

Virtual hearings - A perspective on fairness

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Virtual hearings will become more likely and even more popular in the coming months and years, not just because of social distancing but also because it can significantly reduce costs and time. However, fairness and justice should never be sacrificed at the altar of cost or convenience.

These are some thoughts from the perspective of fairness that may be useful.

1. Virtual hearings must be procedurally fair and serve the ends of justice. Hence the decision maker must ensure that the playing field is level. The following questions should be considered:-
 - 1.1. Is a virtual hearing justified in all the circumstances having particular regard to the principles of open justice?
 - 1.2. What method of virtual hearing best suits the justice of the matter to be heard?
 - 1.3. Are the parties and the lawyers involved able to obtain or access the technology necessary for the conduct of the virtual hearing without undue hardship or expense?
 - 1.4. Is the online connectivity at the location at which the parties and witnesses are located sufficiently stable and fast to enable the fair and expeditious conduct of the virtual hearing?
 - 1.5. Are the parties, within the available time, able to access the necessary manpower and equipment to fulfil the obligations imposed on them by the decision maker to enable the virtual hearing to proceed fairly and expeditiously?
2. Reasons for conducting the hearing virtually rather than in person should be given so that any appeal or challenge to the procedure on the grounds of a breach of natural justice can be fairly and properly determined.
 - 2.1. The rules of natural justice require that adequate reasons for any decision should be given. The absence of adequate reasons can sometimes give rise to the assumption that no adequate reasons existed.¹
 - 2.2. A tribunal hearing an appeal or challenge against the decision will usually be asked to critically examine the process of decision-making as well as the merits of the decision itself. Proper reasons explaining the grounds why a virtual hearing as opposed to a hearing in person was held will enable a proper assessment of the fairness of the

¹ *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan And Another Appeal* [1996] 1 MLJ 481; *Sugumar Balakrishnan V Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289 and "Duty to give reasons" in Chapter 3, *Trial Lawyers Companion* 2nd edition Sweet & Maxwell

procedure adopted and contain any uncertainty or dispute over what those reasons were when the matter is subsequently reviewed.

3. The conduct of the hearing should be expeditious, fair and clear. The following best practices could be used.
 - 3.1. The decision maker must be able to properly control the proceedings in order to ensure that it proceeds smoothly. In order to do this, it is imperative that the decision maker is wholly familiar with the issues and evidence that form the subject matter of the hearing. Control is best exercised by focussing the parties on the issues or evidence that are central to the dispute whilst at the same time allowing flexibility for the parties to develop their arguments and properly present their case. This is a skill and one that is hard enough to master at a face-to-face hearing, much more so at a virtual hearing. Patience, perseverance and respect are key.
 - 3.2. Participants should also avoid over speaking. This is a common problem even in face-to-face hearings. The decision maker could consider a protocol for interjections such as requiring a person wishing to speak to first raise his hand. A card system may also be useful: - a red card for an immediate or urgent objection/interjection and a yellow card for one that seeks leave to interrupt.
 - 3.3. All the materials to be used at the hearing whether affidavits, exhibits, witness statements, reports and documents, pleadings and written submissions and legal authorities must be capable of convenient and accurate reference.
 - 3.4. Where evidence is being taken, decision makers should be mindful, the field of observation over the witness should be sufficiently wide and defined so as to ensure that the witness is not receiving secret communications from others while he/she is giving evidence.
4. The proceedings should ideally be recorded by both parties separately or by an independent party (or the decision maker himself) so that a proper agreed transcript can be produced. Where there are areas of dispute, the recording should be consulted by the decision maker and a determination made.²

² See "Duty to take notes" in Chapter 3, Trial Lawyers Companion 2nd edition Sweet & Maxwell and *Low Thiam Hock v Public Prosecutor* [2018] MLJU 1515