CIVIL PROCEDURE NEWS

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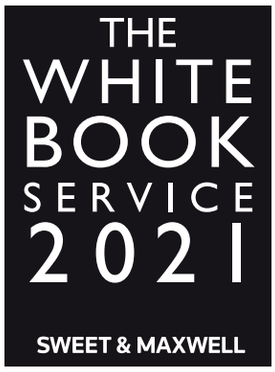

In Brief

Cases

The Sky's the Limit Transformations Ltd v Mirza [2022] EWHC 29 (TCC), 10 January 2022, unrep. (HH Judge Stephen Davies)

TCC – Proposed ADR scheme

CPR r.1.4(2)(e). The TCC, consistently with the general focus by the courts on the promotion and development of alternative dispute resolution at the present time, proposed an innovative form of ADR process for domestic property renovation disputes. The proposal was put forward against the background that while courts are required to determine claims where parties are unable to resolve them consensually, litigation can often:

> *"... likely be a financial disaster for one of the parties and, even if not, likely an expensive and ultimately unrewarding result for both"* (at [5]).

Against that background, HH Judge Stephen Davies set out the following proposed ADR scheme for such claims.

> *"[6] ... directions to be given at the first CCMC [At which the parties could be required to attend in person, especially where the hearing is held remotely, and in advance of which the parties could be notified that the judge was minded to make an order in the stated terms.] along the following lines: (a) disclosure limited to documents relied upon and to known adverse documents; (b) a single joint expert building surveyor to be instructed in all cases [Even where one or both of the parties have already instructed their own experts pre-proceeding] to address all items in issue, both liability and valuation, with questions to the expert strictly for the purposes of clarification only; (c) a stay for mediation on receipt of the report and questions. If the parties are not willing to mediate and the judge does not consider it appropriate to order mediation, then there should be an order for compulsory early neutral evaluation before another TCC Judge.*
>
> *[7] If no settlement is achieved then there should be further directions as follows: (d) witness statements, limited to matters remaining in dispute, strictly complying with PD57AC and limited in length and/or number ; (e) a trial, which should not normally exceed 1 day in length, at which: (i) each party would have produced in advance detailed written opening submissions; (ii) no oral openings would be permitted; (iii) no more than 1 hour each for cross examination of each party's witnesses on their key evidence would be permitted; (iv) the single joint expert would attend remotely to answer questions from the judge and parties for no more than 1 hour in total; (v) there should be 1 hour each for oral closing submissions, followed by: (f) a judgment, orally or in writing at the judge's discretion, which would be as summary as the trial process. To make the trial workable and fair the judge would probably require a half day pre-reading time and up to a full day judgment time, ideally the day before and the day after the trial respectively, with the latter being used either to produce a written judgment or to give an oral judgment in the afternoon following a morning of judgment preparation.*
>
> *[8] In terms of costs budgeting, the approved costs going forwards should not normally exceed £25,000 per party, broken down as to £2,500 for disclosure; £5,000 for expert evidence (which would include the party's half share of the expert's fee); £5,000 for mediation (including a half share of the mediator's fee); £2,500 for witness statements; and £10,000 for trial preparation, trial and post judgment matters.*
>
> *[9] Whilst this process would not enable a judge to produce anything like the sort of judgment I have produced in this case in terms of length and detail, it would enable the judge to produce a judgment after a fair and open, but summary, trial process in which the key issues were ventilated and which, importantly, was reasonably speedy and reasonably inexpensive. I am not suggesting that an order for directions along the above lines would be appropriate in every case [It is likely for example that the number and complexity of the disputed issues and items in this case would have led to the need for a 2 day trial, even adopting a streamlined procedure such as suggested above.] or that it would be a panacea in every case. In particular, it would not address the problem of disproportionate costs being incurred pre-action (although if the judge considered that such costs were disproportionate and was prepared to record as much in the costs management order that might also assist in concentrating minds). However, it would at least allow the parties a better chance to settle with the benefit of independent expert opinion before being plunged into trial. It would also provide a better chance to avoid financial disaster if the case had to go to trial. Most importantly, it would be fair since, based again on my experience of such cases, it is unlikely that a more intensive - and thus more lengthy and expensive - trial process would produce a result significantly different to the result produced through this procedure. In particular, if a party or a witness is thoroughly unreliable or dishonest, that will usually become apparent*

