



## ONE ESSEX COURT

### **A brave new virtual world?**

#### **Practical guidance for remote hearings**

1. This handout aims to provide a practical guide to remote hearings during the coronavirus pandemic. It is based on our first-hand experience of remote hearings during the pandemic and the experience of other members of One Essex Court.
2. The handout is split into two sections:
  - (1) A very brief overview of the relevant guidance and law.
  - (2) Practical questions and tips.

#### **Guidance and law on remote hearings**

3. As a caveat, the position is different in different courts. This handout focuses on the Business and Property Courts, particularly the Commercial Court and the Business List of the Chancery Division.
4. The key guidance is the *Protocol Regarding Remote Hearings* as amended on 26 March 2020: [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_.GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_.GenerallyApplicableVersion.f-amend-26_03_20-1.pdf)
5. The *Protocol Regarding Remote Hearings* refers to changes to the Courts Act 2003 brought in by the Coronavirus Act 2020 and new parts of the CPR. The most significant parts of these are summarised below.
6. By s 55 and Schedule 25 of the Coronavirus Act 2020, the Courts Act 2003 has been modified for as long as the Coronavirus Act 2020 remains in force. In brief summary:
  - (1) S 85A of the Courts Act 2003 allows live-streaming (video or audio) of proceedings, at the direction of the court.
  - (2) Ss 85B and 85C of the Courts Act 2003 provides for various offences in respect of recording or transmitting such live-streamed proceedings or other proceedings

taking place through a live video or audio link. This includes taking pictures of people participating in those court proceedings – including selfies.

7. PD51Y, which will remain in force for as long as the Coronavirus Act 2020 remains in force, also contains provisions on remote hearings during the pandemic.
8. We also recommend COMBAR's Guidance Note on Remote Hearings, which was updated on 23 June 2020: <https://www.combar.com/news/combar-guidance-on-remote-hearings/>.

### **Practical questions and tips**

*Will my hearing go ahead at all?*

9. This depends on the particular court in which the hearing is listed. In the Business and Property Courts (in particular the Commercial Court and the Chancery Division), the steer we have been getting so far is that you should not assume it will be easy to get an adjournment. Those courts want to continue ordinary routine business, even if it is document-heavy, serious (e.g. a contempt application) or involves multiple parties.
10. There are also now some available decisions on whether to adjourn hearings. Of course, each case will turn on its own facts, but the following indications may be helpful:
  - (1) The court will take into account that witnesses may be vulnerable to Covid-19 or have caring responsibilities, but specific evidence of any difficulties needs to be provided to the court, as well as what practical arrangements could mitigate them: *Re One Blackfriars Ltd* [2020] EWHC 845 (Ch) [38]-[39]
  - (2) Where the litigation is between well-resourced and sophisticated parties, the courts are less likely to adjourn a hearing for reasons of potential unfairness: *Re One Blackfriars Ltd* [54].
  - (3) If a litigant in person considers that she will be disadvantaged by a remote hearing, the court may order a hearing in person or a hybrid hearing: *Ameyaw v McGoldrick* at [2020] EWHC 1741 (QB) at [17].
11. (Although technically outside the scope of this note, similar considerations apply to Covid-19-related applications for extension of time: *Municipio de Mariana v BHP Group plc* [2020] EWHC 928 (TCC) at [32].)

*What software will the court use?*

12. The main software is Skype for Business, although Zoom, Microsoft Teams and WebEx have also been used. Paragraph 13 of the *Protocol Regarding Remote Hearings* displays a desire to be flexible as to particular software.

*How do we go about making practical arrangements?*

13. The key is to contact the clerk of the judge as early as possible to make practical arrangements, such as what software will be used, who is responsible for recording, whether there will be livestreaming, etc. The judge's clerk will generally be responsible for organising those practical arrangements and (for example) circulating links to join Skype for Business meetings. That contact may take place between the judge's clerk and counsel, with counsel passing on information to instructing solicitors, or directly between the judge's clerk and solicitors.
14. The courts are expecting a high degree of cooperation between parties and the court to make remote hearings work.

*Bundles*

15. Be in touch with the judge's clerk as early as possible to find out whether the judge will need a paper bundle or is happy to use an e-bundle.
16. PDF e-bundles need to be indexed and paginated.
17. The *Protocol Regarding Remote Hearings* says that the preferred method of sending e-bundles to the court is via an online data room (paragraph 26). We understand that it is not straightforward for the judges to pull bundles from CE-file, and that they prefer to also have a pdf sent separately.
18. In our experience, the prevalence of remote hearings has increased the number of interlocutory hearings at which Opus2 or another online bundling system is used. These systems have several advantages for remote hearings:
  - (1) It is much easier to update these bundles than a PDF bundle.
  - (2) If an Electronic Presentation of Evidence (**EPE**) system is used, it is easier and faster to ensure that everyone (including the judge) is looking at the correct document.

19. Similarly, many more interlocutory hearings now have live transcripts. These are particularly valuable if anyone has technical difficulties with audio or connection to the hearing, and wishes to catch up.

