

THE ROYAL COURT AND COVID: REFLECTIONS

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This Article examines the experience of the Royal Court during the Covid-19 pandemic, the steps taken to ensure that the administration of justice was not significantly affected, and the changes in practice which have resulted.

1 The author was sworn in as Deputy Bailiff on 6 January 2020. His successor as Attorney General was sworn in on 9 March 2020 before a packed Royal Court.

2 The first case of Covid-19 in Jersey was confirmed on 10 March 2020. From 20 March all travellers arriving in Jersey other than essential workers were required to self isolate for 14 days. By then there were Covid patients in hospital. On 29 March 2020 the Chief Minister announced a lock-down effective from 8 a.m. the following day. Islanders were, *inter alia*, required to stay at home other than for two hours each day unless they were employed in an essential function. Islanders were permitted to leave their home for exercise and essential shopping only. The schools were closed. The Bailiff's Chambers carries out an essential function so we continued to go to work. The majority of staff in the Judicial Greffe were able to work remotely although some were required to continue to come to the Royal Court building for the purpose of acting, *inter alia*, as Greffier in court.

3 This article examines the response of the courts, the Royal Court in particular, to Covid. It is in part a narrative in part a recollection of significant events, and an observation as to how the practice and the procedures of the courts have been changed, in some respects permanently, by this period.

4 On 24 March 2020, prior to lockdown, the Magistrate's Court decided to close and remained closed for several months. All hearings took place remotely using an application (now defunct) called Starleaf, with counsel and defendants joining hearings remotely. Any case that could not be dealt with either on the papers or remotely was adjourned.

5 The Royal Court took quite a different approach, issuing its new procedures on 29 March 2020.

6 In respect of criminal cases, owing to the practical difficulties that might arise from assembling and accommodating a jury, it was decided that members of the public should not be summonsed to court for the purposes of forming a jury. All jury trials listed between 29 March 2020

and 30 June 2020 were vacated and re-listed for trial later in the year. In fact, jury trials were resumed in August, commencing with a five-day rape case. Criminal trials listed before the Inferior Number (judge and two Jurats) were also adjourned and the first Inferior Number trial post lockdown took place on 21 July 2020. When jury trials resumed, it was not possible to use the two allocated jury rooms as they were too small to permit jurors to spread out sufficiently from each other. Accordingly the court rented (later purchased) twelve separate tables to be erected in the Old Library which became the jury room for all trials (subject to what is said below) from summer 2020 until the autumn of 2022. The photograph below shows the Old Library configured as a jury room.



7 Otherwise, the court remained open for criminal cases. The court's guidance stated—

“Sentencing, bail applications and other short hearings will continue. The Court will ensure that any participants present in Court hearings observe advice given as to social distancing, with

all participants, including defendants and Counsel, attending by video link where possible.”

8 The public gallery was closed, but representatives of the media were still entitled to attend the hearings in criminal and, if appropriate, civil cases—but all socially distanced.

9 Notwithstanding the closure of the public gallery of the Royal Court during the first lockdown, the public were kept abreast of court proceedings by the presence of the media, the publication of weekly court lists and the publication of the results of hearings before the *Samedi* court together with the usual regular publication of judgments.

10 In fact, in respect of the Friday (*Samedi*) list the Crown Advocate continued to attend in person and defence counsel often chose to appear, although all defendants in custody attended remotely.

11 The Jurats continued to sit in the Royal Court, but separated from the judge by a distance of two metres. Accordingly, when the Royal Court sat as the Inferior Number, the normal practice of the two Jurats sitting to the left of the judge in the Royal Court was dispensed with so that one Jurat could sit to the left of the judge and one to the right, suitably distanced.

12 Importantly the Royal Court continued to deal with a range of civil cases. The guidance stated—

“The Royal Court will continue to determine all public law children’s cases, which by their nature are always important, and other civil cases that are urgent.”

