

Typically, courts are dealing with the social distancing requirements related to coronavirus disease 2019 (COVID-19) by a range of less-contact or no-contact measures. Audio-link and video-link conferences and hearings are part of those measures.

We were involved in a recent WA Supreme Court case, where a hearing by video-link was ordered. There are valuable lessons to be learnt from that experience.

The Court set a hearing date of one day in the matter of *Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia (A Firm)*.¹ This was a single-day “electronic trial heard urgently ... in the face of COVID-19 considerations”. Despite initial plans being for the proceedings to be heard via video-link, the hearing was conducted over the telephone due to the poor quality of one party’s audio-visual connection.

In advance of the virtual hearing, the parties filed evidence by affidavit. The affidavit evidence was of dual benefit to those participating in the hearing, reducing the number of documents filed, and establishing the uncontested factual background information. Submissions were essentially limited to questions of law. There were very few instances where interjections or objections needed to be made, something that may have otherwise proved difficult to execute over the telephone.

Justice Kenneth Martin’s reasons drew a “Category A” classification – having dealt with new and complex legal issues arising out of the Corporations Act 2001 (Cth), Personal Property Securities Act 2009 (Cth), Trustees Act 1962 (WA), as well as the International Arbitration Act (Singapore).

Having experienced the challenges, disadvantages and perhaps even some advantages of a virtual Supreme Court trial, we can share some of our lessons learnt below:

Allow for Some Extra Time

Be prepared for the proceedings to take longer than might otherwise be expected. For example, there will invariably be time lost in establishing (or re-establishing) everyone’s audio-visual connections. There may also be time lost to having to describe documents or their location within the court bundle, which may have previously been done more easily in-person. While these changes may not cause, by themselves, significant delays to the proceedings, when they accumulate over a number of hours (or even days), the end result may be a hearing that takes considerably longer than it otherwise would. These delays could be accounted for when scheduling proceedings and consideration should be given to any other competing calendar appointments that may conflict with a virtual hearing running over the allotted time.

Be Prepared

To guard against significant delays, and the resultant frustration that comes with them, it is best to be prepared. However, being prepared for a virtual hearing takes on a whole new meaning: reliance on one’s own infrastructure and facilities – from internet connection and system capabilities, to specific software use and venue arrangements.

From our experience, it is worthwhile conducting multiple test-runs of the setup in advance of the substantive hearing with the Court. In this regard, we consider the following to be the most important considerations:

- Internet connection and speed
- Audio-visual capabilities
- Clear document numbering or categorisation
- Alternative or backup system/software available
- Room configuration

While the first four are interrelated, in that the connection and capabilities must be sufficient to permit clear and consistent transmission of audio and visual signal to enable counsel to articulate a point, the fifth is also important when determining who will be needing access to the microphone(s) and who ought to be within the primary camera frame. These sound like simple considerations; however, they are best thought of well in advance of the hearing – before substantive matters take over peoples’ focus.

Notwithstanding the above, sometimes all the planning in the world will not stop a technical difficulty on the day. In this regard, it is always best to have suitable contingency plans in place, and to remain flexible.

What You Can and Cannot See

Depending on the configuration, and whether the proceedings are being conducted via telephone or videoconference, certain non-verbal cues (that would otherwise be visible in a courtroom) may be lost. Depending on the situation, this may or may not be a hindrance. For example, counsel may find it more difficult to address a judge or panel when unable to view how a particular point is being received. However, at the same time, where instructing solicitors are able to communicate directly with counsel (particularly from out of view of the video frame or while the microphone is muted), this arrangement may actually work well. Parties ought to give consideration as to how best to mitigate any perceived disadvantages associated with virtual hearings, while also looking to use the change in configuration to their benefit.

¹ [2020]WASC 132.

Communication is Key

In an environment where there is great uncertainty, such as we are currently experiencing due to the COVID-19 pandemic, compounded by the usual stresses that come with litigation proceedings, communication really is key. Solicitors ought to be more willing to communicate more frequently with clients to provide reassurances, to ascertain instructions and to convey important information. Given the new hurdles to overcome, for example, working remotely or conducting proceedings through a different medium, they ought to be looking to communicate with the solicitors on the other side, and working as a united front, perhaps now more than ever before. We have seen that frequent conferral between the parties and also with the court has been an effective means of establishing a party's position and understanding the expectations of the court, both of which are integral to a hearing running as smoothly as possible.

Remain Patient

It naturally follows from the above-mentioned points that when dealing with the current circumstances, where people are learning to use new technologies or processes, a little patience goes a long way. Equally, remaining courteous and patient is more likely to gain the court's appreciation, as well as encourage worthwhile conferral between the parties. This should be the aim of all parties engaged in litigious proceedings, especially now.

We have extensive experience in both litigation and arbitral proceedings and use various technological platforms to service our clients. This has been especially helpful during the recent COVID-19 pandemic. If you would like further information regarding dispute resolution, please contact a member of our team.

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