

COVID 19: an update on remote hearings and making them effective

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Overview

1. Much has been written about the dramatic decrease in civil hearings as a result of the COVID 19 pandemic. A survey conducted by Kate Brunner QC and I for the Western Circuit showed a 75% decrease in the number of hearings and a 58% reduction in work done by the Bar.
2. The aim of this paper is to provide guidance on what legal professionals can do to ensure remote hearings in the Civil Justice System are both effective and fair. It aims to identify the main barriers to a remote hearing and how to overcome them. In the writer's experience the main barriers to effective remote hearings are:
 - a. The wrong type of remote hearing being listed;
 - b. Poor connection;
 - c. Poorly prepared bundles; and
 - d. Lack of co-operation.

Each is addressed in turn.

The type of hearing (paper, telephone, video or in person)

3. Legal professionals charged with representing their clients' best interests must give careful consideration to the type of hearing that is most appropriate for their client, any witnesses, themselves, their opponents and the Court. This must be done in good time (at least three weeks before any hearing, if listing allows). The main options at the Court's disposal are paper determinations, telephone hearings, video hearings and the conventional in person hearing. The type of hearing selected can materially affect whether there is a fair hearing and whether it is perceived to be fair (justice must be done and be seen to be done).

4. A remote hearing will often be appropriate (albeit some hearings will have to be in person), but the type of remote hearing selected is an important factor. There is a great danger parties and witnesses may lose faith in what they consider cheap justice. COVID 19 has sadly already claimed so many victims; public confidence in the rule of law must not be allowed to become another casualty. In the writer's view asking the following four questions should assist legal professionals to weigh which is the most appropriate type of remote hearing:
 - a. Which type of remote hearing is most compatible with a fair hearing under Article 6?
 - b. How can the parties safely (and proportionately) have the most involvement in the remote hearing?
 - c. Which type of remote hearing results in the most confidence in the justice system?
 - d. Practically, will the type of hearing work?

Paper determinations

5. Very little is suitable for a paper determination. It will normally be better for parties to be able to address the judge and make their case. Paper determinations are being utilised in a limited number of small claims where both parties consent and the Judge considers it suitable (per CPR 27.10) and some minor procedural matters.

Telephone hearings

6. Telephone hearings were typically used pre COVID 19 for interim hearings of less than an hour, where at least one person was represented and there were no more than 4 parties, per 23APD6.
7. The current pandemic has seen an expanded use of telephone hearings as the Court has acquired the use of BT Meet Me (a conferencing facility where the Judge calls the parties). This has removed the need for the lawyers to arrange the hearing and allowed hearings involving only litigants in person to go ahead. The Court has been willing and able to conduct some final hearings in small claims by telephone; even where evidence is given.
8. The principal advantages of telephone hearings are that they are accessible (nearly everyone has a telephone) and easy to set up. There are limitations: the participants cannot be seen; participants tend to talk over each other; they do not work as well with multiple parties and/or issues of greater complexity.

9. If a telephone hearing is proving to be ineffective some judges are willing to convert it to a video hearing there and then. This can prevent an unnecessary adjournment.

