



Law Society
of Scotland

Briefing paper

Post-Covid Civil Business Conference

Appeal Hearings

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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 the legal profession and justice sector.

The onset of the pandemic meant everyone had to adapt their professional and personal lives to minimise the spread of infection and save lives. While there appears at present to be some easing of Covid-19 restrictions, we will all be required to adapt our daily lives for the foreseeable future.

The research carried out by the Law Society in February and March this year into online civil courts work, is the latest in a number of Covid-19 related reports. They have been undertaken to gain a better understanding of the impact that coronavirus has had on the profession and the legal sector more widely.

The research into remote civil court procedures and the use of technology in remote civil courts will help inform our discussions with key stakeholders such as Scottish Government, Scottish Courts and Tribunals Service (SCTS) and Scottish Legal Aid Board (SLAB) as to how civil courts can better operate during the pandemic.

The research outlined in this paper will also help inform discussion and debate at the virtual conference to consider, among other things, how civil court business should operate post pandemic.

Law Society of Scotland Remote Civil Courts Survey

The Society carried out an online survey of its members regarding remote civil courts between 19 February and 7 March 2021. 351 respondents completed the survey, and the survey sample was broadly representative of that sector of the profession which conducts civil court business as a whole.

Key survey findings

According to the Society's survey results, online platform Webex and telephone hearings were most popular, with 35% of respondents preferring Webex and 31% preferring telephone. Microsoft Teams (18%) and Zoom (11%) were the other main preferred options.

Over half of all respondents, 59%, stated that they had no difficulty with technology. Of those who cited difficulties, 19% said they had no training in the use of the technology and 15% said they did not have a good internet connection.

Two respondents cited disabilities making it hard to interact remotely. Other reasons included inconsistency of courts' approach, employers' IT security policy prohibiting the use of certain platforms and home-schooling arrangements resulting in issues around use of wifi in the home.

Benefits of using technology

Those benefits cited included reduced travel, less waiting time, reduced costs. A number said it was more efficient than being personally present in court. One respondent also cited the benefit in instructing expert witnesses on a national basis without increasing cost. Another mentioned the benefit of appearing in geographically distant courts. The benefit of keeping staff safe was also mentioned as was the reduction in one's carbon footprint.

Disadvantages of using technology

Some of the practical difficulties experienced with remote court appearances included challenges with obtaining client instructions during remote proceedings client difficulties in understanding or participating in remote proceedings. Some practitioners found it more difficult to articulate their position and others cited difficulties such as no proper analysis of witness credibility, interruptions due to delays in speaking and difficulty in gauging the reaction of the sheriff and other participants. The respondents also said there were difficulties in liaising with other agents before proceedings commence and that with some clients there was lack of respect for the gravitas of proceedings when conducted remotely.

Solicitors reported inconsistencies in remote proceedings in different courts. 58% of respondents said there were inconsistencies, 32% said they did not have enough experience of different courts to comment and 10% said courts had a consistent approach. Inconsistencies included different time limits for written submissions, some courts required written submissions while others did not, different remote platforms for different courts, some courts calling the agent and others asking the agent to dial in.

There were also differences in timings of hearings with some courts allocating specific times for each hearing while others allocated a fixed time for all hearings that day, resulting in agents having to keep the remote link clear until their case called.

Survey findings in relation to appeal hearings

The survey's findings are inconclusive on appeal hearings as small numbers cited appeals in their responses. Few of the respondents, at 15%, said that remote appeals worked particularly well remotely, with 16% of respondent saying that they did not work at all well remotely.

Additional comments from solicitors on remote appeals

Additional, observations and commentary from solicitors, outwith the Society's survey, about their experiences of remote appeal hearings have been collated and are summarised below.

Court service levels

All Inner House business continues to be conducted virtually, so appeals are less affected by the potential for confusion caused by different forms of remote hearing (written submissions, Web ex, telephone callings) as proceedings going on in the Outer House.

The Court of Session aims for a full programme of appeal hearings and substantive business by May 2021.

The court response times to all business, including non-urgent business, are as pre-Covid.

