



## #HardwickeBrew Your Takeaway Cup

*These notes follow the #HardwickeBrew given by Hardwicke's Clinical Negligence and Personal Injury Team on 1 May 2020 which looked at some hints and tips for remote negotiations and talking about what the Courts are doing (or not doing).*

### Remote Court Hearings

#### Will the hearing even take place?

- We understand about 40% of hearings are taking place.
- County Court work has been categorised; priority 1 includes multi track trials that are urgent, subject to triage, and priority 2 includes fast track work that is urgent and again subject to triage. This does not apply to High Court work where it is more of a case-by-case decision but more interim hearings and trials are proceeding than in the County Court. But the parties will still need to be creative and cooperative to find a solution to a hearing proceeding which is acceptable to the Court. On occasions the Courts are setting up their own remote hearings and some require the parties to do the set up. A test run in advance is a must for a trial.
- Many County Courts are looking at the listings about 1 week in advance and then communicating to the parties whether a matter is adjourned or will remain listed. This is causing huge issues for many practitioners and clients who are preparing trials, to be told at the last moment they have adjourned. With the support of our Practice Team, we are doing all we can to assist in chasing Courts for updates on matters.
- Listing is ultimately a matter for the Judge and so consider whether you wish to email any reasoned requests for hearings to proceed or to be adjourned to the Court to consider when making the decision. If it is by consent, it is more likely to be effective, so cooperation is key.

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- Lists are generally shorter because video conferencing is more time consuming and tiring.
- Some Courts (like Central London and many of the regional centres) have their own approach, and are sending out pro formas (asking for various information about the case- please see example below) to be completed by parties about 2 weeks before the hearing and then making a decision on whether the matter will be adjourned. Many Designated Civil Judges have issued bespoke guidance for their Court group.

## **Pre-hearing communication**

- Schedule any conference with the clients ahead of time- it's not as easy as having a quick chat before Court anymore.
- It can be vital to have access to a messaging software platform so you can discuss matters easily during or before/after the hearing.
- Good communication with counterparts by telephone and/or email before hearings is more important than ever. Judges are expecting parties to agree matters where possible; and to ensure that each party has the same documents/draft directions/bundles.
- Consider assisting Litigants in Person so that they have access to the technology and relevant documents for the hearing to avoid a long adjournment.
- Good communication with the Court, where possible, to ensure they have the bundles and any essential documents is also important. This also needs checking at the start of any hearing to ensure the Court has all the correct material to hand or it can be emailed if not.

## **What documents to file**

- A short and concise bundle for PTRs, applications and CCMCs is imperative. Judges are expecting bundles to be much more rigorously limited to the key material only than before.
- Use an agreed indexed electronic bundle of documents which can be referred to between relevant parties by section, page and paragraph number. This is mandatory for QB Masters hearings (see the Senior Master's guidance in the link at the end) and required in many County Courts as well.
- Draft Orders will need to be in Word for ease of editing and spreadsheets for budgeting will need to be able to be edited.
- Consider downloading an app to enable you to mark up the bundles such as Acrobat DC or PDF Expert.

## **The hearing itself**

- The Courts are using BTMeetMe for telephone hearings, where participants are sent conference call phone numbers or the familiar BT Conferencing where the parties receive a call on the day. Check who needs to set it up with the Court.
- For videoconferencing they are using Skype for Business. Participants in a hearing do not need Skype for Business to join the videoconferences, however they need the free Skype meetings app.
- Courts are also migrating towards ‘cloud video platform’ (CVP) for hearings but this depends on the compatibility of the judiciary’s hardware, which is sometimes not up-to-date.
- Remember to test the communication where possible especially when using video link; and ensure the microphone is on or off depending on whether you want to be heard.
- Consider pressing mute when you are not speaking to avoid background noise but write yourself a note to remember to unmute before speaking!
- Ensure that you have the other parties’ email or telephone number so if you get cut off you can make that clear and are able to re-join the hearing.
- Prepare witnesses for the taking of the oath or affirmation in advance. Email the form of words to witnesses in advance of the hearing and make sure they have any book they require to take an oath.
- Ensure that your background is appropriate for a hearing. Consider using a green screen.
- Expect regular breaks/segments to the hearing and request or agree these with the other side in advance.
- Limit yourself to a glass of water as you would when appearing in an actual court- avoid coffee cups or anything distracting.
- Dress as you would for an in-person Court hearing. Business attire (but not legal robes) are expected at all levels of hearing where video is used. But you do not need to stand up when the Judge(s) join(s) the conference!
- Short and precise submissions are key. Leave a pause before and after speaking to avoid talking over each other. There are sometimes time delays or echoes.

## **Remote negotiations**

- Work out your own preferred approach – telephone or video conferencing? If the latter decide which platform you want to work with. From our experience, the most popular platforms have been Zoom and Microsoft Teams.

