

Podcast transcript

Remote hearings: what worked and what didn't

Lawyers from Marks & Clerk Law participated in the first fully remote hearing ever to take place at the UK's Court of Appeal. In our second podcast, Mike Gilbert, Tom Taylor, Imogen Kelso and Jonathan Solomon share their experiences, discussing key client concerns and how they overcame the technological and logistical perils to achieve success. As lockdown continues, so do the courts.

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Jonathan Solomon: [00:00:05] Welcome and thank you for listening to this podcast, the latest podcast and the Marks and Clerk podcast series.

Jonathan Solomon: [00:00:16] Marks & Clerk law is a firm of intellectual property solicitors who advise in a variety of intellectual property rights, including patents, trademarks, designs, copyright and trade secrets.

Jonathan Solomon: [00:00:29] We advise on both contentious, and non-contentious issues and are part of the same group as Marks and Clerk trademark and patent attorneys. This particular podcast focuses on the use by the courts of England and Wales, of remote hearings to continue the operation of Justice despite the Covid-19 pandemic and the government's advice on social distancing.

We have a fantastic team joining for today's podcast. First joining us is Mike Gilbert. Mike is Mark & Clerk Law's managing partner and advises on rights in a variety of business sectors and for a variety of clients. With a background in natural sciences, Mike, often advises on issues in the life sciences area and has advised in a number of multi-jurisdictional issues in the high court, the Court of Appeal and Supreme Court. We also have Imogen Kelso and Tom Taylor. Imogen is an associate solicitor with a background in biochemistry and Imogen advises on all IP rights but focuses on patents in the life science sector. And Tom is also an associate solicitor, but has a background in physics. He advises on both contentious and non-contentious issues and has a specific interest in high tech patents.

Jonathan Solomon: [00:01:43] Finally, I am Jonathan Solomon. I'm also an associate solicitor. I have a background in the intersection between law, bioethics and healthcare, and I primarily advise on life science patents but work on all intellectual property rights in all sectors.

The team at Marks and Clerk Law have experience dealing with a number of remote hearings will start today by allowing Mike to give a brief summary of their experience. Mike will then talk about some of the key concerns that we and clients had about the prospect of remote hearings. Tom will then discuss what he considers to be the key steps required preparing for a hearing. Imogen will talk about her top tips and the practicalities of a remote hearing. The team will then discuss their experiences and evaluate whether the remote hearings that they participate in. Where is success? Finally, we will consider whether there was a future for remote hearings. Once the current covered pandemic is over, whether there are elements of remote hearings which could be implemented in normal proceedings.

So without further ado, turning to Mike, please, could you provide an overview of our experience with remote hearings?

Mike Gilbert: [00:02:52] Of course. And Jonathan, thank you very much indeed for that kind introduction. So what we're going to be talking about today are two cases where we were involved as solicitors on the record when the hearings were held fully remotely.

The first case was a full blown appeal before three judges, two law justices and one lady justice sitting in the Court of Appeal on an urgent matter. And the second was an interim hearing. The high court with performance to justice first sitting in the patent court in relation to a disclosure application and a request for an extension of time. And yes, you guessed it, the extension of time was requested in the light of the Covid-19 issues that we're currently experiencing in terms of the Court of Appeal hearing that was heard on the basis of a very urgent application that needed to be decided before the expiry of an SPC. And the Court of Appeal very kindly arranged, on very short notice indeed, to sit remotely with all of the judges in their homes to determine this matter, as I say, before the expiry of the SPC. That hearing lasted all day. And we were extremely grateful to the judges for giving up that time and also for making themselves available to deal with the matter remotely. And it was a case as Lord Justice Floyd pointed out, that was the first remote Court of Appeal hearing ever to have taken place.

The second case, which again happened very, very shortly after the lockdown measures were put in place, was a first instance hearing as part of an ongoing patent dispute between two large bio-pharmaceutical companies. Some very important issues to be discussed and debated at that hearing and that in terms, is a matter that is shortly coming on to trial before the patent court for a hearing at the end of June into July, which, given the current situation, is highly likely to be held fully remotely as well.

