

# All rise remotely – is there a long-term future for remote trials?

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The Covid-19 pandemic and its consequent restrictions on cross-country travel and in-person gatherings have forced the courts to reconsider how justice is done and seen to be done. The courts have had to adapt fast and the dawn of the 'remote trial' has well and truly begun.

Pre-Covid, some interim or procedural hearings might have taken place by telephone conference. However trials, the conclusion of often hard-fought years of litigation, the point at which a Judge declares who is the winner and who is the loser and ultimately delivers justice, almost always took place in a courtroom with all parties, their witnesses, experts and legal representatives present in person.

To ensure that access to justice is maintained and to prevent huge backlogs of cases developing during the pandemic, the courts have held some trials remotely via a virtual platform, such as Zoom or Microsoft Teams.

The run-up to a virtual trial is very similar to a normal in-person trial. The usual documents are filed with the court, counsel is briefed and trial bundles are prepared. However rather than compiling hard copy bundles which often run to several lever arch files, an electronic pdf bundle which is indexed, hyperlinked and searchable, is prepared. Email addresses for attendees are shared with the court's clerk ahead of the trial and shortly before the trial is due to begin, each attendee, dressed appropriately as if they were attending court in person, clicks on the link to join the virtual 'courtroom' from the comfort of their home office or living room.

The parties and their legal representatives are admitted to the 'courtroom' and when everyone is ready and any technical issues have been resolved, the Judge will join, a statement will be read confirming that the trial will be recorded and the trial will begin. Unlike in a real courtroom, when all present are required to stand upon the declaration of "all rise" or "court rise" from the usher when the Judge enters, there is no standing or nodding for the Judge.

Any party not speaking will be asked to put their microphone on mute and generally only counsel will have their video in use. There will be the inevitable technical difficulties, multiple declarations that "you're on mute!", internet dropouts and background noise interruptions. So long as all parties can hear sufficiently and the Judge has easy access to the electronic bundle(s), the making of submissions to the Judge appears to proceed smoothly.

The remote trial differs significantly from the usual in-person trial in two respects:

## 1. Witnesses

Ordinarily a factual or expert witness will sit in the witness box, be sworn in and give his/her evidence to the Judge in person. The Judge (and counsel) can watch the witness closely, observe his/her body language and posture, notice nervous ticks or gestures, pick up on voice inflection and generally form a view on the evidence being given by the witness, based on all of the above give-aways which the witness probably doesn't even realise he/she is doing!

During a remote trial, the Judge's view of the witness is likely to be of the witness' head only, or perhaps the witness' head and shoulders. The ability to observe body language, posture, nervous habits and gentle changes in the pitch and tone of voice are much

more difficult to notice, if it is possible to see or hear them at all. It is also not possible to see what the witness can see, off camera, or be sure that there is nobody else in the room with the witness. The art of cross-examination by opposing counsel loses potency and the Judge does his/her best with what he/she can see and hear, which may not be the full story or picture.

## 2. Communication

In a courtroom counsel sit on the first two rows, instructing solicitors sit with the instructing client behind counsel and any other clients or witnesses will sit behind them. If counsel needs to take instructions or if the client/solicitor wishes to raise a point with counsel, counsel will turn his/her back to the Judge briefly and a whispered discussion will take place. More private discussions can take place during any recess or over lunch, generally in a private room in the court building.

During a remote trial, communicating with your 'own team' is difficult. Everyone is logged into a Zoom or Microsoft Teams meeting and there is no way to have a private conversation on that same platform. It is therefore necessary to have an alternative platform, such as a Whatsapp or Messenger group, whereby communication within the team can take place. However this communication is limited to the exchange of messages or emails rather than a verbal discussion, which makes it much more difficult to exchange information and take instructions effectively.

The innovation shown by the justice system in holding remote trials and continuing to deliver justice in these trying circumstances is to be applauded. As a result of this financial investment and advance in technology, there is a possibility that remote trials might remain a permanent fixture, even post-Covid, to deal with case backlogs and the lack of available courtrooms to hear cases.

While certainly a step forward for technology, would it also be a step forward for access to justice? In some cases, perhaps. For commercial or other cases with no factual or expert witnesses, it is difficult to see what is lost by holding a trial on a remote platform as opposed to in a courtroom, with savings to be made in respect of both time and costs. However in cases where witness evidence is key, the importance of seeing and hearing a witness in person should not be underestimated.

It is to be hoped that in a post-Covid world, in-person trials and the formality and majesty of the courtroom can be safely resumed.

If you have any queries concerning remote trials, please feel free to contact [Emma Marshall](#) in the Commercial Dispute Resolution team.

## Contact



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