

Civil Justice Conference

Proofs

Introduction

Following the introduction of Covid restrictions, the hearing of proofs remotely began in the commercial court in June 2020. All of the commercial judges have now conducted a number of remote proofs of varying complexity. Our experience has been, on the whole, a positive one. Practices have improved with experience and no insuperable problems have been encountered. This paper describes our practices in relation to (i) pre-proof preparations and (ii) conduct of the proof, and offers some suggestions as to the circumstances in which the remote conduct of proofs could/should be retained after Covid restrictions have been reduced or removed.

Pre-proof preparation

Oral evidence

The use of witness statements to stand as the witness's evidence in chief, except in so far as the court may otherwise allow, has been standard practice in the commercial court for some years. This has been especially helpful for the conducting of remote proofs where there is greater scope for things to go wrong: lost internet connections; poor quality sound or video; or other communication problems. Our experience is that these potential difficulties have encouraged parties to conduct a more critical appraisal, in advance of the proof date, of whether there is any need for cross-examination of particular witnesses, or whether, on the contrary, the evidence in their witness statements can simply be agreed, with any challenge to the relevance or significance of that evidence being addressed in counsel's submissions.

This has resulted, in some cases, in the proof proceeding entirely on the basis of witness statements agreed to constitute the respective witnesses' evidence. Clearly that has been beneficial as regards the court time required to complete the proof, as well as obviating the need for the witnesses to make themselves available for the giving of oral evidence. Even where the oral evidence of a witness cannot be dispensed with altogether, it is important for counsel and solicitors to give careful

consideration while preparing for the proof, to the preparation of focused questioning, in order to minimise the time spent on taking a witness's evidence.

Timetabling of witnesses also has to be carefully thought out in advance of the hearing. Ideally there should not be lengthy pauses while the next witness is contacted and connected to the hearing. However there is no reason why this should be any more difficult than it is for in-court proofs. There is perhaps less scope for "running out of witnesses" when matters are being conducted remotely: a witness can be on standby to begin his/her evidence while carrying on with their own activities, rather than sitting in a witness room waiting to be called or, alternatively, having been sent home on the basis of an inaccurate forecast of when they would be required.

Documentary evidence

It is now our invariable practice to use electronic documentation for proofs. This removes the need for arrangements to be made for safe and secure delivery of paper copies to witnesses and collection afterwards, and the need to attempt to identify in advance which documents will be required for a given witness.

As regards pre-proof preparation, it is important for the documents to be uploaded in a way that facilitates speedy movement from one document to another. The Court of Session now uses the file sharing platform Objective Connect which allows large files to be uploaded and shared with other parties. Any inventory of productions or other documents (such as witness statements and authorities) should include an electronic table of contents so that all participants in the proof can move from one document to another with a single click. It is also helpful if references to documents in witness statements can be hyperlinked to the documents themselves.

Although it is desirable for all of the documents to be in a single folder, if file size is a problem, more than one folder can be used.

As with oral evidence, it is extremely helpful for as much of the evidence based upon documentation to be agreed in advance of the proof hearing. If, for example, the factual background includes lengthy email exchanges, parties are often able to agree a narrative which avoids the need to lead evidence that requires the witnesses to pick their way through email chains.

Technical preparation

It is desirable that all of the participants in proceedings have some familiarity with the mechanics of Webex in advance of the start of the hearing. It is particularly important that solicitors or counsel who will be responsible for “sharing” documents have familiarised themselves with the bundles so that this can be carried out efficiently during the hearing. The clerks of the court often set up practice sessions the day before, although these are becoming less frequent as more and more solicitors and counsel become familiar with the technology.

Tests can also be carried out in advance of the hearing to try to ensure that the participants (especially witnesses) have adequate hardware and a good internet connection. Needless to say there remain occasions when the test goes well but the connection fails on the day.

Consideration may also have to be given to how many screens will be required by the judge and by counsel during the hearing. I use only two: one which is remotely-operated and which shows the participants (ie counsel and witnesses) and on-screen documents, and one which I use when I wish to view a document, or a different page of a document, without having to ask for it to be put on screen for everyone to see. If you use a laptop to note the evidence, you may require a third screen. If the evidence is being transcribed live, that may also require its own screen.

Pre-proof case management hearing

The need to ensure that these matters have been addressed makes it all the more important – indeed essential – to hold a case management hearing shortly before the proof diet. Ideally this should be kept separate from any hearing fixed to resolve last-minute contentious matters such as late amendments or productions, so that a co-operative atmosphere can be maintained. I am happy to report that it is our invariable experience in the commercial court that regardless of the extent to which parties are at loggerheads on the substance of the litigation, they readily come together to co-operate on the mechanics of the remote hearing.

One matter that can be canvassed at the pre-proof hearing is whether a special case can be made for a particular witness’s evidence to be heard in a court room. I return to this below.

Conduct of the proof

Oral evidence

Some witnesses will give evidence from their home or place of work. Others may have been provided with a room by a party's instructing solicitor. The latter has the advantage that there may be IT support available if something goes wrong. In all cases it is important at the outset to check (i) that the witness is alone in the room; (ii) that he/she has made arrangements not to be disturbed while giving evidence; and (iii) that any mobile device is on silent and any laptop has been configured so that email alerts are silenced. It is unnecessary to have mobiles switched off altogether; indeed it is desirable that there be a means of communication with the witness in the event of a lost internet connection.

Experience has shown that giving – and listening to – evidence remotely is more tiring than a face to face court hearing. A mid-morning break is essential, together with a mid-afternoon break or a slightly shortened afternoon session. During breaks, the witness is instructed not to sever the connection, but simply to mute and switch off video until the session resumes.

