



Rapid Consultation: The impact of COVID-19 measures on the Civil Justice System

Written Submissions of the South Eastern Circuit

The South Eastern Circuit (“SEC”) represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

This is the written response on behalf of the South Eastern Circuit (“the SEC”) to the Legal Education Foundation Rapid Consultation regarding the impact of Covid-19 on the Civil Justice System. This response is based on information supplied by members of the SEC. Given the urgent nature of the consultation it is inevitably not as comprehensive as we would wish. However since the onset of this crisis, all six Circuit Leaders have met on an almost daily basis, discussing developments. We have given careful consideration to the survey conducted by the Western Circuit. The collapse in work described is echoed across the country, not least in the surveys conducted by the PIBA.

The document has been prepared by the Leader of the Circuit and lifts quotations (in italics) from email correspondence he has received/ seen.

1. Summary

Civil work, particularly for junior barristers (under 10 years’ Call), has decreased dramatically since the imposition of the lockdown, with the consequential impact on income. This is true for both court and written/advisory work but especially the former. See comments from members of the SEC below:

1.1 Chair of PIBA: *There has been great publicity about the resumption of Crown Court jury trials. Civil trials in the County Courts and District Registries are virtually non-existent. The number of hearings generally is down by about 75%. Although every effort has been made to try and facilitate video hearings, take up has been minimal. For every high value remote commercial trial at the Rolls Building that is lauded on Twitter and celebrated as a great success, there are thousands of civil trials and hearings up and down the country that continue to be adjourned*

1.2 Junior with mixed common law practice (2016 call): *my civil court work has entirely evaporated since the lockdown restrictions. Unfortunately, so has my advisory practice. I would anticipate this is in large part due to more senior members of the profession being out of court and eager for paperwork. This is a 100% drop in civil work.*

1.3 Junior but established practitioner at well-regarded civil and PI set in London – not publicly funded but hit very hard: *My court work is at 0%. Since the beginning of lockdown, I have not done a single court hearing either in person or remotely. A number have come close, though been pulled the day before. Most hearings are either being adjourned by consent between the solicitors, or being vacated by the court. This is contrasted with pre-lockdown, in normal times, when I was doing 3-4 court hearings per week.*

1.4 Junior (2012 Call) established practitioner at a well-regarded civil PI set in London: *My court practice has been very badly hit, as has those of almost all the junior barristers in my Chambers. In discussions within our Junior Practitioner’s Group, the drop-off in Court work was estimated to be 90-95% in April, and 75-80% in May. It is obvious that the county courts are in disarray and cannot organise remote hearings in even fairly simple interlocutory hearings, and that the decision has overwhelmingly been to adjourn hearings. This has had a deleterious effect on income – hitting the most junior the hardest, as they have less of an “aged debt” buffer to survive on. Although it’s not the “done thing” to actually talk about numbers, I thought it would be worth demonstrating the extent of the drop off in gross billings in my practice:*

December 2019	TOTAL BILLING EXC VAT: £14,083.00
January 2020	£23,814.15
February 2020	£12,024.00
March 2020	£17,012.50
April 2020	£4,535.00
May 2020	£4,750.00 so far

Clearly these are gross figures, and a) include some work on a CFA which may never be paid, and b) include expenses, Chamber’s rent contributions etc. The above represents an approximate 70% drop in billing: clearly unsustainable in even in the medium term for any sole trader business, particularly when they represent the total probable income for a household in the months ahead. For a colleague of mine in Chambers (2016 Call), the difference is even more stark:

Month	Billings
Dec 2019	£10,660.20
Jan 2020	£8,912.41
Feb 2020	£9,636.87
Mar 2020	£13,850.34
Apr 2020	£4,710.00
May 2020 (current)	£1,350.00

This should be very concerning for all those who care about a diverse, thriving junior Bar – if even well-established practitioners are suffering this kind of loss (and I anticipate taking more time off later in the year to have a baby), one can only imagine that the pool of barristers will start to evaporate, leaving the profession and future pool of Silks/judiciary impoverished.

1.5 Junior (2016 call and in full Practice since end of 2018 – about 18 months now): *there is a little bit of a feeling that the junior end in civil is not at the forefront of the Profession's mind – they are of course hit hard!*

- *Court work dropped about 90% and*
- *Written/advisory work dropped by about 66%*

1.6 Head of a chambers Junior Practitioners Group: *having spoken to the other juniors, most reported a drop of around 90% in their work, all are living on savings, and many are in serious financial difficulty. Times are really tough.*

1.7 Jointly from 2 juniors (2016 & 2018 call, also reflecting the experiences of their peers):

It has been our experience that the level of civil work has drastically decreased since the lockdown announcement was made in late March. As is the case for most junior juniors, our civil practices are primarily court-based. Whilst we have the occasional piece of paperwork or conference, we are predominantly in court on a daily basis conducting small claims trials, fast track trials, stage 3 hearings, infant approval hearings, interim applications, case management conferences, and occasional interim hearings in multi-track matters.

