association

Rt Hon Sir Julian Flaux CHC

10 March 2021

The direction of travel

Good afternoon everyone and thank you for inviting me to speak at today's webinar. There are many familiar names in this virtual audience but this event is my first proper opportunity to introduce myself to those members of the Association I don't know and reintroduce myself to those I do. I have already had the chance to meet Amanda Hardy and Andrew Twigger on two separate occasions – once immediately after my appointment, and more recently at our Chancery Users Group meeting. I was also invited to introduce and attend your excellent seminar on Artificial Intelligence last month. I look forward to being able to meet more of you properly in person.

I want to start by saying how delighted I was to be appointed as Chancellor earlier this year. It is an important role and I can genuinely say that it is the only leadership role within the judiciary which I have ever wanted. I feel excited, and not a little daunted, at being presented with the chance to fulfil that ambition. It offers the opportunity to work with the highest calibre of practitioner and judge across England and Wales, at a time when we are all working hard to maintain our reputation for excellence, domestically and internationally.

I would also like to thank my predecessor Sir Geoffrey Vos for all his hard work and his vision as Chancellor. He has left the Chancery Division and the B&PCs in extremely good shape and I look forward to working with him to maintain the reputation for excellence of which I just spoke.

It won't have gone unnoticed by some of you that my background, as a barrister and judge, has not been in traditional Chancery work, and there are two things I'd like to say about that.

The first is that my immediate priority as Chancellor – along with individual conversations with each judge in the Chancery Division – has been to hear cases in those jurisdictions within the B&PCs with which I am less familiar. I have already been able to sanction a scheme of arrangement and heard a four-day Inheritance Act trial last week. There are other areas in which I plan to sit before the summer – intellectual property and shareholder disputes among them. I have enjoyed my early sitting, and not least the chance to visit or revisit less familiar areas of law. And I will continue to sit regularly across the work of the B&PCs. I am, in other words, committed to every part of these courts and I believe that my previous broad experience at first instance and in the Court of Appeal will strengthen that commitment.

The second point relates to my initial thoughts about my new role. It is still too early, only two months in, to be able to outline a detailed 'vision' or attempt to sketch more than an outline of the work I hope to do. I am convinced that the future of the B&PCs, and every area of specialist civil work that they encompass, lies in continuing to offer a gateway to high-quality, just, and expeditious decision-making for clients of all sizes both domestically and internationally. The

approach of judges and lawyers to the resolution of disputes within the different specialisms in the B&PCs have more in common than they do differences.

A system that is accessible needs to be tailored to the needs of court users, with consistent procedural rules and guidance where that is appropriate and where common themes exist. We might even learn from our differences. Might the Chancery Division benefit from a four-day sitting week like in the other B&PC jurisdictions? Might the time of Commercial Court judges be usefully freed up by allowing the equivalent of Masters to undertake some of their interlocutory and box work? I have been closely involved in the disclosure pilot, and more recently in the amendments to the rules relating to witness statements. Significantly, these are important developments that have been worked on and implemented across the Business & Property Courts, without jurisdictional differentiation. However, there is clearly more that can be done.

I am going to offer some preliminary thoughts on the road ahead. That road has been irrevocably affected by our experiences of the last year and the rapid changes forced by the pandemic. So, before I look forward, I am briefly going to look back.

The past 12 months

Much has been said and written about the rapid adaptation of the B&PCs to the changes required by lockdown, and the new ways of working we have developed over the past 12 months. You have played a large and important part in that and in helping to maintain the provision of the highest quality of legal services in the most difficult and uncertain of circumstances – for which, thank you.

In fact, there was been a unity of approach from the start across the B&PCs, with work in London and in the regions continuing largely unimpeded and with a generally smooth adaptation to remote, and later hybrid, hearings guided by the early adoption of a remote hearing protocol[1] and practice directions.[2]

It is difficult to understate the seismic change that occurred, about a year ago, when almost overnight we moved from in person hearings to remote hearings and from predominantly paper bundles to electronic files. It is a massive tribute to the resilience and dedication of our court system – its judges, lawyers and support staff– that this was achieved.

Next few months

Now that the end is possibly in sight, with the Prime Minister's announcement that, subject to a number of conditions, all legal limits on social contact will be lifted by 21 June 2021,[3] it is time for a more reflective and less crisis-driven approach to remote hearings, or those with a remote element. With an eye firmly on the middle distance, we must seize the good things that

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[1] https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1-1.pdf.

[2] https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part51/practice-direction-51y-video-or-audio-hearings-during-coronavirus-pandemic; https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus.