Expert evidence

The oral evidence of experts can be heard in the same way as factual witnesses. Alternatively, the use of Webex facilitates (in my view) the use of concurrent expert evidence or, as it is sometimes called, hot-tubbing. This practice was already in use to some extent in the commercial court before Covid. Concurrent evidence consists of the expert witnesses being in court together (in pairs if the evidence covers more than one field of expertise) with the ability to respond to questions from counsel and also directly to what is said by their opposite number. It has proved to be a very effective means of focusing the extent of disagreement between them. Having the two experts appearing side by side on a Webex screen is as good as, if not better than, having them sitting side by side somewhere in the court room. It also saves them the time and trouble of travelling, sometimes long distances, to attend court in Edinburgh.

Documentary evidence

I have already mentioned that documentary evidence is now invariably viewed electronically during the hearing. A member of the legal team whose witness is being

examined is given control of the documents and is responsible for calling documents on to the screen and scrolling them up or down as requested. An incidental benefit of this procedure is that documents in small type face can be enlarged and made easier to read than could be done with the hard copy originals. Moving from one document to another is also likely to be faster than providing a witness with hard copies in court. Pagination seems to remain a problem: the electronic page numbers of documents sometimes vary from device to device. This needs to be checked and, if possible, resolved before the morning of the proof.

One potential disadvantage of the Webex system over face to face court hearings is that when a document is on screen, the image of the witness is minimised along with those of the other “panellists”. However, there are ways of mitigating this, provided that you have the document available to view at a legible size on a second screen. The image of the witness can be “locked” on screen, and the relative sizes of the document and the image of the witness can be adjusted so that the witness’s image remains at a reasonable size. It might be helpful if a system could be devised that would allow the witness to be shown on one screen and the document on another; we are not quite there yet.

“Blended” or hybrid proofs

I am aware that there are differing opinions as to whether remote proof hearings afford a satisfactory basis for the assessment of the credibility and reliability of witnesses. Judges may be more inclined than counsel to be confident that this can be done. It has been submitted to me that a witness who is being subjected to cross-examination on matters going to credibility should not be sitting in the reassuring surroundings of their own home or office where they might feel under less pressure to tell the truth. One could, on the contrary, argue that when it comes to reliability, a witness is more likely to provide accurate answers when relieved of the stress of a courtroom environment.

One solution to this perceived problem is to conduct the proof partly remotely and, in relation to specific witnesses, in person in court. This too has been successfully trialled in the commercial court. It does, however, require a significant amount of extra preparation and advance notice. Current Covid restrictions require social distancing

and frequent sanitisation of the court room. Lord Ericht, who conducted the first “blended” proof in Court 9, described the court room layout as follows:

“Judge and clerk were in their usual positions. Instead of the macer’s usual position beside the witness box, the macer sat near the jury box. Senior counsel were in their usual position in the front row. Junior counsel could not sit beside them or in the row behind, due to physical distancing. This would have placed juniors in the public bench, with no fold-down shelf for laptops, papers etc. So instead junior counsel sat in the jury box where they had a shelf and power points. Instructing solicitors sat behind senior counsel in the public benches, and the clients sat behind them. There were a small number of seats available for the clients’ friends/family or the public, and if a seat for friend/family was required this was booked in advance by agents through the clerk.”

Witnesses had to be programmed for specific days to avoid unnecessary travel or attendance in the court building, resulting in some loss of court time. Communication among solicitors and counsel was restricted by social distancing. Nevertheless the view of all concerned was that the arrangements had been successful.

The future: what should be retained?

Covid has forced us to adopt many practices which might otherwise have remained years in the future, or might never have been adopted at all. Regardless of what may be decided in relation to proofs in general, I hope that many of these practices will be retained after Covid restrictions have been reduced or removed. These include:

- Use of electronic documents. The advantages in relation to ease and speed of presentation of on-screen documents over hard copy, to say nothing of the benefits to the environment of abandoning an enormous waste of paper, are very clear. There seems to be no reason why the system of document presentation that we have become accustomed to should not be retained as the norm in a court room setting. A further advantage is that the documents are visible to everyone present, including the media and the public. Production of hard copy documents could become the exception, restricted, for example,

to circumstances in which there is dispute about their authenticity, and the evidence consists of the document itself rather than its content;

- Increased pre-proof agreement of witnesses' evidence. There is no reason why the good habits of minimising the need for personal attendance of witnesses should be abandoned.
- Concurrent expert evidence. This too is at least as effectively carried out remotely as in the court room.

Other features that I suggest should be considered, going forward:

- Now that we have the facilities and the experience, use could continue to be made of Webex to take the evidence of witnesses who live a long way from Edinburgh or for whom travel to court is difficult;
- Short proofs, where the inconvenience to witnesses of travelling to Edinburgh is disproportionate to the length of their evidence, could be conducted using Webex, even if the judge, clerk, counsel and solicitors are all in a court room together;
- There are considerations of open justice. It is generally much easier for the media or the public to attend a hearing conducted on Webex than to attend an in court hearing. I have noticed that the number of "attendees" at Webex hearings with a degree of media or public interest has been much higher than the number of people that one would usually see sitting in the court room; the case I am currently hearing has upwards of 50 attendees each day. Consideration should perhaps be given to conducting high-profile cases remotely even when they could conveniently be heard in court.

Although these observations are based upon experience in commercial litigation, I would suggest that they are equally relevant to other civil proofs. Issues of credibility and reliability arise in commercial actions as much as they do in others. The benefits that I have identified appear to me to be of general application.

Lord Tyre

April 2021