Written evidence from Irwin Mitchell LLP

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1 Foreword

We are grateful for the opportunity to feed into this parliamentary inquiry regarding the situation with court capacity in the face of the recent pandemic.

Set out within this short paper is a collective view of experiences from various colleagues across our business working in many different areas of the law, touching on both courts and tribunals. We both considered data within our case management systems but also asked for feedback on matters where hearings had been listed recently.

Irwin Mitchell is a full service, litigation focused, top 20 UK law firm and is therefore well placed to feed into the Committee. We always seek to engage constructively with requests of this nature and would make the offer at the outset that if we can be of any on-going assistance or if any clarification is required, please don't hesitate to get in touch via the contact details below.

October 2020

2 Executive Summary

A fully functioning courts and tribunal service is fundamental to the justice system within England & Wales. The pandemic which continues to cause so many hearings to be abandoned and adjourned has had a serious impact on an already stretched service.

Between 2010 and April 2019 the Ministry of Justice had been severely hit by austerity measures with a 40% budget cut over that period and a further £300m reduction planned in for the year from April 2019[1]. This had resulted in over half of the courts in England & Wales closing between 2010 and 2019 and an ongoing plan to close a further 77 courts before 2025.[2]

Whilst we fully appreciate that the programme to reform the courts estate was running in conjunction with a programme to reform courts and tribunals generally and make more digital justice available, we have over this period seen increasing delays in the justice the courts are able to provide. The system was creaking long before covid-19 impacted our courts and tribunals.

The recent challenges are not of anyone's making, but to help our economy and indeed our nation to move out of the recession we find ourselves in, having sufficient capacity at all levels of the entire justice system is of key importance.

It is of course vital that our criminal and family courts continue to function well, to preserve law, order, liberty and freedom but with hundreds of thousands finding themselves out of work or with companies refusing to pay debts in the absence of an effective court sanction, it is hard to exaggerate the importance of getting the wider court and tribunal service up and running and functioning at a high level.

We welcomed the Rapid Consultation commissioned by the Civil Justice Council regarding the courts response to covid, but we are unsure as to the decisive action taken since to address the findings which their report set out. If the Committee can help facilitate this we believe it would be very worthwhile.

If there was one theme to pull out of our experiences with the court system post covid, it would the difficulty of inconsistency. We reference this in more detail below, but would ask that the Committee be mindful of steps which could be taken to bring greater consistency across the court estate which should benefit all involved.

[1] Evidence given to the Justice Committee in November 2018 by Lord Burnett of Maldon, Lord Chief Justice of England and Wales.

[2] https://www.nao.org.uk/wp-content/uploads/2019/09/Transforming-Courts-and-Tribunals.pdf

3 Inquiry: Terms of Reference

We considered with interest the Commons Justice Committee's report *Coronavirus (Covid-19): The Impact on Courts* referenced in this inquiry. We would urge the Committee to update this report given that it was published in late July 2020 and we believe that many of the circumstances referenced will have worsened since that time. It is not the case that through the early months of the pandemic teething issues were worked out and that since July matters have settled or improved.

We readily acknowledge the efforts made by the court staff, HMCTS, the Judiciary and Government to 'keep the wheels of justice turning', as Lord Burnett of Maldon, put it before the Committee in May 2020. At the same time however, we welcome the scrutiny of the Committee on the basis that changes brought in under the stress of dealing with a pandemic should not automatically be adopted in the long term. Our experience of dealing with the courts has on many occasions been very poor through the last 7 months and justice has undeniably been adversely affected for many individuals looking to the courts and tribunals for help.

To assist those considering the evidence received through this process, we have structured our response below around the four different headings outlined within the Call for Evidence issued by the Committee. Please do note that this response has been pulled together at very short noticed (unfortunately, we were not immediately aware of the inquiry) and therefore, should any matters require clarification, please do not hesitate to get in touch.

The impact of Covid-19 on court sitting days and the backlog of cases, including whether the one-off additional funding and 4,500 additional days provided for 2020/21 is sufficient and staffing and recruitment issues.

