



Law Society
of Scotland

Briefing paper

Post-Covid-19 Civil Business Conference

Procedural Hearings and First Instance Debates

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Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The coronavirus pandemic continues to affect each and every one of us. Over the last year We have all had to adapt both our working and our personal lives in order to minimise the spread of infection and save lives. Previously we have seen resistance to change until those who are affected are used to that change. The change that has been brought about by the pandemic has been forced upon the profession. The profession has had to adapt and in short, they have adapted very well.

It is already clear that we have seen significant benefits to the use of remote hearings in being time saving and cost effective particularly in relation to procedural hearings. The conference on post-Covid-19 civil business will help shape the future of medium to long-term work practices. After the pandemic should we revert back to having procedurals in person? Is the current system of remote hearings working well or should we adapt it as we look to the future?

The Law Society carried out a survey in February and March this year, from which we can draw useful insights on what has worked well for solicitors and their clients and which will also help inform how we should work post-pandemic and consider what aspects, if any, of remote hearings could or should be incorporated into the civil justice system post-pandemic.

351 respondents completed the survey. The responses received indicate that the survey sample is broadly representative of that sector of the profession which conducts civil court business as a whole.

Procedural hearings

The findings from the Law Society's survey indicate that use of remote hearings is considered to be very useful for procedural hearings. They work well for procedural and non-contentious matters. They cut down on waiting and travel time and thus are more cost effective and an efficient use of time. For example, the procedure allows people to log on, and even if waiting for their case, they can deal with other things, with Webex on in background.

A majority of survey respondents, at 78.5%, said they would like remote court hearings to continue after the Coronavirus pandemic. The vast majority of respondents, at 91%, thought that procedural hearings worked particularly well and 99% said they would like to see them continue remotely.

An example of a typical procedural hearing in the All-Scotland Personal Injury Court outlines the process involved.

Example hearing

Once a hearing has been assigned by the court the solicitor is informed of a date from the Clerk of Court. This is generally done by email. As procedural hearings normally take place on a Monday, details of who is attending the hearing need to be intimated to the clerk by the previous Wednesday. You must state who is appearing as a panellist and as an attendee. Generally, counsel is the panellist and attendee is the instructing solicitor. The difference between the panellist and attendee is that the panellist can be seen on camera and heard. The attendee can see those on the screen but won't be seen themselves and can only listen in to the hearing. On the Friday before the Monday hearing an email will be sent by the court to all panellists and attendees with the Webex invite.

On the day of the hearing, all those participating are asked to join via the Webex link for 9.30am with a view to the court commencing at 10.00am. This is in order that those joining the hearing can be tested to ensure that they are audible and visible. Participants are asked to switch off their videos and mute their microphones until the court starts. The court rolls are published at 9.30am which allows agents to see what position they are in for their case to call. Once the case is called the Sheriff and Clerk are visible on screen. The Clerk will call the first case and the agents will be asked to switch on their videos and unmute themselves. Every other agent requires to wait until their case is called with their videos off and muted. Once a case is called the participants simply leave the meeting to end the court hearing.

For procedural hearings in the Sheriff Court via Webex the procedure is similar. However, in some Sheriff Courts, agents are allocated time slots to attend for a procedural hearing. These are generally in 10–15-minute time slots. The agents must log in to the Webex hearing in time for their time slot.

Whilst Webex is being used as one way of conducting a procedural hearing. In some Sheriff Courts procedural hearings are being conducted via telephone. As Webex has been rolled out across all Sheriff Courts from 23 November 2020, it would appear that telephone hearings are less common but are nevertheless still in use.

Feedback from our members is that for some using the telephone is an efficient way to conduct a procedural hearing by telephone. It cuts out the waiting time at court of waiting for your case to call and reduces costs to clients. The agent can have the entire electronic file in front of them and also not have to rely on the court's sometimes unpredictable Wi-Fi/4G signal. Feedback suggests from those in favour of using the telephone for these types of hearings that this should be the default setting unless one party is unable to participate, for example due to hearing impairment or lack of proper technology. It may not also be appropriate where there is no agreed position and an issue requires some debate. The results show that in that scenario it is better for the agent to be able to see the Sheriff and opposing parties.

In terms of the Society's survey results, Webex has the edge over telephone hearings, with 35% of respondents preferring Webex, while 31% preferred telephone, although it is accepted that they could have

their place especially where there are broadband difficulties/connection issues. The findings indicated that Microsoft Teams (18%) and Zoom (11%) were the other main preferred options.

