

## PRACTICAL LESSONS LEARNED FROM REMOTE HEARINGS

### BY SIMON SALZEDO QC

In the last two weeks I have been fortunate enough to take part in two remote hearings: a four day trial in the (London Circuit) Commercial Court and a two day hearing in the Grand Court of the Cayman Islands. The first was by Skype for Business and the second through Zoom. In both cases, all participants (as far as I am aware) were in their own homes.

Generally, both hearings worked well. They were proper hearings where all parties were able to make the points they wanted to make. It perhaps goes without saying that they were not quite as satisfactory as the live hearings we are used to, but they did work and that is the most important thing.

### Bundles

As in any court hearing, it was critical that all participants had the same set of documents. In a virtual hearing that was more difficult to manage, especially because the Judges concerned were at home without any live support from clerks. It is worth bearing in mind that Judges often lack the sophisticated software which can make it easier to manage, for example, large PDF bundles.

In the trial, the bundles were made available in PDF with hyperlinked contents pages. This generally worked well, but the Judge did not have ideal software and if the hyperlinking failed, he had to scroll through the pdfs manually. **Lesson: ensure that the Judge (and all parties) have the bundle in a form that they can easily navigate with the tools available to them.**

I had to cross-examine through an interpreter. The interpreter did not have the documents at all, which made certain lines of cross-examination difficult to effect. **Lesson: everybody involved, including interpreters, require access to the bundles.**

In the Cayman hearing, we had Magnum, which resolved the problem of bundles, but that will not necessarily be available in every case. That of course meant additional screens were needed and that is something that may need to be planned for. **Lesson: ensure that all participants have sufficient screens and screen space.**

### Witnesses

There were surprisingly few issues with witnesses in my, admittedly short, trial. They were sworn by the Judge's clerk and gave their evidence without glitches. That said, in a case where cross examination was more contentious, it might have been less satisfactory. There was less ability for counsel to read witnesses' body language and tone, when all was mediated through internet video and audio with inevitable imperfections. Short questions and no over-speaking were even more important than normal.

### Submissions

Similarly, it seemed reasonably straightforward to make legal submissions. As with witnesses, it was perhaps a little harder to read the Judge including matters such as whether a submission was being made too slowly or too quickly. But for the most part, it did not seem too difficult, especially as it was clearly visible when a Judge was taking notes.

The view taken in both my hearings was that counsel who was not on their feet, as well as all other participants, should generally mute both audio and video to avoid distractions. In both trials, there

were occasional issues with echoes when audio had not been muted. **Lesson: ensure all participants are aware from the outset of the importance of muting their audio.**

One impact of the muting was that it was harder than normal for counsel to interrupt each other, which I suspect was a difference that the judiciary could happily live with.

### **Intra-team communication**

The advocate who is speaking may have rather a lot of screens open at any one time: the hearing video; the document being referred to; the live transcript; the next document they are looking for. At the same time, in a live hearing, the advocate may be receiving communications from the team on post-it notes etc. What is the equivalent for an online hearing?

In my hearings, my teams communicated in part by email and the private message function built into Magnum, but mainly with Whatsapp. Whatsapp is available for PC as well as phone, which makes typing messages much easier. It is more reliably instant than email and more secure.

**Lesson: (1) it requires thought before a hearing what medium will be used for communication within the team and, what method will be used to attract the attention of an advocate on their feet if that is required; (2) advocates should consider asking for time at the end of a submission or cross-examination to permit their teams to pass notes if wanted.**

### **Skype v Zoom**

On both systems there were minor teething issues with connections from some individuals, which were resolved before the main hearing. **Lesson: check all connections in a test run before the hearing.**

The English judiciary is equipped with Skype for Business (though at least one Commercial Court trial has also proceeded on Zoom). A minor point to note about this system is that a participant does not appear on the video until a few seconds after they have spoken. A disadvantage for counsel is that participants have no control over the size of different faces, so it is not possible to focus as clearly as might be wanted on a witness or the Judge.

The Cayman Grand Court used Zoom. This also worked well and it does permit a participant to focus on one face, though this is at the expense of seeing anybody else.

### **The future**

In the short term, a major question is whether long trials will go ahead by remote technology. The first public indication in this regard is the decision of John Kimbell QC sitting as a Deputy High Court Judge in [Re One Blackfriars Ltd](#) [2020] EWHC 845 (Ch), that a 5 week trial would be heard by remote technology rather than being adjourned. It remains to be seen whether that will be the approach for all the larger trials that are currently due to run next term.

In the longer term, the question will arise whether more use can and should be made of remote technology for civil hearings. There are, it seems to me, two main objections. The first and most serious is that the use of remote technology reduces, or at least changes, public access to observe cases. Under Practice Direction 51Y, a hearing takes place in public if access is granted on request to media representatives, and hearings are to be recorded and accessed upon request in a court building with the consent of the Court. It is hard to see how this would be fully satisfactory in terms of open justice if it were to be used more generally. That said, this factor would not apply to hearings that take place in private in any event (such as urgent ex parte applications), nor if the

hearing was broadcast as a few Court of Appeal and all Supreme Court hearings are at present. Secondly, parties may feel that their ability to interact with the Court is reduced by the intermediation of the technology. It seems to me that this is a lesser concern. As a result it may be that remote hearings could be used after the current crisis especially for private hearings or appeals, but that there is unlikely to be a major shift in this direction for most civil litigation.

That said, the experience we will all have with this technology, together with the ever increasing environmental imperative, may lead to much greater use of remote technology for meetings in the legal world as elsewhere. The choice so far has usually been between a live meeting in a single location and a telephone conference call, but never a video conference. We now have much wider spread of decent broadband connections, much greater access to technology like Zoom, Skype and Teams, and now we will all have learnt to use it. I predict more video meetings in future and I see that as a very positive development.

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