As the stated intention of the inquiry acknowledges, it is difficult for us to provide evidence to the Committee as to whether or not the additional 4,500 sitting days provided for in 2020/21 are sufficient to alleviate the current backlogs. That said, we can provide an indication of our experiences recently, both in terms of the human impact of the delay but also some statistics around the timeframes involved in respect of certain hearing types.

The intended investment is certainly welcome, however clearing the backlog will require much more than additional funding. We anticipate that it will be very difficult to find the physical space which is set up with the necessary support staff and technology/social distancing measures to allow so many additional sitting days to proceed and we also do not believe that there are sufficient judges available to deal with the backlog of hearings regardless of funding.

To help with this response, we asked our colleagues engaged with litigation of all forms who had recently received a notice of a hearing to provide details of that hearing in terms of when it had been received and the date the hearing was due to take place.

Of the responses received, over half of the hearings listed had been impacted by the pandemic, either in the sense that they had had to be adjourned and re-organised or they had been listed much further into the future than would usually be expected.

For those specifically re-listed as a result of the pandemic, they were on average between 6 and 7 months delayed. These covered a very wide spectrum of hearing type: an application in the family court to re-locate children, a bankruptcy petition, approval hearings for infant and adult protected parties, a CICA appeal and an application to set aside an account freezing order. The likely effects of all of these hearing types being significantly delayed is clear, although in a later section of this response, we provide more detail.

Before turning to some of the human impacts of the current situation within our court system, set out below are some statistics to help show the magnitude of the delays faced.

We are conscious that gathering evidence regarding the impact of backlogs in certain case types may be difficult for the Committee. One area in which we carry out a large volume of work has to do with recovering uninsured losses for individuals referred to us by national insurance companies. These claims range from small track monetary only claims (some person and some commercial) to those including a fast track injury (i.e. claims with a total value of up to £25,000). As we deal with a large volume of these, we trust we are able to provide statistically meaningful data to demonstrate our experience over time (and most recently since the impact of the pandemic) on how long it takes to obtain a hearing date.

Please note the following in respect of the four graphs below:

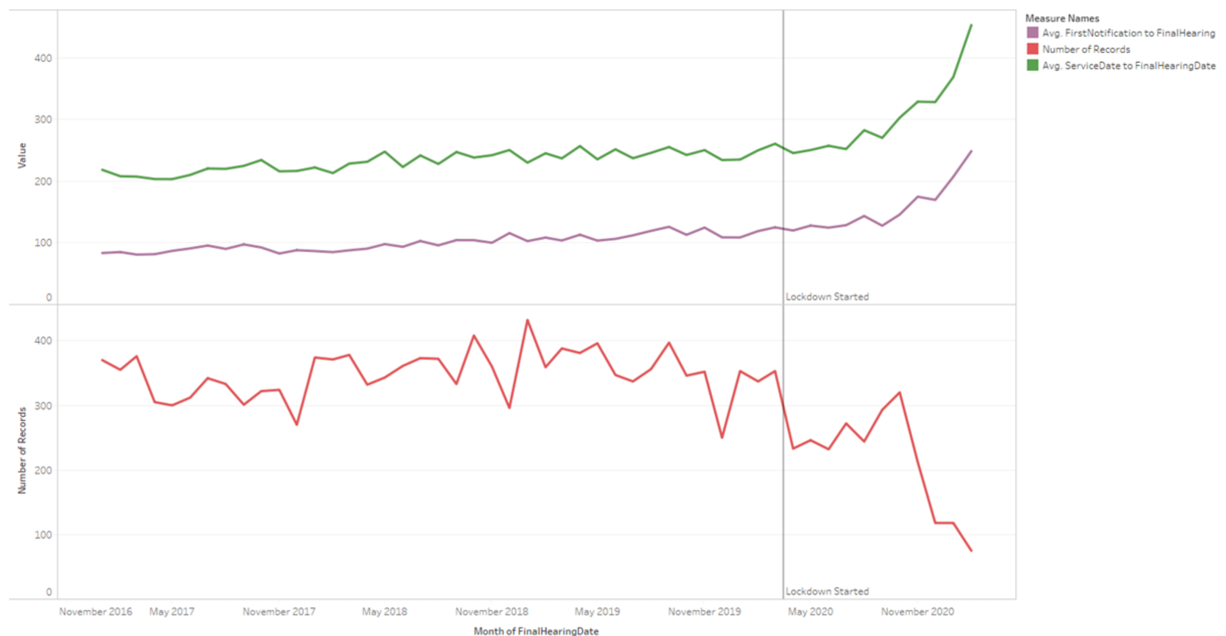
We carried out a review of how long it has taken to obtain a hearing date on small and fast track motor accident related claims over the last 4 years. This is therefore intended to show the experience over a 3+ year period prior to the pandemic and then since the lockdown introduced later in March 2020.

