

CIVIL JUSTICE CONFERENCE

10 MAY 2021

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1. Introduction

None of us can at this stage lay claim to expertise in relation to the management of remote courts. Like courts all over the world, the Scottish judicial system has responded to a pandemic. There will no doubt be much to study about what worked and what did not and we will learn lessons from other jurisdictions. The introduction of remote courts has not been a managed, researched, piloted project with a supporting infrastructure or training, but rather an immediate response to a pressing need. The judiciary, the civil and criminal bars and Scottish Courts and Tribunal Service are to be congratulated for their willingness to embrace innovation. This Conference now provides a welcome opportunity to take stock, share our experiences, discuss best practices and identify pitfalls with a view to an informed discussion on what might be retained and refined for the future.

Remote procedural hearings are not a new phenomenon. For well over a decade, the commercial court in Glasgow Sheriff Court has conducted case management conferences by telephone conference call. At the time, this small step into the world of technology was considered a giant leap for the judiciary and the profession. Case management hearings in family actions in Glasgow Sheriff Court have been conducted by telephone since 2017. The views I express here are informed by my experience as an Appeal Sheriff, a Commercial and Family Sheriff in Glasgow Sheriff Court and the lessons learned from presiding over the first virtual civil proof in the sheriff court.

I have been asked to provide the Conference with a paper dealing with remote hearings in the Sheriff Appeal Court (SAC). I have also been invited to share my views on the future of remote hearings in the Sheriff Court.

Before dealing with these courts, I set out some general observations on the relative advantages and disadvantages of remote hearings by telephone and video.

2. Telephone v Video/Virtual

Telephone procedural hearings (and debates) were the simplest and fastest means of restarting civil business during the pandemic. Telephone hearings have worked well in the commercial and family courts in Glasgow, however such hearings have their limitations. Most obviously there is no eye contact and no non-verbal cues. It is easy for individuals to speak over one other without realising they are doing so. Telephone hearings are only suitable for short procedural hearings; they are cumbersome for large volumes of business – time slots require to be provided and time is lost making calls; the volume of business which can be conducted in one day is thus reduced

causing delays in the administration of justice; problems are caused if an agent provides the wrong number or the clerk notes it incorrectly.

In addition, managing party litigants by telephone can be more challenging. It is difficult to convey that human connection and empathy which may help a party litigant feel respected and more at ease. It is more challenging to explain legal terms or procedural requirements to a party litigant by telephone when you cannot see from their expression, or a nodding of their head whether they understand what is being said. And of course, for the small category of disruptive or difficult party litigants, it can be more difficult to express disapproval of their conduct or control their behaviour¹.

Remote courts by WebEx are a welcome development and address many of these issues. They have been generally well received by the profession and by the judiciary as an alternative to telephone hearings.

The remainder of this paper will discuss remote hearings by WebEx as an alternative to in person hearings.

3. The Sheriff Appeal Court

Procedural business in the SAC resumed by telephone conference on 11 May 2020. The first remote civil appeal presided over by a Triple Bench took place on 4 June 2020. WebEx based procedural hearings commenced in November 2020.

3.1 Procedural Hearings

Procedural hearings by WebEx work very well in the SAC. By their nature, such hearings are generally short. They tend to involve a single issue for determination or require an Appeal Sheriff to make a range of well-defined orders by way of case managing an appeal.

The WebEx procedural hearing gathers all participants in a virtual courtroom much like a physical court with the clerk discussing the running order with the assembled parties. The Appeal Sheriff then joins and each case is called. While agents/counsel and parties are awaiting their case, they are encouraged to turn off their video and audio. This also allows such persons to continue to work on other matters until their case is called – something which was not possible from the public gallery.

Judicial preparation for such hearings is much as it was pre-Covid. Prior to the pandemic, hard copy papers were delivered to appeal sheriffs by the SAC clerks. Papers are now filed electronically in folders for individual appeal sheriffs which is of considerable assistance. There is a clear environmental benefit to such a practice being retained.

It is difficult to identify a good rationale for a return to physical procedural hearings in the SAC. When such hearings are conducted remotely, Appeal Sheriffs from across

¹ Managing contempt issues is also challenging in any remote environment.

Scotland can participate without the requirement to travel to Edinburgh; there is a clear benefit for agents/counsel/parties in terms of the travel time and costs involved in attending procedural hearings (which often take less than 30 minutes). There is a clear financial saving for the public purse, without any corresponding detriment to the administration of justice.

3.2 Substantive Appeal Hearings

Similarly, substantive appeal hearings have worked well in the SAC. Judicial preparation is much the same, albeit with the use of electronic rather than paper documents. Pagination of electronic documents can be problematic and such matters should be checked and resolved with the clerks prior to hearings.

