



TRIAL BY VIDEO – A CASE STUDY

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I was recently instructed in a 7-day ET hearing by video conference, and I lived to tell the tale. There were 10 witnesses and some members of the public and press in attendance.

And lo and behold, it actually worked.

Or rather, it worked once everybody turned their mics off - which took about 15 mins. Like the proverbial family member sat on the remote control, everyone assumed that the problem lay elsewhere: It was not their mic which remained on and/or it was not their mic which was picking up background noise.

Before now, when I spoke to clients before a trial, I told that that if they remember nothing else, remember to 'answer the question' in cross-examination. I will now add 'turn off your mic'.

Overview

The case related to facts from 2016 and 2017 and the hearing had already been postponed twice. So, despite the objections of both parties, the judge determined that it would proceed by video, using the ET's Cloud Video Platform.

I was in Manchester, in my 'study'* (*my attic). The judge and a wing-member were in Birmingham. The other wing member was in Leeds. My clients were somewhere in what I regard to be the Midlands. The other side were somewhere else in the Midlands. Several witnesses joined from their homes.

There were various moments when the technology got the better of someone, usually (with respect) the judge, and someone was muted when they ought not to have been, etc. But these problems were small and easily surmountable.

Overall, I felt the process was managed very well. Obviously, the parties had to ensure their witnesses had access to the bundle. My solicitors were on the ball and had arranged for everyone to have the relevant material in front of them, including the oath and affirmation. (Turns out it's not actually that easy to find the precise wording of the oath / affirmation when you need it!).

Before the Hearing

We had a pre-hearing video conference via Teams and a debriefing each day. We had set up a WhatsApp group so that the client could keep me posted if I had any burning questions during the hearing, or if (i.e. when) I could not find a page in the bundle. (We took the view that emails might keep audibly 'pinging' throughout the hearing).

My concerns before the hearing included witnesses being prompted by others in the room with them (something I have experienced before) and/or the judge being unable to get a feel for the demeanour of the witnesses. It is hard to be sure, but I think these issues are unlikely to lead to injustice in many cases.

In the employment tribunal, most judges spend much of their time writing or typing notes, and if they want to see the witness (by video) they need only look to their screen. That's not to say that evidence by video would be my preference if / when COVID-19 is but a distant memory.

It is certainly an imperfect solution, but it is probably necessary for now. After all, no matter what we lawyers think, justice is almost *always* imperfect. It's just about *trying* to enable the judge to work out what happened and to apply the law to those facts.

The Hearing

In my humble opinion, the biggest difference - for the advocate - between conducting a trial by video, rather than in person, was a greater reluctance to butt into your opponent's cross-examination. This is something I try to avoid, but it inevitably happens once or twice during any trial.

You cannot give the judge a glance, you cannot speak quietly to your oppo to say 'that's not what the document says, can you rephrase please?' Instead, if you take issue with a question, you have to do the video equivalent of standing up and saying 'Objection Your Honour' – you basically have to start talking over your opponent, or at least wedge your point in very quickly while they have paused for breath.

This felt far from ideal, but I imagine we probably all cut across one another far too often. Perhaps it is not such a bad thing.

For my part, I certainly enjoyed conducting a largely uninterrupted cross-examination and closing.

I also enjoyed not having to get the train to and from Birmingham each day.

However, that brings me to the next difference between a conducting the hearing by video and doing it in person. I was knackered. It was really tiring sitting looking at a screen for all those hours. I don't know how those teenagers do it.

Tech

I hooked my iPad up as a second screen for my laptop. This has changed my life. I now think I am an IT genius.

It enabled me to connect to the Cloud Video Platform via my laptop (I cannot get my iPad to connect to CVP directly), but to view the hearing on my iPad. So I could still use my laptop for my e-bundle and statements. This was a lot easier than working my way through seven lever arch files.

Whenever Chambers sought to introduce paperless working, I was a bit unsure. I mused (like many others I'm sure), 'Is this one of those ideas that sounds really good and everybody convinces themselves is really good but actually is not a very good idea at all?'

Turns out it was one of those rare 'good ideas' that actually turned out to be, in fact, a good idea.

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