* The reference to 'Service Date' is actually the date we sent proceedings to Court to be issued and served.
* The 'First Hearing Received Date', is when we received first notification of a hearing date.
* The 'Final Hearing Date' is the last date at which the case was scheduled to be disposed of by the Court. If a hearing is adjourned the later hearing date will be used.

To note: Cases where we have not recorded all the key dates required for the calculations have been removed from the data set.

AVERAGE DAYS TO FINAL HEARING

OVERALL



The above shows that of the hearings which took place in May 2017, on average we had received c.3 months notice of the hearing date and that hearing date was on average c.7 months post commencement of proceedings. (The 'value' on the y axis in the top half of the graph is 'Number of Days').

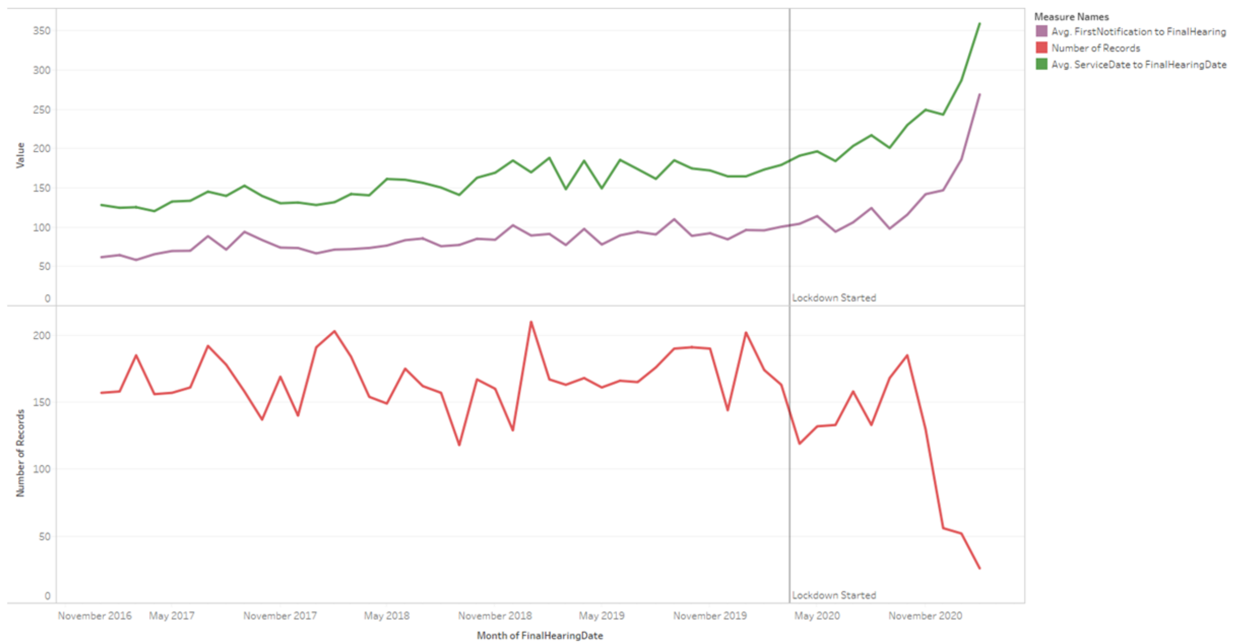
By the start of 2020, these time frames had increased to hearing being set down 4 months post notification, and on average it was taking over 8 months to get from commencement to final hearing.