Almost immediately after the lockdown was announced, our diaries (which had been full many weeks ahead) began to empty. The trend has continued: even as recently as this week (w/c 11th May 2020), hearings and trials are vacating or being adjourned at the last moment, leaving our diaries largely empty of civil matters.

We have had the occasional remote hearing during the crisis, but we practise at a mixed set and have noted that far more family and criminal matters appear to be going ahead than civil matters. There have been some case management hearings conducted by telephone and one or two unsuccessful attempts at hearings with evidence via Skype.

It is not always clear why things are vacating. Sometimes we are told it is the decision of the court. Sometimes we are told that the parties have requested it. More often we are told nothing, or at least nothing specific.

1.8 Junior:

The pandemic has had a significant impact on the level of both my court and written work. During "normal" times, I would be in court approximately 3 times per week on a range of matters. This would include small claims hearings, interim applications and case management hearings. I was also starting to take on more multi-day employment trials as I stepped out of the shadow of pupillage. However, since 6 April (over 5 weeks) I have had only two oral hearings. These have both been relatively short matters lasting no more than an hour.

Written work has also decreased considerably with simply the odd piece of drafting or advice to do. I have looked to the senior members of chambers to devil for, or even better, be a junior to in one of their cases. I have been fortunate enough to have received some good quality work this way, which has provided me with more drafting opportunities.

I have also been impacted by the increased money-consciousness of many potential clients, who have perhaps started to see a junior civil barrister as more of a luxury rather than a necessity. Potential clients are clearly less willing to pay for representation when they feel they can manage themselves.

1.9 Junior:

As a rough estimate, I would usually be in court 1-2 times a week. My personal practice has always been slightly more weighted towards papers/advisory work. Since lockdown, the court hearings have largely fallen away. I've had one telephone hearing in the County Court (CMC) and one permission to appeal hearing in the High Court using skype. I have a couple more hearings coming up in the next two weeks – in the court of protection and high court. However, the County Court work has certainly dried up for me.

That being said I know a number of my colleagues are doing telephone County Court hearings, and some in person too. This is usually involving urgent injunctions and/or committal applications involving breaches of anti-social behaviour injunctions. My sense is that outside of this "urgent" work, the County Court does not seem to be facilitating remote hearings. I have had at least one trial vacated despite both parties agreeing that it turned on purely legal issues and that a telephone hearing would be suitable.

2 Financial data

The precipitous drop in work has seen finances hit dramatically, made even worse for those at the junior end who have little to no savings and may not be able to benefit from the Government's scheme to support the self-employed because of the evidential requirements. See comments from members of the SEC below.

2.1 Junior:

The financial impact has been huge at the very junior end of the civil bar. Whilst we are lucky to have built up a bit of a backlog of aged debt, and to have a set of chambers which is working hard to ensure we are paid that debt, we are not certain how long that will sustain us if this crisis continues. We are both at the start of our careers and have not built up large reserves. We rely on a steady stream of income from one-off hearings to keep ourselves afloat financially. One of us, having only been on her feet since April 2019, is not eligible for the government's self-employment relief scheme; the other, having been on her feet since April 2018, will receive very little due to the precise nature of the HMRC calculation. We therefore would wish to impress upon those involved in this consultation the importance for the junior bar of getting this kind of civil work back up and running as soon as possible where the facilities and the interest of justice allow.

2.2 Junior

Solicitors who would usually look to counsel such as me to conduct smaller hearings because it was more cost-effective for the client or, simply because they did not want to travel for hours and sit in the court's waiting room for most of the day, are deciding to do the hearings themselves. They no longer have the added aggravation of travel and long waiting times.

This last observation reflects an existential threat to the junior Bar. This may be an unavoidable consequence of this new technology and the proverbial genie may be out of the bottle. But whether this is so, or not, many fear that careers are going to be ended by a combination of no work now, and their work being taken away even when matters improve.

3 Remote hearings - what is working?

Some remote hearings have been taking place, and some have been running smoothly, although this seems to depend very much on the court. See comments from members of the SEC below.

3.1 Junior:

In the first week of lockdown, I had an RTA hearing which was heard via telephone, with all the parties working off of electronic bundles. This worked perfectly. It strikes me that while straightforward hearings of this nature (small claims, stage 3s, even fast tracks) may lack urgency, their simplicity and the familiarity that DJs and DDJs have with them, should encourage us to continue with them remotely. It is the work that most junior-junior practitioners depend on.

