



Law Society
of Scotland

Briefing paper

Post-Covid-19 Civil Business Conference

Proofs

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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 change in civil court work practices over the last 12 months has been dramatic and no more so than in the preparation for and conduct of evidential and proof hearings. Tribute must be paid at the outset to the substantial efforts made by Scottish Courts and Tribunal Service (SCTS), embraced by the vast majority of court users, in rapidly devising and implementing workable solutions to allow evidence-based hearings to continue (almost) unabated.

Of course, there have been hurdles to cross along the way. Tackling the impact which the pandemic had upon the conduct of civil litigation was never going to be plain sailing. The Law Society has, throughout the last year, endeavoured to promote good communication links with SCTS and other stakeholders to ensure proper scrutiny of changes to work practices and to try to minimise any adverse impact on Law Society members and their clientele. By doing so we have gained an early insight into problems which have arisen at both local and national level and sought solutions through constructive dialogue. We have also been able to understand what benefits the changes have brought and still bring to the conduct of business in the civil courts.

With the added advantage of hindsight, we can look back and take stock. The changes have been a necessity, with the impact of the pandemic leaving no real alternative if conducting civil business was to carry on. As we will see, solicitors and their clients feel that the use of technology to allow *some* types of court hearing to be conducted virtually has worked extremely well and should continue. However, that is not the case in relation to civil Proofs.

As society at large begins to come out of lockdown restrictions and works towards the “new normal”, the Law Society welcomes the opportunity to share the knowledge gained over the last year, reflective of the views of our members and their clients, as part of the discussion on the medium to long-term plan for conducting civil business.

Earlier this year, the Law Society commissioned a survey to ascertain the views of its members. 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.

The first part of this paper deals with those sections of the survey which are wholly or partly relevant to the preparation for, and conduct of, proofs and other evidential hearings. The paper also includes observations relating to other jurisdictions and respectfully offers some suggestions for the future.

Law Society survey (undertaken February / March 2021)

Key findings:

1. The preferred method of appearance was:

- telephone – 31%
- Webex – 35%, with a small remainder mainly preferring Microsoft Teams (18%) or Zoom (11%).

2. In terms of general difficulties encountered in using the technology:

- 59% said they had no difficulties with using technology
- 15% respondents stated they did not have a good internet connection and
- 19% stated they had had no training in the use of the required technology. 66

3. In terms of practical difficulties which are experienced in the conduct of virtual hearings:

- 31% said they had no practical difficulties
- 45% said that they find it challenging to get instructions from their client during remote proceedings
- 41% respondents said that their clients struggled to fully understand or participate in the proceedings and
- 23% respondents felt that they found it more difficult to articulate their position to a court during a virtual hearing

4. Consistency of approach in different courts

- 58% of respondents highlighted that there were inconsistencies
- 10% of respondents reported that courts were consistent
- 32% of respondents said they did not have enough experience of different courts to be able to comment

5. The benefits of remote civil courts were seen as:

- saving on travelling time – 91%
- saving waiting time – 74%

- reduction in costs – 69%
- more efficient than appearing in court in person – 54%

6. In terms of which aspects of civil court procedure worked particularly well remotely:

- the vast majority, at 91%, responded positively in relation to procedural hearings
- only 5% of respondents responded positively in relation to proofs

7. When asked which aspects, if any, of civil court procedure they thought do not work at all well remotely:

- 68% of respondents said proofs
- 66% of respondents said other evidential hearing
- 4% of respondents felt that procedural hearings did not work at all well

8. When asked in what ways remote court access improves the civil justice system:

- 75% of respondents said it was a useful addition to physical court appearances
- 69% of respondents said it increased efficiency in court business
- 11.5% of respondents said it did not improve the civil justice system

9. Asked how, if at all, remote courts had had a detrimental effect on the civil justice system:

- 40.4% of respondents said that there was a greater requirement for written submissions in advance of any hearing,
- 31% of respondents said it was more difficult to make an oral submission to the Court in remote proceedings
- 70% of respondents felt that examination and cross-examination of witnesses is more difficult
- 74% of respondents felt that the credibility and reliability of witnesses is harder for the judge or sheriff to ascertain in remote proceedings and
- 59% of respondents felt that the inconsistency of approach across the different courts led to difficulties.

10. The majority, at 78.5% of respondents, said they wanted remote court hearings to continue post-pandemic. 21% said they did not.

11. In relation to which aspects of civil court hearings respondents would like to continue remotely (please note there were 274 respondents to this question):

- 99% were in favour of procedural hearings continuing virtually,
- 13% were in favour for proofs
- 12% were in favour of other evidential hearings.

Reasons cited for not continuing with remote hearings included (please note there were 76 respondents to this question):

- a client's interests being disadvantaged if hearings are virtual – 78%
- difficulty to effectively participate due to technological issues such as connectivity – 50%

- difficulty to effectively participate due to practical issues such as examination and cross-examination of witnesses – 89%

Additional comments or explanations from those who gave reasons for not continuing with remote hearings include:

Examination and cross-examination of witnesses – the responses highlighted the need to be in court to effectively examine and cross examine witnesses. “I want to see the whites of their eyes” or “I can’t guarantee that my cross examination of a witness will be as effective if I’m not facing them in court” are examples of the concerns expressed. That coupled with the perception that the judge or sheriff will be impaired in their assessment of the evidence (as mentioned above) were fundamental reasons for reverting to evidence-based hearings being held in person.