13 Where possible the court directed counsel and their parties to attend hearings remotely but in respect of public law applications, such as for final care orders, the court continued to sit with all parties who wished to attend in attendance. The court’s decision to continue hearing such cases in person was mirrored by a subsequent decision made by the English Court of Appeal (Civil Division) presided over by the President of the Family Division on 30 April 2020,¹. Sir Andrew McFarlane, P, giving the judgment of the court, noted that on 9 April 2020 the Lord Chief Justice, the Master of the Rolls and the President of the Family Division had sent a message to all judges which contained general guidance to the effect that “If all parties oppose a remotely conducted final hearing, this is a very powerful factor in not proceeding with a remote hearing ...” In family cases the guidance was to the effect that where parents opposed the plan of a local authority and the only witnesses to be called were the social worker and the guardian, and the

¹ [2020] EWCA Civ 583.

factual issues were limited, the hearing could be conducted remotely; where only expert medical witnesses were to be called the hearing could be conducted remotely but, in all other cases where the parents and/or lay witnesses were to be called, the case was unlikely to be suitable for a remote hearing. McFarlane, P said at para 7 of the judgment that this latter provision only extended to final hearings and not interim hearings.

14 Social distancing requirements meant that most hearings could only take place in the Royal Court or the States Chamber. The States Assembly sat at Fort Regent and then remotely for several months. It was not possible for the court to sit in Court 2 or the Old Library save in circumstances where the judge was sitting alone (the size of these court rooms was insufficient to allow distancing of the Jurats at two metres) and the parties were either all attending remotely or up to two counsel only were in attendance. As to the Royal Court or the States Chamber, the published guidance noted—

“The Island is fortunate to have available two such large spaces which can accommodate litigants under conditions that make it relatively easy to ensure social distancing.”

15 As the *Samedi* (Friday) morning court was shorter in duration owing to reduced business, pursuant to a direction dated 30 March 2020 from 17 April 2020 onwards the passing of contracts commenced at 12.30 p.m. (not 2.30 p.m.); all contracts were required to be passed by power of attorney with no members of the public permitted to attend court, and the legal profession asked wherever possible to limit the number of attendees from each firm to one person. It became common for one attorney to represent both sides of a transaction in court. The number of transactions gradually fell as the effect of the lockdown intensified and the amount of residential conveyancing in the pipeline reduced, until the number of contracts passed on a Friday regularly failed to exceed ten. But it never fell below five and there were always people who wished (as they were entitled to do under the restrictions) to move house and continue transacting even when other aspects of commercial life had quietened considerably.

16 There was a suggestion on the part of Government that the court should no longer sit to pass contracts on a Friday afternoon because that could not be described as “urgent business”. The court elected to continue to sit as to do otherwise would create inconvenience and might stymie important commercial and domestic transactions. Further, as to the listing of hearings (apart from trials) that were due to be heard during the lockdown, including trust cases and other civil matters, the court was live to the needs of law firms, trust companies, banks and other businesses to continue their business as usual where at all possible.

17 In order to ensure that the virus was not transmitted by the handling of documents, parties were required to file papers electronically where possible and in other instances to file paper bundles no less than three clear working days before the hearing listed for Samedi Court, and further in advance for civil cases. As to court attire, counsel were directed, even when attending *via* video link, to be gowned unless there were “valid reasons” for them not to do so, in which case the court should be advised in advance and in any event counsel were “expected to wear appropriate business attire”. The spring of 2020 was warm and there were hearsay accounts of counsel attending hearings remotely from home covertly wearing shorts. Hearings were often interrupted by dogs barking, clocks marking the hour and the sounds of birdsong—all imported into court from homes all over the Island and occasionally from further afield.

18 At the request of the legal profession, the Bailiff issued directions in respect of powers of attorney executed pursuant to the Powers of Attorney (Jersey) Law 2005 directing that the various statutory requirements under the Law might be complied with by remote execution of documents which would be treated as being made “in the presence of” the prescribed witness. A similar direction was made in relation to affidavits executed pursuant to the Affidavits (Advocates and Solicitors) (Jersey) Law 1992. Each affidavit executed in accordance with the Practice Direction needed to set out that the deponent was present remotely. The legal profession and the court did not charge fees for these documents.

19 There are various changes to court practice and procedure which required primary legislation. In many jurisdictions the required changes to legislation were made either by way of emergency powers or executive orders. However, in Jersey the States Assembly met remotely and frequently in order to consider a great deal of legislation.