Dealing with lengthy appeals can give rise to 'screen fatigue' for all participants. It is important that this is recognised and that adjournments are taken at the appropriate time.

The SAC clerks offer practice sessions to agents/counsel/party litigants prior to appeal hearings. Such sessions will often identify any issues with broadband connectivity or allow advice to be given to participants to improve audio/visual problems. With increasing familiarity of WebEx among the profession, such practice sessions are now invariably limited to assisting party litigants. Where there have been difficulties with a party litigant joining with video, they have nonetheless been able to join an appeal hearing using audio. Remarkably, no appeals have required to be adjourned owing to technical difficulties.

Single bench appeals often provide a Sheriff Principal an opportunity to sit in a local court. That can be a valuable exercise. Were remote appeal hearings to become the norm, there is a risk that justice may no longer be seen to be administered in a local jurisdiction.

Frequently, single bench appeals involve party litigants. Some party litigants can feel more at ease joining an appeal hearing remotely, from the comfort of their home. Indeed, party litigants tend to produce lengthy written submissions (and can feel better prepared having done so). In my experience, their oral submissions are normally more limited or with direction from the bench, can be focussed on the pertinent issues. For those reasons, remote hearings may suit many party litigants. On the other hand, it can be more challenging to control the environment from which a party litigant joins a remote hearing. Difficulties can arise when they either seek to refer to documents which have not been lodged prior to a hearing or refer to documents which cannot easily be identified from those lodged. In a physical court room such issues are easily managed.

Triple Bench appeals benefit from early preparation and discussions among the Appeal Sheriffs and prior active case management. That now takes place remotely in advance of the hearing. By their nature, Triple Bench appeals often involve complex issues with voluminous papers and lengthy lists of authorities. Preparing for such

hearings using electronic documents can be challenging, particularly if this is done after court hours, using a laptop from home, rather than with access to multiple screens in chambers. Well-ordered, clearly paginated and timeously lodged documents are an essential component of remote courts. A common approach to such matters across all courts in Scotland would be welcome.

Notes of argument containing hyperlinks to authorities (with relevant paragraphs of authorities highlighted) or lists of authorities with hyperlinks to the authorities listed would be of considerable benefit.

Conducting a substantive appeal hearing by WebEx has advantages. Adjournments to allow the appeal sheriffs to discuss matters are short as these take place in a virtual practice session. Oral submissions tend to be briefer and more focussed with a greater degree of emphasis on written submissions and notes of argument. That leads to a more informed discussion between the judiciary and those appearing before the court and can lead to shorter appeal hearings. Court accommodation in Edinburgh is not required. On the other hand, the spontaneous nature of a discussion between the judiciary and those appearing before the court, which can often have the effect of clarifying a submission or producing a concession, can be somewhat stifled in a virtual environment. The benefits of meeting face to face with colleagues and members of the profession and the shared learning often gleaned from such interactions are also lost. If during a hearing a matter requires to be clarified between counsel and an instructing agent, this can lead to delays while hearings are adjourned or responses to email communications are awaited.

Remote substantive appeal hearings have a place and will prove to be a very useful 'tool in the box'. In my view, the SAC should retain a discretion as to whether to convene a remote or physical substantive appeal hearing. That would allow a degree of flexibility which can take account of the views of the parties, issues of convenience and any particular issues which may arise in relation to party litigants.

4. The Sheriff Court

A full discussion of the very wide ranging jurisdiction of a Sheriff is out with the scope of this paper. Instead this paper will focus on specialist courts (such as Commercial Courts and the All Scotland Sheriff Personal Injury Court or ASSPIC), procedural hearings/opposed motions/debates in ordinary actions, child welfare hearings and proofs. While it is appreciated that not all sheriff courts are currently using WebEx for procedural courts and child welfare hearings², for the purposes of this paper, it is assumed that any future model of remote hearings is suitably resourced by trained and qualified staff, supported by a comprehensive digital infrastructure and conducted by WebEx.

It is important to note however that as a court of first instance with a wide and varied jurisdiction, the sheriff court often deals with matters which may have a profound

² A number of sheriff courts are conducting such hearings by telephone.

impact upon the lives of litigants, such as actions for eviction or those which seek orders for the removal of children. While the problem of 'digital exclusion' is perhaps not as acute as one might assume³, in my view, the issue of social exclusion remains. There are those who lead chaotic lifestyles and may struggle to meaningfully participate in remote hearings or provide instructions to their agents; often instructions are received by agents in the court building on the morning of a hearing. These problems manifest themselves regularly in proceedings for adoption, permanence orders and proceedings in terms of the Children's Hearings (Scotland) Act 2011. In my view, very careful consideration is required before any decision is taken to retaining remote hearings for such proceedings. The comments which follow do not apply to such proceedings.