[3] https://www.gov.uk/government/speeches/pm-statement-at-coronavirus-press-conference-22-february-2021

have come out of the terrible crisis – the efficiencies and the things that we have learnt to do better – and jettison the bad, – including the erosion that working from home has caused to our perception of the work/life balance. There is no doubt that we have been offered an opportunity to do things differently, and we should grasp that firmly.

It is clear that we will not be returning to the position as it was in early 2020. I note that if the relevant provisions of the Police, Crime, Sentencing and Courts Bill, which some of you will have seen was introduced in Parliament yesterday, pass into law, there will be power for the temporary provisions in the Coronavirus Act that enabled the observation of remote hearings to be made permanent. This could only benefit the B&PCs and make them more competitive, as it would maintain the ability of clients and witnesses to participate in hearings remotely and enable the press and members of the public to observe hearings remotely. This would give the B&PCs an opportunity to build on the better elements of this method of resolving some disputes.

New etiquette

In the early weeks of the pandemic, 85% of B&PC work continued without any need for adjournment. And as we have developed different ways of hearing cases with a live element – or hybrid hearings – cases requiring adjournment became increasingly rare. In fact, waiting times for listing some hearings in the Rolls Building have decreased.

A new etiquette has quickly emerged in hearings with a remote element. Within a few weeks, judges adapted their introductions. We acknowledged that video conferencing felt informal, but emphasised that a virtual court was still a court and that all those present should behave accordingly. Some judges continued to wear robes for the same reason. Sometimes referring to the principle of open justice, we have explained that links to the open hearing had been provided to members of the public and press but on the basis that they still comply with the rules applicable to hearings in court. Attendees are reminded that recording or taking photographs of the proceedings is prohibited. That introduction has also often become the place to ask for tolerance when faced with inevitable technical hitches.

As it has turned out, the main change in the judicial approach to B&PC hearings since those first weeks has been in our confidence that the system will work properly. In the early days, we were in uncharted territory and did not know to what extent the technology and format would work or prove sufficient. There is a higher degree of confidence now that it will. Technical glitches occur, but are relatively uncommon. And the frustrations that one encounters during a remote hearing are often similar to or the same as would have emerged in court.

However I know that even if a remote hearing is a more efficient way of justly and fairly resolving a dispute, it has its price. The infrastructure – screens, bandwidth, cameras – needs to be in place, and even if it is, conducting remote hearings is more tiring for all concerned. We have, in the past, done it, and done it well, but at some personal cost. The extra mile to which all in the legal system have gone is not something I take for granted, and it is not a price that can continue to be exacted.

After the experience of the last 12 months, we have a clearer view about the sort of cases that will and will not suit a remote hearing. Committal hearings, those elements of a trial involving an assessment of a witness's credibility and (on occasion) interim applications involving a

litigant in person are all examples of matters that are often best conducted live, though even then there are exceptions.

In *Bilta v TFS* [2021] EWCA Civ 221, last month, the Court of Appeal ruled that the key factor in deciding whether to adjourn a case because a party or major witness would not be available was whether a refusal to do so would lead to an unfair trial. The judgment described hearings concerning allegations of dishonesty as 'paradigm examples' of cases where live cross-examination would assist the trial judge. The first instance decision in that case also includes helpful guidance by Mr Justice Marcus Smith on the factors to be taken into account by parties seeking to agree directions for trial while social-distancing measures remain in place. They include the importance and nature of the issue (whether interim or final), whether there is a need for urgency, whether the parties are legally represented and a lay party's ability to engage with the remote process and the source of evidence such as whether it is written or oral, expert or lay and the extent which it is contested.[4]

As well as cases that do not suit a remote hearing, it has become apparent that there are hearings that suit them well, and where a speedier less expensive format seemed more proportionate. Generally speaking, these have been the shorter preparatory and interim hearings that are often a collaborative exercise between partie,s like directions hearings.

Taking stock

As we approach – we hope – calmer waters, the time has come to take stock. We all want to retain what we see as improvements to the system, and the advantages offered by remote and hybrid hearings. And an open and adaptable approach to remote and hybrid hearings would only enhance the English court's existing reputation as one of the leading centres for international business dispute resolution. The experiences and opinions of this audience, and of all B&PC practitioners and regular court users must be actively sought and taken into account as part of this process.

Of course, a flexible approach to working is nothing new in the B&PCs, which have long been using the powers in CPR 32.3 to hear witness evidence via video link,[5] especially when those witnesses are based outside the jurisdiction.