Jonathan Solomon: [00:05:07] In the short time that remote hearings have been taking place in the court, we have been involved in a number of them. Mike, obviously you've been involved in advising clients on a variety of cases for a long time. However, remote hearing must be extremely different to anything that you have advised on before. Please can you tell us about your concerns? Either you or your team or your clients had, conducting a remote hearing and whether those concerns were, in fact, founded when the hearing took place?

Mike Gilbert: [00:05:38] Yes. Yes, of course. Well, one of the sort of main concerns, I think, from a client perspective was to ensure that both hearings were fair hearings, not just to our clients, but also more generally as well, so to all participants. And when I say fair hearing, I mean, a hearing where the judges really did have a full opportunity of hearing arguments that were made by counsel for both sides, but also so that they could feel that they could ask questions if there were matters that were not clear or they had other concerns that need to be addressed by counsel on their feet.

The other sort of issue that we did have to deal with and be concerned about was the extent to which it was going to be possible to gauge the reaction of the judges. One of the sort of key parts in guiding hearings, of course, is to make sure that the judge's understanding points and also to so make sure that if there are certain arguments that appear to be warmly received than others, that those arguments are focused on and likewise, whether arguments that appear to not being well received by the reading of body language and facial expressions such as counsel and solicitors alike, can react to those.

And those, in summary, were the key concerns that our clients had for both of the hearings that we've been involved in. And I'm very, very pleased to say that actually, given the extensive preparation and the use of technology that was being utilised on those hearings. We were able to deliver, to the clients, the type of service that they

would ordinarily expect when dealing with hearings of this nature. So all in all, I think our clients in both of these cases felt that the hearing had gone well, that the arguments had been well received and that we were able to, as I say, read the body language, read the tea leaves as to how the arguments were being received by the judges in those two cases.

Jonathan Solomon: [00:07:42] Thank you, Mike. And turning to Tom. Tom, did you find that preparing for remote hearings was different to your standard preparation when preparing for a normal hearing? And if you were preparing for another remote hearing in the future, what would you consider the main steps in preparing for that remote hearing?

Tom Taylor: [00:08:01] Thanks, Jonathan. And thank you also to Mike for just setting out briefly some of the background of the Court of Appeal hearing that we were involved in. I was mostly involved with that at the Court of Appeal and also the High Court before that and quite a peculiar case in that the high court hearing actually took place in person in the courtroom. And then the Court of Appeal hearing took place very shortly after the lockdown actually began. So we we're sort of in a bit of a strange situation where we're preparing in the office and then having the hearing from home.

And we were extremely grateful to the court as Mike mentioned, for accommodating us. It's one thing to think, great, we're going to have this hearing remotely, but at quite another to actually prepare for it. And a lot of things can perhaps be overlooked and definitely need to be kept at the forefront of your mind. Once remote hearing might be suggested that the first of those would be bundles, perhaps seems a bit of an administrative task. But you can quite easily forget just how important it is that everybody's working from the same documents, that all the cross references are correct, that the that skeleton's rule or referencing to the same documents, and especially when working with electronic documents, these can quite easily slip.

Tom Taylor: [00:09:16] You might be working from previous versions. So we used Dropbox a business and actually created a single PDF bundle all bookmarked and hyperlinked and shared these with the judges and with the other parties so that way everybody is working from the same thing. This seemed to actually work very well, at least from my perspective, was significantly easier than working with hard copy bundles where, if not, they'd require a small army of couriers are required to nip around to every

chambers, whereas in this case you could just updated PDF using some of the PDF technology that's around now and share it with everybody. So that seemed to actually work, work very well.

The second concern we perhaps had with communicating with with counsel, it's quite common when you're in there in the courtroom to sort of a note system passing notes back and forth between the benches on the wall, slips of yellow paper. And it dawned on us quite early on that we were going to struggle to do that. There is, of course, chat functions in many of the video conferencing services. And we were quite worried that if we were to start saying one thing or that, you know, that the judges is taking that point very well, that the other side might see that.