Poor internet connection - When proofs or evidential hearings are disrupted due to poor internet connection of certain users the effects can give rise to substantial expense and delay. Some users, due to their locality, simply cannot avail themselves of Superfast Broadband. The problem may be less acute in procedural hearings, and indeed the use of virtual technology for such hearings in remoter parts of the country where significant travelling time to court would have to be incurred creates a strong case for virtual procedural hearings to continue if the internet connection is satisfactory, but for proofs, which may last several days or weeks, technical/internet issues can have significant implications. (see section below on Natural Justice)

Pre-hearing testing of internet connections – this can be inconsistent with some courts simply requiring the participants to log in and as soon as they are visible and audible the test is over. It is felt that that is not necessarily robust enough to check that the participant will be able to maintain sufficiently good internet connection during a court hearing. In addition, testing is not always carried out by the participant using the same device and in the same location as will be the case when they appear at the actual hearing. There seems to be no point conducting a test unless the test is carried out using the same device and locality as will be used for the proof.

Communication difficulties between counsel, agent and/or client – One of the main practical difficulties in conducting a proof virtually, is the inability of the agent to communicate privately with counsel and/or their client. Such communication has had to be done by email, text, WhatsApp or whatever other means is available, but proves impossible if counsel is addressing the court and is not in a position to receive a written message. It is not possible in a virtual hearing to “tug on the gown” of counsel or discuss matters with clients sitting next to the agent unless arrangements can be made for counsel, agent and the client to all be at the same venue. A workable solution is required for this issue to alert the court practitioner that an agent or client has an issue to raise and/or to enable confidential discussions to be had between members of a legal team and/or the client.

Keeping the courts public – there is no obvious means available to members of the public, media or court practitioners to be able to watch any virtual court hearing which is not deemed to be private. In the interests of open justice, the Society would suggest that a system is created for anyone to use whereby they have a point of contact at the relevant court to request a link so that they can observe proceedings. This would be of particular benefit to trainees and junior solicitors who, as part of their training would normally be expected to sit in court to watch and learn.

Tech difficulties re status of participants - Webex invitations which are sent to panellists and attendees in advance of a court hearing have sometimes led to a panellist being treated as an attendee and then on the day of the hearing the clerk has been unable to promote them and thus the agent or counsel has been unable to be seen. If this happened in the context of a proof, the proof would have to be adjourned.

Impact on advocacy skills A significant proportion of responses from solicitors highlighted greater difficulty on their part in communicating effectively with the court if proofs are conducted virtually. The virtual experience is considered detrimental to the development of advocacy skills, particularly for the newly qualified and less experienced members of the solicitors' profession.

National practice notes and guidance - Another practical difficulty which solicitors have faced is the volume of practice notes, directions and guidance issued by different courts as work practices were adapted to take into account the developing situation from March 2020. The Society is very pleased to see that updated sheriff court guidance from March 2021 was issued on a national basis. Whilst it is appreciated that there will be a need from time to time for some variances between sheriffdoms to take into account local requirements, the Society would strongly support national guidance being the norm. The advantages include greater consistency in all courts together with an ability for agents to rapidly understand and implement new guidance particularly in sheriffdoms where they are not based and are not in the habit of conducting business.

Social interaction – the lack of in-person court hearings has meant that agents and counsel have been unable to meet and socially interact in the court building. This is seen as being detrimental. Learning and development is promoted by being around others. Cognitive ability and advocacy skills improve by being able to interact with other court users, discuss cases, watch others present their case and observe the judicial officer's handling of cases. All of the foregoing takes on an added significance in the context of a proof.

However statistics do not tell the whole story. Societal changes complicate the issue. One in five small businesses in the UK are actively considering, or already using, a four-day working week with a survey by "Be the Business" showing that more than 50% are open to reconsidering the structure of the working week. 5% of SMEs already have a four-day week while a further 18% are considering the idea. Just under a third say they might implement such a change in the future. Therefore, it can be anticipated that many law firms will not simply revert to five days per week office working. Any new civil court work practices should have inbuilt flexibility to cater for the long-term anticipated change in how wider society and, in particular those who work in law firms, take things forward.

Additional issues which were highlighted in the Society's survey included:

Lodging of documents

Regardless of whether a proof proceeds in person or virtually, there are a number of advantages in lodging documents digitally, for example efficiency in avoiding copying multiple bundles of papers, avoiding the use of paper, easier transmission of documentation, and subject to the undernoted comment on search functionality, ease of accessing the relevant information. This would however require a rule change so that electronic/digital versions are, for evidence purposes, to be treated as the original to avoid hard copies having to be lodged with the court in advance of a proof hearing e.g. pre-pandemic, ASPIC required any production which had been lodged digitally to be lodged as a hard copy two days in advance of the proof.

