

Remote and Hybrid Hearings: The Good, the Bad and the Ugly

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Overview

- 1 The legal framework
- 2 Published guidance on remote hearings
- 3 Recent case law
- 4 Bundles
- 5 Practical tips
- 6 Lessons from recent hearings
- 7 The view from the bench

The legal framework

- 1 Common law principles (natural justice, open justice)
- 2 Senior Courts Act 1981 s 71(1)
Coronavirus Act 2020, Sch 25 (Courts Act 2003, ss 85A-D)
- 3 Rules and practice directions
 - (a) PD51Y (Video or Audio Hearings During Coronavirus)
 - (b) PD51ZA (Extension of Time Limits)
 - (c) PD32, Annex 3 (Video Conferencing Guidelines)
 - (d) CPR r 39.2
- 4 Civil Justice Protocol Concerning Remote Hearings
(Practice Note) [2020] 1 WLR 1334 (updated 26 March)
- 5 Chancery Guide paras [21.100]–[21.101]

“There are certain features of a common law trial which are fundamental to our system of justice ... First, subject to certain established and limited exceptions, **trials should be conducted and judgments given in public** ... Another aspect of the principle of natural justice is that the parties should be given an **opportunity to call their own witnesses and to cross-examine the opposing witnesses**”

Al-Rawi v Security Service [2012] 1 AC 531, [10], [13] (Lord Dyson JSC)

“Sittings of the High Court may be held, and any other business of the High Court may be conducted, at **any place** in England or Wales.”

Senior Courts Act 1981 s 71(1)

Practice Direction 51Y

- 1 In force only until the *Coronavirus Act 2020* ceases to have effect
- 2 Courts are empowered to direct that proceedings conducted wholly by video or audio shall take place in private “where it is necessary to do so to secure the proper administration of justice”
- 3 However, such hearings must be video or audio recorded where practicable
- 4 Recordings may be accessed in a court building on the application of any person, with the consent of the court

Two preliminary issues

- 1 Is the hearing to be in public or in private; if in private, on what grounds?
 - (a) Open justice is the default position under CPR r 39.2, and a core feature of English civil litigation
 - (b) A private hearing is only possible where it is “necessary, to secure the proper administration of justice”
- 2 How is the hearing to be recorded, or can an order properly be made to dispense with recording?

“... remote hearings should, so far as possible, still be public hearings. This can be achieved in a number of ways: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing accredited journalists to login to the remote hearing; and/or (c) live streaming of the hearing over the internet. **The principles of open justice remain paramount.**”

Protocol (Civil Justice: Covid-19: Remote Hearings)
[2020] 1 WLR 1334, [8] (Etherton MR, Sharp P, Vos C, Thirlwall J)

“[12] It will normally be possible for all short, interlocutory, or non-witness applications to be heard remotely. Some witness cases will also be suitable for remote hearings.

[13] Available methods for remote hearings include (non-exhaustively) BT conference call, Skype for Business, court video link, BTMeetMe, Zoom and ordinary telephone call. But any communication method available to the participants can be considered if appropriate.”

Protocol (Civil Justice: Covid-19: Remote Hearings)

[2020] 1 WLR 1334, [12]–[13] (Etherton MR, Sharp P, Vos C, Thirlwall J)

Four potential solutions

- 1 A stated appropriate **remote communication method** for the hearing (eg, Skype for Business, Zoom, ordinary telephone call or another method).
- 2 A hybrid hearing with some participants in court (with precautions to prevent transmission of Covid-19) and others attending remotely.
- 3 The **case will proceed in court** with appropriate precautions to prevent the transmission of Covid-19.
- 4 The **case will need to be adjourned**, because a remote hearing is not possible and the length of the hearing and number of parties or overseas parties, representatives and/or witnesses make it undesirable to go ahead with a hearing in court at the current time.