3.2 *The few hearings I have taken part in remotely have all been via telephone and, mainly, have run smoothly. They have either been through the BTMeetMe system or through the Employment Tribunals' dedicated service. As the Employment Tribunal has been running telephone hearings for case management hearings for a while, it has been business as usual.*

4 Remote hearings – what could be better?

There has been a steep learning curve for most involved in remote hearings and all have been imaginative and flexible. A number of “etiquette” behaviours are being learned e.g. staying on mute, removing distracting backgrounds. There are a wide variety of experiences, depending on the particular court/tribunal/parties. A source of irritation across all jurisdictions is time spent waiting without explanation. Some very junior barristers feel disadvantaged without appropriate working spaces at home. Some junior barristers are struggling as they balance the needs of small children who are at home with the appropriate decorum required for a successful hearing. Many are concerned about the lack of a level playing field for those who are unrepresented. The ability of the professionals to adapt to the new technology is seldom matched by the litigant in person. See comments from members of the SEC below.

4.1 Junior

I had one hearing in the Central London County Court where both parties were ready at the allocated time (10am) and we were subsequently told to wait for 1.5 hours as the judge had taken another case. Around an hour later we were informed by the judge's clerk that the case was to be adjourned. No discussion was had with the parties and the reason given for the adjournment was that no arrangements had been made for a remote hearing. This made no sense considering provisions had been made and both sides were ready to proceed. It perhaps was because they were not using the BTMeetMe system, which is to be used at the adjourned hearing.

4.2 Junior

Telephone hearings can of course become a problem if the parties begin to speak over one another. I have found that if the judge makes it clear at the beginning that everyone should take it in turn and addresses each party clearly when it is their turn to speak, this tends not to be a problem. However, there can still be interruptions especially if there is a lot of background noise on someone's line. Judges should mute all parties that are not speaking to avoid this. Although I appreciate it might become tiresome to constantly mute and unmute parties.

4.3 Jointly from 2 juniors (2016 & 2018 call, also reflecting the experiences of their peers):

The remote hearings which we have attended have varied in success. There have been more telephone hearings than video hearings, although video tends to be preferable. Telephone hearings might work well enough for counsel-only matters, but they are certainly not appropriate for witness evidence. Case management hearings and submission only hearings have been successfully conducted remotely by both authors. We wonder why more of these hearings cannot be conducted, for instance CCMCs.

Our chambers recently conducted a full small claims mock trial with witnesses for one of our regularly instructing public authority clients, using Microsoft Teams. It went very smoothly indeed and did much to allay the client's concerns about how these hearings would work. This hearing involved three witnesses and a large bundle.

Despite the relative smoothness of remote hearings, certain issues have arisen:

- *There is not any facility at the moment for conducting pre-hearing discussions with opposing counsel. In the types of matters we handle, we usually do not know who our opposing counsel is until we arrive at court. That makes it difficult to track them down for a pre-hearing chat. It would be very helpful if the court could facilitate some time ahead of a hearing for these discussions to take place – at the very least by informing counsel of the contact details of their opponent – so that issues can be narrowed and hearing time can be used more efficiently.*
- *Certain litigants in person and lay clients may feel that the remote environment does not command the same level of formality and respect as a 'real-life' courtroom. One of us recently conducted a telephone hearing against a litigant in person who, mid-judgment, when it became apparent that the result was adverse to him, promptly left the call. The other author recently had a client wandering around his house and then sitting and playing PlayStation whilst the judge gave judgment.*
- *During video hearings, in most cases the parties and the judge are inventive and patient in coming up with ways to get around small hurdles that arise. Whilst they are clearly not better than a hearing in person, they are capable of being conducted smoothly and without mishap or detriment to those involved.*
- *Not everyone has a suitable home environment for conducting a hearing, especially at the junior end of the bar. Some members of chambers have been safely travelling in to work (by cycling or driving) and conducting hearings from conference rooms. Equally many lay clients, litigants in person, and witnesses may not have a comfortable environment in which to engage. The authors have*

particularly in mind those people who are less well off in terms of their home environment and access to technology. The authors would worry that in appearance at least, not everyone is on the same level playing field when they “attend” a hearing remotely by video as opposed to going to court.

- *If the court is delayed and a scheduled remote hearing cannot begin on time, communication from the court would be useful so that advocates and witnesses are not left waiting and wondering if there has been a technological failure.*
- *Ultimately, there will be many cases where a client’s needs cannot be met by a conference over the phone; for example, those who need the physical proximity to their counsel in order to better understand concepts and the court process. But for many cases, particularly with professional lay clients and witnesses, their ability to engage will not be hindered by remote hearings and things have and can run smoothly.*

5 What else could be done?

Everyone involved in the Civil Justice System has worked hard at pace to keep hearings progressing where possible, and this will no doubt be a changing landscape for some months still. But there are positive ideas and suggestions coming from many practitioners, for example about prioritisation of cases and use of technology.