Tom Taylor: [00:10:32] So we actually relied on WhatsApp messaging system, created a little group with all the members of the internal team and with counsel. And that actually seemed to work very well. Another thing was, was testing the video calls. We decided to use Skype for Business to take part of the Court of Appeal hearing. And we were concerned, again, that a lot of feedback might happen if people left their microphones open. And also, our counsel wanted to have a bit of a trial run beforehand to see how is body language coming across how to best set up cameras and things of that nature. And I think I think a lot of testing, we managed to iron out the bugs and we were quite prepared for a lot of teething problems.

As Mike said, this was the first fully remote Court of Appeal hearing. And we were quite pleasantly surprised that actually a lot of those concerns then didn't amount to anything. And I think this was in large part due to the practice. And another point about preparation really is just the media communication. We were in close contact with all the other parties involved and with the court's clerks and the good communication between everybody was made. Everything run a lot smoother. I think.

Jonathan Solomon: [00:11:50] Thank You, Tom. And finally turning to Imogen. I can imagine that practically speaking, conducting a remote hearing is very different to an in-person hearing. I was hoping that you could give us your top tips on conducting remote hearing on the practicalities of doing so.

Imogen Kelso: [00:12:08] Thanks, Jonathan. I will give my five top tips for a successful remote hearing. So I think my first tip would be to start thinking about the practicalities at an early stage. As Tom mentions, of E-bundles are increasingly being used remote

hearings rather than potentially hard copy bundles. This means that any of the participants in the trial may need additional hardware, such as screens or tablets to view the bundles and also be able to participate in the hearing at the same time. And also, if hardcopy bundles are being used, then there are additional logistics involved around printing and delivering bundles to the right people. Also, if you think that someone might have an unstable Internet connection, then you could consider buying potentially a 4G dongle to help solve the issue.

Imogen Kelso: [00:12:59] Of course, the amount of preparation you need to do may depend on the type or scale of the hearing that's taking place. A short hearing is also very different to a full blown trial. And there are additional complications if any witnesses or experts are involved, especially if they are located overseas. So making sure you get equipment or bundles to the right people will take time. So it's really good to think about that early stage.

We've also seen that there are a few companies out there that can assist with this, such as Opas2 to Sparq. And they provide sort of remote hearing services such as centralised bundles, I.T. support and hardware provision. So that's another thing to look and do before beforehand. You could also consider enrolling any witnesses in a witness familiarisation program, and especially one that focuses on giving evidence via video link. This will help the witnesses get a feel for giving evidence remotely.

My second top tip would be to agree on suitable methods of communication between team members. This was alluded to by Tom earlier. And when he talk about using WhatsApp to communicate, obviously during an in-person hearing, they're really easy means of communication between parties and their legal teams, between solicitors and barristers. So to ensure communication is just effective in a remote hearing, you should agree in advance how you parcel messages and instructions. In the hearing I was involved in in the high court we found that using WhatsApp was a really good way to communicate during the hearing, as it's pretty much instant and everyone has on that browses. You can easily type out messages. So it's basically like a virtual Post-it notes and also various video conferencing providers that may be able to set up different rooms or chats for each policy. And there are other means of communication, such as email or Skype business that you can use to communicate during the hearing.

My third tip will be to carry out a test of the video conferencing system beforehand. That's another thing that Tom mentioned earlier, and it's a really important thing to do at the moment. The court seemed to be favouring Skype for business or Zoom for the hearings. But as we know, there are a lot of different video conferencing providers out there. And so it might be the case that some of you needs to attend. The hearing may not use the court's preferred system before. So it might not be familiar with how it works. So carrying out a test in advance of the hearing, we'll just make sure everyone is comfortable using the video conferencing system that will be used for the hearing. So this will make sure that everyone knows how to turn that video on and off, how some meet, how the set up works and things like that. Also, performing a test will light on our technical difficulties ahead of time, such as any problems with sound or video. Well if the person is a witness or an expert and they will be giving evidence by video link, they need to make sure that camera is set up correctly, making sure it's at the right angle, making sure they have sufficient lighting and a suitable background. And if you're using Zoom, you could use a virtual background feature that may best avoid this for a court case.