**Online
resources
published by
HMCTS**

- 1 Summary of covid-19 advice and guidance (see [here](#))
- 2 Weekly operational guidance on courts and tribunals (see [here](#))
- 3 List of staffed courts (see [here](#))
- 4 Court building safety (see [here](#))
- 5 Guidance for witnesses (see [here](#))
- 6 Joining instructions (as at 13 May 2020) (see [here](#))

Listing in the High Court under the contingency plan

- 1 Urgent business (business that would warrant an out of hours application in, eg, the Business and Property Courts)
- 2 “Business as usual” (everything else)

Guidance on civil listing priorities (County Court)

- 1 “Priority one” work:
 - (a) Committals
 - (b) Freezing orders
 - (c) Injunctions (and return days)
 - (d) Applications with a “time element”
 - (e) Applications in cases listed for trial <3 months
 - (f) Applications in cases with a substantial hearing <1 month away
 - (g) Multi-track hearings (including trials) which are (i) urgent and (ii) suitable for hearing (either remotely or in person)
- 2 Everything else (only if judge considers (i) should be heard and (ii) suitable for hearing (remotely or in person))

Safety guidance in court buildings

- 1 Physical barriers/markings to ensure distancing
- 2 New queuing/security procedures
- 3 Witness attendance only on days when needed
- 4 New procedures for oaths
- 5 Limits on numbers in court (previously ≤ 6 , but has evolved since March)
- 6 Decisions about masks in court will be made by the presiding judge

Adjournment is rarely granted

- 1 No adjournment: ***Murphy v Nygate (Re Blackfriars)*** [2020] EWHC 845 (Ch) (5-week trial; multiple fact/expert witnesses; no safety risk or unfairness)
- 2 No adjournment: ***In re Smith Technologies*** (Unreported, 26 March 2020)
- 3 No adjournment: ***National Bank of Kazakhstan v Bank of New York Mellon*** [2020] EWHC 916 (Comm) (USD\$506m claim; witnesses in Kazakhstan, Belgium and USA)
- 4 Short extension only: ***Heineken v Anheuser-Busch*** [2020] EWHC 892 (Pat)
- 5 Adjournment to allow extension of time: ***Municipio de Mariana v BHP Group plc*** [2020] EWHC 928 (TCC) (group claim with c.202,000 claimants; 5-6 week extension for reply evidence; consequential adjournment from June to July)
- 6 Adjournment: ***Conversant v Huawei & ZTE*** [2020] EWHC 741 (Pat) (12-week FRAND trial; written questions to experts and lengthy written submissions not appropriate given need for XX; looming Supreme Court decision)

Adjournment: relevant factors

- 1 The importance of the continued administration of justice:** justice delayed is justice denied even when the delay results from a response to the currently prevailing circumstances.
- 2 Fairness:** the extent to which a dispute can in fact be resolved fairly (eg extent of live evidence and cross-examination, equality of arms).
- 3 Flexibility:** the courts must be prepared to hold remote hearings even if doing so would have been inconceivable only weeks ago.
- 4 Safety; necessary adjustments:** ways in which a remote hearing could be conducted consistently with natural justice and public safety.

Municipio de Mariana v BHP Group plc [2020] EWHC 741 (Pat), [24] (HHJ Eyre QC)

“The courts exist to resolve disputes and ... the guidance given by the Lord Chief Justice is very clear. **The default position now in all jurisdictions must be that a hearing should be conducted with one, more than one, or all participants attending remotely.** I accept that for various reasons, in particular the geographical location of the expert witnesses, this exercise will have particular challenges. But it seems to me that having regard to the need to keep the service of public resolution of disputes going, **it is incumbent on the parties to seek to arrange a remote hearing if at all possible.**”

National Bank of Kazakhstan v Bank of New York Mellon
[2020] EWHC 916 (Comm) (Teare J)

“The hearing was conducted without any technical hitch and all parties co-operated to ensure that the hearing took place efficiently and fairly. I am very grateful to the parties, their solicitors and counsel, the witnesses, transcribers, the suppliers of the necessary software and my clerk for enabling a case in the Commercial Court involving international parties and witnesses from several countries to take place notwithstanding the impediments caused by the outbreak of coronavirus.”