Interestingly, for our courts, it is the use of those methods within the jurisdiction that has been more novel. This has opened the possibility of specialist judges 'sitting' outside London more easily and more swiftly being able to deal with short applications and hearings that require a High Court Judge in circumstances where those High Court Judges who are out on circuit are not free.

One area where that is now being put to good effect is the extension of Intellectual Property Enterprise Court (IPEC) multi-track hearings to the seven B&PC centres outside London. The speedy resolution of disputes before that court relies on firm case management by one of a small pool of expert judges and a short timeframe between CMC and trial by a docketed judge. The ability to conduct even just the CMC remotely will mean that those often London-based judges are more likely to be able to hear cases that have been issued in one of the regional

[4] ***Bilta (UK) Ltd (in liquidation) v SVS Securities*** [2021] EWHC 36 (Ch) at [14(3)]

[5] ***Re One Blackfriars Ltd*** [2020] EWHC 845 (Ch) (6 April 2020) per Deputy High Court Judge John Kimbell QC at [42]

centres – probably Manchester or Newcastle – with the same level of service whilst allowing parties to have their dispute heard in a local court.

Dignity of court

But as we start to consider those parts of our newer way of working that we wish to retain, we must not lose sight of the benefits of many of the formalities attached to the court-based system that has existed for so many years.

We have all experienced the informality that can creep in when we are conducting cases from our kitchen tables or studies. We have had to become tolerant of those interruptions: bad WiFi connections, rings on the doorbell, noises from others in our family or barking dogs. Counsel taking instructions via WhatsApp and parties speaking more freely among themselves or litigants in person, perhaps feeling disinhibited and behaving less appropriately,[6] or even on a more mundane level having to remind those who are not speaking to put themselves on mute to avoid feedback, can be distracting for the judge and participants.

This has been a small price to pay as we worked to keep the justice system in the B&PCs fully operational and we have been able to work with the assistance of practitioners such as you with your accrued sense of what is proper in a courtroom. However, as we start to think about the longer-term use of remote hearings, we need to guard against unintended consequences of informality.

To talk about the dignity of the court probably sounds self-regarding and maybe even a little pompous. But an element of formality in a courtroom is important, and serves to demonstrate the seriousness of the decisions being taken. Particularly in cases involving individuals and the economically disadvantaged, the outcome of a hearing can, and frequently does, have life changing consequences. When the court is making a compulsory order, it is compelling someone to do something that they do not want to do, and the person who is subject to the order needs to understand the consequences of not complying with that order. I believe that what I call the dignity of the court can be – and has been - maintained whilst ensuring that the B&PCs are neither inaccessible nor hostile to those who are infrequent users. Indeed, that dignity is the way of ensuring open justice, so that in hearings that are inevitably stressful with much at stake, all can be assured of courtesy, respect and, above all, a fair hearing – and the perception of a fair hearing - of their case.

In five years, new advocates coming up the system with less experience of live hearings might lose the inherent sense of how to behave in court. As well as the detrimental impact on their professional development,[7] that might be accompanied by less regard for the rules of the court such as deadlines for filing documents with a risk that the system would slowly become less fit for purpose.

How might formality be introduced into a more flexible system? One example might be technology. In a fully represented hearing, whether remote or hybrid, there should be an understanding of the minimum level of IT provision for judges and the parties. As advocates,

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[6] Report and recommendations "The impact of COVID-19 measures on the civil justice system" May 2020 - para 6.21

[7] https://www.stewartslaw.com/news/covid-19-and-the-practical-implications-on-civil-litigation-where-are-we-now-and-what-can-we-expect-in-the-future/

you need to know that judges have access to enough screens to allow them to have the video and audio link and multiple documents open at the same time[8] and that judges will have access to sufficient bandwidth to be able to access the e-bundles we have been sent. And there should be a consistency of approach in referencing those bundles, with proper file names and consistent page numbering.

I hope that the updated AV equipment that has been installed or will be installed in eleven courts in the Rolls Building will go some way towards providing this element of consistency for parties. The new equipment is compatible with the HMCTS' 'cloud video platform' and will be capable of supporting hybrid hearings, making such hearings more accessible to those who have not employed or cannot afford to employ the services of private software providers such as Opus 2.

This is only one example of the way proper formality within remote or hybrid hearings might be achieved. What is clear is that, as we start to consider how to incorporate remote and hybrid hearings more permanently, the purpose and benefits of a degree of formality should be part of the discussion.