My fourth top tip would be to make sure you've organised a transcriber as remote hearings have been taking place for about a month now and many transcription providers will be used to attending remote hearings. But it's really good to check in with your usual provider that they have the capability to do so. They may also be able to provide additional features that assist with attending hearings remotely. So in our experience of attending an interim hearing, we just explained to our preferred provider that we had a remote hearing and also they could provide some contact details for the transcriber. We then just provide the transcribers email address to the court, or this could be, again, the party organising the video link. So then the transcriber will be invited to the hearing and can join. We generally had really good experiences with the transcribers and haven't seen a difference in service between an in-person hearing and a hearing.

So my final top tip is to comply with remote hearing experts. You don't want to be that person who forgets to mute their mic, and interrupts the hearing when the doorbell goes off halfway through. So it's very important to mute your mic when you're not speaking. Also, make sure you log into the area and plenty of time as usually parties and observers will log in maybe 50 minutes beforehand. This will give you time to sort out any last minute connection or sound problems.

Jonathan Solomon: [00:17:21] Thank you, Imogen it sounds as if all of you have had a very positive experience with remote hearings so far, especially with these preparation and practicalities that Imogen and Tom discussed. However, if a client was likely to be involved in a future remote hearing, I'd ask you to assess whether you thought that the remote hearing worked. What would you think? And how would you respond? Let's start with Mike.

Mike Gilbert: [00:17:48] You can probably tell from the fluency that Tom and Imogen have spoken, both of those individuals worked tirelessly in making sure that the hearings were as successful as they were. And I think it's in no short measures that all the preparations that were put in to make the hearings very successful. I mean, notwithstanding the actual result in one of the cases, but less said about that, the better, probably.

But the most important thing from our perspective as lawyers representing our clients is to make sure that our clients were happy or happy they could be with the way that the hearings progressed and our clients were able to follow the hearing by the real time transcripts, but also by reading the paper transcripts or the soft copy transcripts that was available afterwards. And also having feedback from us as well, or went to having, I think, very positive feedback from the two hearings that we did have. I think and we'll come back into this and I'm sure Imogene and Tom will sort of echo these views that I think the success of these types of remote hearing does in large part depend upon the nature of the hearings themselves. So when we're talking about argument being made, counsel to judges and questions from judges to counsel, whether that's in the appellate court or indeed, for that matter, at an interim hearing in the high court, those sort of hearings are the ones that we were involved in. And they did seem to be very well suited to this type of remote hearing. The courts were very happy and as were we.

Jonathan Solomon: [00:19:32] Thank you, Mike. And Imogen what about you? What are your views of the hearing?

Imogen Kelso: [00:19:37] I was involved in an interim hearing in the high court. So as it was, I need an application and it didn't involve any witnesses. So it was pretty straightforward and it went reasonably well. We were lucky we didn't have any technical problems. The judge initially couldn't hear anything. And he just logged out and logged

back in again, seemed to solve it. So that was pretty lucky. As Mike mentioned earlier, we have another trial scheduled for July. So is it a full blown trial rather than sort of interim application. This involves multiple witnesses of all located outside of the UK. So we'd only build on what we've learned from previous hearings to prepare for this this new one. But I think overall, the hearing went really well. And I definitely echo what Mike says. I was pleasantly surprised with how well everything went and what the technology was.

Jonathan Solomon: [00:20:29] And finally, Tom have you got anything further to add?

Tom Taylor: [00:20:33] Yes, absolutely. So as Mike mentioned, ours was in the Court of Appeal and we actually had three parties involved. So whilst we didn't have any expert witnesses, any fact witnesses cross-examined, we did have three judges and three barristers all on all on video says six people isn't a small number. And so we were quite relieved to see that all went quite well. In addition, some of the concerns about body language, again, didn't seem to be too bad. You could tell when a judge was nodding along and when they were taking notes. And it could you could definitely read something that we were worried we might not have been able to.

