

COPING WITH REMOTE HEARINGS

The Honourable Justice Clyde Croft and Tricia Hemans consider some of the challenges for practitioners dealing with remote hearings and practical ways to overcome them.

At the turn of the new year it would have been unthinkable to suggest that in just three months the majority of the courts in England and Wales would be closed, that is, at least in the physical sense. In the wake of Covid-19 the Courts have remained open for business however, most of that business is now being conducted in the virtual realm. From online mediations and applications to full-blown witness actions, this is a brave new world for most practitioners, particularly those in civil law, who are used to lugging paper-laden suitcases up and down the various Courts in the land.

However, technology was used in a variety of ways even before the current outbreak. In many international arbitrations for example, witnesses based outside the jurisdiction have been able to give evidence through the use of applications such as Skype with great results. Family practitioners may also be well versed in the use of such technology following the advent of Family Procedure Rule 3A.8 in 2017, which allows vulnerable witnesses in certain circumstances to give evidence via live-link.

Nevertheless, the outbreak has brought with it the need to use technology to conduct Court business on a wide scale not seen before. The legal profession, however, has risen to the challenges presented by the current situation with stoic heroism, keeping the justice system on track. While early indications are that adjournments of civil cases are commonplace, this will no doubt become less frequent as time progresses.

Issues of procedural fairness and “open justice” were addressed recently by the Western Australian Court of Appeal in a very substantial matter – *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38 (30 March 2020). The judgment of the Court at [7] and [8] contains some very apposite statements on these issues:

[7] It is necessary that we state that the court's experience is that the conduct of appeal hearings by telephone has been satisfactory as senior counsel for the respondents made the submission that an appeal hearing by telephone or video-link would be manifestly inadequate (as to telephone) or inadequate (as to video-link). Senior counsel suggested that he (and thereby the respondents) would be at a significant disadvantage if he could not see and 'read' the court throughout the appeal hearing referring to the benefit of non-verbal communications.^[3] Senior counsel for the respondents went as far as to say that the respondents were 'entitled' to have a normal hearing, in pressing for an adjournment until such time as counsel for the parties could attend in person at an appeal hearing. We reject those submissions. Procedural fairness requires that a party be provided with an adequate opportunity to properly present its case. The court's experience is that, having regard to the other practices and procedures in the Court of Appeal, the conduct of an appeal hearing by telephone provides for comprehensive and considered dialogue and debate between bar and bench as to the issues raised by the appeal. It is not the case that an appeal hearing by telephone is manifestly inadequate or that an appeal hearing by video-link is inadequate.

[8] In the extraordinary circumstances presented by the COVID-19 pandemic the arrangements provided for in the public notice of 18 March 2020 are a necessary but proportionate alteration to the normal practice and procedure of the court consistent with the due administration of justice. Were the submission of senior counsel for the respondents to be accepted this court would be unable to conduct any court hearings for an indeterminate time. That would be antithetical to the due administration of justice in the State of Western Australia and at odds with achievement of the goal and objects in O 1 r 4A and r 4B of the *Rules of the Supreme Court 1971* (WA).

These sentiments have been echoed in the English Courts which is currently, at County Court level, conducting many hearings by telephone and, at High Court and above, increasingly facilitating hearings by live-link.

In the short time since the pandemic began, many challenges have arisen, and lessons learnt. This article provides an overview of the common problems encountered by advocates when acting within the digital space and makes practical suggestions about best practice in this new virtual age of conducting court business.

Common Challenges

Some of the current defects of remote hearings include:

- Variable sound quality
- Screens freezing and participants speaking soundlessly into the camera.

- Participants dropping out of the video call altogether.

When judges notice such problems, the hearing will usually be stopped and the individual re-invited. Beyond the technological difficulties, however, are the issues which can be pre-empted, managed and in most cases circumvented with adequate preparation:

- Witnesses speaking down into their documents and mumbling.
- The loss of the ease of interactions of actual personal presence.
- The draining nature of spending hours interacting with a screen compared to 'in-person hearings'.
- The fact that the hearing will take longer as people navigate electronic bundles and switch between speakers.

Practical Tips and Solutions

Having good software and a stable internet connection will be key to ensuring the smooth progress of any hearing. At present Skype for Business and Zoom appear to be used most regularly. At a recent Chancery Bar Association Seminar, Mr Justice Nugee explained that most courts are using Skype business at the moment. The MOJ is investigating the use of Zoom but there are security concerns.

Unreliable technology will make it very difficult for the Judge to maintain concentration and even more difficult for the advocates to speak authoritatively to the Court or Tribunal. While there might be very little that a practitioner can do about that particular problem, there are some general and more specialist practices which could be adopted so as to help the experience progress as smoothly as possible.

General Advice for using video technology

- Embrace the technology. If possible, test the software prior to the hearing. Familiarise yourself with its core features. Skype for Business allows you to show the document you are looking at on the screen. Zoom allows for participants to be sent to a 'breakout room' so that instructions can be taken privately where necessary.

- Place your microphone on mute when you are not speaking. Avoid shuffling papers and making other distracting background noises. In general, it is better for participants to mute themselves unless they are speaking. This avoids feedback and extraneous noises. The sound of a keyboard can be quite disconcerting and devastate the audio quality for everyone. Some recommend the use of a headset, as this is said to improve the sound quality and minimises the risk of feedback during video calls.
- As more and more people are working from home and using software such as Skype for Business, Zoom and Cisco Webex there is a great deal of pressure on networks and there may be problems with bandwidth. In those circumstances turning the video off often saves the connection and avoids the disruption of a party or representative dropping out and having to reconnect. All that can be very disruptive. These issues should be discussed with Court staff prior to commencing the hearing to ascertain the judge's position on this. There may be times, such as examining witnesses or making submissions where it is not appropriate to have audio only, but these should be discussed and resolved in advance.
- Advocates should keep their video on for the duration of the hearing, even when not speaking (this is for the benefit of the other advocates and the judge, however, it also has the added benefit that others will notice immediately if your connection drops off). Where solicitors, juniors or other individuals attend a virtual hearing they can put their video on but many choose not to and just listen in.