Wellbeing

There is another aspect of the way we have been working over the past year of which we must remain aware, and that is the pace and intensity at which we have all been working. I have been struck by the experience of our district and circuit judges during my early conversations with the regional B&PC centres. The impact of the transition to remote hearings has not been felt evenly across all levels of the judiciary and has further compounded the heavy workload of our district judges. To continue to work in that manner is unsustainable and raises important questions about well-being. I know that these impacts have been felt far beyond the judiciary, and I am sure that you have all had your own experiences of the difficulties of working remotely.

We must also be sensitive of the fact that technology has an exclusionary angle, particularly for litigants in person. Respondents to a Civil Justice Council Report on the impact of COVID-19 measures in May 2020 cautioned against the use of remote hearings involving litigants in person as it risked undermining trust in the justice system, especially for those who still want their 'day in court'.[9]

All in all, we must look at our experience in the round. We must remain alert to good aspects of remote and hybrid hearings and constantly refine our approach to ensure it is nuanced, fair for all parties and workable across all levels of the judiciary.

Procedural changes

I mentioned witness evidence in context of video hearings earlier in this talk, but this has also been an area that has been the focus of thought during the last 18 months, pre-dating the pandemic. Practitioners such as yourselves are faced with the perennial task of presenting your client's case fully and properly and demonstrating to your client that you are doing so, whilst

[8] ***Re One Blackfriars Ltd*** [2020] EWHC 845 (Ch) (6 April 2020) per Deputy High Court Judge John Kimbell QC at [42]-[43]

[9] Report and recommendations "The impact of COVID-19 measures on the civil justice system" May 2020 – paras 6.6, 6.22 and 8.7

only providing the court with what it requires to try the case fairly and determine the issues which are really in dispute. The new Practice Direction, PD57AC, which applies to new and existing trials in the Business and Property Courts for witness statements signed on or after 6 April 2021, seeks to promote best practice.[10] I am not going to say very much about the terms of the new PD: but I am going to say something about the problem the PD is intended to address. A witness statement that goes beyond what that witness can properly say is a dangerous thing. Of course, all clients want their story to be told, their way, as many times and as comprehensively as possible. But the witness statement is not the "whole story", it is evidence of what is almost certainly just part of the story, and judges (and for that matter clients) are far better served by reading and hearing from a witness the evidence she or he can properly give, on which the witness can be cross-examined, rather than having witness statements which far too often consist of a recitation of the documents in the case, on occasions documents not even sent or received by that witness and which too often also seek to argue the merits of the case. I also know that witnesses are going to require legal guidance in terms of what their statements should say. Removing the proper involvement of the lawyers is not intended and would be a mistake. But what might be described as the over-lawyering of witness statements, papering over of cracks, advocacy and comment on the case and on matters beyond the witness' knowledge – this is what adds cost and time particularly in the cross-examination in which opposing counsel feels obliged to engage, to the detriment of the justice process.

Another recently-established group, chaired by Mr. Justice Adam Johnson, is exploring ways of using existing judicial case management powers to encourage an early focus on the key issues in a case. There are often issues that you as practitioners know are the important ones from the start. Though still in its nascent stages, it is another example of judges and practitioners constantly revisiting ways of avoiding litigation that risks becoming unmanageable.

Judicial recruitment

One final point - I started by mentioning the high calibre of the judges of the Chancery Division, and across the Business and Property Courts. That can only be maintained if people like you continue to apply for roles as deputy or salaried judges. My door is always open to those of you looking for a sounding board if you consider applying. The next recruitment round for deputy judges will start in the Autumn, and now is the time to be turning your minds to that. The section 9 deputy High Court judge role is a good way of getting a taste of the work of a salaried judge, and in the Rolls Building we have a mentoring process to support those who wish to get the experience and evidence necessary for becoming a full-time judge if that is what they aspire to.

Finally

We cannot know what the next twelve months will bring. Our departure from the EU and the continuing impact of Covid are both bound to have an impact on our work, with an increase in work in some areas. We must continue to work together to ensure that the B&PCs offer just, effective and efficient judicial decision-making for individuals and for businesses of all sizes, across England and Wales and internationally. As the times change, so too must the legal

[10] https://www.judiciary.uk/announcements/new-witness-statements-practice-direction-approved/

system adapt to remain fit for purpose. This can only be achieved by fresh thinking on flexible ways of working and a consistency of approach to procedure in all the B&PCs. You are an important part of that thinking, and I look forward very much to working with you in the months and years to come.

Thank you for inviting me to speak and for your attention.