

Litigating during the pandemic

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This is the second in a series of risk management alerts for law firms. We have already provided property practitioners with our views on the risks relating to property transactions during the pandemic and we have provided some practical advice on issues to be aware of during the current crisis.

COVID-19 has also had a significant impact on litigation and as it looks likely that we will be living with the pandemic for the foreseeable future, in this alert we will examine some of the key areas in relation to litigation.

Courts

Temporary amendments have been made to the Civil Procedure Rules. Some Courts are closed, or are not open to the public. Provision has been made for video and audio hearings, and most hearings will be conducted remotely, at least in the short term. Firms must ensure that they are familiar with the relevant technology to be used in advance of any remote hearing.

Many Courts are now asking for bundles to be prepared electronically which can be a very time consuming process especially given the requirement to include hyperlinks to every document in the index to the bundle. Firms should start the preparation for remote hearings earlier than they would normally consider necessary to ensure that they comply with the Court's requirements.

Parties are now permitted to agree extensions of up to 56 days to comply with directions without the Court's permission (providing a hearing date is not put at risk) and the Courts are to take account of the impact of COVID-19 when considering applications for extensions of time to comply with directions, the adjournment of hearings or relief from sanctions.

Practice Direction 51Z stays claims for possession, or to enforce a possession order for 90 days, subject to certain exceptions. Firms will have to take care to familiarise themselves with such temporary provisions when advising clients.

Signatures

There is an increased risk of challenge to the authenticity of a signature where an electronic signature is used so in every case careful consideration is required as to whether the appropriate approach to electronic signatures is being adopted having taken into account the nature of the document, the parties involved, the likelihood of challenge and the sums involved. The use of Signable/Rubix is appropriate in relation to certain documents as it provides a secure means of endorsing a document with a signature and an audit trail.

ABI/ACSO Statement of Intent

The Association of British Insurers (ABI) and the Association of Consumer Support Organisations have agreed a Statement of Intent which applies mainly to low value Protocol claims during the COVID-19 crisis. Solicitors should consider whether the Statement of Intent applies to their matters.

Limitation and the ABI/ACSO COVID-19 Personal Injury Protocol in England and Wales

Limitation dates must be observed in the usual way, but there may be difficulties in preparing and issuing proceedings. If a firm and the relevant Defendant insurer are signatories to the COVID-19 Personal Injury Protocol then it provides that limitation dates in personal injury cases are frozen. The only obligation on Claimant lawyers in return is that they have to undertake to respond constructively to requests for extensions to serve Defences. Signatories agree to provide a regularly monitored email/telephone "hotline" where senior decision makers will consider any failures to act in accordance with the limitation/extension provisions. The position for England and Wales can be found on the ABI website [here](#), which also sets out separate arrangements for personal injury claims in Scotland and Northern Ireland. Lawyers should carefully consider if the Protocol applies to a particular case, and what impact it has on the claim.

Outside of the Protocol and the personal injury arena, the need for standstill agreements, or protective proceedings should be kept under review in the usual way."

Remote mediations

Mediation remain an effective way to resolve disputes even if the parties are not in the same building. The mediator invites

the parties to a virtual meeting and can re-direct the parties to separate 'rooms' so that lawyers and their clients can speak together privately or he/she can bring the parties together into one room. Features such as screen sharing allow parties to review documents together.

Data Subject Access Requests

Data Subject Access Requests are often used in litigation, and recipients of such requests must usually respond within a calendar month (unless more than one request is made or the request is complex). Compliance could prove problematic in the current climate. The time limits have not been formally extended, but an ICO statement suggests that where a Data Controller has had to divert resource away from DSARs to prioritise other areas as a result of coronavirus, the ICO is less likely to use its formal powers, except in extreme cases. Organisations should still seek to comply with the usual time limits where possible, but where there is a genuine issue affecting compliance due to the current crisis it may assist to explain this and seek to agree an extension in which to respond.

Settlement

Aside from the practical difficulties of litigating in a pandemic, law firms may also be under financial pressure, with lawyers trying to settle claims to collect their fees. It is vital therefore that the settlement advice to clients remains focussed firmly on the best interests of the client. If a claim is settled at less than its proper value there is a risk that this will expose the firm to a claim later.

It is also true that clients may be keen to settle a claim at a discount as they may be desperate for money or because they are concerned that their ability to recover from their opponent will be adversely affected by the financial crisis that it is predicted will follow lockdown. Settlement advice should be reviewed in light of the pandemic, clients advised of their options, and an appropriate record of the advice and the client's decision retained on the matter file.

We are finding new ways to work and to keep litigation moving forward. We predict that some of the practices we have described will survive lockdown. Remote mediations for example provide a cost effective way to resolve disputes and avoid the need to travel often long distances to meet your opponent.

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