

VIRTUAL TRIALS IN CIVIL PROCEEDINGS –
RESPONSE IN RELATION TO THE UNITED KINGDOM

Colleagues will recollect that within the United Kingdom, Scotland is a separate legal jurisdiction from that of England and Wales. The answers which follow are collated as they relate to Scotland and the English and Welsh jurisdiction.

1. Did your jurisdiction offer complete or partial virtual civil trials or hearings before the Pandemic? If yes, please describe what was offered and how often the offer was exercised.

SCOTLAND.

No. All civil trials and hearings were conducted in person within court buildings. For substantive hearings, there was the possibility of taking evidence from a witness via live video link, which required an application to be made in advance, and which could be granted 'on cause shown'. This provision was used extremely infrequently, usually either to take the evidence of a witness who was abroad, or to facilitate the attendance of a party who was incarcerated.

ENGLAND AND WALES.

All civil trials, including family cases, were conducted in person within court buildings. As in Scotland, there was provision for permission to be given for a witness to give evidence via video link in limited circumstances, for example an expert witness who had professional commitments and was resident some distance from the court centre. There was, however, the provision for telephone interlocutory hearings up to one hour in length for case management purposes. This was frequently used, indeed in civil interlocutory hearings it was the norm where parties were represented. It was not used with litigants in person.

2. Did your jurisdiction offer civil virtual trials or hearings during the Pandemic? If yes, was there a change in how, what and when it was offered? Were protocols published? Also, if yes, when were the virtual trials/hearings offered and what was the uptake?

SCOTLAND.

Yes. In March 2020, at the point at which 'lockdown' restrictions were first imposed, civil trials and hearings could not proceed as there was no ability to conduct hearings remotely. Virtually all procedures required documents to have a wet signature, for writs to be served in hard copy, and most courts did not work with electronic copies of civil case papers. Emergency legislation was passed to allow proceedings to be initiated by electronic means, and to remove all requirements for wet signature and service of hard copy documents. In addition, the courts moved to entirely electronic case papers and parties were required to submit all documents in electronic form.

Within three weeks, substantive appellate hearings in Scotland's Supreme Courts had resumed, and were being conducted remotely via the Webex video conferencing platform. The WebEx platform was ultimately rolled out to all courts of first instance for the conduct of both procedural and substantive hearings. Initially, procedural hearings and substantive hearings not involving witness evidence were conducted via telephone conference. Telephone conference was phased out as the capacity to provide WebEx was rapidly increased.

During the first lockdown period (March-June 2020), there was no option to hold an in-person hearing at all. Civil trials and hearings were conducted via WebEx, and parties could elect to have legal argument determined on the papers alone by written submissions. In the next phase, coinciding with the removal of the strictest public health measures, parties could seek the permission of the court to have an in-person or 'hybrid' hearing (where one party/agent/counsel attended via WebEx, and others were present in court). Hybrid hearings were a popular choice, standing the flexibility which they offer. The default position remained virtual hearings, although the approach to 'cause shown' to justify an in-person hearing varied from court to court. The default position remained remote hearings, until early-2022, when the higher courts reverted to in-person hearings for trials and substantive hearings as a default, with the option to seek remote or hybrid hearings on cause shown. Procedural hearings continue to be conducted remotely, with the option to seek an in-person hearing on cause shown (but this rarely happens). The default position in the lower courts remains WebEx hearings even for substantive business, with the option to seek an in-person hearing on cause shown. Some courts approach 'cause shown' more restrictively than others, and the approach varies on when an in-person hearing is justified.

Protocols were published in the form of guidance notes addressed to the general public and practice notes addressed to practitioners. Both were issued by the Lord President (the Head of the Judiciary in Scotland), prepared by his legal secretariat, and published on the court service website. The guidance was refreshed following any key development in public health advice, eg on the tightening or relaxation of restrictions. The most recent guidance and practice notes remain in force. They were last updated in April 2022. The uptake of virtual civil trials and hearings has been high. During the first lockdown, many civil hearings were discharged whilst the technology was put in place to conduct WebEx hearings. Initially, many firms delayed raising proceedings on an 'wait it out approach'. As summer 2020 wore on, it became clear that the public health measures were going to remain for a longer period, and the raising of new business resumed.

ENGLAND AND WALES

As with Scotland, the lockdown in March 2020 resulted in a very quick change in procedure. Family cases took priority, and telephone hearings were very quickly instigated. The system used was a conferencing facility offered by a telecom company which entailed the judge, or sometimes the administrative support, dialling out to parties. There have been difficulties with this, in that evidence had to be taken without the holy books, parties had to confirm their identities, and the advocates were not in the same place as the litigants. There is also the feeling that some litigants have "dumbed down" the gravity of the court, taking the telephone calls as they go about their daily lives rather

than making time for hearings.

Protocols were issued very quickly, from the Lord Chief Justice, the President of the Family Division and the Master of the Rolls. Protocols and guidance changed on a regular, sometimes a daily basis as the court system tried to adapt to the ongoing situation. In the early part of the pandemic there were only family and urgent cases heard. Trials were heard by telephone for the first few months of the pandemic.