Video hearings

10. There are a number of video conferencing options available including Skype for Business, MS Teams, Zoom and CVP. None of these platforms are difficult to use, good user guides/videos are available on the developers' websites. Legal professionals have a role to play in making sure we (and our clients) know how to use these platforms. Lawyers need to be aware of the key advantages and disadvantages of each platform, some key points are set out below. The writer's own view is that MS Teams is probably the best compromise between security and functionality (other views will differ).
 - a. **Skype for Business (S4B).** This is supported by HMCTS; all Judges have access to it and should be able to use it. It has some limitations, not least it is being retired by Microsoft in favour of Microsoft Teams (MS Teams). In the writer's experience MS Teams is superior and preferred by most (but not all) judges.
 - b. **MS Teams.** As noted above this is the successor of Skype. Training is available to any Judge on how to use it. The writer has successfully carried out a number of hearings using MS Teams and it is emerging as the preferred platform in many Court centres. It appears to be secure and is generally reliable. It is not as intuitive to use as Zoom nor is functionality as good, but it is more than sufficient.
 - c. **Zoom.** Zoom is not supported by HMCTS, but ultimately choice of platform is up to the Judge and it is being used. It has some drawbacks, principally: it is limited to 40 minutes unless someone has the paid for version and there are questions over whether it is secure, as it does not have end to end encryption. The lack of encryption may be less problematic in civil hearings which are public, but of more concern in private hearings or for client conferences. The advantage of Zoom is its user-friendly layout, intuitive design and popular use (many clients have already used it).
 - d. **Cloud Video Platform (CVP).** This is HMCTS' bespoke video platform and their preferred option. The rollout has been subject to numerous delays, but it is now starting to make an appearance. It is secure and allows for easy public access. It must be accessed using Google Chrome in order to work properly. In the writer's view it is inferior to all of the commercially available platforms outlined above; functionality is not as good (for example there is no facility for breakout rooms and there is less

control over screensharing). HMCTS is working on its successor which is called Fully Video Hearings (FVH); that is not likely to be available for some considerable time.

- e. **How to join.** A CVP hearing is set up by the Court and parties join by clicking on the emailed link. The other platforms will require one of the lawyers to download/sign up to the platform in order to set up the meeting/hearing. Invites are sent by email and parties/clients do not need to have an account (or the app) to join; they can simply click on the link in their invite email. Using the app is normally better.
11. Breakout rooms (rooms in which some participants may speak in private) are extremely useful as they allow for negotiations between parties and taking of instructions without ending the video call. Not all platforms have them.
12. If the Judge is not sat in a courtroom they must be consulted about who will carry out the recording; recording the hearing without the permission of the Judge is contempt of court.
13. Remote hearings require more time than an in person hearing, at least a third longer, as the technology takes longer to set up, hearings tend to be more tiring and more frequent breaks are required. Time estimates should allow for this.

In person

14. Some hearings are not suitable for any kind of remote hearing. Examples might include cases involving: interpreters (this might be overcome by having the witness and interpreter in the same room); disability that prevents taking part in a remote hearing; lack of telephone, internet connection or computer; credibility as a substantial issue; and where there are real concerns that a party or witness may be prompted or subject to undue influence. Before reaching the conclusion that only in person will be appropriate please do consider the possible solutions outlined in the rest of the paper. The Court will need to know how many people are attending so it can list the hearing in an appropriate room.
15. Some in person hearings are now returning and this will increase as restrictions lift, but capacity is much reduced (generally not more than ¼ of pre COVID 19 levels). Social distancing is to be observed and additional measures are in place (e.g. hand sanitiser/screens). Risk assessments are available by contacting the Court centre.

16. On some parts of the Western Circuit there is to be a return to in person fast track trials as a default position. Parties cannot operate on the basis a hearing will be adjourned. Applications for remote hearings will be considered and will need to be made in good time.
17. Legal professionals will need to consider any particular health needs of those involved. Some participants are shielding or at particular risk and the Court is sympathetic to that. It may be that a hybrid hearing is possible, that is some people attend in person and some attend remotely. Whilst not ideal it may be preferable to a delay without a known end date. Justice delayed can be justice denied.

Poor connection

18. A poor connection is proving to be a significant problem when conducting video hearings. Legal professionals and Courts tend to have invested in enough bandwidth. But the connection of witnesses and parties is a big problem. A lay client or witness may be trying to connect to a video hearing using a poor quality mobile phone and using a patchy mobile signal; not everyone can afford a good quality smartphone/computer/laptop and/or broadband connection.
19. Practical suggestions include:
 - a. Discuss the following with each party/witness who is to take part (in good time before the hearing):
 - i. how the person will connect (e.g. broadband, mobile signal) and whether that is reliable;
 - ii. which device will be used to connect;
 - iii. whether there are any disabilities/childcare difficulties or any other factors which make the use of a remote hearing impractical/unfair;
 - iv. how the person will be accessing the bundle (does a paper copy need to be sent so they can see the hearing and bundle at the same time?);
 - v. whether the participant has a private and suitable location to join from;
 - vi. how any pre-hearing conference will occur;
 - vii. how appropriate instructions will be given to counsel during the hearing (e.g. by email or text message) and how and when this should occur;
 - viii. a reminder that the hearing is still a court hearing and rules of contempt apply, as parties can be more disinhibited in a remote hearing.