Any method of lodging documentation electronically should be user friendly and have search functionality. Training would be required, such as by way of video supplemented by user manual with clear visual instructions.

Child Welfare Hearings and proofs in family matters

The general view from family practitioners is that Child Welfare Hearings (CWHs) and proofs should be considered separately. It is anticipated that the majority of family law solicitors would prefer to retain in-person hearings for CWHs and proofs, for some of the reasons highlighted earlier in this paper and certainly, in relation to issues concerning children. An example was given by a family law solicitor who recently attended a Court of Session proof in relation to orders for financial provision on divorce. It was reported that the proof ran smoothly and had a 'proof' feel about it. However, observations were that it may have been a more daunting experience for the parties had it been an in-person hearing and indeed may have led to settlement discussions.

The direction of travel appears to be to hold more remote hearings for CWHs and proofs by Webex. It is suggested by family practitioners the Society has consulted, that there needs to be provision made in the court rules for applications to be made for in person hearings on cause shown.

Natural Justice and virtual hearings

The principles of natural justice are fundamental to ensuring fairness and securing justice. The principles - *Nemo Judex in causa sua* – No one should be judged in his own cause and *Audi alteram partem* – Hear the other party/provide a fair hearing are the cornerstones of our justice system.

It could never be argued that the conduct of a case virtually would lead to a breach of the first principle but there could be a perceived breach of the second principle in failing to provide a fair hearing if evidence has to be given virtually in a case involving issues of credibility and reliability.

The Society's survey clearly shows that there is a strong perception amongst those who responded that a judge or sheriff cannot assess credibility and reliability as well as they would do in an in-person evidential hearing or proof.

The Society accepts that there is conflicting data on this point but whether it is true or not, is respectfully neither here nor there. The perception is all important as justice needs to be seen to be done. If there is a widely held belief that remote hearings impairs the decision makers ability to reach an accurate decision due to being unable to weigh up and assess evidence given virtually, confidence in the system will be lost. One clear example of this arising related to a Pursuer giving evidence from abroad in a sheriff court proof which commenced in January 2021. The case involved a damages claim for alleged rape. The pursuer's internet connection was unstable and her image on screen kept freezing and buffering. The sheriff made it clear that he had never been happy to proceed with the proof virtually because credibility and reliability were all important and he had concerns that his ability to assess the parties' credibility and reliability would be impaired by them not being in court. However, lockdown and social-distancing restrictions were such

that an in-person hearing could not proceed in the court in question. When it became clear that the pursuer's internet connection was evidently unreliable the sheriff adjourned the proof after only 30 minutes of evidence and remitted the cause to ASPIC for an in-person hearing, the perception being that ASPIC is better equipped to host in-person hearings.

Jurisdiction comparisons

We have considered what is happening in other jurisdictions across Europe, New Zealand and Australia. At this stage we have no information to suggest how any of these countries intend to deal with evidential hearings in the longer term. All that can be said is that their approach in handling evidential hearings has been very similar to the practice in Scotland. The main exception to this has been Germany where in-person hearings have remained the default.

Conclusions

Of necessity, the default position in Scotland, due to lock down restrictions, has meant that evidential and proof hearings have been conducted virtually unless there were justifiable reasons to order an in-person hearing. The question is whether that should remain the position once the lockdown restrictions are removed.

Given the issues highlighted above, we have outlined our suggested proposals based on the Society's survey findings and other feedback from practitioners.

1. The default position for proofs reverts to in-person hearings unless there are good reasons to order a proof to be conducted as a hybrid (either partly virtually and partly in-person) or wholly virtually. Unlike procedural hearings, the views expressed by members of the solicitors' profession and their clients show that the benefits of conducting proofs as in-person court hearings far outweigh the advantages of conducting proofs virtually.
2. For those cases which have to be conducted virtually in whole or in part for whatever reason we would respectfully suggest:
 - a. There is more stringent pre-proof testing of the technology all participants will use. Practice directions should be issued to make it clear that the test must be performed using the same device and in the same locality as will be the case during the proof. If the test proves unsatisfactory, the proof should proceed as an in-person hearing unless a workable alternative solution can be found.
 - b. Efforts are made to identify a means of counsel, agents and clients communicating confidentially during the conduct of a virtual proof. The English method which is being devised may be informative.
 - c. A facility is created and publicised whereby anyone can request, from the relevant court, a link to observe a public court hearing.



- d. All future changes to practice in the sheriff courts, where possible, are dealt with by way of national guidance or practice notes, with sheriff principals agreeing a common approach (subject to any special geographical considerations).
- e. There is a recognition amongst judicial office holders that there are likely to be long term changes to working practices in law firms, whether by way of shorter working weeks and/or employees being given the flexibility of home working. It would be extremely helpful for the courts to allow agents and counsel to raise availability issues as a matter of routine and for proof diets to be arranged to take into account any difficulties which may arise. In that regard, a relaxation of the stance adopted in varying timetables would be extremely helpful.
- f. Civil Online should continue to develop so ALL documentation including the initiating writ or summons can be lodged electronically. A search facility should be introduced to allow particular documents or parts of documents to be located instantly and user-friendly training materials should be prepared and published.