

Insights

BCLP ACTS IN ONE OF THE FIRST COMMERCIAL COURT VIRTUAL TRIALS - KEY ISSUES FOR REMOTE HEARINGS

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BCLP has acted in one of the first virtual trials conducted in the Commercial Court of the High Court of Justice.

Whilst the hearing date had been set long before the Covid-19 crisis and the parties had been working toward the preparation of a hearing in the usual way, the evolving nature of the current pandemic and UK government restrictions, meant that the parties were required to rapidly make alternative arrangements for the conduct of a remote hearing.

Set out below are our reflections on the remote trial process and practical considerations when conducting remote hearings.

Platform for hearing and engagement with the Court

On 26 March 2020, the Business and Property Courts of England & Wales issued its latest "*Protocol regarding remote hearings*" stating that there will be a number of methods available for the conduct of virtual hearings including via a court video link, Zoom or Skype For Business. Whilst this suggests that there will be some flexibility in the choice of platforms, it appears that judges in the Commercial Court are being trained on how to use the Skype for Business platform, and that this platform will be the default option for the Court unless there are legitimate reasons that it cannot be used.

To prepare for a remote hearing:

- Parties should contact the Listing Office confirming their intention for a previously listed trial to proceed, as scheduled. The Court will then confirm the platform on which the hearing is planned to proceed.
- It will often be the case that firms and clients have their own video conferencing systems which may not be configured to interact externally with Skype for Business (or any other platforms). Should this be the case, there are usually multiple ways to access a platform

which can be explored. By way of example, Skype for Business is readily accessible via its “App” and the hearing can be joined from the Court issued invitation, as a “guest”.

- The invitation to the hearing will be monitored and closely controlled by the Court. It cannot simply be forwarded to a third party (including a client). Instead, the Court will request a list of attendees including barristers and the client/client team to whom the invitation should be issued. Any additional person wishing to join the hearing at any stage, must email the Judge’s clerk requesting an invitation directly. Participants joining the hearing need to include their name when accessing the hearing and it is therefore possible to see the names of participants who have joined the hearing.
- It is advisable for legal and client teams joining the hearing to test their ability to access the intended platform. Early testing allows parties to address any IT issues arising, and to make alternative arrangements, if necessary. The Court can facilitate multiple tests in order for parties to work through IT and access issues.
- It will also be necessary for the Court to consider the principles of “Open Justice” and what is sufficient to meet these requirements, in each case. In some cases, live streaming a hearing so that it is accessible through the daily cause list may be appropriate.

Preparations for hearing

The current guidance from the Listing office is that the Commercial Court will no longer receive hard copy bundles, meaning that that all bundles must be in an electronic form. It is therefore necessary for parties to be organised both in the preparation of core trial and witness bundles, as well as any authorities bundles.

There are multiple ways for electronic bundles to be collated including by engaging an external firm to host a database (with individual access provided). Where there are not a large number of parties and/or documents involved, it may be easier for bundles to be collated into folders, saved locally with a hyperlinked index. Whatever method is selected by the parties, it is key that the organisation of the trial bundle is agreed early. It is also useful for parties to agree a method for dealing with any additional documents exchanged or submitted, following completion of the bundle.

Having a real-time transcript assists in the efficient conduct of the hearing. Advantages include:

- (i) The live transcription acts as a “back up” to ensure that arguments are not missed. This means that should the Judge or advocates lose their individual connection at any stage, they are able to immediately confirm what, if anything, was missed and to respond accordingly;
- (ii) Should commonplace issues with technology arise, such as delays and/or frozen images (which are unavoidable in remote hearings) both parties and the Judge, are able to follow the

hearing via the live transcript and there is minimal disruption to the conduct of the hearing;

(iii) On a practical level, this service assists the judge and all parties in the management of the hearing, minimising disruptions owing to manoeuvring between multiple bundles across multiple screens.

Should parties arrange for any transcription service, it is important to ensure that the stenographer is included in tests of the chosen platform.

During the hearing

Only those speaking during the course of a hearing will appear on camera, namely the Judge and the advocates. To ensure an uninterrupted hearing, no other participants should activate their camera or microphones. Even inadvertent noises such as typing on a computer, can draw the attention of a live microphone so once connected to the hearing, devices should be immediately placed and remain on mute for the duration of the session.

As with the conduct of any hearing, a remote hearing is likely to require practitioners to access a large number of documents across multiple folders during the course of arguments. It is important to consider the number of screens and/or devices needed for the proper conduct of their hearing, given: (i) the number of documents involved/size of the trial bundle; (ii) the ability to access a real time transcription service (iii) how you are intending to communicate with barristers and clients during the hearing; and (iv) the need for continuous access to the hearing itself.

It is also imperative to ensure that there are clear lines of communications during the hearing, both for the client to their solicitors and for advocates to those instructing them. These communications should be established and known prior to the hearing, and may involve the use of numerous platforms. By way of example, video conferencing facilities often also have a function to allow a “live chat” to be conducted with numerous participants. This is particularly useful for large “teams” of people (whether the client team or solicitors team) and can be used in conjunction with other means of communications such as messaging groups and of course, emails.

Conclusion

Overall, the technology if set up correctly works well and facilitates effective hearings. The Court is very helpful in facilitating test runs, leading to effective hearings.

If you would like to discuss any issues regarding virtual trials, please contact Andrew Tuson or Alexandra Kirby.

MEET THE TEAM



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