The Sheriff Appeal Court is working at the same level as prior to lockdown with three substantive appeal hearings per fortnight conducted by Webex. One procedural court is held per fortnight and is conducted by Webex. In addition to this any urgent hearings are set up to call by telephone conference

The nature of appeals being at either the Inner House or the Sheriff Appeal Court means that the transition to remote appeals has been consistent within those courts; this can be compared to first instance work in the sheriff courts, where there has been a variation in practice and what is expected across the Sheriffdoms.

Electronic papers

A paper-dependent administrative system must now transition into an integrated system with fully electronic processes in place – there have been some difficulties posed by the speed of this transition.

Electronic papers need to work properly, or it is very noticeable during the course of the appeal. They can be harder to pull together than traditional paper bundles due to the requirement for hyperlinks et c. However, when they are working properly, the use of electronic papers reduces the length of time spent by the court and counsel looking for pages during submissions, allowing the pleadings to flow better.

There are steps being taken to improve the difficulties presented by the sudden transition to all electronic papers:

- The SCTS has recognised that part of the practical difficulty posed by the pandemic has resulted from what has been hitherto, a largely paper-dependent administrative system, and what is required is an integrated system with fully electronic processes in place.
- A recent IBA seminar looking at the Future of Litigation Globally recognised that if the future is to be partly, or entirely, dependent upon remote hearings then the IT system has to be “spectacular”.
- Solicitors have experienced IT difficulties such as bundles of authorities being too large to be emailed to court, and secure file links being rejected by the courts' email security.

- The Court of Session Covid-19 discussion group has commented that there should be a paring down of productions to those that are actually going to be used, to assist with the preparation and use of electronic bundles.

If technical issues can be resolved, electronic bundles could be a feature which remains after the pandemic is over.

Communications with counsel

Remote appearances change how solicitors communicate with counsel. WhatsApp groups or emails work when there is a junior counsel who is with the senior counsel, but it can be harder to communicate with counsel while they are speaking.

Impact on the efficacy of advocacy

Overall, there has not been a huge difference to the preparation of and running an appeal, and the impact of remote hearings on carrying out an appeal has been less than that on proofs; but there are some concerns as to the quality of appeal hearings which are carried out remotely.

The personal injury user group has noted a concern regarding the loss of oral advocacy skills, and the accessibility for practitioners for training purposes. There were also concerns that technical issues could diminish advocacy and cause delays.

UK Supreme Court appeal – an example

The comments gathered include a solicitor's experience of a UK Supreme Court (UKSC) appeal, which is outlined below.

The appeal was lodged with the UKSC in January 2020, at which point those involved thought it would be heard in the court itself. The appeal was heard in February 2021 via Webex.

Preparation of papers was not affected by the case being heard remotely, as the UKSC has required electronic bundles for a couple of years, and documents are lodged by email. The hearing itself ran smoothly via Webex, with only the Justices and senior counsel having access to Webex – aside from some minor wifi connection issues requiring the repeating of questions.

Discussions before the appeal was heard included whether the remote platform would make the judges less inclined to interject. This proved not to be the case and both sides received challenging interventions throughout their submissions. Only the Lord President and the advocate who was speaking at the time had their mic on at all times, and if other judges wished to interject, they raised their hands and their mics were switched on – this avoided speakers cutting over each other and worked well.

It was easy to arrange for agents/clients/other interested parties to view as the court has always live streamed proceedings.

Conclusion

It is positive that the courts have been able to so swiftly transition to remote appeal hearings and allow business to continue mostly as normal.

There are some advantages, such as the increased efficiency by the use of electronic papers. This will rely on easy-to-use technology and good internet connectivity. It will be important to also consider any additional training that may be required.

Law Society members have expressed some concerns about the quality of appeal hearings which are carried out remotely and effects of potential future reliance on remote appeal hearings, as well as possible negative impact this would have on advocacy and training.

Remote hearings may become the new norm for procedural matters in most cases, but for the conduct of appeals it may be worth considering a hybrid model, with an emphasis on the traditional face-to-face court hearing.