The latest situation, for cases due to be heard at the end of 2020 is that those hearings were set 7 months before they are due to take place (of course they could be adjourned and pushed back further). Also, the average case duration of these lower value claims is now approaching a whole year.

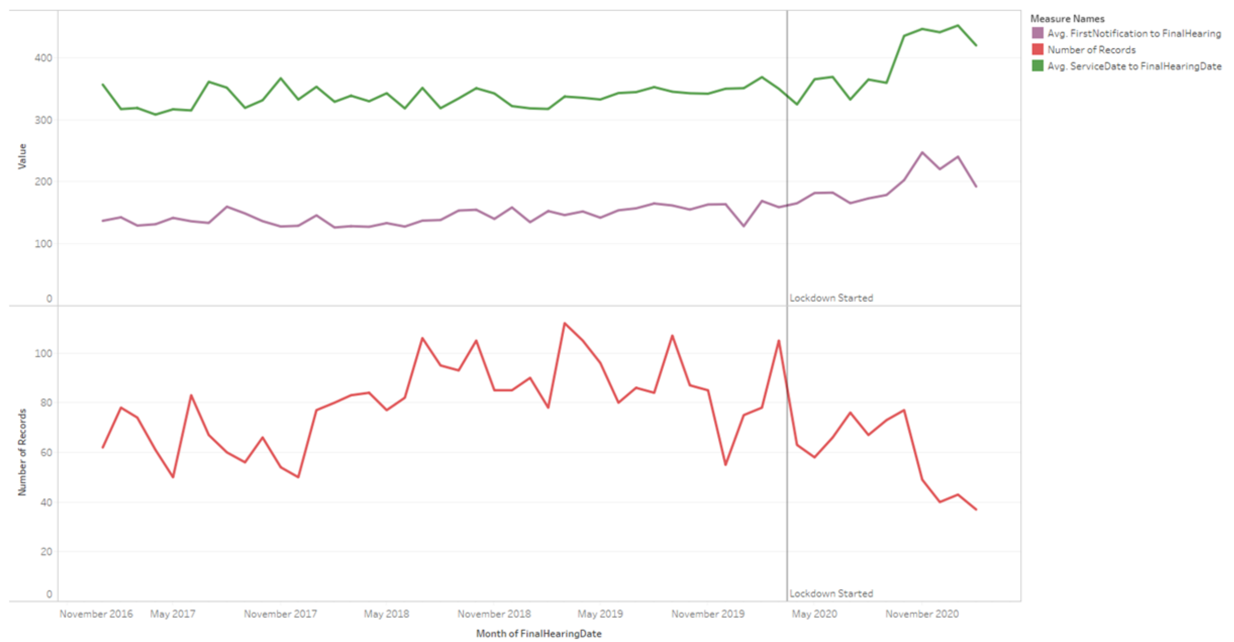
* We do have hearings listed throughout 2021 and even into 2022, but the numbers are smaller and so have been excluded from the data at this stage which stops at the beginning of 2021.
* The data only includes matters with a hearing date set (i.e. a trial window would be excluded).

The tables below follow the same logic but split out the overarching picture into those matters being deal with as part of the lower value 'streamlined' process. Those which are standard fast track matters and lastly, those which are small claims track only.