20 The courts were consulted about the need for and content of the legislation affecting the court. The Covid-19 (Emergency Provisions—Courts) (Jersey) Regulations 2020 were adopted by the Assembly on 22 April and came into force on 23 April 2020. Initially they were due to expire on 30 September 2020 but were renewed until they ultimately expired on 30 September 2022. No one would have anticipated when the regulations were adopted that they would remain in force for nearly two and a half years.

21 The principal effects of the regulations were as follows:

(i) The Bailiff (and any judge of the Royal Court) could determine all matters sitting alone, notwithstanding the terms of any other enactment, with the exception of a criminal trial, the imposition of a sentence or an appeal from the Inferior to the Superior Number or from

the Magistrate's Court to the Royal Court. This meant that the Bailiff could determine many criminal matters alone and all civil cases with the exception of trials. This was designed to ensure that matters could be dealt with at speed, particularly in circumstances where the number of Jurats incapacitated might be so great that it would be difficult to convene sufficient for a hearing. It would in principle have allowed the court to (for example) determine representations in trust cases and interim care orders without Jurats. In practice these cases were heard with Jurats throughout the period covered by the regulations.

(ii) The quorum of the Superior Number was reduced from not less than five to not less than three Jurats. This was a significant and necessary change. At two metres social distancing it was impossible to seat five Jurats, even in the Royal Court. The maximum number would have been four. Further, there was a risk that the pandemic would mean that there were insufficient Jurats to carry out the business of the Royal Court. If, for example, one court was sitting as the Superior Number for sentence and another court hearing a civil case with two Jurats that would require at least seven Jurats. There were periods during the pandemic when the incidence of Covid and other connected difficulties, together with the need to shield vulnerable persons, meant that the number of available Jurats fell to approximately that number. It was not appropriate for there to be any risk that a case be adjourned for want of Jurats. This never occurred during the time that the regulations were in force, partly thanks to this regulation. Further it became clear that there were certain categories of case where empanelling three Jurats would be adequate to meet the justice of the case and the nature of the sentencing regime applicable, regardless of Covid.

(iii) The Royal Court was duly constituted if the Bailiff and the required number of Jurats were present by way of live link, telephone or otherwise. This permitted all members of the court to attend remotely from each other and the other parties if necessary. Although infrequent, there were occasions when one or more Jurats attended a hearing remotely and there were a handful of occasions when the Jurats were present in court and the judge attended remotely (in which case, a video link to the retiring room was also often needed). The live link provision provided that the court was entitled to direct that all and any participants in the proceedings including the parties, counsel and witnesses were treated as being present if they were able to communicate with the court by way of live link, telephone or otherwise. The caveat in the regulation was that the defendant in a criminal trial must be able to see and hear the court.

(iv) Finally, the regulations provided that the licensing assembly was properly constituted if it consisted of the Bailiff (or the Deputy Bailiff or a Lieutenant Bailiff) and two Jurats. The experience of the court

whilst this regulation was in force was that the court constituted in this fashion was sufficient to discharge the business of the licensing assembly.

22 To ensure that infection of the judiciary did not lead to an inability to deliver justice, the Bailiff and Deputy Bailiff moved to different ends of the Royal Court building with two Bailiff's Chambers staff in each case. The two separate teams did not mix or mingle, and for a period of several months contact between Bailiff and Deputy Bailiff was by telephone/video link only. In fact, neither the Bailiff nor the Deputy Bailiff were to contract Covid until approximately two years later in early 2022, but nonetheless these arrangements ensured the resilience of the Royal Court was preserved.

23 By the same token, the Jurats were not permitted to attend the Royal Court building unless it was their duty week. All documents were couriered to their homes.

24 It was certainly a curious time to be working. With the exception of relatively few essential workers, the streets of St Helier were deserted including at lunchtime. All the shops were closed, save for those providing food and those of us working at the Bailiff's Chambers made a point of frequenting places such as those locally operated shops in the Central Market which continued to provide an essential service to Islanders during this period.

25 As the first wave of the pandemic receded there were various relaxations in Government restrictions. Of most significance so far as the Royal Court was concerned was the reduction in the two metre distancing requirement to one metre. This occurred on 26 June 2020.