National Bank of Kazakhstan v Bank of New York Mellon
[2020] EWHC 916 (Comm) (Teare J)

“Since the start of the health crisis developments in the guidance given courts as to the conduct of hearings and trials have been rapid. But so far, anyway, these have not included a change in the *Civil Procedure Rules* which would make it appropriate for the conduct of a FRAND trial, such as the present one, to go forward largely on paper. ... I do not accept that either the *Civil Procedure Rules* or the guidance of the Lord Chief Justice or the Chancellor permit a trial with the characteristics of a substantial FRAND trial to be conducted largely on paper.”

Conversant v Huawei & ZTE [2020] EWHC 741 (Pat), [18] (HHJ Hacon)

Additional case law

1. Video link evidence - [Polanski v Condé Nast Publications \[2005\] 1 WLR 637 \(HL\)](#)
2. Clinical negligence trial - in court hearing with video evidence - [SC \(a child\) v University Hospital Southampton \[2020\] EWHC 1445 \(QB\) \[18\] et seq. \(Johnson J\)](#)
3. Defamation - [Depp v News Group Newspapers Ltd \[2020\] EWHC 1237 \(QB\)](#)
4. Permission to appeal - [Quality Solicitors Harris Waters v Okonkwo \[2020\] EWHC 1168 \(QB\)](#)
5. Worldwide freezing injunction - [Les Ambassadeurs Club Ltd v Albluewi \[2020\] EWHC 1313 \(QB\)](#)
6. Landlord and tenant - [Croydon London Borough Council v Kalonga \[2020\] EWHC 1353 \(QB\)](#)
7. Clinical negligence - [Quatey v Guy's & St Thomas' NHS FT \[2020\] EWHC 1296 \(QB\)](#)
8. Equality of arms - fair hearing possible with one counsel remote - [C \(Children\) \(Covid-19: Representation\), Re \[2020\] EWCA Civ 734 \(CA\)](#)

Week	Audio	Video	In person	% by audio/video
27 March 2020	1,250	450	650	70%
01 April 2020	1,800	750	450	85%
08 April 2020	2,100	1,300	450	90%
15 April 2020	1,800	950	350	90%
22 April 2020	1,650	1,200	300	90%

Notes: rounded to nearest 50 or 5%

Source: [Gov.uk](https://www.gov.uk)

Bundles: general requirements

- 1 Should contain “only documents and authorities that are essential to the remote hearing”: [2020] 1 WLR 1334, [25]
- 2 Must be filed on CE-file, or (preferably) sent by link to a cloud data room or delivered on USB stick: ibid [26]

“The parties should, if necessary, prepare an electronic bundle of documents and an electronic bundle of authorities for each remote hearing. Each electronic bundle should be indexed and paginated and should be provided to the judge’s clerk, court official or to the judge (if no official is available), and to all other representatives and parties well in advance of the hearing.”

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[2020] 1 WLR 1334, [24] (Etherton MR, Sharp P, Vos C, Thirlwall J)

Bundles: specific points

- 1 In general: file size <20MB, PDF, OCR text-searchable
- 2 For smaller hearings: ideally a single PDF file
- 3 For larger hearings and trials: (A) core bundle, (B) pleading annexes, (C) C evidence, (D) D evidence, (E1...En) exhibits
- 4 Use short, clear bookmark names (eg “01 – Smith 1” **not** “Tab 1 – First Witness Statement of John Smith dated 18 June 2020”)
- 5 Use short, clear file names (eg “A – Core.pdf”, “B – Pleadings.pdf” or just “IL-2020-1234 – CCMC.pdf”)
- 6 Ensure all pages correctly rotated
- 7 Consider how to deal with native documents (eg Excel spreadsheets)

Guidance on bundles in Financial Cases (Mostyn J)

Guidance of Mostyn J dated 3 March 2020 (see [here](#)); and similar ChBA guidance