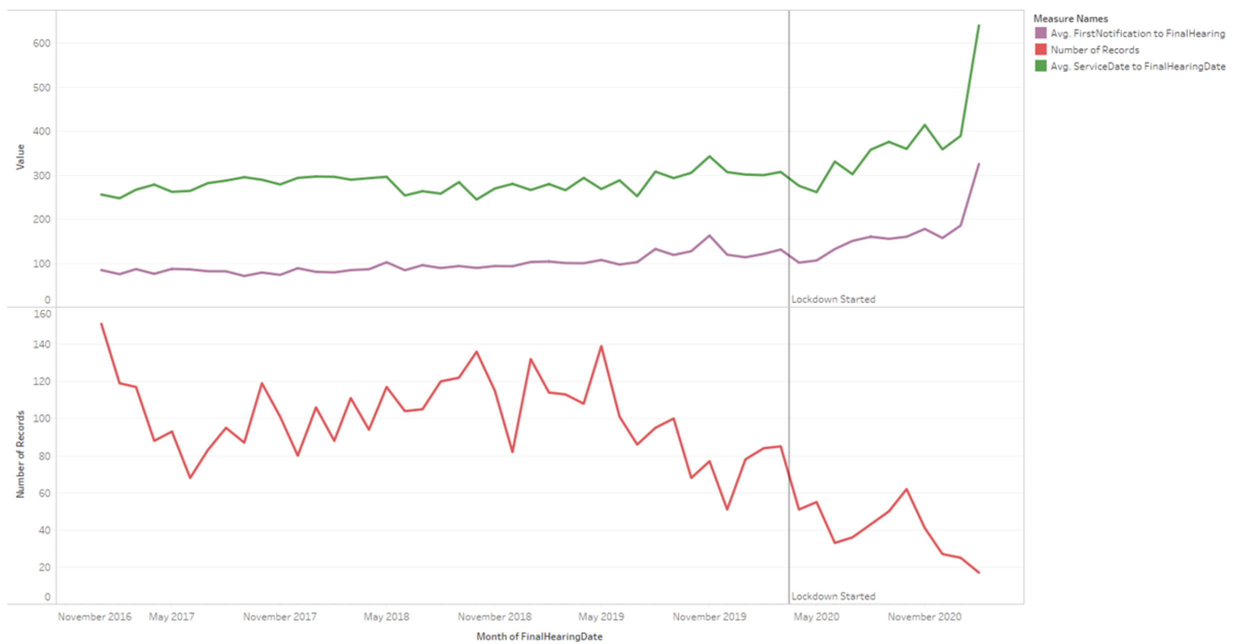
LOW VALUE RTA STREAMLINED CLAIMS PORTAL CASES



STANDARD FAST TRACK PERSONAL INJURY CLAIMS



SMALL CLAIMS TRACK

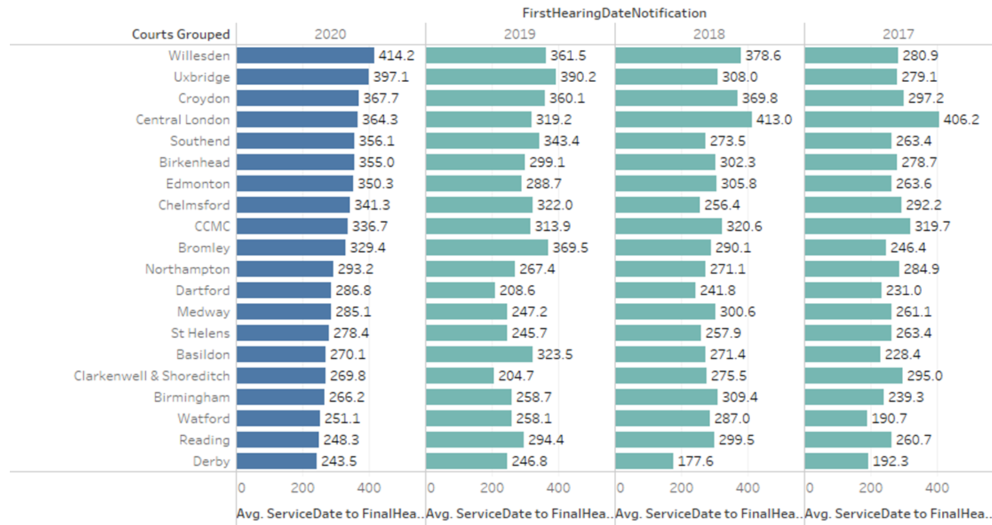


The time taken to list and dispose of a small claims track matter had been averaging approximately 9-10 months for a number of years now, which is surely already unacceptable given the nature of these claims in terms of value. The impact post covid is again very significant with the likelihood of the volume of small claims track cases increasing again with the introduction of the Civil Liability Act due in early 2021 and the small claims limit increasing to £5000 for these types of cases.

