KC LEGAL UPDATE

Autumn/Winter 2020

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KEATING CHAMBERS

THOUGHTS ON REMOTE HEARINGS: INTERVIEW WITH JUSTIN MORT QC

Marie Sparkes
(BD & Marketing Manager)
and
Elle Ashman
(Marketing Executive)

Marie: Good morning Justin.

Justin: Hello Marie, hello Elle

Marie: So we're all here to talk about remote hearings but before we dive in, how have you adapted to life in lockdown generally? I know you're a keen runner; have you managed to keep up with that this year?

Justin: Luckily someone suggested a chambers running club at the start of the first lockdown which Dominic [*Woodbridge*] set up on Strava. So, every day I can see if I am running as far or as fast as my friends

Elle: The mix of competition and support must help a lot with motivation. The camaraderie at Keating during lockdown over virtual networks has been great.

Marie: I completely agree. Remote working for us has been much easier and more effective than I would have envisaged at the start of lockdown.

So, Justin, you've been involved in a number of remote trials and hearings recently during lockdown. What has your experience of them been like so far?

Justin: I suspect that most people's experience of remote trials follows much the same trajectory. Initially there is a little concern about the novelty of it. After a short while one wonders why trials were conducted by any other method, or at least why a remote hearing should be remarkable.

Both of my trials during lockdown were conducted from Chambers, but with my instructing solicitors and clients located elsewhere.

In one of the cases I also had a junior, socially distanced, in my room. For me the principal advantage of a remote hearing for me was her uncontrolled smiling – off camera – when a cross-examination came out particularly well. I do not recall any junior doing that in a conventional hearing, although I accept that that could be for other reasons.

Marie: Has it been your experience that virtual hearings have saved time?

Justin: Obviously conducting a trial from your room in Chambers has a number of what may seem trivial advantages over conducting a trial in a court room or arbitration centre.

It is not necessary to be anywhere or to go anywhere. In the morning you go to your workplace; at 10am or 10.30 the hearing starts. You just need to ensure that by that time you have successfully accessed the relevant link, and that you are suitably attired for a formal hearing, or such part of you as may be on camera. You do not need to queue for court security, or to arrange for anything to be brought to and from the court room each day.

Whilst this is a trivial advantage in the general scheme of things, I found it beneficial not to have to interrupt my preparations for the day's hearing with the admin of getting to the venue in good time.

Sitting in chambers one also has the support of the tireless staff, printing facilities and other benefits of chambers immediately to hand.

Elle: Besides proximity to the Chambers' stationery cupboard are there any more substantial advantages to a remote hearing?

Justin: You have as much working space as you need. Whilst you need screens in order to conduct a remote hearing, in practice you need almost the same number of screens to conduct a typical construction trial in person. In a remote hearing you are not having to share limited working area with a large number of other people.

Marie: Anything more substantial?

Justin: At the risk of stating the obvious, anyone can attend a remote hearing relatively easily.

Non-parties can attend hearings held in public without having to travel. Similarly party representatives (company directors or equivalent) can attend for crucial parts of the case without inconvenience.

At a time when the Commercial Bar is looking at how it might improve the diversity of its intake there is potential benefit here – for example by encouraging students to attend TCC hearings remotely without the expense of having to stay in London for a mini-pupillage.

Elle: Yes, we have found the same with being able to offer mini-pupillages virtually. It is sometimes suggested that preparation for a remote trial has to be more thorough or more comprehensive than for a physical hearing. Has that been your experience?

Justin: I have heard this said, and that there is perhaps less scope in a remote hearing for say a hasty consultation with the client or one's expert during a 10 minute break.

I am sure that that is a valid consideration in some cases. But it was not my own experience in my cases to date (I should say, I had immense assistance from first rate law firms in both cases such that nothing was left to chance in either case).

In the TCC trial (*Premier v MW*) the other side was permitted to serve a witness statement made by a new witness in the middle of the hearing, covering new topics. Whilst we had to prepare that witness's cross examination during the trial, I didn't feel that that exercise was made any more difficult by my being remote from the remainder of my team. Given the nature of the issue addressed in the witness statement (essentially, the preparation and explanation of a vast spreadsheet), it was easier being able to look at the same material (remotely) on a shared screen. I can't envisage attempting to carry out such an exercise say in the corridor outside court 22.

Marie: Do you feel that there were technological advantages to remote hearings then? Is that your experience?

Justin: For me a more significant change in trial practice was the movement, a couple of years or so before the pandemic, from trial bundles that were entirely or largely hard copy to the use of e-bundles for some if not all of the hearing bundle.

That has nothing to do with COVID or the requirement to conduct trials remotely as such, although of course the use of e-bundles is necessarily yet more widespread and more comprehensive in 2020 than before.

Arguably the use of e-bundles does impose some discipline upon the advocate in terms of the advance preparation of every last detail (eg if the person operating the e-bundle requires document references long in advance). Possibly e-bundles involve slightly more preparation than hard copy bundles.

But in my experience the remote hearing works much better with an e-bundle because in a remote hearing everyone is necessarily looking at documents on a screen.