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- Develop a strategy for your preferred platform. For example, through Zoom you can set up a “Main Session” for your negotiation and “breakout rooms” for the respective Claimant and Defendant’s legal teams and lay clients.
- In order to achieve this functionality through Zoom you will need to “claim host” as the key participant. An access code is required in order to do this. Or you can have separate log-ins for discussions between the parties and private discussions with clients.
- Seek to agree your strategy with your opponent, making tweaks where necessary.
- Decide upon a mechanism for communicating with your opponent outside the main session. Using Zoom you can “broadcast” a message to all breakout rooms to re-join the main session. Alternatively, the host of the session can “close” breakout rooms bringing all participants back to the main session with a short warning. Outside the platform emails can be used to notify your opponent that you will be ready to re-join the session in (say) 5 minutes time.
- Organise a test with the representatives using the selected platform, and in particular creating the breakout rooms and moving participants between the breakout rooms and the main session.
- The host of a Zoom session can “mute all participants” to mitigate background noise and apply the “spotlight speaker” function to ensure the camera picks up the participant speaking at any particular time: this is helpful where you have a large number of participants. The host can “unmute” participants when appropriate.
- Be careful to maintain confidentiality: if you are going to “share your screen” ensure that the desktop selected to share has only the document you wish to share. Be wary when using the “chat” function – it automatically sends your message to all participants. When communicating with your clients/counsel it is advisable to do this off-platform using email or an alternative chat platform (i.e. WhatsApp). Zoom allows you to see a list of all of those participants in the main session/breakout rooms at any time. Or ask for a break.
- Sharing your screen is a useful way of tracking offers when in a negotiation as between you, counsel and the client.
- Make use of two screens: one for the video conference and the second for your papers/bundle and email.
- A clip-on microphone or headset and external speakers substantially increases audio quality substantially. In our experience, casual attire is the norm for remote negotiations not involving a Judge.
- Virtual backgrounds can be applied on many VC platforms lending both anonymity to your surroundings and an apt sense of solemnity to the negotiation.

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- Have a draft order or memorandum of agreement ready to fill in at the end of a successful negotiation. This can be drafted and agreed between the parties via email, ideally whilst still in the virtual negotiation. If the order/MOA needs to be perfected later on, ensure that the terms are agreed orally (and ideally recorded in an exchange of emails) before leaving the negotiation.

## **General litigation matters**

### **Expert reports**

- Medco has agreed the current ban on the use of remote examinations will be lifted.
- A recent statement was released by the Association of Consumer Support Organisations (ACSO) made up of claimant firms and the Association of British Insurers, with temporary measures to allow for personal injury medical examinations to be carried out by video.
- We are aware anecdotally that expert examinations are proceeding remotely, where appropriate, e.g. care or OT assessments and other (usually) non-medical examinations where an in-person visit may not always be essential.

### **Extensions of time**

- Generally, Courts are now permitting parties to agree extensions of time of up to 56 days. On the back of O`Driscoll v FIVE Bianchi S.p.A the temporary CPR PD 51ZA has come into force: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/practice-direction-51za-extension-of-time-limits-and-clarification-of-practice-direction-51y-coronavirus>

### **Limitation**

- Parties are encouraged to agree extensions to limitation in the current climate.
- The ABI and various firms of Solicitors have agreed an Extension to the Personal Injury Protocol regarding limitation, which APIL has endorsed: <https://www.abi.org.uk/products-and-issues/choosing-the-right-insurance/motorinsurance/coronavirus-protocol/>

## **Example Pro forma**

This is an example of the type of format that can be used when contacting the Court to request that a listed case is heard as urgent or adjourned (Taken from the Central London Pro Forma):

1. Have all outstanding directions been complied with?
2. Is the matter fully effective?

3. Has the relevant (hearing) fee been paid and, if not, has an application for relief from sanctions been made?
4. Can you please confirm the time estimate for the hearing?
5. Are there any parties or witnesses travelling from abroad? If so, can you please provide details?
6. Have any relevant translators been booked to attend the hearing?
7. Are there any expert witnesses due to attend the hearing? If so, can you please provide details?
8. Do you consider the matter urgent? Please state why.
9. Are any aspects of the matter agreed?

## **Further resources and information**

HMCTS Guidance for video and telephone hearings:

<https://www.gov.uk/guidance/hmcts-telephone-and-video-hearings-during-coronavirus-outbreak>

List of open Courts:

<https://www.gov.uk/guidance/courts-and-tribunals-tracker-list-during-coronavirus-outbreak>

List of County Court priorities:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/877242/Civil\\_court\\_listing\\_priorities\\_1\\_April\\_2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877242/Civil_court_listing_priorities_1_April_2020.pdf)

High Court work contingency plan and Senior QB Master's Guidance for remote hearings:

[https://www.judiciary.uk/wp-content/uploads/2020/03/High-Court.Contingency.final\\_.26thMarch2020-002.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/High-Court.Contingency.final_.26thMarch2020-002.pdf)

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COVID19 – APIL and FOIL Best Practice For Mutual Co-Operation:

[https://d3n8a8pro7vmtx.cloudfront.net/piba/pages/215/attachments/original/1585915379/2020.03.31\\_APIL\\_FOIL\\_Best\\_Practice\\_Covid-19.pdf?1585915379](https://d3n8a8pro7vmtx.cloudfront.net/piba/pages/215/attachments/original/1585915379/2020.03.31_APIL_FOIL_Best_Practice_Covid-19.pdf?1585915379)

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