Finally, this regard, for these types of hearings, the chart below shows the courts where we have experienced the longest average time to hearings in 2020 and to provide context, we have included the data for the same courts over the three prior years.

* To avoid any distortion we have limited this information to courts where we have at least 20 hearings booked for 2020.

LONGEST AVERAGE TIME TO HEARINGS – TOP 20 COURTS IN 2020



Practical experience of delay in Crown and other courts among lawyers, witnesses, victims and defendants and whether there is appropriate access to justice.

As was referenced in passing above, there so many examples of real human impact when it comes to delays in the Courts and Tribunals. Below are three simple examples of the frustrations regularly faced at present:

One of our clients (and their family) who have been impacted by covid revolves around a high value birth injury clinical negligence case, which has been listed now for a trial on the issue of liability with three different trial windows and still it is not yet listed with an actual trial date. The problems started pre-covid with a first trial window set down in January 2020, but the court could not accommodate this. It was then given a window in June which again was not kept by the court. Since January, we have chased on 15 occasions for details of when the matter would be set down, which now looks like it will happen in March 2021. On chasing we kept being told that the matter was with the listing team and could not be set down because of the pandemic. This matter is being dealt with in the Newcastle County Court.

This example is of course not isolated. We are simply struggling to get any response from the courts either by e-mail or telephone. In our attempts to do the best for our clients, we will chase the courts but are finding that on occasion we are simply being ignored.

One very significant problem is the apparent inability of the courts to liaise by e-mail. We are seeking to work remotely as much as the courts are, but we understand that the court systems are designed to generate post which then doesn’t always apparently go out. Early on in the pandemic, we engaged with the judges of main court centres who said that the court staff would correspond by e-mail but this has not happened in anything like a consistent and joined up manner.

We continue to face a very inconsistent approach from different courts and tribunals. Listing matters for face to face hearings and then switching them to remote hearings a day or two beforehand. This

also happens in reverse and it seems to be at the whim of the particular judge or court in terms of the technology which is or isn't available.

A second example of the human impact is a matter we had listed in the family courts, an application to relocate a child abroad. This was originally due to be heard, and we trust dealt with in that it was listed as a final hearing in Barnet Family Court at the start of April 2020. The matter was adjourned as a result of the pandemic and has now been relisted for a February 2021 hearing and that has been set for directions rather than a final determination. This extended period of uncertainty for the child and their family is significant, as the decision will impact various important decisions about the child's life.

Applications for interim payments are taking longer than would have been the case before. Often interim funds are sought to either ease significant financial hardship brought about by an injury or to allow access to rehabilitation. Delay in either situation is painful and difficult to deal with for those of our clients who are most needy.

Further to the situation with interim payments, and a third example of the human impact, we were able to conclude a case in terms of agreeing damages for one of our clients back in December 2019. Our client is a protected party and so the settlement is subject to the court's approval and even before the pandemic the original approval date was 6 months after the parties reached agreement. The day before that hearing was due to take place in June 2020, the court adjourned it for reasons which are not entirely clear. Whilst it was relisted quickly, it was going to take another 3 months and this time a Sept 20 date was set. All papers and contact details were sent to the court in good time in line with the order given, however on the morning of the hearing a link was sent out by the court for it to be dealt with by MS Teams. Unfortunately, our client and their litigation friend could not access this. The court sought to resolve the matter by sending out an alternative Skype link, but this would not work for either the claimant or the defendant's representatives and so it was decided that the matter would proceed by telephone. Upon finally speaking with the Judge, the hearing was adjourned altogether as the court only had one of the documents filed two weeks before and so now 10 months post settlement our vulnerable client has received none of their agreed damages.

Attending court for any client to give evidence is no small matter and so having to prepare for this only to be let down and then having to wait and prepare again on a future date is extremely poor service to those the system should be there to both serve and safeguard.

Inconsistency is a very significant theme. Last minute hearings, hearings into 2022. Face to face hearings being switched to virtual at the last moment and vice versa. Some courts seem to have developed their own set of rules in terms of how exactly documents must be e-filed, others have different requirements. Some courts will deal with multi-day hearings virtually, others simply will not. Some judges accept e-filing of documents, others insist on physical papers being available.