26 This was an important date, as from this point onwards it was possible for the Royal Court to recommence jury trials and other trials where witnesses were to give evidence, and some ceremonial events such as swearing in of advocates, albeit with numbers strictly limited. Only three advocates could be sworn in at a time, with up to two family members per advocate in court. Others were permitted to attend by video link. When the new Solicitor General was sworn in on 1 May 2020 his three children could not attend court and joined by video from the kitchen at his home.

27 The Royal Court is fortunate to contain a jury box designed for a jury of 24. The ushers measured that it was possible for 12 jurors to occupy the jury box at one metre distance from each other.

28 Accordingly, with effect from 6 July 2020 the Royal Court directed that all trials in the Royal Court, with or without witnesses, would resume with "all parties attending in person and observing physical distancing". This included jury trials. Further, all defendants

to be sentenced in the Royal Court would attend with counsel and defendants attending in person, subject to physical distancing. However, in respect of other hearings (other than trials and sentencings) a defendant in custody would continue to attend *via* video link from the prison with counsel appearing in person. The public gallery was reopened but limited to 20 persons—the maximum capacity of the gallery at one metre distancing.

29 In civil cases, counsel and witnesses listed to give oral evidence were required to appear in person, subject to observing physical distancing restrictions. The Royal Court table and the passing of contracts returned to their (2.30 p.m.) Friday slot. Attorneys were to continue to represent members of the public for the purpose of passing contracts wherever possible.

30 Accordingly, from 6 July 2020 it was in many senses “business as usual”, subject to social distancing. In reality some things did not return to normal. The wish of parties, counsel and witnesses to attend remotely continued to be permitted as a matter of the court’s discretion. It was essential to ensure that such parties gave undertakings in relation to their remote attendance. The standard undertakings that they were (and are) required to give are:

1. Not to permit any other person to listen to (or view as the case may be) the proceedings;
2. Not to record or disseminate the proceedings or any part thereof to any other person;
3. To comply with any directions of the court; and
4. To notify the court immediately in writing if any of the above undertakings or directions given had been breached.

31 The necessity for such undertakings followed various difficulties which had occurred in other jurisdictions. Live streaming can go wrong and in *Gubarev v Orbis Business Intelligence Ltd*,² Warby, J found that there had been a breach of s 41 of the Criminal Justice Act 1925—the ban on taking photographs in court—and/or s 9 of the Contempt of Court Act 1981—the ban on sound recordings and/or the order of the court. On 25 June 2020, the court had given directions at a pre-trial review for the trial to take place on a socially distanced basis, with a second court room reserved so that members of the press and public who wished to observe the trial could do so *via* a live video feed. On 14 July 2020, the court made a further order permitting certain witnesses to give evidence remotely *via* video link and also ordered that the

² [2020] EWHC 2167 (QB); [2020] 4 WLR 122.

second court room would be deemed to be an extension of the first court room and that—

“(For the avoidance of doubt) unless the Court so directs, there shall be no transmission of any live audio or video recording, nor any live feed of any transcript of the trial or any part of it, to any location other than the second court room ...”³—

subject to an application being made by a party supported by written evidence as to why admission should be given and identifying the specific location to which it was sought to transmit.

32 That order was communicated to the parties but not shared by one of the solicitors with her clients. One of the parties applied to the court requesting permission for one of their representatives to review the live transcript of the trial remotely and that was granted. The solicitor referred to, shortly before the trial was due to begin, incorrectly advised her clients that they could share the Zoom link with a third party who wanted to observe the trial remotely. Her client shared the link or caused it to be shared with a number of individuals who were not present in either the primary or secondary court room. When they watched it remotely, the order was accordingly breached and arguably the statutes referred to above were also contravened.

33 During the trial it came to the attention of the judge that persons were observing the trial remotely without the court’s permission to do so. The solicitor was ultimately rebuked and ordered to pay costs by her professional body and the judge referred the matter to the High Court. Although the High Court accepted that the breach was not deliberate, the President of the Queen’s Bench Division, Sharp, LJ, said that the misconduct after nine individuals including persons in the United States, Cyprus and Russia, had watched three days of the trial via Zoom in breach of statute and the court order displayed a “casual attitude towards the orders of the Court which falls well below the standards to be expected of senior and experienced legal professionals”.