within a fairly short time, measured in minutes rather than hours, of focussed cross-examination and, more often than not, such findings are unlikely and cases more often turn on the contemporaneous documents, which are usually not seriously in dispute, and the expert evidence which, if given by an independent single joint expert, ought not to be capable of significant challenge." (Text in square brackets was in footnotes in the original text.)

(See ***Civil Procedure 2021*** Vol.1 at para.1.4.11 and Vol.2 Section 14.)

- **Ideal Shopping Direct Ltd v Mastercard Inc** [2022] EWCA Civ 14, 13 January 2022, unrep. (Sir Julian Flaux C, Elisabeth Laing and Birss LJJ)

Service of unsealed claim form by CE-File – whether a curable procedural defect

CPR rr.3.10, PD 51O. A claim form was filed via CE-File under PD 51O – the Electronic Working Pilot Scheme. Before receipt of notification of the claim form's acceptance by the court under the Scheme, unsealed copies of the claim form were served. An issue arose whether service of the unsealed copies amounted to valid service. At first instance, the court held service to be invalid. **Held**, the Court of Appeal dismissed the appeal. In doing so it affirmed that it was clear law that as a general rule only service of a sealed claim form could amount to valid service. That general principle applied to amended claim forms as much as it did to claim forms in general (at [137]–[139]). Practice Direction 51O did not alter or abrogate the general position. It was clear that the pilot scheme was subject to the CPR, as its para.1.2 stated and which further aspects of it, e.g. paras 7.1 and 8.1, made clear (at [140]–[144]). The court also held that CPR r.3.10 was not applicable. The appellants were, it noted:

"... asking the Court to treat service of the unsealed amended claim forms as good service and to dispense with the requirement for any further service" (at [145]).

This was within the scope of CPR rr.6.15 and 6.16. The appellant's position was also, in effect, one that sought an extension of time to serve under CPR r.7.6(3), albeit it was noted no such application had formally been made. As a consequence the court held applying r.3.10 to the current situation would impermissibly bypass those specific rules that were applicable:

"[146] It follows that the appellants are asking the Court to do the very thing which Vinos and the line of authority which follows it does not permit. The general provision in rule 3.10 cannot be used to override a specific provision, here rule 6.15 or rule 6.16. The appellants could not satisfy the 'good reason' or 'exceptional circumstances' criteria under those two rules and they are not permitted to use rule 3.10 to bypass the requirements of those specific provisions. Likewise, since the appellants could not have satisfied condition (b) of rule 7.6(3), as they could not have shown that they had taken all reasonable steps to comply with rule 7.5 or that they had been unable to do so, they cannot be permitted to use rule 3.10 to bypass the requirements of rule 7.6(3).

[147] This is clear from the judgments in Vinos of May LJ at [20] and Peter Gibson LJ at [27] and from the judgment of Simon Brown LJ in Elmes at [13]. It is also clear that the Court of Appeal in Steele v Mooney approved that principle established by Vinos (see [24] of the judgment) but was able to grant relief because, unlike in the present case, the error which was sought to be remedied was not a failure to serve originating process in accordance with the Rules, but an error in the form of the consent orders made by the Court (see [27]–[28] of the judgment)."