Before the hearing

- Make contact with the court clerk well in advance of the hearing to discuss the arrangements. This will include:
 - the possibility of a case management conference,
 - the form of technology to be used,
 - whether the parties and particularly witnesses will have access to a computer or laptop (as this may impact the decision on the software used or the ability for the case to proceed at all),
 - dial-in or other contact details (essential in the event that a participant drops out of the call and needs to email the clerk or judge

- in order to be re-invited – have this information readily available during the hearing),
- the format in which the bundles should take i.e. paper copy to be couriered or electronic (there is no consensus yet amongst judges about how e-bundles should be prepared),
 - whether there is a need to robe (the minimum expectation is that advocates will wear suits),
 - if parties and advocates can remain seated, and
 - the details of all the attendees.
- It is very important to have the witness protocol settled in advance – where the witness is to link from, with what documents (electronic or paper) and free of distractions and any possibility of coaching by someone from the sidelines. Consideration also needs to be given to how the witness to be sworn, and unless the witness is to affirm, whether there is access to an appropriate religious text.
 - It is essential that bundles are well prepared in advance and last-minute additions are avoided. Of course, where it is essential that new material is presented to the court or tribunal, this can be sent via email. Most judges be able to access online databases, such as Westlaw and BAILII, where authorities can be obtained. However, this should be the exception not the rule.
 - Discuss the case with the other side and attempt negotiations before the hearing so as to narrow the issues as far as possible. Where appropriate, supply draft minutes of orders and skeleton arguments well in advance of the hearing.
 - Consider your working environment. Where will you place your hard copy papers? Is it possible to use two screens: one for displaying the video hearing and one for the electronic bundle? An innovative way of doing so while working at home without necessarily having ones desired work set-up is to connect a flat-screen television to a computer for use as a second screen.
 - Turn off email and other notifications which might be given on your computer and distract you or others during the proceedings.

During the Hearing

- Aim to connect to the video call at least 15 minutes before the designated start time.
- Ensure you are in an environment that shuts out as much noise as possible, has decent lighting, keep a glass of water and any necessary device charger to hand.
- There is a “background” feature in the Zoom menu which can provide you with a neutral background. This may help to avoid distraction (and perhaps the potential embarrassment of having a less than ideal working space).
- Bandwidth will have a huge impact on the smooth-running of the hearing. It is important to minimise internet use in your home during the hearing in order to secure the best and most consistent connection.
- In the High Court, the clerk manages the session and will invite counsel and allow counsel to invite solicitors and parties. However, there may be some instances where it falls to one of the solicitors to make the necessary arrangements.
- In a recent seminar, Mr Justice Fancourt explained that the default position is for the hearing to be held in public. Third parties, such as members of the media, who wish to attend can do so by contacting the listing office. If a private hearing is required, this must be flagged at the earliest opportunity. The court will record the hearing. The parties and representatives must not do so unless specifically permitted by the judge.
- Keep the same degree of formality as you would in a physical courtroom.
- Try not to interrupt. If there is a need to, do not simply launch in with your point. Say something to get the judge’s attention i.e. “Your honour/ My lord” and then wait for an invitation to speak. Simply speaking over the other person will not work well on video-link. Zoom has a “Hands Up” function which enables counsel to make objections or interpose a submission to the Judge. The judge will see that “hands up” from counsel and call on them to visually articulate the issue that required the “hands up”.

Witness Handling

- Prepare witnesses at the beginning of questioning by asking them to remain seated (assuming this is agreed by the judge in advance) so as to stay within

the camera frame, keep their voices up and look into the camera when giving answers to questions.

- Establish whether the witness is on their own, what documents they have with them and ask them not to refer to notes etc.
- Ask clear and concise questions which have an obvious ending. Try using non-verbal cues (such as a slight nod) to signal the witness can begin their response.
- Depending on the software used, it may be possible to have multiple video images on screen at once. This might allow you to see both the witness and the judge's reaction to the questions being asked.
- Speak slower than you would ordinarily.

Training and knowledge sharing

A number of webinars on the subject of online hearings have already taken place and no doubt there will be more to follow in the not too distant future. In addition, the Inns of Court College of Advocacy (ICCA) are in the process of developing a specific training programme to assist in the area of witness-handling via video link. This is to be delivered both online and (in due course) face to face. The ICCA website currently contains helpful resources dealing with foreign languages in Court and the effective use of interpreters. The principles expounded there, particularly around clear communication, will be highly relevant to those engaging in online hearings.

There is also the website www.remotecourts.org, which is a joint effort - hosted by the Society for Computers and Law, funded by the UK LawTech Delivery Panel, and supported by Her Majesty's Courts & Tribunals Service. This is designed to help the global community of justice workers including judges, lawyers, court officials, litigants, court technologists, to share their experiences of 'remote' alternatives to traditional court hearings.

These are certainly difficult times which will no doubt have a lasting legacy. Despite the many negative aspects, however, it is hoped that the innovative modes of working and use of technology being utilised now will be for the betterment of the legal profession and administration of justice as a whole in the long run.

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