34 Sharp, LJ also said:

“51. In normal circumstances a judge can see and hear everything that is going on in court. The judge can see who is present, and whether a witness who is giving live evidence has been present in court observing and listening to the evidence of other witnesses. The judge can see whether someone is attempting to influence, coach or intimidate a witness whilst they are giving evidence. The judge can immediately see, as Warby J did in the course of this

³ *Ibid.*, at para 18 per Warby J.

hearing, that a person sitting in court who is not a journalist appears to be tweeting on their mobile phone without first obtaining permission. That a judge can see and hear everything that happens in court enables the judge to maintain order, discipline and control over what is done in court, and thus to maintain the dignity and the integrity of the proceedings as a whole. This control extends to the recording of images and sounds of what goes on in court and what is then used outside court.

52. Once live streaming or any other form of live transmission takes place, however, the Court's ability to maintain control is substantially diminished, in particular where information is disseminated outside the jurisdiction, as happened in this case. The opportunity for misuse (*via* social media for example) is correspondingly enhanced, with the risk that public trust and confidence in the judiciary and in the justice system will be undermined. In these circumstances, it is critical that those who have the conduct of proceedings should understand the legal framework within which those proceedings are conducted, and that the Court is able to trust legal representatives to take the necessary steps to ensure that the orders made by the Courts are obeyed."

35 The first jury trial in Jersey after the lockdown took place on the 28 August 2020: *Att Gen v Dhar*. In this and other cases jurors were told at the outset that, if they wished, they could remain masked throughout the trial. A similar direction was given to all juries until the middle of 2022. Very few jurors elected to wear a mask during the first or indeed any subsequent trials.

36 However, the relaxation in restrictions was neither complete nor permanent. The "second wave" struck in the autumn of 2020. New cases began to climb steadily from late September and additional restrictions were imposed in the late autumn of 2020.

37 In late 2020 and notwithstanding the increasing prevalence of Covid, the court continued to hear substantial witness cases, in particular a four week trial that took place at the Hotel Cristina when it was closed for the winter months (*FTV v Tuckwell*). The case was perhaps a paradigm example of how litigation could be managed in the Covid environment. Owing to restrictions in the United States it was not possible for the witnesses for the three plaintiff companies to attend Jersey to be examined and cross-examined and accordingly they, together with the experts in this case, gave evidence by video link. Indeed, only one witness, the defendant, gave evidence in person and he had needed to obtain special permission from the Australian government in order to travel to Jersey. Accordingly, approximately a dozen witnesses gave evidence by way of video link, with the evidence

they gave recorded on a live transcript and made available to lawyers in various countries and different time zones. It was necessary to maintain distancing of one metre during the hearing and all those attending court needed, in accordance with Government and court requirements, to prove that they had tested negative for Covid if they had recently arrived from outside the Island.

38 Ultimately, rising cases led to what was described as a “circuit breaker” but which was (with the exception of the continued opening of schools) in effect a second lockdown in early December 2020.

39 Importantly these measures included a restoration of the two metre social distancing requirement which in fact, contrary to the expectation when it was imposed, remained in place for several months, only coming to an end on 12 April 2021. This meant that the Royal Court building could no longer accommodate jury trials, many of which had been listed for early 2021. The court was determined not to cancel or adjourn listed cases and accordingly arranged for the Royal Jersey Showground to be used as a jury court for the early months of 2021.

40 Originally the Royal Jersey Agricultural and Horticultural Society (“RJAHS”) building, known as the Trinity Showground, was taken for the period January to March 2021 but ultimately this period was extended to 28 May 2021 owing to the continuation of the two metre distancing requirement. The first trial commenced on 11 January 2021. That was a jury trial lasting the week. Over the course of the next few months the Showground hosted not merely jury trials (including the trial of *Att Gen v Bala* in January 2021 and a one week trial of *Att Gen v Moon* in February 2021) but also a five-day public law children’s case in March 2021 and a complex civil case lasting six days in May 2021.