In applying the ***Vinos*** line of authority, the court also doubted the decision in ***Bank of Baroda v Nawany Marine Shipping FZE*** (2016), which had been decided by the Commercial Court without the benefit of reference to that line of authority (at [149]–[150]). ***Vinos v Marks & Spencer Plc*** [2001] 3 All E.R. 784, CA, ***Elmes v Hygrade Food Products Plc*** [2001] EWCA Civ 121; [2001] C.P. Rep. 71, ***Steele v Mooney*** [2005] EWCA Civ 96; [2005] 1 W.L.R. 2819, ***Barton v Wright Hassall LLP*** [2018] UKSC 12; [2018] 1 W.L.R. 1119, ***Piepenbrock v Associated Newspapers Ltd*** [2020] EWHC 1708 (QB), ***Boxwood Leisure Ltd v Gleeson Construction Services Ltd*** [2021] EWHC 947 (TCC); [2021] B.L.R. 459, ***Serbian Orthodox Church v Kesar & Co*** [2021] EWHC 1205 (QB); [2021] Costs L.R. 709, ***Bank of Baroda, GCC Operations v Nawany Marine Shipping FZE*** [2016] EWHC 3089 (Comm); [2017] 2 All E.R. (Comm) 763, ***Citysprint UK Ltd v Barts Health NHS Trust*** [2021] EWHC 2618 (TCC), ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.3.10.2.)

- **Ceredigion Recycling and Furniture Team v Pope** [2022] EWCA Civ 22, 14 January 2022, unrep. (Sir Julian Flaux C, Newey and Edis LJJ)

Court of Appeal – power to re-open appeals

CPR r.52.30. An application for permission to appeal, from an order of the High Court in the claimant's favour, was refused on the papers. The first defendant applied under CPR r.52.30 and the court's inherent jurisdiction to reopen the appeal. **Held**, the Court of Appeal rejected wide-ranging submissions that it had jurisdiction under the inherent jurisdiction, which is acknowledged by CPR r.3.1(7), to reopen its own appeals and that reliance could be placed on the jurisdiction inherited by the Court of Appeal from its predecessor, the Court of Chancery, via the Judicature Act 1873,

to rehear its own decisions. It was clear that the only jurisdiction the Court of Appeal had to reopen its own appeals, including decisions of single judges on permission to appeal applications, was that which is now codified in CPR r.52.30. As such any application to reopen must come within the scope of that rule as explained by the extensive case law on its meaning and interpretation (at [41]–[46]). (See ***Civil Procedure 2021*** Vol.1 at para.52.30.2.)

■ **O'Grady v B15 Group Ltd** [2022] EWHC 67 (QB), 17 January 2022, unrep. (Master Thornett)

Part 36 – application of doctrine of mistake

CPR rr.36.1.1 and 36.10(2)(b). Proceedings were brought under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. The claimant made a Part 36 Offer to settle. Subsequently, the claimant applied to withdraw or vary the offer under CPR r.36.10(2)(b). The basis of the application was that the offer was based on a mistake relied upon by the claimant's solicitor. It was conceded that such a mistake, if made in respect of a contract, would render a contract void. However, it remained in issue whether the common law doctrine of mistake applied to Part 36 Offers. **Held**, Pt 36 did not incorporate all the rules governing the incorporation of contract: see ***Gibbon v Manchester City Council*** (2010). It is, "*nonetheless compatible with them in the absence either of express exclusion, express inclusion or direct contradiction*" (at [17]). It was clear, for instance, that the courts had applied the common law approach to contractual interpretation to Part 36 Offers (at [18]–[21]: ***Rosario v Nadell Patisserie Ltd*** (2010); ***Ho v Adelekun*** (2019). In ***Ho***, the Court of Appeal had considered the question of how improbable a possible interpretation of a Part 36 Offer was. That was comparable with the approach taken at common law to mistake (at [21]–[22]). Furthermore, it was apparent from ***Flynn v Scougall*** that Pt 36 was not a wholly separate, hermetically sealed code within the CPR as it had to be interpreted consistently with the overriding objective. Given that, and the range of authorities applying, for instance, principles of contractual interpretation to Part 36 Offers, there was no reason to exclude the application of the common law doctrine of mistake from such offers. As Master Thornett concluded:

> *"[25] I am satisfied that the doctrine of common law mistake can apply to a Part 36 offer in circumstances where a clear and obvious mistake has been made and this is appreciated by the Part 36 offeree at the point of acceptance. Authority is entirely in support with the application of the doctrine. Nothing about Part 36 being a self-contained code excludes it. On the particular facts of this case, it is entirely compatible with a procedural code that is intended to have clear and binding effect but not at the expense of obvious injustice and the Overriding Objective still has application."*

Flynn v Scougall [2004] EWCA Civ 873; [2004] 1 W.L.R. 3069, ***Gibbon v Manchester City Council*** [2010] EWCA Civ 726; [2010] 1 W.L.R. 2081, ***Rosario v Nadell Patisserie Ltd*** [2010] EWHC 1886 (QB), ***Ho v Adelekun*** [2019] EWCA Civ 1988; [2019] Costs L.R. 1963, ref'd to. (See ***Civil Procedure 2021*** Vol.1 at para.36.2.2.)

Practice Updates

STATUTORY INSTRUMENTS

CIVIL PROCEDURE (AMENDMENT) RULES 2022 (SI 2022/101). In force from **6 April 2022**. The first set of Amendment Rules for 2022 make a number of changes to the CPR. They include the following:

- after two decades, the CPR can no longer properly be classified as a new procedural code, and CPR r.1.1(1) is amended to remove "*new*" from the Overriding Objective;
- CPR Pts 2 and 42 are amended to introduce reference to MyHMCTS, which is defined as "*the online case management tool managed by Her Majesty's Courts and Tribunals Service*";
- CPR Pts 10 and 12 are replaced by new, simplified, Pts 10 and 12;
- CPR Pts 16, 26, 27 and 45 are amended to reflect the increase of the small claims limit for personal injury claims from £1,000 to £1,500;
- CPR r.39.2(4) is amended to clarify that the court may order the identity of "*any person*" to be anonymised, i.e. the rule is no longer expressly limited to a party or witness;
- CPR Pt 47 is amended to clarify the powers of authorised costs officers; and
- CPR Pt 65 is amended to make provision to inform respondents to anti-social behaviour injunctions of their entitlement to a reasonable opportunity to obtain legal representation and seek legal aid.

PRACTICE DIRECTIONS

CPR PRACTICE DIRECTION – 140th Update. This Practice Direction affects a number of amendments that supplement changes made to the Civil Procedure Rules by the Civil Procedure (Amendment) Rules 2022. The amendments come into force on **6 April 2022**, except for an amendment extending the duration of PD 51O (Electronic Working Pilot Scheme) to 6 April 2023 and one to PD 75 (Traffic Enforcement). The former came into force on **1 February 2022**. The latter came into force from **14 February 2022**. Significant amendments are as follows:

- the replacement of PD 1A with a new PD 1A to take account of the Domestic Abuse Act 2021;
- an amendment to PD 3C to increase the maximum period for which a civil restraint order can be made to three years;
- the introduction of new Circuit Commercial Court forms in PD 4;
- an amendment to PD 7A to raise from £1,000 to £1,500, in para.3.8, the figure which must be specified in a claim for damages for personal injury started in the County Court in respect of the figure a claimant expects to recover for pain, suffering and loss of amenity. This is subject to a transitional provision and only applies to claims where: the date on which the cause of action accrues, or the person injured's date of knowledge is on or after 6 April 2022;
- the omission of PD 8C, PD 10 and PD 12 as part of the Civil Procedure Rule Committee's rule simplification project;
- updating references to electronic forms of communication so that the references are technology neutral in PD 25A, Practice Direction – Application for a Warrant Under the Competition Act 1998, and Practice Direction – Civil Recovery Proceedings;
- the introduction into PD 25A of a model "*Imaging Order*";
- the replacement of Practice Direction 54D (Planning Court Claims) with a new Practice Direction 54D – Planning Court Claims and Appeals to the Planning Court; and
- reference to use of MyHMCTS through amendments to PD 42 and PD 51ZB.