See comments from members of the SEC below:

6.1 There are current stays on all possession proceedings and all multi-day employment trials have been converted into case management hearings. These rules could be lifted over the next month or so, which could see my workload increase quite significantly. However, this may only be if the technology is suitable as I imagine it will still be a while until in-person hearings take place.

6.2 In the first week of lockdown, I had an RTA hearing which was heard via telephone, with all the parties working off of electronic bundles. This worked perfectly. It strikes me that while straightforward hearings of this nature [RTA] (small claims, stage 3s, even fast tracks) may lack urgency, their simplicity and the familiarity that DJs and DDJs have with them, should encourage us to continue with them remotely. It is the work that most junior-junior practitioners depend on.

6.3 Is there any support for “hybrid” trials with judge/counsel physically in court with witnesses participating by video link? If not, why not? The feeling at the moment is that the regional Designated Civil Judges are being left to devise local solutions which inevitably leads to inconsistency of approach and some judges being more proactive than others. I have no sense that a centralised or “joined up” approach is being adopted. Please tell me if I am wrong. We are very fortunate . . . that our civil presider and our DCJs are trying to increase the number of trials and hearings but the decisions are not theirs; we need HMCTS on board as they control the buildings and employ the staff.

6.4 Now that Courts and the Bar are coming to terms with remote working, one huge step to give hope to the junior PI Bar would be to revise the current Civil Listing Priorities for County

Courts so that, at least in respect of personal injuries work, courts could be positively encouraged to do more. From our recent experience:

- CMCs (case management conferences) and CCMC (costs and case management conferences) can successfully be done and should be included under Priority 2.*
- More fast track and small claims trials could successfully be done remotely, where there are 4 or fewer witnesses and so long as there is no issue of fundamental dishonesty. They need no longer be limited to “urgent” ones.*
- Similarly, some of the more straightforward multi track hearings and trials can be done remotely. Again, there could be a presumption that they should be done rather than having to satisfy a threshold of “urgent”.*

6.5 I don't see any pressing need for the typical hearings I conduct to go ahead in person at the moment. Though there has been an abject failure by southern courts to grapple with remote hearings. I do not understand why hearings not involving witness handling cannot be proceeding either on skype/zoom or just on the telephone. I would suggest the same is true for trials, involving witnesses, where there is not an allegation of dishonesty.

6.6 My suggestion would be to do more hearings by telephone. All barristers are familiar with these, and they are easy to arrange. If there any concerns that the hearings could take longer because of practical difficulties, then a buffer could surely be left in the day's listing. Yes this method is imperfect, but these are challenging circumstances and the courts must adapt.

6.7 We are hesitant to say that remote hearings should be the 'new normal' once COVID-19 has passed. Certainly, there are many benefits to having a hearing in person – most importantly from a lay client's perspective. But remote hearings are vastly preferable to allowing an enormous backlog to build up whilst junior barristers and smaller sets of chambers risk becoming financially inviable. It looks as though there will be restrictions on movement in place for some time yet, and courts will not be 'back to normal' for at least several more months. It is therefore imperative that the lower civil courts engage with the technology and start listing remote hearings for all matters where a remote hearing is feasible and just, regardless of urgency.

Conclusions/ Suggestions

The “Cloud Video Platform” technology available to the MoJ could be rolled out across many jurisdictions. This would transform the delivery of remote justice.

We understand of course that the civil courts are hampered by paper files and HMCTS staffing challenges. We wish to acknowledge the unsung efforts of those HMCTS staff who remain at work, while many are isolating at home. However the data and evidence show that far more could be done by the courts to manage the cases and to reduce the rate / incidence of adjournments. Candidly we fear that the guidance issued by the senior judiciary is being misapplied and that far too many adjournments are taking place.

There is also a clear need for a return to safe working, probably in larger spaces where social distancing can be practised and where parties will not need to spend large amounts of time sitting closely together in poorly ventilated waiting rooms. To that end, it is clear that many county courts are not fit for purpose and may not be able to be safely used for many months. Whether we are right or wrong about the cause, the fact is that the public is being denied access to justice and all those who want their matters to go ahead are being stymied. The public interest is not being served. The Lord Chancellor has spoken publicly about the need to explore the use of spaces outside the traditional court estate for criminal trials where defendants are on bail. There is absolutely no reason why such safe spaces and similar technology should not relieve pressure on the county courts and other tribunals, and maintain access to justice even through this pandemic.

One of the consequences of these shortcomings, is an existential threat to the current junior Bar. In recent years much has been achieved to reduce the barriers to entry and chances of success for those from diverse and less advantaged backgrounds. These gains are at risk. If the present situation continues for much longer, it will only be those with substantial savings or financial support who can survive until things materially improve. Those without that back-up are much more likely to be forced to leave the profession. The pool of diverse talent currently in practice will dwindle and the profession (and ultimately the Judiciary) will become less representative of the society it serves

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