Working with the industry to formalise what is required in terms of how documents (particularly e-bundles) should be filed would be very welcome. The rise of 'local practices' between which there is no consistency was understandable in the urgency of the pandemic initially, but should not be allowed to continue.

Similarly, measures which allow parties to agree a way forward without some of the onerous requirements brought about by Mitchell/Denton may be beneficial all around whilst we all navigate the current situation. We would see this has a short term measure only, not a return to a world where

court directions were regularly missed without issue or sanction. In this regard in a costs context, we have received orders which already place us in breach because of delays with them being sent out. It is not ideal, that our first required action upon receiving an order is seeking urgent relief because the date for complying with the order had passed before it was sent out.

The extent to which courts have appropriate capacity post-Covid-19, including the extent to which courtrooms are idle across England and Wales.

It is again difficult for us to have a full picture of the capacity of courts and when they may or may not be idle. We would urge the Committee to update the report prepared in July and referenced in the inquiry heading to establish the picture in detail since late July 2020.

In relation to the small claims and fast track data shared above, we have seen some evidence which is backed up anecdotally in other areas that the courts have recently been listing some matters with very short notice indeed. We can only assume that this is an attempt to fill available court rooms (physical or virtual) when they become available at short notice.

Of course if the possibility of a hearing becomes available, we would certainly rather be offered it, but this is not always possible at such short notice, especially if it is to happen virtually and our clients need support in accessing the correct software to allow the hearing to go ahead.

If we could be sure of which software solution was to be used by all courts, we might have more opportunity to prepare our Client in terms of accessing the software and working out how to use it ahead of time.

Also in this context, whilst parties will of course take steps to settle cases early wherever possible, if this could be encouraged early to free up court lists we believe this would be of benefit to all concerned.

Long-term solutions to reduce delay in cases coming to trial, including the move to the digital transformation of the court estate.

The following is not set out in any particular order of importance:

We believe that HMCTS and the Judiciary should engage with practitioners to arrive at an agreed standard in terms of how digital hearings and documentation will be approached. The Rapid Consultation carried out by the Civil Justice Counsel in May 2020, captured a great deal of feedback in terms of those maters which were best suited to virtual hearings. We believe this was sound research, but as yet it has not been applied in a consistent way across the various courts and tribunals.

As a firm we have made increased use of our own document sharing site – IMShare – which is essentially a HighQ based deal room facility. We have found that some courts have been very happy to use this service (it is simple to access via an e-mail invite and having set up log in details), whereas other courts were not prepared to engage with this solution. We can certainly provide more details of the service, how it works and what the capabilities are if it would be helpful.

If appropriate cases were always dealt with remotely/digitally, whether by phone or video conferencing technology, this should in turn free up court room space for those which benefit from being dealt with in person to be heard. This matters with professional representatives on both sides and no involvement with the claimant or defendant are often best suited to a digital solution.

Early in the pandemic, there was certainly further inconsistency in terms of which video platform the different courts favoured. If Cloud Video Platform is the solution of choice for the Courts, as soon as this can be used consistently following full and clear training for all involved the better.

We find that it isn't always clear when dealing with remote hearings, who is to set it up. There was a period of time where the courts were favouring Skype for business, but whilst many organisations could join a meeting, they didn't have the permissions to organise and host a meeting, which caused some difficulty with certain courts.

Having mentioned training, whilst it may be an additional challenge at present, in-depth tutorials for the judiciary in terms of how to conduct hearings remotely will be beneficial in due course. It is such an important aspect of justice that the court service user feels as though they were given a full and fair hearing. This can be very difficult to convey if the judge refuses to engage directly with the lay participants or will not turn their camera on whilst conducting a video hearing.

We were very grateful for the swift extension of PD51S pilot, which allowed us to continue to litigate county court claims and deal with service much more quickly that would have been possible by post. We have been involved in some testing of further features of this option and look forward to them going live hopefully shortly. Other extensions of this process should be considered, i.e. to Part 8 as well as Part 7 claims.

We do trust that some of the points made above at helpful. As offered at the outset, if any further detail or clarification is required, we will do our very best to help.