*Is the hearing in public or private?*

20. It is important to be clear about this given the consequences that flow from hearings in public (release from collateral use under CPR 31.22, for example).
21. Paragraph 3 of PD51Y provides that “*Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings.*” The key question is whether a media representative is hypothetically able to access the proceedings, not whether any media representative in fact does so. Listing is making this clear on the Rolls Building cause list, using the following rubric:

*The hearing will be available to representatives of the media, on their request, and therefore will be a hearing conducted in public in accordance with CPR PD51Y. It will be organised and conducted using Skype for Business. Any media representative (or any other member of the public) wishing to witness the hearing will need to do so over the internet and provide an email address at which to be sent an appropriate link for access. Please contact [comct.listing@justice.gov.uk](mailto:comct.listing@justice.gov.uk)*

22. If there are practical reasons why the media or the public cannot attend – i.e. reasons arising from the fact of the remote hearing, rather than the other reasons for a private hearing – the court can order that a hearing take place in private where it is necessary to secure the proper administration of justice (under either CPR 39.2(3)(g) or paragraph 2 of PD51Y). However, paragraph 8 of the *Protocol Regarding Remote Hearings* makes it clear that “*The principles of open justice remain paramount.*”

*What technical kit do I need for a video hearing?*

23. If possible, use a wired in rather than a wireless connection. If that’s not feasible, make sure your wireless connection is as good as possible.
24. Consider the number of screens that you need. We have found that having three screens is helpful: one for the video hearing; one for the electronic bundle; and one for the EPE screen.

*What other prep should I do in advance of a video hearing?*

25. Do a test run the day before, to make sure you are comfortable with the software and ensure your screen set-up works. In general you can go into the “*court room*” as soon as you receive the link from the clerk. You may want to do this in a small group so that you can also check for any audio problems or feedback.

*Video hearing etiquette – public-facing*

26. If you are not speaking, your microphone should be muted. It is also normal for those not speaking to also turn off their video.
27. Do not take pictures of yourself or others participating in a remote hearing: this is an offence under s 85C(2) of the Courts Act 2003.
28. Someone should keep an eye on whether the judge is on the video call – it is possible for them to drop off.
29. If you drop off the video call and cannot get back in, email the judge’s clerk and ask to be re-invited.
30. As no court staff are present, the court may be flexible on sitting hours. However, most judges say that they find video hearings more tiring than in person ones.

*Communication among the team during the video hearing*

31. It may be useful to set up at least two WhatsApp groups for the hearing:
  - (1) One including all counsel and solicitors, for general discussion and seeking instructions.
  - (2) One including only counsel, as a digital substitute for juniors passing leaders post-it notes.
32. If counsel wants to take instructions during the video hearing, he or she can do the virtual equivalent of asking to turn his or her back: ask the judge for permission to mute his or her audio feed, and then call instructing solicitors.

### *Differences in submissions*

33. If the judge has only an e-bundle, you may find that he or she has done less pre-reading than normal, and be slower in opening documents.
34. Longer skeletons are proving useful, so if you are in the Commercial Court think in advance about whether to seek permission for a skeleton above the normal page limits.
35. It is much more difficult to “*hand up*” documents by emailing them, so try to ensure that any additional submissions or court aids are either not necessary (because the skeleton is complete) or are provided in advance.
36. The judges have access to Westlaw (and Bailii) if they need to be referred to an authority that is not in the authorities e-bundle.
37. Although short, clear submissions are always desirable, this is even more so in a remote hearing.

### *Witnesses*

38. If your hearing may involve witness evidence, thought should be given in advance to the practicalities. You may need to liaise with the other side and/or with the court.
39. You will need to consider where the witness will give evidence, and whether anyone will be present with them.
  - (1) It may be sensible for a witness to give evidence from somewhere other than their home, whether for privacy, a better internet connection, or a multi-screen set-up.
  - (2) If a witness is to give evidence remotely, where they will be and who (if anyone) will be with them, and why, should be discussed between the parties in advance. (*Navigator Equities Ltd v Deripaska* [2020] EWHC 1798 (Comm) at [9].)
  - (3) Any arrangement other than the witness being on their own during their evidence should be approved by the court, in advance if possible (*Deripaska* at [9]).
40. You will also need to consider how witnesses will be sworn in. Although in some early remote hearings some of the formalities were relaxed, judges now expect witnesses who are swearing to have the appropriate religious book, and Andrew Baker J recently

criticised a party for having failed to prepare for this (*Deripaska* at [7]). Similarly, you should ensure that the witness has the words for the oath or affirmation at hand.

41. Different platforms may be more or less suitable for witness evidence (or, at the least, present different issues). For example, in Skype for Business, a witness may be “*highlighted*” while giving evidence, which means the witness cannot see the advocate or the judge, and the advocate cannot see the judge. This is a point to be taken into account both in explaining the process to one’s own witnesses and in preparing cross-examination.
42. You may want to ask the judge’s clerk for the opportunity to familiarise a witness with the relevant software before any trial or other witness action.
43. As with submissions, keeping questions short and to the point (and not asking unnecessary questions) is even more important in remote hearings.
44. An EPE system may be particularly valuable in a hearing with witness evidence, as a witness will take a long time to find documents otherwise, and a junior solicitor cannot do the job while social distancing.

#### *Miscellaneous points*

45. Although potentially less relevant in commercial work, be aware that lay people and, in particular, litigants in person may find the slight increased informality of video hearings, and the insight into how lawyers and judges live (with the attendant markers of class, taste and income) exclusionary or less like “justice”. This was an issue in a remote Court of Protection trial held early in the pandemic.<sup>1</sup> If there is a party or lay client in your case for whom this might be an issue, consider how to be sensitive to this possibility.

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<sup>1</sup> <http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>