Similarly, as Imogen mentioned with the transcribers, it was great to have a live transcript set up. There was a lot of public interest in our case. We have members of the press in attendance. And it was it was great to see 70 people being able to follow it, especially people who were perhaps overseas and might not have travelled down to the courtroom for the real thing. In terms of what didn't work well, but how it became resolved. We actually did have a technical problem where one of the judges had an Internet connection issue and dropped off. But fortunately, because Skype for business has a telephone feature, he was able to call in and still participate in the hearing and it didn't seem to hold things up too much. And after that, after the break, it seemed to be the case of turning on and off again, fixed the Internet. But it was it was good having that back up there. So that was helpful.

Jonathan Solomon: [00:22:04] Thank you all for you for your views on assessing the remote hearings, at least from my perspective. I think it's been an overwhelming success. Obviously, the use of remote hearings has involved the implementation of a variety of technologies and looking to the future. Is it likely that while remote hearings are happening, that trials are likely to be longer or more expensive and after all, the

current of a pandemic has passed? Do you think there are any aspects of any technologies that have been implemented in these remote hearings that could have a use in hearings post pandemic? Mike, have you got any thoughts on that?

Mike Gilbert: [00:22:44] I think as many people are saying at the moment, it's going to take a while and indeed quite a while for the world to get back to the degree of normality. But I think that in relation to court hearings we probably just need to start actually by remembering that the patents court were the first courts to encourage telephone hearings. I seem to recall doing my first one in about 2006, and those sort of hearings were people are remote, and that was one where was two solicitors and a judge, could be done remotely. It's more cost efficient and in many respects more informal. But what is what is likely to happen now, given that we have had to all embrace new technology and that's not just lawyers, but also judges alike, but what is what is likely to happen, are future hearings, I should say, to be held remotely. It will certainly assist, I think, with judges who may not wish to travel to London to attend hearings.

But of course, it would also be of some considerable benefit to lawyers whose offices are not particularly close to the to the law courts, I think for solicitors who have their offices in the in the provinces or at least outside of London. So I can see that sort of going forward, there is likely, even after business returns to whatever the new normal may be, that there will be more of these types of remote hearing taking place because they have, as we've been discussing with you today, really shown to be beneficial and indeed are very streamline and an a very good and productive use of technology. But that, I think, is in relation to hearings rather than trials, necessarily. And as both Imogen and I have said earlier on this podcast, we do have a trial that is due to due to come on in the patents court at the beginning part of July. And that is going to be a very interesting experience where we do have a number of experts and witnesses of fact who are dotted all around the world who will need to have ready access to the appropriate technology, the trial bundles, and also be able to be serviced in terms of giving their evidence without the benefit of having someone present sitting beside them to hand them the necessary documents and to guide them into the right place in those documents, which, of course, has been the standard approach in IP and patent litigation for many, many years now.

There will inevitably be some teething issues. But I do think that what has been sort of demonstrated, not just, of course, in the IP field, but more generally, that humans are extremely adaptable. And we have certainly found that becoming more and more adaptable and learning by our experiences, by giving us more and more sort of confidence going forward, thinking about things in a rather different way, so thinking about prepping experts, thinking about how we interact with council on all of these practical issues takes on a hugely different perspective when everything has to be done remotely.