4.1 Specialist Courts

Between April and June 2020, the All Scotland Personal Injury Court (ASSPIC)⁴ was transformed into a fully digital operating model embracing WebEx for proofs, procedural hearings and motions⁵. A recent pilot using Objective Connect software to allow the lodging of documents and authorities of significant volume has been well received.

The fully digital model has transformed ASSPIC into a court with true national reach. This is of particular importance given its national jurisdiction. Practitioners across Scotland have equal access to the court across all steps of procedure. Proceedings can be progressed expeditiously as the court can expect to be addressed by the principal solicitor familiar with the issues. This reduces the number of unnecessary continuations for instructions which had hitherto been a feature of the court.

Virtual proofs using WebEx are the default⁶. The court has issued guidance as to the considerations which are likely to be of importance in determining whether a proof might proceed by WebEx, in person or in hybrid form.

Specialist sheriff courts such as ASSPIC and Commercial Courts are well placed to take advantage of remote hearings, including evidential hearings. Such courts are presided over by specialist Sheriffs. Hearings are less likely to involve party litigants. The issues to be determined are well focussed. Evidential hearings tend to involve

³ See "Online Courts and the Future of Justice", Richard Susskind; according to figures from the Office of National Statistics 90% of adults in the UK in 2018 were internet users. The pandemic is likely to have accelerated the growth in the use of the internet and we should be mindful that generations to come will be increasing familiar with digital platforms.

⁴ This court deals with a high volume of personal injury litigation (between 3,000 – 3,500 writs per year) and operates a case flow management procedural model based upon Chapters 36 and 36A of the Ordinary Cause Rules (OCR).

⁵ Procedural hearings and motions operate in a very similar manner to the SAC civil procedural court.

⁶ Civil Jury Trials are likely to commence later this year using the Remote Jury Centres.

expert and professional witnesses who can take advantage of the convenience of giving evidence remotely.

4.2 Procedural Hearings/Opposed Motions and Debates (Ordinary Actions)

For the reasons set out in Part 3.1, it is difficult to identify a persuasive rationale for a return to physical courts for procedural hearings/opposed motions and debates in ordinary actions, except in exceptional circumstances⁷.

However, it must be acknowledged that Sheriffs do not have access to individual folders containing electronic copies of papers for hearings, unlike the SAC. The volume of business in the sheriff court does not lend itself to that approach. Instead Sheriffs have access to the Integrated Case Management System (ICMS) which existed pre-Covid. While the electronic submission of documents has been encouraged during the pandemic, ICMS has not yet been adapted to facilitate easy access by Sheriffs to such documents. The system of filing documents on ICMS is not intuitive. Valuable time is lost during hearings while Sheriffs search for documents referred to by parties. Sheriffs are also often working with hybrid processes. It is cumbersome to work with a process which is part in hard copy form and part electronic. Considerable difficulties are created when documents are lodged late and have not been uploaded on to ICMS before a hearing commences. The judiciary has demonstrated a real willingness and commitment to progressing civil business remotely as efficiently as possible during the pandemic and SCTS staff have worked tirelessly to support such hearings. However, at times, dealing in particular with large bulk courts (such as Ordinary courts) has been an onerous task.

If procedural hearings/opposed motions/debates are to be conducted remotely and efficiently in future, the digital infrastructure and document management systems to support these must be improved. In that respect, a Civil Online system which allows solicitors to submit documents relating to ordinary actions directly on to ICMS is being piloted. That will undoubtedly assist. It is important too that ICMS has a function for an electronic inventory of process with hyperlinks to each item of process. The newly formed SCTS Civil Executive Action Board is now considering how that might be introduced.

In addition, there will require to be a greater emphasis on the need to comply with the directions of the court relating to the lodging of documents. Documents must be lodged timeously.

⁷ Exceptional circumstances might exist e.g. where a party is unable to join a remote hearing or would struggle to participate meaningfully (whether because of connectivity issues, language or communication difficulties or known vulnerabilities) or because the sheriff determines that it is in the interests of justice for the hearing to take place physically.

4.3 *Child Welfare Hearings*

Sir Andrew McFarlane, the President of the Family Division invited the Nuffield Family Justice Observatory to conduct research into the effectiveness of remote hearings in the family justice system in England and Wales last year. A report of its findings was published in September 2020⁸. Many of the findings will resonate with those who have experience of remote child welfare hearings. There was an acknowledgment from most respondents that remote family hearings are convenient and cost effective and few considered such hearings to have an adverse impact upon justice and fairness.

However, concerns were expressed about the effect of remote hearings on the authority and formality of the court. In addition, there were concerns about parents taking part in proceedings from home alone and thereafter being left to process the outcome of a hearing without the face to face debrief which might ordinary take place in a court building.

The report was commissioned at a time when hearings were being conducted primarily by telephone and when technical problems were widely reported with the use of video conferencing platforms.