- 1 Should be a single PDF file (if feasible)
- 2 The PDF file must be searchable
- 3 Pagination must be computer generated within the PDF, not hand-written
 - (i) Original pagination must be by section and page number i.e. A1, A2, A3.... B1, B2, B3 etc;
 - (ii) New pages should be added using legal numbering (eg adding “B13.1, B13.2” after “B13”);
- 4 Each section and individual document should be separately bookmarked;
- 5 Should be delivered via a cloud-based link (eg iCloud, OneDrive, Dropbox or Google Drive) rather than in a series of emails.

Lessons from recent hearings

- Interim hearings
- “Hybrid” hearings
 - Remote trials

Challenges

- 1 The remote environment (background noise, unwanted [interruptions](#), lighting, visuals)
- 2 The technology (internet outages, computer crashes, software glitches, video/audio quality)
- 3 Witness evidence (dealing with inexperienced witnesses, general guidance, XX and potential pitfalls)
- 4 The Tribunal (referencing, documents, remote advocacy)
- 5 Remote working (concentration/stamina, timetable)
- 6 The perils of mute

Technology

- 1 Multiple monitors
- 2 Invest in a high-quality external microphone (eg [RODE-NT USB-C](#) mic, [Blue Yeti X](#) external mic) and stand
- 3 Invest in a proper external webcam (eg [Logitech C930](#))
- 4 Test in advance (and dial-in early on the day)
- 5 Networking considerations (wired connection, minimise parallel network usage)
- 6 Have a backup plan (eg smartphone, 5G wireless access point, secondary device/tablet)

“The issue of broadband connection and bandwidth will be an absolutely essential enquiry for the parties in this case, given that potentially, there may be 17 people trying to log in to a remote trial using their own domestic broadband. ... [I]t may well be preferable for witnesses to travel to a few locations as close as possible to their home, such as solicitors’ offices or other premises ... rather than to dial in from home without any assistance. That also will alleviate the anxiety that many people suffer from, including judges, when it comes to the moment of being dialled into proceedings and to being interrupted ... by unexpected household events.”

In re Blackfriars Ltd [2020] EWHC 845 (Ch), [51]

Communications in court

- 1 The usual rules apply (phones on silent, food/drink, etc)
- 2 Non-speaking attendees should be on mute with video off, unless addressing the court
- 3 Helpful to have a 'back channel' available within each party's legal team (eg WhatsApp web, Slack, Evernote)
- 4 Transcribers are permitted but court's permission must be sought in advance
- 5 Consider the need for instructions in advance to deal with contingencies (or short breaks to take instructions)

Other practical tips

- 1 Judges are likely to suggest longer and more frequent breaks – factor this in to the timetable
- 2 Written submissions likely to be lengthier – allow more time for pre-reading – may be a gap before closings
- 3 XX may be less likely to elicit useful material, which may make adducing positive evidence more important
- 4 Closing submissions likely to take longer
- 5 Minimise jumping between documents
- 6 Consistent referencing is vital (bookmarks are fastest)

Lessons from interim hearings

1 CCMCs

- (a) Costs budgets and DRDs – difficult to navigate on screen
- (b) Normal time estimates often inadequate
- (c) Listing delay for adjourned hearing ~2 months

2 PTRs

- (a) Adjournment unlikely save in rare cases
- (b) Greater focus on timetable
- (c) Consider necessary arrangements for vulnerable parties and witnesses in advance – make provision in timetable
- (d) Solicitor supervision may be appropriate where one side's witnesses all giving evidence from same location

Lessons from a trial

- 1 “Teething issues” on day 1
- 2 Timetable (breaks and gaps; technical delays)
- 3 Adapting to video link XX
 - (a) Copies of selective bundles for witnesses
 - (b) Time estimates
 - (c) Locating documents
 - (d) XX bundles
- 4 Closing submissions

Remote and Hybrid Hearings

The Tribunal's perspective

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