So when we do get back to a sort of a new normal, whatever that may be, where there is going to be sort of closer contact. Can I see that there's going to be more use of this technology and a more encouragement to use video linking, for example, to encourage experts who may be based overseas to avoid travelling to the UK? Yes, I can do. I think our experiences of running trials will bode well for the future conduct. Yes, I do. Do I think trials are going to be more expensive and are they going to be longer? Well, I think certainly as we're in this very nascent stage at the moment where there is an awful lot of things that we do all need to learn, there have been some cost centres that we would never have envisaged at the start of these particular proceedings. In the grand scheme of the expensive litigation, it's probably a relative drop in the ocean. But I can imagine for other cases, costs and considerations would really sort of come into play. Do I think the trials are going to become longer? Well, potentially, yes. It is going to take longer for witnesses to orientate themselves into the right place during their cross-examination. Of course. Will it take longer just in case there are breakdowns in communication links? Well, of course, there is every possibility of that happening. And as Imogen and Tom have said in the two hearings that we did have that were, as we said, overall, a real success, there were nevertheless times when either the judge or one of the panel, one of the judges on the panel in the Court of Appeal, did lose that connection. And that, of course, took some time. But again, in the grand scheme of the overall duration of the hearings, it really didn't amount to anything more than a 10 minute delay in each of those hearings. So can I see that we will return to a normal service of having IP actions and patent trials in particular with everybody all being in London in a courtroom and with witnesses and counselling services, getting together with clients in the usual way? Of course, there will continue to be cases like that. But equally, I can see that there will be other cases where clients who may be based overseas, who have busy business operations to run, may not want to be that in person and may want to dial

in or have access via a remote, remote link. And in many respects, any form of use of technology that helps in that process I think would be looked at very favourably by clients. And ultimately, what are we driven by? Well we're driven by the need to serve our clients and to assist our clients in their disputes and of course, in the commercial situations that they find themselves in. And if that means this by cutting some costs of not having extensive travel commitments, either of lawyers or witnesses or themselves, that will very much help in the overall delivery of service to clients.

Jonathan Solomon: [00:29:45] Thank you, Mike. Imogen and Tom anything further to add to what Mike has said?

Tom Taylor: [00:29:50] No, I just echo Mike's thoughts on the future. I completely agree. And perhaps one final point is, I think, we're very fortunate that all this technology has been here for a very long time. It hasn't sort of come out of nowhere. Skype and Zoom have been around for a long time, as has WhatsApp. It's great that we're getting to use them in the legal system now, I think.

Imogen Kelso: [00:30:11] I would also add that actually, just from someone who is interested in sort of the access to justice, it's been really interesting to be able to watch remote hearings online, which a number of providers have been making available. So instead of having to go down to the courtroom, which you would usually do. You can just click a link and view the hearing that way. So it's been quite good to be able to have that option as well.

Jonathan Solomon: [00:30:36] Thank you both. Unfortunately, that brings us to the end of today's podcast. It is clear to us that remote hearings are here. They are being used by the court and for the most part, they are working well. It's important to properly plan for these hearings to ensure that you have dealt with all the necessary practicalities. But hopefully, Tom and Imogen's top tips will help you in the planning process. And despite some concerns from lawyers and from clients, these hearings, for the most part, have gone on well and the concerns have been unfounded. It is clear that justice is still being done. Before we close any final words?

Mike Gilbert: [00:31:16] I would just say, Jonathan, that of course, if anyone listening to this podcast has any questions or just wants to tap our information bank for any other recommendations that we can give, we'd be delighted to help. And of course, that extends to clients, potential clients, but also any lawyers who have been sort of listening

in and have their own cases coming up. We want to hear more directly from us. And I have to say, we do extend some gratitude to some solicitors at Stewart's law, who did very kindly provide us quite recently with some of their own experiences for how to deal with a remote trial that they were involved in. We were very much right on the on the outset of lock down. So it was literally taking place as lock down kicked in. So we would just like to sort of repay the debt of gratitude that we owed them by making it clear that we'd be very happy for anyone listening to this who has any specific questions or general questions and is about get involved in the hearing, we would be more than happy to help you. Of course do just get in contact.

Jonathan Solomon: [00:32:29] If you have listened, thank you for joining us and we hope that you find the discussion interesting and useful piece to share this podcast on LinkedIn or by e-mail. If you do have any questions on remote hearings or in fact, any intellectual property concerns, please do not hesitate to contact us. Our details can be found in the blurb to this podcast or on the Marks & Clerk website, which is www.marks-clerk.com. And then finally, all remains to be said is thank you to Mike, Imogen and Tom for joining us and we hope to reconnect with you soon. Thank you.