

## IN BRIEF

► The environmental impact of the changes brought about by the COVID-19 pandemic on the justice system and litigation management, including the rise of remote hearings and electronic bundles.

► How these changes can and should be advanced in the longer term.

A positive but unintended consequence of the COVID-19 pandemic has been the environmental sustainability gains. These have primarily been brought about due to the reduction in travel and the accelerated rate of digitalisation across many sectors of the economy. This article considers the environmental impact of the changes on the justice system and litigation management. It also considers how these changes can and should be advanced in the longer term.

### COVID-19: changes to the justice system

The justice system in England and Wales dates back to the 12th century, and the pace of change since then has been slow. Consequently, it was not in the best position to respond to the challenges brought about almost overnight by the COVID-19 pandemic. Given its fundamental role in society (and the backlog of cases that predated the pandemic), it was not feasible for court hearings to be postponed for a significant time while the various restrictions were in place.

The justice system had to adapt, and adapt quickly. Many were pleasantly surprised at the speed and efficiency with which the courts, the judiciary and other legal sector participants responded. Not all courts were so quick to adapt. The French and Spanish courts were temporarily closed, with all but the most essential or urgent matters being suspended. In England and Wales, seismic and unprecedented changes to process and procedure were adopted in a short space of time, many of which have now become commonplace. These included:

(1) The increased use of remote hearings and virtual meeting platforms at all stages of the litigation process, which has reduced the need for travel and the associated costs and emissions. This is particularly relevant in large international commercial disputes where multiple parties, lawyers, witnesses and experts might previously have travelled around the world to attend in-person meetings and court or arbitration hearings. Numerous studies have demonstrated that the reduction in travel brought about by the pandemic significantly reduced pollution levels, which, if sustained, would help limit the

# Are the courts greener on the other side of COVID?



It is important that the courts do not lose the environmental gains made as a result of the pandemic, say **Francesca Berry & Karen Hutchinson**

rise in global temperatures.

(2) The move to remote hearings, which has reduced the need for all court buildings to remain open. HM Courts & Tribunals Service (HMCTS) has a large property estate, and the output of running and maintaining real estate has been recognised as a major contributor to climate change. While some physical court space must remain available, a longer-term shift to more remote hearings would reduce the need for office space, meeting rooms and service buildings and allow HMCTS to downsize its property portfolio. This would result in cost efficiencies and a reduction in the justice system's net energy emissions.

(3) The increased use of electronic bundles and the court's e-filing system, which has reduced the substantial physical resources and emissions associated with preparing and updating multiple copies of paper bundles. Paper bundles and hard copy filing consume huge volumes of paper. There are also the environmental costs associated with couriering countless updating documents to court and the locations of different parties in the run-up to any hearing. There are obvious time efficiencies in amending or correcting electronic bundles as opposed to paper bundles. Although electronic bundling existed in the pre-COVID world, the pandemic has accelerated

its adoption, and paper bundles have in many instances become the exception rather than the norm.

(4) Numerous ancillary environmental benefits are associated with the move towards remote hearings and working, such as a reduction in the need for takeaway food and coffee and the associated use of single-use plastics and disposable packaging.

In 2020, following a consultation, the Civil Justice Council reported on the impact of COVID-19 measures on the civil justice system. The report recognised that 'the impact of remote hearings on carbon emissions should be studied, particularly in relation to large international commercial disputes where parties are currently required to travel internationally to attend in-person hearings'.

Following this report, a steering group of litigation practitioners developed the Greener Litigation Pledge ([greenerlitigation.org](http://greenerlitigation.org)), by which signatories (including Stewarts) commit to taking steps to reduce the environmental impact of their practice and reduce their emissions. The commitments encourage participants to engage with the courts to support changes to rules, procedures and practices, such as electronic bundles and remote hearings.

It is of note that the new Commercial Court Guide, published on 3 February 2022 in the

post-pandemic era, now advocates ‘paperless trials’, requires that ‘no hard copy bundles, only electronic bundles, should be filed with the court unless requested by the judge’, and requires parties to ‘minimise their own and other participants’ use of hard copy bundles and documents’.

Parties are now also encouraged to use technology at trial beyond electronic bundles. There is also a greater emphasis on evidence being given remotely by video link or telephone. The guide states that this should be ‘at least considered for a witness who will have to travel a substantial distance, including from abroad, whose evidence is expected to last no more than half a day’.

### Government investment programme

In addition to the changes necessitated by the pandemic, in 2021, the government announced a £40m spending plan to make the courts and tribunals more sustainable. This includes the installation of solar panels and other energy-saving technology in court buildings to make HMCTS more environmentally friendly. It was recognised that the justice system is a significant source of greenhouse gas emissions, both direct (generated by the courts) and indirect (those which users of the court incur during the litigation process).

The aim is to reduce these emissions by 10% by 2025 to help meet the government’s wider objective to bring all greenhouse gas emissions to net zero by 2050. HMCTS has also developed a five-year strategy to ensure sustainability is considered in everything it does.