CPR PRACTICE DIRECTION – 139th Update. This Practice Direction Update effected two amendments to Practice Direction 51R. The amendments came into force from **11.00** on **25 January 2022**. The amendments permit legal advisers to give case management directions in defended cases up to a value of £300 and increases their authorisation (not delegation) under para.20 of Practice Direction 51R so that they can deal with cases up to a value of £1,000.

PRACTICE GUIDANCE

THE QUEEN'S BENCH DIVISION GUIDE. On 7 February 2022, the Judicial Office published the 2022 edition of the Queen's Bench Division Guide. The revised guide contains updates concerning interim, out of hours and urgent and short applications (Pts 9, 11), e-bundles and Media and Communication List pre-trial reviews (Pt 17). It also updates Masters' Clerks contact details (Annex 2) and information concerning the payment of court fees (Pt 3). Further updates will appear to the text as published on the Judiciary of England and Wales website.

THE COMMERCIAL COURT GUIDE. On 3 February 2022, the Judicial Office published the 11th edition of the Commercial Court Guide. The revised guide has been updated to reflect a number of practice reforms effected as a result of the COVID-19 pandemic. Notably, electronic bundles are now to be used by default: see Appendix 7. A stylistic change sees alternative dispute resolution now referred to as negotiated dispute resolution, emphasising the more general move within the civil courts to integrate consent-based dispute resolution techniques with case management. Reference to the process for carrying out Early Neutral Evaluation makes no mention of the fact that the court can order parties to undertake such a process, suggesting that in the Commercial Court, at least, its use will continue to be one that is based on party agreement: see Pt G. The court's approach to expert foreign evidence is given in Pt H, providing guidance in the light of the Supreme Court's decision in ***FS Cairo (Nile Plaza) LLC v Lady Brownlie*** [2021] UKSC 45 at [148]. Changes to the Guide also take account of the Disclosure Pilot Scheme under CPR PD 51U (Pt E) and the introduction of CPR PD 57AC on witness statements at trials in the Business and Property Courts (Pts H and N).

THE CIRCUIT COMMERCIAL COURT GUIDE. On 3 February 2022, the Judicial Office published the 11th edition of the Circuit Commercial Court Guide. As it generally follows the approach taken by the Commercial Court Guide, the two guides should be read in tandem, with the former guide providing detail as to where the approach in the Circuit Commercial Court diverges.

In Detail

WITNESS ATTENDANCE AT HEARINGS

One consequence of the COVID-19 pandemic has been the rapid adoption by the courts of remote technology. With the start of the pandemic, video hearings, or at the least hybrid hearings, became the default. Cross-examination was thought to be something that could only properly be done in court. Experience led to the conclusion that that was not necessarily the case (***A Local Authority v A Mother*** [2020] EWHC 1086 (Fam)). Inherent in these developments was the fact that the courts' approach moved to one where witnesses gave their evidence remotely; they were not required to attend court to do so. Three recent decisions have, however, made clear that as the pandemic continues to recede, the courts are moving back towards witness attendance at hearings as the default.

The first decision is that of Ms Clare Ambrose, sitting as a deputy judge of the High Court in ***Rahbarpoor v Said*** [2021] EWHC 3319 (Ch). Directions were sought for trial concerning a property dispute by the defendants. Additionally, and very late, the claimants sought permission for the first claimant to give evidence by video-link (CPR r.32.3). The defendant opposed that application. The basis of the claimant's application was that the claimant, who was in his seventies, had a number of pre-existing health issues and was "*extremely concerned with the high level of Covid in the UK*." He considered it to be safer to give evidence by video-link from a part of Iraq where his son lived, where it was submitted COVID-19 cases were low (at [8]). The claimant also submitted that it was too late now for him to obtain a visa.