In those sheriff courts where WebEx based child welfare hearings are available, they are generally working well. WebEx based hearings also offer the opportunity of 'break out rooms' or private discussions between parties and their agents, should that be necessary. There may be room for greater progress when the animosity of a physical meeting between parents is removed. Where there are allegations of domestic abuse, the party making such allegations might be in a position to engage more meaningfully in a remote hearing.

On the other hand, there are many child welfare hearings which benefit from a frank exchange between the Sheriff and the parties, by the ability of the Sheriff to 'read' the parties in court, to have a stern word with parents regarding their conduct or to persuade them to work together and to focus on the child. That 'personal engagement' between the Sheriff and the parties is not easily replicated in a remote setting.

Remote child welfare hearings (particularly those by WebEx) have provided an excellent alternative to in person hearings during the pandemic and have prevented unacceptable delays in resolving cases involving children. They will continue to be a useful 'tool in the box'⁹. However, I would suggest that research and consultation is necessary in this jurisdiction before a decision is made to retain remote child welfare hearings as the primary form of such hearings. The views of those practitioners, parties and members of the judiciary who have participated in WebEx based child welfare hearings should be obtained.

⁸ Nuffield Family Justice Observatory, "Remote Hearings in the Family Justice System: reflections and experiences" September 2020.

⁹ Such as where geographical considerations make remote hearings convenient or where there are allegations of domestic abuse.

4.4 Proofs

Many sheriffs have now conducted remote proofs and fatal accident inquiries. Undoubtedly, remote proofs require careful and active case management. The current ordinary court rules do not lend themselves well to this. Moreover, historically, civil proceedings in the sheriff court have rarely involved an early focus upon an evidential hearing. That would require to change. Finally, the comments made at Part 3.2 in relation to the need for an improved digital infrastructure and document management system apply equally to remote or hybrid proofs.

As others at this Conference will address the future of proofs, this paper will focus upon what changes might be required in the sheriff court were remote proofs or hybrid proofs to be retained after Covid restrictions are reduced or removed¹⁰.

The following suggestions are made:

- The approach to case management in the commercial courts and the family courts should be replicated in all ordinary actions with the Options Hearing being replaced with a Case Management Hearing¹¹ at which an early discussion on the format of the proof (remote, hybrid or in person) can take place and at which case management orders can be granted with the pre-proof hearing becoming an opportunity simply to ensure that all such orders have been complied with¹²;
- There requires to be a greater emphasis on the early agreement of evidence, both in terms of a joint minute of agreement and in terms of identifying whether the evidence of any witness can be agreed¹³;
- Timetables for exchanging and lodging of affidavits require to be agreed and strictly adhered to – this also allows a Sheriff time to consider the terms of the affidavit before any subsequent pre-proof hearing or proof diet;
- The profession might benefit from training on the drafting of affidavits to avoid such affidavits containing either irrelevant or inadmissible evidence;
- Where a physical proof or a hybrid proof is to be held, parties should be required to explain why it is necessary for any professional witness to give evidence in person. Professional and expert witnesses (including social workers, teachers and medical staff) should give evidence remotely wherever possible to prevent unnecessary delays in court and inconvenience to such witnesses;

¹⁰ The suggestions made by Lord Tyre in his paper on Proofs regarding practices which may be retained after Covid restrictions have been reduced or removed would all be welcome developments in the sheriff courts.

¹¹ While OCR 9.12(3)(a) allows a sheriff to make such order as he thinks fit, commonly those orders are limited to simply fixing a proof diet and a pre-proof hearing.

¹² Presently, the pre-proof hearing is often the first time that a sheriff has considered the case fully, is addressed by the parties on the evidence to be led at proof and is in a position to make any case management orders.

¹³ Joint Minutes are regularly lodged on the morning of a proof diet in the sheriff court.

- Greater attention requires to be paid to the nature of productions lodged. The common approach to lodging full medical records or social work records when only selected entries are of relevance or will be referred to by witnesses, must be avoided. This practice presents a significant unnecessary challenge in a remote or hybrid court;
- Wherever possible, joint bundles of productions and authorities should be lodged;
- There requires to be an agreed national approach in the sheriff courts to ensure consistency of well ordered, correctly paginated and timeously lodged productions;
- There requires to be an agreed national approach in the sheriff courts to the recording, storage and transcription of remote, hybrid or in person proofs.

5. Conclusion

The pandemic has accelerated the pace of change in the Scottish Judicial System. The availability of new forms of technology provides a real opportunity to develop a civil system of justice fit for future generations. The efficiencies to be gained from the use of remote courts, where appropriate, will deliver benefits to all court users and to the profession. For that to happen, we must guard against the desire to simply return to old practices holding on nostalgically to the idea that *“thus it has always been and thus shall it ever be”*.

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April 2021