

Conducting Family Law Hearings from Home

Peter Cummings SC

When the pandemic hit I was in day seven of a 10-day trial in the Family Court with evidence due to be given by three experts concurrently the following day. The Family Court's Sydney Registry had physically shut down the previous day for cleansing after it was revealed a practitioner who had been there appearing in a duty list had tested positive for COVID-19. The conditions in which we were working - in a relatively small courtroom with four barristers, three solicitors, a judge, court staff, witnesses and other support people - was, it occurred to us as matters were rapidly unfolding, unsafe.

In the absence of a suitable safe alternative venue the case, which was of some complexity and involved parenting orders affecting two small children, had to be abandoned without any indication as to when it could be reconvened. It has now been set down to conclude in November. It was a blow to the parties and to the court.

This was the point at which the family courts effectively stopped live hearings. Unlike some other jurisdictions many of the longer trials in the family courts have been adjourned until live hearings can be convened; a reflection perhaps of the work of the jurisdiction.

Within the first two weeks of the court shutdown about 40 days of trial work came out of my diary with a view to it being re-listed at some unascertained time, maybe later in the year. Some of it has been re-listed for hearing late in the year.

The first thing [I did to adapt] was to immediately upgrade my access to and command of technology to ensure not only the ability to participate in externally conducted court hearings but also to facilitate conferences. It has also been important to maintain contact with friends and colleagues and to be as philosophical and calm as possible about matters which are beyond our control.

The uncertainty attaching to the short and long term economic future pervades many aspects of property cases not just in terms of valuation of businesses (which may have suffered severely or even disappeared),



but also in terms of the ongoing earning capacity of parties and the approach of third party financiers who are underwriting debt and facilitating resolution. The "rules" in so many cases are being rewritten.

By far the hardest feature for me has been the inability to actually appear in a courtroom. I have found it truly challenging having spent many years developing courtroom technique and presence to suddenly, virtually overnight, have to convert that to a skill which is effective when you are sitting down in an empty room looking, on screen, at a number of people doing the same thing, or worse, all on the telephone. The handling of documents and the conduct of cross-examination are also challenging but the mindset and context have been the hardest things with which to grapple.

Physical separation from opponents and solicitors and clients has also impeded the facilitation of negotiations that invariably occur at court, typically while waiting in busy judicial duty lists when the parties and their lawyers are present and focussed.

I have experienced very positive reinforcement of the collegiate quality of our profession in particular in my chambers. There has been a genuine recognition of the challenges of both the bar and solicitors and indeed clients caught up in the middle of a bad situation that has suddenly become worse. I have welcomed the ability to spread the load and share ideas and guidance about new ways of dealing with our challenges. Ironically perhaps I think that the experience has reminded us of the benefits and importance of access to justice in a courtroom.

I think there is an increasing place for videoconferencing and the improvements in our equipment and skills will serve us well. On the other hand I think there is a grave danger for litigants in the family courts that the quality of justice may be materially compromised if telephone and video hearings were to become more usual and replace attendance at court to any significant extent.

Peter Cummings SC has been practicing at the Bar for 24 years working primarily in family law. BN