The changes brought about by the pandemic will have reduced the costs and carbon footprint associated with the litigation process considerably. If sustained and further developed, they are likely to dramatically improve HMCTS’ prospects of achieving its objectives.

### Conclusions

Despite the obvious virtues associated with the digitalisation and modernisation of the justice system accelerated due to the pandemic, some potential downsides should not be overlooked:

- (1) Not every court user has access to the technology required or the necessary technological skills to support attendance at a remote hearing or the use of electronic bundles. Therefore, in-person hearings and paper bundles will remain important to ensure certain court users are not excluded from the process or the right to a fair trial.
- (2) While complex trials have successfully taken place remotely, there are still legitimate concerns about the

effectiveness of remote hearings in the largest and most complex of cases.

- (3) Certain parts of the trial process, such as witness cross-examination, are generally thought to be more effective in person. It is debatable whether they can be fairly undertaken remotely in certain types of cases, notably fraud.

Consequently, it is doubtful we will soon see a transition to all hearings being conducted remotely. Indeed, the president of the UK Supreme Court, Lord Reed of Allermuir, has specified a strong preference for reverting to physical hearings in the Supreme Court as soon as possible. He said ‘they do work better’ and ‘the whole experience is much more spontaneous and interactive than it becomes online’.

The current default position is that interim and other hearings not involving witnesses should be heard remotely. Any hearings longer than half a day or involving witnesses will typically occur in court unless there are good, health-related reasons to do otherwise. Rather worryingly, there are indications that traditional pre-pandemic practices continue to be favoured by both some practitioners and senior members of the judiciary. These include preferences for in-person hearings or hard copy bundles, even where this is not strictly necessary, and a remote hearing or electronic bundle would be equally effective. In particular:

- (1) Several decisions have reiterated the pre-pandemic principle that remote attendance should not be permitted without good reason or simply for the convenience of the parties or their witnesses: see, for example, *Farrer & Co LLP v Meyer* [2022] EWCA Civ 706, [2022] All ER (D) 76 (Jun); *United Technology Holdings Ltd v Chaffe and Others* [2022] EWHC 151 (Comm); and *Jackson v Hayes & Jarvis (Travel) Ltd* [2022] EWHC 453 (QB), [2022] All ER (D) 115 (Jan). The position appears to be the same even when there is consensual support for a remote hearing among the parties. In *Bilta (UK) Ltd (in liquidation) and others v SVS Securities plc and others* [2022] EWHC 723 (Ch), [2022] All ER (D) 115 (Mar), Mr Justice Marcus Smith summarised the approach the courts were adopting. He said in-person hearings were more likely to be suitable in actions involving witnesses whose live evidence needs to be heard and tested via cross-examination. This is so even if the parties expressed opposition to an attended hearing and a desire for a remote hearing.
- (2) The use of electronic bundles has been more widely accepted. However, anecdotally we are aware that some

members of the judiciary and counsel are still working from hard copies. Concerns have been expressed about the difficulties that can be encountered navigating extensive electronic bundles (see, for example, *Wigan Borough Council v Scullindale Global Ltd and others* [2021] EWHC 779 (Ch), [2021] All ER (D) 65 (Apr) and *Re ETP (UK) Ltd Yildiz v Turk and another* [2021] EWHC 1747 (Ch), [2021] All ER (D) 15 (Jul)).

While some return to the old way of doing things is to be expected, there is a clear window of opportunity for everyone to capitalise on the changes imposed by COVID-19 to make a lasting environmental difference. It is important to build upon the positive advances made during the pandemic and the investment in technology to support remote hearings and electronic filing and bundling, rather than revert to the comfort of familiar pre-pandemic practices.

The technological advances adopted by the justice system during the pandemic have brought into focus some of the opportunities to ease pressure on the court system and bring about permanent changes to reduce carbon emissions. All parties involved in the litigation process and court users should consider the environmental impact of the process they are engaged in and whether there is a more sustainable way to do things in accordance with the commitments set out in the Greener Litigation Pledge.

Given the wide case management powers available to judges to determine how a hearing should be conducted, more could be done to ensure that environmental impact becomes a core tenet of the decision-making process and informs case management directions. The new Commercial Court Guide is a step in the right direction as it requires parties to consider the use of technology at the case management stage.

However, the focus of the changes imposed appears to be the associated time and cost savings rather than an overt requirement on parties or the courts to assess the environmental impact of the trial process. More could be done to explicitly codify a requirement to consider the environmental impact at every stage of the litigation process. This might be done by incorporating it into the list of factors (at CPR 1.1(2)) to be considered as part of the overriding objective to deal with cases justly and proportionately. This may sometimes result in hybrid hearings or a mix of paper and electronic bundles. Any actions that reduce emissions should be required to be considered in every case and embraced whenever they can be. **NLJ**