Those using Webex in the Court of Session for procedural hearings have reported it worked generally well although sometimes judges can experience difficulty getting online. The actual hearings themselves being conducted remotely are generally over in 15 minutes or so, which is much more efficient being done remotely rather than for example, three counsel and three solicitors all travelling to Parliament House and then back to their respective offices as well as charging the clients for it. Other positives of using remote hearings for procedural hearings is that agents whilst waiting for their case to call can continue to work on other matters using their time more efficiently.

Procedural Hearings in family matters

From a family practitioner perspective, the view is that there should be a distinction drawn between Ordinary and family actions. This is supported by the subject matter of family disputes, but also the fact that separate court rules, specialist family judges and accreditation all exist.

The view expressed is that most family procedural hearings should be capable of being dealt with remotely, especially those relating to financial disputes or case management hearings/motions for commission and diligence etc.

From family practitioners that have been consulted (outwith the Society's survey), it would appear that remote hearings for procedural matters have on the whole been an improvement for clients and should be retained.

Advantages for clients:

- Increasing access to justice, including procedural justice: It is much easier for clients to attend a hearing – they can hear how the matter has been dealt with, rather than relying on a report from solicitor afterwards.
- Efficiency savings: If clients wish to attend, they don't need to travel/take time off work to attend court.
- Cost savings: The solicitor may have less waiting time and therefore cost the client less, although this depends on which sheriff court, as some courts, like Edinburgh, expect you to dial in for the 10.00am court and wait for the case to be called, as with an in-person hearing, while some other courts give a nominated time for the hearing. This however must be balanced against the fact that most courts still require written submissions for procedural hearings in advance, reducing the potential cost savings for clients, especially when the hearing is not disposed of based on written submissions alone.

The downsides:

- Technology: issues with technology can affect the smooth operation of hearings. It will also be important to consider access to a hearing where a client may not have access to a device/broadband etc.

- Impact of the hearing: this is likely to be more important for Child Welfare Hearings (CWHs) and Proofs, but there has been feedback that some clients do not regard the hearing to be as serious as they ought as they simply log-in. There is power in clients attending courts personally, whereas there is a danger that a video hearing is viewed as less formal and simply another zoom call.
- Potentially less scope for settlement: with clients and agents not in the same vicinity, there is a danger that constructive conversations to narrow disputes and/or reach settlement are lost in a remote setting. These were commonplace prior to in-person hearings, even procedural ones although this is more of an issue in CWHs and Proofs.

It is suggested by family practitioners the Society has consulted, that there should be provision in the court rules for applications to be made for in-person hearings on cause shown for procedural hearings, but there is support for most procedural hearings to continue by way of remote hearings.

First Instance Debates

First instance debates can proceed by way of Webex or telephone call. The date for debate is fixed similarly to the process for procedural hearings, but parties are usually directed in advance to prepare and exchange written submissions in advance of the hearing. Agents are usually also directed to lodge with the Sheriff Clerk their written submissions, joint bundles of authorities, copies of documents referred to in the pleadings that may be used in the course of the debate, and a note setting out the name and contact details of the agent who will be conducting the debate for each party.

Similarly to substantive hearings, such as procedural debates, there would not appear to be an absolute need for personal appearance.

Feedback from the Society's Civil Justice Committee members on conducting first instance debates remotely have said that there should be an amendment to the court rules to specify what agents must provide by way of written documents in order for these debates to run smoothly remotely or in person. The sheriff could give particulars of what written submissions must contain, how the joint bundle of authorities should be marked and highlighted. Agents were advised in advance that they had 30 minutes per submissions. This is taken from an example given by a member who supported the hearing being conducted in this way.

Some suggestions from our members are that it would be beneficial for all judges/sheriffs to be issued with standard laptops with Webex on them for the purpose of hearings and that it would also be useful to ensure regular IT training for the judiciary going forward.

One of the difficulties that has been encountered is how agents and counsel communicate effectively during a procedural hearing. There is currently no set method as to how to do this.