In support of the application, it was submitted that while in-person evidence was "*better*" than remote evidence, given the COVID-19 pandemic the courts had adapted to receive remote evidence. It was further submitted that remote evidence was "*nearly as good*" as in-person evidence, and the trial judge could still assess the witness's demeanour. Further, it was submitted that cross-examination ought not to be extensive (at [9]). The defendant objected to the application, submitting that the claimant had previously informed the court that he could attend trial in-person, the trial was listed for hearing on that basis, and that his conduct was "*disgraceful*". That the claimant had "*deliberately disabled himself*" from attending by not obtaining a visa in time was particularly stressed (at [10]). The defendant further submitted that the claimant was vaccinated against COVID-19 and had had COVID-19 – thus there was no evidence to support a claim that he was "*extremely vulnerable*" to it – and had travelled previously to mainland Europe (at [12]). Moreover, it was submitted that the risk of COVID-19 was the same in Iraq as it was in the UK. It was also stressed that in-person evidence remained "*the gold standard*" and was, in this case essential, due to the need to determine credibility not least through subjecting witnesses to searching cross-examination. Absent both parties giving evidence in person, there would be no effective equality of arms (at [14]).

The deputy High Court judge noted that permission was needed to deal with proceedings via video-conferencing. Practice Direction 32 para.29 still applied (at [17]). As she put it:

> *"[17] It remains the case that under the practice directions, the court's permission is required for any part of the proceedings to be dealt with by means of video conferencing. These provisions are particularly relevant in relation to a trial where there is no current practice of matters being listed to be heard remotely. Whether to allow a witness to give evidence by way of video conferencing is a matter of discretion for the court. The decision is one of case management, and I take into account the overriding objective, taking account of what is fair and efficient, and also the parties being on an equal footing and there being an equality of arms. The decision also engages Article 6 rights to a fair trial. I have to decide whether, if the trial goes ahead with the claimant giving evidence remotely, it will be a fair trial."*

It was the case that over the course of the COVID-19 pandemic the courts' approach had varied. It had varied as had the risks to litigants and the courts from the pandemic. At each stage though the courts had strived to ensure hearings were fair. The deputy judge accepted, in the circumstances, that it was reasonable for the claimant to seek permission to give evidence by video-link given his age, his vaccination status, and the risks that COVID-19 posed. That he had not applied for a visa was understandable given the way in which the court's practice had varied over the pandemic and his reasonable health grounds for not wanting to travel to London (at [21]–[22]). That then raised the issue of whether the trial should go ahead with the claimant giving evidence via video-link. Would such a trial be a fair trial?

The deputy judge concluded that such a trial would be fair and could go ahead with the claimant giving evidence via video-link, while the defendant gave evidence in person. It was possible to ensure that appropriate safeguards could be put in place to secure the integrity of the claimant's evidence. A local notary or lawyer, for instance, could be instructed to ensure that that was the case (at [27]). More generally, it was noted that:

> *"[22] ... From practice over the past eighteen months, we have seen that evidence can properly be given remotely, and a witness's demeanour can be assessed with remote attendance even when interpreters are involved."*

Remote attendance by the claimant would not render the trial unfair. The parties would not be an unequal footing if the claimant attended via video-link, not least because his evidence was not as central to the key issues in dispute as that

of the defendant. Furthermore, adjourning the trial at such a late stage would cause significant prejudice to the parties and adversely affect the use of court resources (at [23]–[27]). While the deputy judge ultimately refused the application and considered evidence by video-link in this case to be permissible, her judgment highlights three fundamental points.

First, that parties should not simply assume that, in the light of the various guidance issued by the senior judiciary, that remote hearings or remote attendance should be considered to be the general rule. Such guidance is – as all guidance is whether in a Court Guide, Practice Statement, Practice Guidance, Practice Note or other guidance – subject to the CPR and, as in this case, any relevant Practice Direction. An application to attend by video-link must therefore be made further to PD 32 if evidence is to be given remotely.