The overwhelming benefit of the remote hearing (besides the ten minute saving in travel time) is the ability for the advocate to share his or her screen during either cross examination or submissions, rather than depending upon the e-bundle operator to find as it may be a specific cell in a large spreadsheet or the equivalent.

Elle: But how have you found the process of cross-examining a witness remotely compared to in person?

Justin: In my mind there are two modest advantages to the remote hearing when it comes to witness evidence.

Firstly: the ability to share your screen with the witness means that as an advocate you have more control over the cross-examination process, and in particular the pace of the cross examination.

If the documents are entirely fielded by the e-bundle provider it should make no difference whether the cross examination is conducted remotely or in person. But in my experience there are inevitably occasions when as an advocate you want to take the witness to specific parts of a drawing, or technical data, or spreadsheet.

Secondly with my remote trials I felt able to see the witness and their reaction in much more detail (regardless of the quality of the internet connection) than would be the case in a physical hearing.

There were a couple of occasions in particular in each of my trials where a witness's physical reaction to a question was particularly visible on the screen. (Obviously the reaction is itself not on the transcript; and you do not know that the tribunal is also looking at the witness at the time. But it is simple enough to get it onto the transcript).

In the High Court the witness box is positioned almost immediately adjacent to the position of one advocate, and some distance away from the other. I have always thought that that gave some advantage to the advocate next to the witness. (If anyone disagrees, try proposing such an arrangement in an arbitration hearing).

Marie: How about any other disadvantages to remote trials?

Justin: There are some negatives. First, one is dependent upon the technology working. It is probably necessary to set aside some float time against the possibility of time being lost; there is a high risk if one has not done so. But equally in the case of a remote hearing, less is involved in reserving time for a hearing since no one has to go or stay anywhere different to their normal location.

In addition there is likely to be less interaction with your opponent. Obviously the loss of human contact is an unavoidable feature of remote working more generally. Ongoing contact with an opponent during a trial process is necessary if only to keep everyone on speaking terms and to maintain the required atmosphere of cooperation. But that is easily addressed without having to congregate together.

Elle: Any final comments?

Justin: Overall the experience has been good, particularly as a result of the positive attitude of the TCC staff and judiciary, and all practitioners.

Elle: Thanks Justin

Marie: Thank you Justin.

Justin: Happy Christmas to all our readers.

THE INTERNATIONAL CONSTRUCTION LAW CONFERENCE

"I have been very impressed by the co-operation and flexibility shown by the parties, by their legal representatives, by the experts and by the court staff to ensure that the wheels of justice could keep turning."

The International Construction Law Conference took place on 10 September.

Initially intended to be a fringe event during the second London International Disputes Week, like many of 2020's events the Conference changed format in response to Covid-19. The result was a virtual 1-day conference uniting international construction law practitioners from 24 leading law firms, chambers and expert consultancies, along with a number of senior in-house lawyers and industry experts. That alone was an unprecedented piece of co-operation. The entire day was hosted and managed on a virtual basis by Kings College London who stepped in when an in-person event was no longer possible. 3,450 delegates from around the world signed up to watch and during the day between 400 and 1,000 people were tuning in at any one time.

The keynote speech was provided by Mrs Justice O'Farrell DBE, Judge in Charge of the Technology and Construction Court ('TCC'). The TCC is part of the Business and Property Courts of England and Wales ("BPC") introduced in 2017. In London, the BPC is based in the Rolls Building and comprises the commercial court, admiralty court, and the chancery division in addition to the TCC.

Mrs Justice O'Farrell included reference in her keynote to how the TCC has responded to Covid-19.

She explained that on 23rd March 2020 when UK lockdown was announced, the TCC issued template orders and draft letters to be sent to all the parties for remote hearings. Within a few days a protocol was in place for remote hearings for all jurisdictions of the High Court. There were only a small number of trials adjourned in the TCC which were heard in vacation or re-listed for early 2021. Other than that, all hearings went ahead as originally listed save that they were remote, usually by video link.

She added that new cases in the TCC increased by 6% in the first 6 months of this year. That is on top of the overall increase the previous year of 20%.

Since the beginning of July, the courts in London have been offering hybrid hearings or full physical hearings in court where it is appropriate in agreement with the parties.

Mrs Justice O'Farrell concluded her keynote by saying:

> *"I have been very impressed by the co-operation and flexibility shown by the parties, by their legal representatives, by the experts and by the court staff to ensure that the wheels of justice could keep turning. I think we have benefitted from learning how to use technology, for example this conference, to improve the efficiency and cost of legal proceedings in general without compromising justice. We do recognise the value of continued physical hearings and physical meetings where appropriate but I think this has served to demonstrate the resilience and the agility of the courts in England & Wales generally, and in London in particular. The Courts in London and, in particular, the TCC, are ready to welcome parties from all over the world to resolve their disputes."*

Click here to listen to recordings from the International Construction Law Conference

https://www.youtube.com/playlist?list=PLW9PMidnRP0FUCQgjgsF-Q8zKrpjxrfMq

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