41 The West arena, frequently used to show prize cows and exhibit rabbits and guinea pigs, was converted to a jury court in the space of a few days. The site conversion cost £20,000. In addition to the West arena being converted for the purpose of being used as a court, the Members room was used as a jury retirement room, the main hall (with four separate marquees) was used as a waiting room for jurors summonsed before empanelment and witnesses waiting to give evidence, and the Council room on the first floor was used as a judicial retiring room. All items purchased for the court were bought with the intention of being reused when physical distancing was no longer required. A photograph of the part of the showground that was used as the Royal Court appears below. There was a suggestion (although not supported by empirical analysis) that juries in England and Wales that deliberated subject to the two metre distancing requirement failed to reach a verdict as often as might otherwise have been the case because of the difficulty of bonding with each other. Whether or not that was

the case (and in the author's view it was probably correct) Jersey juries did return verdicts in the cases that they tried at the Showground.



42 Notwithstanding the fact that for the first five months of 2020 the Royal Court was unable to hold jury trials and many other witness cases, as soon as the restrictions were imposed by social distancing were eased the court worked hard to catch up on its outstanding case load. The consequence was that Royal Court sitting days in 2019 totalled 366.5 days and were only a little lower at 353.5 days in 2020. This was a remarkable achievement. This statistic, together with work done in 2021, meant that the Royal Court did not have a backlog of cases to hear when restrictions ended. This was achieved notwithstanding the fact that the States was also extremely busy during 2020—sitting for 81 days compared to 50 in 2019, principally as a consequence of the amount of emergency legislation which the Assembly needed to consider as a consequence of the public health crisis.

43 Sometimes ingenious (or at least novel solutions) were found to issues presented by Covid. On 10 January 2022 a defendant attended court who claimed to have had Covid. It was impracticable to simply send him away without a hearing as it was important that he surrendered to bail and that there was a hearing so that he could be formally remanded on bail to the date of his trial in the near future. The court staff were understandably reluctant to permit him to surrender to custody in a court room in the building and accordingly we decided to hold the hearing in the Royal Square, tape recorded by the Greffier. The Bailiff's Judicial Secretary took a photograph (which does not show the defendant and so perhaps does not amount to a contempt of court!) which also appears on the next page. Counsel are Crown Advocate Matthew Maletroit, Defence Advocate Alana Binney and, partially obscured by pillars, are Stuart Anderson, Chief Usher and Claire Rouault, Greffier.



44 What are the legacies of the pandemic? In some respects it is perhaps too early to tell, but some observations can be made.

45 The practice which developed during Covid of medical witnesses, experts who live outside the Island, and those giving formal or brief evidence where the credibility of the witness was not in dispute, being permitted to give evidence remotely, has continued. This has even extended to witnesses in criminal trials, but key witnesses need to give evidence from a court building (if outside Jersey) or, if at home, in the presence of a police officer who can confirm that no-one else is present. This has resulted in a saving of costs and is convenient to witnesses outside the Island, particularly experts who, in order to ensure that they arrived in time to give evidence and were not taken by surprise by any delays, would often need to arrive in the island at least a day in advance of the hearing. Save in cases where the quality of the video or audio link was poor, it has been easy to accommodate such witnesses. The court has generally been resistant to Jersey counsel based outside the Island attending a hearing of any length remotely as there are presentational and technological difficulties that frequently arise. In any event it is tiring dealing with a case that lasts a day or two where one advocate is present only remotely, and this can put the party represented by the absent advocate at a disadvantage.

46 The prevailing view prior to the pandemic that it was difficult, if not impossible, adequately to address the credibility of a witness, the evidence of whom is disputed, were he or she giving evidence remotely, no longer holds such wide currency. It still remains the case that it is preferable for key witnesses to give evidence live and in court but of course it is already the experience of the courts, particularly when (for example) hearing the evidence of a child or vulnerable witness remotely on the video link in a criminal case, that juries and other tribunals of fact are able to assess the evidence of such witnesses even though they are physically absent from the court room.

47 Although independent of the pandemic, the introduction of CaseLines in November 2021 was accelerated by the pandemic and its adoption in virtually all cases in early 2022 has, almost overnight, substantially eliminated the use of paper. A combination of the introduction of wholly electronic bundles and the effects of the pandemic has resulted in a substantial change in the way in which justice is administered and delivered. It is hoped that those changes have been beneficial not only to those who work in the courts but also to litigants and others affected by the work of the Jersey courts.

Robert MacRae has been the Deputy Bailiff of Jersey since January 2020. He held the office of Her Majesty's Attorney General from May 2015 until his appointment as Deputy Bailiff.