In late 2020/2021 a video platform called the Cloud Video Platform was introduced as a secure platform to be used for hearings. This has had a number of technical difficulties, with accessibility of the system to litigants among them. A move to Zoom was popular but there were concerns about data protection and the ownership of the system and the information recorded. Although CVP is still used, Microsoft Teams is the more popular and is generally efficient and well received.

In the early part of 2022 guidance was given at national and local levels to ensure that any hearing at which evidence is given should be in person if possible, and that is now the default position. There are still telephone hearings at interlocutory level, and Teams or hybrid type hearings, where some parties are in court and others on Teams, still exist. The legal profession has adopted the remote hearings with enthusiasm, as it saves travel and expense. It is likely that more interlocutory hearings will take place via telephone or video link than before 2020.

3. Presuming that civil virtual trials were offered, was there any improvements made in the technology/software that the government provided? How were documents and exhibits managed?

SCOTLAND

Yes. The court service procured used of the Web Ex platform, and issued laptops/tablets to all clerks in order to facilitate remote hearings. No changes have been made to the platform itself, and the court service continues to make use of WebEx to conduct remote hearings. Documents and productions required to be submitted in advance by the parties in electronic format. Screen sharing is a feature available on the WebEx platform on which documents can be shown. Otherwise reference would be made to a page in a particular agreed bundle, which each individual participant would view on their screen. There had been limited use of electronic papers in certain courts (eg the appellate division of the higher courts and the commercial courts) prior to March 2020.

ENGLAND AND WALES

Yes, the technology and software were under constant review, and proceeded from being a telephone only system, called BTMeetMe, which could take a very long time to connect where there were many parties to a case, through to much more agile platforms. As in Scotland, staff and Judges have laptops and access to multiple screens so that more than one document can be viewed.

The court system requires that electronic bundles are filed in advance of a hearing, which are now uploaded onto a portal which is, at the time of writing, inefficient. Solicitors have to purchase an electronic bundling system, which can easily be uploaded and can be

manipulated by the Judge on screen, eg by adding flags, highlighting or noting the electronic documentation. This direction is sometimes not adhered to, with a series of PDFs being attached to emails. Litigants in person have particular difficulty with electronic bundles, and they are generally given some latitude provided that documentation has been prepared and filed electronically in some form.

4. What does the future hold in your jurisdiction with respect to the continuation of virtual trials? What are the issues and or benefits that have arisen?

SCOTLAND

The current proposal is to retain remote hearings as the default for all procedural business in the higher courts, to retain remote hearings for both procedural and some substantive business in the lower courts, and across all courts to retain the option of remote or hybrid hearings for the longer term. Electronic papers and documents will also be retained.

It is fair to say that there are mixed views on remote hearings and the opportunities which they present. In certain courts, for example the commercial courts, remote or hybrid hearings may present more benefits than issues. Commercial litigants are well used to remote interaction, issues of witness credibility and reliability can be less acute, and commercial entities appreciate the saving of time and associated expense of bringing witnesses to court. Remote hearings can make it easier to allocate procedural hearings to a particular judge and to manage busy diaries, for judges, practitioners and litigants. It is possible to secure the evidence of witnesses who may be outside the jurisdiction in a much more proportionate and efficient way. Others see the potential issues as outweighing the benefits of the procedure. Technological issues, whilst not routine, can occur. The interaction between Bar and Bench is more stilted and distant. Public (and press) access to the proceedings may be inhibited, as members of the public require to request a dial-in telephone number in advance of the hearing in order to listen to the proceedings. There is a concern that the gravitas of the court, or 'sense of place', is lost by remote hearings. Communication between parties and their representatives, or between judge and clerk, must take place by instant message, and may require an adjournment if instructions cannot be obtained.

ENGLAND AND WALES

Aside from the difference that, certainly at First Instance, the hearings where evidence is taken are now to default to in-person, the situation is as Scotland, and the observations above are reflective of the views for England and Wales.

5. Has or is research being done in your jurisdiction to help ameliorate some of the concerns that have arisen with virtual trials?

SCOTLAND

Yes. The body responsible for the promulgation of civil procedure rules (the Scottish Civil Justice Council) is currently considering what aspects of remote hearings ought to be retained in the longer term. A virtual conference took place in early 2021, bringing together the court service, judiciary, legal profession and other interested parties with a view to considering what measures should be retained and why. Following the

conference, the SCJC undertook a lengthy period of consultation, which closed in November 2021.

ENGLAND AND WALES

As with Scotland, there is considerable debate and consultation as to the future of delivery of civil Justice. The Civil Justice Council works alongside Her Majesty's Courts and Tribunals Service, and the Court system in England and Wales is in the middle of a program called Reform, which is designed to make the system largely electronic and portal based rather than paper. The Pandemic has moved digital working on more quickly than would otherwise have been achieved, and it is hoped that the positives can be kept and the negatives serve as situations to avoid.

6. How did the digitally excluded people in your jurisdictions have access to justice and specifically to virtual trials during the Pandemic?

SCOTLAND AND ENGLAND AND WALES

Digital exclusion of a party or witness was a factor pointing towards an in-person hearing taking place, and would justify an application for such a hearing, at least in the later phases of the pandemic. In the earliest phase, the only options were to defer the case, to seek agreement to proceed on written submissions alone (if possible), or to invite the digitally excluded person to participate via telephone link. The telephone number to access the proceedings was chargeable at a local/national rate.