- b. Test the possible platforms with the party/witness.
- c. If connection is a problem, enquire whether the person can ask others in the household not to use the internet at the time of the hearing. This can make a very big difference.
- d. Look for other solutions. It may be the witness or party can go to the solicitors' office/barrister's chambers and use the connection there. So long as social distancing can be maintained this can also reduce the number of connections required. It can have the added benefit of allowing counsel to take instructions.
- e. Has your opponent made the same enquiries?

Bundles

20. A properly prepared PDF bundle is crucial to the smooth running of the hearing. Guidance has been issued¹ and must be followed. There is decreasing tolerance of non-compliant bundles; some court centres are already rejecting bundles which do not comply.

21. In the writer's experience there are some common errors, addressed below:

- a. Make sure everyone has a copy of the bundle – whilst elementary, it is a surprisingly common problem. Make sure everyone has the same copy too.
- b. Consider how a party or witness will access the bundle. Whilst many barristers have two screens to work from (one for the video hearing and one for the bundle) witnesses/parties are much more likely to be trying to use one screen for both; that rarely works well. You may need to send a paper copy.
- c. Bundles must be in both PDF and OCR (optical character recognition) format unless this is simply not possible; this is not optional. OCR means that the contents become searchable, which is extremely useful when handling large electronic bundles.
- d. If your documents are not in PDF and OCR format, then invest in technology that can convert it. Most of the software comes at a small cost (for example Abode Acrobat Pro DC); that is going to be the cost of doing business post COVID19. The guidance on PDF bundles contains links to videos showing readers how to create an e-bundle. There is no point in repeating that here, they are short and worth watching.
- e. Bundles must be in as few PDF documents as possible (a bundle in 32 parts is not easy to navigate, especially for witnesses!).
- f. Numbering must follow a specified format. It should be preceded by a letter; for example, instead of page 24 it should be page A24. This makes searching for page numbers much easier. Typing A24 into the search function will bring up the page you wish, whereas typing 24 into the search function will bring up every number 24. This

¹ <https://www.judiciary.uk/wp-content/uploads/2020/05/GENERAL-GUIDANCE-ON-PDF-BUNDLES-f1-1.pdf>

might seem pedantic but in the writer's experience it makes the bundle much easier to navigate. Numbering should be computer generated.

- g. Include an index, ideally hyperlinked. Bookmark significant documents.
- h. Size. Court email addresses ending with justice.gov can only accept attachments up to 36Mb according to the guidance (in the writer's experience this is not always accurate, bundles have been rejected even if smaller than this). Judges email addresses have a higher limit of 150Mb (a solution may be to send the bundle direct to the judge, if permitted).

Co-operation

- 22. The parties and their representatives must assist the Court to make remote hearings effective (where a remote hearing is safe and just). This involves ensuring effective co-operation between solicitors, barristers, opponents, clients, witnesses and the court. The logistics require some advance planning and briefing counsel in good time should assist.
- 23. On the Western Circuit, where the writer is based, practitioners/Circuit and the judiciary have had an ongoing and productive dialogue, which has resulted in a free flow of ideas and initiatives. For example, the Designated Civil Judges on the Western Circuit have issued a (very welcome) protocol requiring barristers to liaise with one another and provide the court information as to a suitable type of remote hearing. This sort of co-operation should become the norm.
- 24. A lack of pro-activity and co-operation has been responsible for some hearings not proceeding. Effective co-operation will be essential if there is to be any return to 'normal' levels of work.

6 July 2020



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