

## COVID-19: Remote Courts - *What to expect*

Remote courts are here. Remote directions hearings are already taking place for some High Court and Circuit Court cases. Virtual hearings commence in the appellate courts from 20 April 2020 onwards before being rolled-out more generally.



Focus on  
**COVID-19**  
Coronavirus

The speed of implementation reflects the impact of the COVID-19 pandemic on the administration of justice, and the extensive work that has been carried out by the Courts Service and the judiciary over the Easter vacation to facilitate a rapid deployment.

Following successful pilots, both the Supreme Court and the Court of Appeal will hear certain cases remotely from 20 April. Parties with appeals listed for hearing in the new term (20 April to 28 May) should prepare on the basis that their case could be heard remotely. Parties in some cases will be contacted about the possibility of their case being heard under the remote courts procedures. A new [Practice Direction](#) has been issued by the Supreme Court providing guidance on how applications will be heard. Further guidance is expected to be published by the Courts Service in the short term addressing the requirements for the conduct of remote hearings and providing technical guidance on how parties can participate in remote hearings.

As it appears that most High Court business will be adjourned until at least 5 May 2020, remote trials and hearings may not be rolled-out in the High Court until later in May. The President of the High Court confirmed in a [Statement](#) on 17 April that it is hoped that from 27 April the High Court will pilot remote hearings where suitable, where they can be conducted in a manner which is fair and where the parties and their representatives can comply with all current Government guidance and directions. Further statements will be issued on these developments shortly. This reflects the practical difficulties in running remote hearings in the High Court which do not arise in appellate hearings (e.g. the need for oral witness testimony).

So what can parties expect? We take a look at how remote hearings have been rolled-out in other jurisdictions, and what we can expect in the coming weeks. We also summarise the key practical issues for parties and the steps that can be taken to facilitate a smooth remote hearing.

### How will remote courts work?

The technology currently in use and favoured by the Courts Service is a virtual meeting room (VMR) powered by PEXIP. This VMR can be linked directly to the Digital Audio Recording (DAR) system in operation in some courtrooms. As there is a constitutional requirement for justice to be administered in public this is believed to be an important aspect of the technology. However, other technologies have also been used during mock hearings, including workarounds to see whether the DAR could operate effectively with alternative VMR platforms (by the simple expedient of placing the DAR microphone beside the speaker of the devices broadcasting the mock hearing). If the DAR microphone picks up the sound from the monitor sufficiently well then it would not be necessary to connect the VMR platform into the DAR system and so any VMR platform could be used.

We expect that participants (Judge, counsel, lawyers, and witnesses) will join the virtual courtroom by video link using video conferencing software. The virtual courtroom will be accessible using any standard laptop or touchpad that is microphone and video enabled.

Remote hearings will follow usual processes and participants will be able to communicate with each other via a live video stream (and legal teams and their clients may exchange private messages by WhatsApp or text). Whichever video conferencing service is selected, it should ideally allow the parties to see each other via live video link so as to enable participants to engage as they would in a physical court room.

At present, it is envisaged that the number of connections or participants in the virtual court should ideally be kept to a minimum. This is however, subject to compliance with Government guidance and regulations (e.g. around staying at home and social distancing).

The Supreme Court Practice Direction suggests that parties may be required to file papers electronically, in hard copy or in both (although it seems unlikely that parties would be compelled to deliver hard copies while the current 'stay at home' rules are in place and it is likely that the Court will try to reduce the volume of hard copy documentation as much as possible). Parties should consult any updated guidance and may be given specific directions from the presiding judge who may deal with how electronic filing is to be conducted in the particular case.

A written judgment will be delivered by email to the parties and a copy, subject to such redactions as would ordinarily apply, will be posted on the Courts Service website. The date and time of delivery will be notified in the Legal Diary. The parties will be invited to communicate electronically with the Court on issues arising and these will be dealt with remotely (unless the interests of justice require an oral hearing). If further rulings are required, the parties will receive the decision by email and a copy will also be published on the website. This procedure for judgments and submissions is currently in operation even where the hearing itself has not been heard remotely.

### What has been the experience in other jurisdictions?

The US Supreme Court is due to undertake its first remote hearing in May and many jurisdictions have successfully rolled-out remote hearings through video conferencing technology platforms operated by the parties such as Skype and Zoom. For example, the first virtual trial in the English Commercial Court was recently conducted through video conferencing technology. *National Bank of Kazakhstan v The Bank of New York Mellon*<sup>1</sup> was heard remotely using Zoom with all parties participating by video conference from various locations including England, Belgium, Kazakhstan and the United States.

The trial lasted four days and the Court heard from five expert witnesses, with one expert requiring the assistance of an interpreter. While the variety of witness locations and consequently time zones required some planning in respect of the trial timetable, the trial ran according to the proposed timetable.

