



Principles to be considered in respect of Applications for Adjournment or for Extension of Time during the COVID-19 Pandemic

By Freya Foster

In *Municipio de Mariana & Ors v BHP Group PLC & Ors* ([2020] EWHC 928 (TCC)) His Honour Judge Eyre QC set out the principles to be applied by the Court when considering applications to extend time for compliance with directions or for the adjournment of hearings in the context of the challenges posed by the COVID-19 pandemic. These principles provide a helpful framework for parties seeking to make such applications.

Background

1. The First and Seventh Defendants' ('the Defendants') sought an extension of time to comply with directions, as well as the adjournment of a seven-day hearing listed to begin in early June 2020.¹ The need for the extension of time was attributed to difficulties caused by the COVID-19 pandemic, and the Court was asked to adjourn the matter until Autumn to enable an in-person hearing.²

The Court's approach to the applications

¹ *Municipio de Mariana & Ors v BHP Group PLC & Ors* ([2020] EWHC 928 (TCC), paras. 8 and 11.

² *Ibid* paras. 14-15.

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2. The Court began by recalling paragraph 4 of Practice Direction PD51ZA, which states that, insofar as it is compatible with the proper administration of justice, the impact of the COVID-19 pandemic will be considered by the Courts when considering applications for the extension of time for compliance with directions, adjournments and for relief from sanctions.³

Principles to be applied to adjournment applications: Should a hearing be adjourned to allow it to be held in-person?

3. There have been a number of recent decisions addressing applications to adjourn hearings in order to enable them to be held in person: *National Bank of Kazakhstan v Bank of New York Mellon* (Unreported, 19 March 2020); *Re Smith Technologies* (unreported, 26 March 2020); and *Re Blackfriars Ltd* ([2020] EWHC 845 (Ch)).⁴ In all three cases it had been found that, having taken into account relevant legislation, Practice Directions and Judicial guidance⁵ issued to address the pandemic, remote hearings could fairly be heard.
4. Having considered these authorities and the materials cited therein, HHJ Eyre QC set out five principles to be considered when deciding whether to adjourn a hearing so that it can be heard in person or whether to hold it remotely – these are:⁶
 - a. The importance of the continued administration of justice – the principle that justice delayed is justice denied continues to apply, even where the delay arises from the circumstances of the pandemic.

³ *Ibid*, para. 17.

⁴ *Ibid* paras. 20-22.

⁵ Primarily the following: Lord Chief Justice, [Coronavirus \(COVID-19\): Message from the Lord Chief Justice to judges in the Civil and Family Courts](#) (19 March 2020); [Update – Civil Justice in England and Wales: Protocol regarding Remote Hearings](#) (31 March 2020).

⁶ *Ibid*, para. 24.

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- b. The extent to which disputes can in fact be resolved fairly by way of remote hearings must be recognised.
 - c. The Courts must be prepared to hold remote hearings in circumstances that would have been inconceivable before the pandemic.
 - d. The possibility of a remote hearing and how it could be carried out in a manner consistent with justice should be rigorously examined before the court accepts that a just determination of the issue cannot be achieved in such a hearing.
 - e. Whether a matter can be fairly resolved by a remote hearing will inevitably be case specific. A number of factors will be taken into account and whether and to what extent live evidence and cross-examination will be necessary is likely to be important in many cases.
5. HHJ Eyre QC concluded that there will be cases where the Court cannot be satisfied that a fair resolution can be achieved by a remote hearing. Notably, the Court also referred to the risk that, given the uncertainty as to how the pandemic and measures to address it will develop, where cases are adjourned for a longer period of time to permit an in-person hearing there can be no guarantees that such a hearing will be possible by the new date.⁷

Principles: Applications for an Extension of Time where the pandemic has caused or will cause difficulties in complying

6. In considering the extension of time application, the recent decision of *Heineken Supply Chain v Anheuser-Busch Inbev* ([2020] EWHC 892 (Pat)) was addressed. While HHJ Eyre QC, agreed with the importance attributed in that case to maintaining the administration of justice during the

⁷ *Ibid* para. 46.

pandemic, he reiterated that the courts had to recognise the difficulties posed by remote working.⁸

7. Taking into account paragraph 4 of PD51ZA, the overriding objective, Judicial protocols and guidance, and the approach applied to the adjournment of hearings, HHJ Eyre QC set out the following nine principles to be considered where an extension of time is sought in the circumstances of the COVID-19 pandemic:⁹
 - a. Existing deadlines should be kept if they are achievable. Where this is not realistically possible an extension of time should be as short as reasonably practicable. Great importance continues to attach to prompt administration of justice and compliance with court orders.
 - b. Legal professionals can be expected to make appropriate use of modern technology, including for remote contact with witnesses and others. Remote working may have to be used in a manner that would not have been contemplated prior to the pandemic.
 - c. Legal professionals will be expected to seek to rise to the challenges posed. This may require them to go further than might otherwise be expected, especially where there is a deadline and even more so where failure to meet that deadline will jeopardise a trial date. This may entail putting up with inconveniences; using innovative methods of working; and acquiring the skills needed for the effective use of remote technology.
 - d. Expert witnesses who are professionals will be expected to “*go the extra mile*” in the same manner as legal professionals. Different considerations will likely apply where measures are required by individuals who are neither experts nor legal professionals.

⁸ *Ibid* para. 31.

⁹ *Ibid* para. 32.

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- e. The court should be willing to accept evidence and material that is less polished and focussed than normal if this is necessary to meet a deadline.
 - f. The court should take account of the realities of the position and avoid requiring compliance with deadlines which are not achievable even with “*proper effort*”.
 - g. The court must be conscious that remote working is likely to be less efficient in achieving a particular result, such as the production of evidence, than traditional methods.
 - h. The consequences of movement restrictions and working from home must also be considered. This includes the realities of home-working set ups, such as varying IT and internet capabilities, as well as the additional responsibilities that those working remotely may be undertaking, for example childcare, caring for sick relatives, or supporting vulnerable persons.
 - i. Finally, an extension of time that will require the loss of a trial date should be granted less readily than one that does not. Where a trial date will be impacted the court must be confident that there is no alternative that will permit the case to be dealt with fairly.
8. Taking into account these principles it was found to be in the interests of justice to grant the Defendants’ application for an extension of time and the hearing was adjourned until July 2020.¹⁰

Summary

9. The principles set out in this decision provide a helpful framework for those making an application for the adjournment of a hearing or for an extension of time to comply with directions because of challenges posed by the pandemic. However, a court will require sufficiently detailed evidence as to

¹⁰ *Ibid* paras. 35-42.

the specific difficulties caused – it will not be enough to simply refer to the challenges presented in general terms.

10. The authorities suggest that the courts are not readily adjourning hearings on the basis that an in-person hearing is required. As noted by HHJ Eyre QC the uncertainty over how long the present circumstances will persist means that hearings that are delayed so that they can be held in-person may face repeated adjournments – this could be a significant factor in considering whether it is in the interests of justice to press ahead with a remote hearing.

11. Finally, it is clear that the Courts, while sympathetic to the difficulties posed by remote working, will expect legal and other professionals to step up to the challenges presented by COVID-19. This will require innovation and additional efforts to get up to speed with new technology, as well as cooperation with other parties in order to find solutions that enable justice to continue to be served during this crisis.

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