Secondly, that parties should not assume that because remote evidence was permissible during the course of the COVID-19 pandemic it will continue to be permissible on the same basis in future. The court's approach had changed during the pandemic depending on the circumstances. At the present time, it appears that the pandemic is receding. Applications to give evidence remotely should take account of the current circumstances.

Thirdly, attendance in person at trial remains "*the gold standard*". This applies not only to cross-examination, but as the deputy judge noted, more generally. It applies to whether there would be adequate legal support or whether the court process would be "*sufficiently respected*" (at [23]). It can be expected that that gold standard is one that the courts will seek to give effect to as the pandemic further recedes. This final point is particularly to be stressed in the light of the two most recent decisions on witness attendance at trial.

In ***United Technology Holdings Ltd v Chaffe*** [2022] EWHC 151 (Comm), HH Judge Pelling QC, sitting as a judge of the High Court, considered an application for directions in respect of an application to strike out proceedings brought by the defendants. An issue was whether the defendants were in fact all pseudonyms for the same person. An application was made for the applications to be heard remotely. It was made on the basis that the claimants were litigants-in-person based outside England and Wales and that travelling to England was "*unpredictable and may be impossible*" for them (at [4]). No evidence was noted to have been submitted in support for those propositions. The application was refused, with all relevant witnesses having to attend in person with their passports. The latter requirement was to enable the court to assess whether the allegation that the claimants were pseudonyms for the same person was valid or not.

The application to attend remotely was, however, specifically refused for two reasons. First, the nature of the issue that the court was to determine – identity of the persons said to be the claimants – was something that made an in-person hearing "*essential*" (at [7]). Secondly, and more generally, the default position was that hearings were to be carried out in-person. As HH Judge Pelling QC put it:

> *"[8] ... First, the default position in respect of any hearing which is due to last longer than half a day is that it should take place in court, unless there are good health related reasons to the contrary. No health related reasons have been identified and the default position is that therefore this hearing, which is estimated for a day in length, should take place in court. Secondly, before the pandemic engulfed the world it was never thought to be an appropriate way to proceed for hearings to take place remotely simply to suit the convenience of one of the parties. The claimants in these proceedings have sought to litigate in England. They have, I think, given addresses for service in their claim forms in England. In those circumstances, I see no reason why the court should adopt an entirely novel approach to the determination of its business by directing remote hearings simply to suit the convenience of a party who has chosen to litigate in England but is unwilling to travel here."*

Finally, and most recently, in a decision that is, at present, only available via a case digest, Eady J in ***Jackson v Hayes and Jarvis (Travel) Ltd*** [2022] 1 WLUK 321 refused to grant permission to give trial evidence via video-link. In refusing permission the judge noted approvingly HH Judge Pelling QC's approach from ***United Technology Holdings***, i.e. that the default position was for hearings to be in person and not carried out remotely. It was noted that health risks due to the pandemic were only, at the time the application was made, potential risks; no evidence was available such risks were "*unsurmountable*." Nor was there evidence that the witnesses would otherwise refuse to attend in person. Moreover, there was no evidence – contrary to the position in ***Rahbarpoor*** – to suggest that a remote hearing could be carried out with appropriate safeguards from Kenya, where the witnesses were. In the absence of evidence, there was nothing to enable the court to conclude that it could properly grant permission and thereby set aside the default position.

Taken together the three short judgments make clear that the direction of travel for the courts is back to in-person hearings. The pandemic may have resulted in the courts embracing remote and hybrid hearings, but the question post-pandemic is whether it is appropriate to hold such hearings where the hearing is scheduled to last longer than half a day. Important considerations for the court in assessing whether to deviate from the default will be the nature and importance of the evidence, whether there are any – evidenced – health reasons justifying remote attendance, and whether a fair trial and particularly equality of arms can be secured through remote attendance. And, importantly, whether sufficient arrangements can properly be made to secure the integrity of the court process in respect of the remote attendance.

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