Agents quite often agree as to how they will communicate with one another prior to a hearing. There is a chat function on the Webex platform. However, there is a concern that an agent or counsel could, in the heat of the moment of a hearing, send a message to the wrong person. This could be extremely detrimental to the client's case and care needs to be taken. Also, often when counsel is being asked a question by the sheriff/judge, it may be that the question is answered and the agent has no time in which to get a message to counsel. During an in-person hearing the agent can simply tug the gown of counsel or voice when something is incorrect. Virtual hearings prevent this from happening. If remote hearings are to be the preferred method for procedural hearings, it is important that this issue is considered and a solution sought. If there is no obvious solution, solicitors and counsel must be alert to this.

The Society's survey results saw 25% of respondents say that first instance debates worked well remotely, with 13% saying they did not work well remotely.

In response to another question on aspects of civil court procedure they would like to see continue remotely 43% of respondents said they would like remote first instance debates continue (please note there were 274 respondents to this question),

While not exclusively asking about first instance debates, the Society's survey also asked respondents why they would not like to continue with remote court hearings and were invited to select more than one response (please note that 76 respondents answered this question). 78% of respondents to this question stated that their clients' interests were at a disadvantage, while 89% of respondents said that they found it difficult to effectively participate due to practical issues such as examination and cross examination of witnesses. 50% of the respondents said that they find it difficult to effectively participate due to technological issues such as connectivity and 28% referred to other reasons, such as clients being less able to understand remote procedure, lack of ability to discuss and negotiate (with other parties) prior to a hearing, there being no substitute for in person hearings and again the lack of formality.

Additional points

Consistency in approach across sheriffdoms

Guidance from some sheriff courts/sheriffdoms has tended to vary in the past, and it is clear from our survey result that consistency was a concern for our members, with over half at 58% citing inconsistency. 32% of respondents indicated they did not have enough experience of different courts to comment, and only 10% said there was consistency. However, we are encouraged by the approach now being taken by the Sheriff Principals. The new guidance for court users in all Sheriff Courts/ASSPIC/Sheriff Appeal Court is due to have effect from 1 April 2021. The guidance has been prepared in consultation with the Sheriff Principals in order to provide consistent guidance nationally although agents should be made aware that further guidance may be issued locally in any Sheriffdom. This approach is extremely welcome, and it is hoped that all future guidance can continue to be applied nationally where practicable.

Impacts on Trainee/Newly Qualified Solicitors

Some of the downsides of the use of remote procedural hearings are the impact it has had on newly qualified/less experienced solicitors who have not had the same opportunity to see other solicitors appear in court. Ordinarily, trainee solicitors would be taken to court to gain some practical experience from conducting a procedural hearing through to a proof. This was quite common pre-pandemic.

It has been reported via the Society's Civil Justice Committee members that there are some issues in allowing others who are not involved in the case to attend a virtual hearing. The consideration of allowing access to non-participatory observers is perhaps worthwhile from a training perspective. We understand it is possible for new solicitors to attend an online hearing however, it is not publicised anywhere that this option is open to them. In our view, this is certainly an important aspect of encouraging training learning going forward. There should be a clear method made available to allow this to happen.

Another aspect mentioned in some of the anecdotal evidence received from members is not having the same exposure to court etiquette, such as being able to observe body language of sheriffs, agents, etc. Certain sheriffs are reported to be seated some distance away from the camera and can appear remote from it all. However, it is clear from other evidence received that most sheriffs are engaged and eager to deal with matters proactively.

Conclusion

The Covid-19 presented significant operational difficulties. However it has also brought a unique learning experience for all those involved in the justice system. Overall, the legal profession has been able to make the rapid adjustment to the restrictions posed by Covid and move in large part to online working. It is important that we learn from our experience and where there has been genuine progress, use it to improve how we work and make the civil justice system more effective and efficient.

Remote hearings are not right for everything. From the survey and additional commentary, we know there are issues around communicating with clients and counsel, but a large majority of respondents to the Society's survey, at 78.5%, said that remote hearings should continue in some form. 99% of respondents thought procedural hearings should continue post pandemic.

As highlighted above it is suggested by family law practitioners that while there is overall support for procedural hearings to continue remotely, provision should be made in the court rules for applications to be made for in-person hearings on cause shown for procedural hearings in family law matters.

In relation to first instance debates, 43% of survey respondents believed first instance debates should continue remotely. We would therefore suggest that while there may be scope for some to be held remotely, we do not think that this should be the default model for all first instance debates and perhaps a hybrid model is the best approach, depending on circumstances of each case.