The parties engaged a technical production company to test each participants' equipment in advance of the trial and manage the video conferencing throughout the trial. Crucially, the third party tested the Zoom platform with each trial participant and conducted a test video conference call between all parties, including the judge, the day before the trial. The production company managed access to the virtual court by operating the 'waiting room' function on Zoom therefore controlling when the witnesses or interpreter were granted access to the hearing.

In terms of media access, the Coronavirus Act 2020 provides the English courts with a legal basis to authorise the livestreaming of a remote hearing. Alternatively, judges can grant a journalist access to the remote trial by video link, this approach ensures compliance with the public access requirements of the UK courts without broadcasting the trial to a wider audience. However, as a result of time constraints, the remote trial of *National Bank of Kazakhstan v The Bank of New York Mellon* was livestreamed on YouTube.

<sup>1</sup>Claim No FL-2018-000007

**Administration of justice in public**

It remains to be seen how the Irish Courts will ensure compliance with the constitutional obligation that justice be administered in public. The Chief Justice’s recent statement suggests that the requirement could be satisfied by granting access to accredited journalists. On that basis, it appears unlikely that hearings will be broadcast or livestreamed on platforms such as YouTube in the foreseeable future.

A PEXIP video steaming system is already installed in several video capable courtrooms around Ireland and is regularly used to facilitate the provision of witness evidence from a location outside of the courtroom. This could enable the viewing of the remote hearing on a screen in a courtroom where journalists will be granted access to attend (in accordance with Government guidance and physical distancing guidelines) and watch the remote hearing, therefore fulfilling the constitutional obligation that justice be administered in public. It is equally possible that an accredited journalist may be provided access to the remote hearing by private livestream accessible by password.

It may be necessary to put in place provisions preventing the unauthorised recording or

transmission of an image or sound which is broadcast as part of a remote court hearing. It will be important to ensure that any secondary use of such a recording, for example broadcasting or uploading onto social media platforms, is strictly prohibited.

**New processes in the Supreme Court**

Practice Direction SC 21<sup>2</sup> confirms that the process for applying for leave to appeal as set out in [Practice Direction SC 19](#) will continue.

The new Practice Direction also contains new procedures introduced to facilitate remote hearings. In advance of the remote hearing, the appellate court now has the option to issue a Statement of Case setting out the Court’s understanding of the case and a Clarification Request on any matters where the Court requires additional information. It is envisaged that a Statement of Case and/or a Clarification Request, if required, will issue to the parties approximately two weeks before the hearing of the appeal. The parties should reply to any queries raised not less than three days before the hearing. In the event that parties consider that elements of the Statement of Case are materially incorrect or incomplete they should also file a document specifying any such matters.

**Practical issues in a remote hearing**

We summarise the key practical issues for parties facing remote hearings, and the steps that can be taken to efficiently prepare and facilitate a smooth roll-out. Further guidance will be issued in the coming weeks by individual courts which will likely provide detailed guidance on some of these issues.

Issue	Solution
<b>Suitability</b>	<ul style="list-style-type: none"> <li>Some cases may not be suitable for remote hearings, for example a hearing involving a mass volume of documentation or where cross examination in person would be critical or there may be reasons why the parties are not in a position to proceed to hearing while COVID-19 restrictions are in place. If this is the case, parties may either seek adjournments or seek to proceed in person applying physical distancing and other such measures. However, as we have seen already, the Courts may still direct the parties to proceed as scheduled<sup>3</sup>, particularly when the new technology is tested and established.</li> <li>The Court Presidents and the Courts Service are exploring ways in which to increase the number of cases which can be dealt with in physical hearings in circumstances where a case is not suitable for a remote hearing.</li> </ul>
<b>Enhanced co-operation and flexibility</b>	<ul style="list-style-type: none"> <li>Remote hearings will pose challenges for the Court and practitioners. To ensure a smooth hearing, the Court will expect the parties to co-operate and work together, particularly in addressing procedural issues and technical challenges. We expect parties will be encouraged to agree matters on consent where appropriate to avoid court time being devoted to non-essential issues.</li> </ul>

<sup>2</sup> [beta.courts.ie/content/conduct-proceedings-supreme-court-covid-19](https://beta.courts.ie/content/conduct-proceedings-supreme-court-covid-19)  
<sup>3</sup> [www.algoodbody.com/insights-publications/covid-19-adjudgment-applications-be-prepared-for-hearing](https://www.algoodbody.com/insights-publications/covid-19-adjudgment-applications-be-prepared-for-hearing)

<b>Testing</b>	<ul style="list-style-type: none"> <li>▪ It is important to test the functionality of the each participant's remote system to ensure that their device, software and broadband are compatible with the video streaming system being operated by the Court. This will identify and resolve any connectivity, audio or visual issues before trial. Participants should ensure that their devices have adequate power supply and that their internet speeds are sufficient to support the technology without delay or interruption. This will ensure dynamic participation and interaction between the parties.</li> <li>▪ Testing should be done on an individual and all-party basis.</li> <li>▪ This raises the question of technical production support and who is responsible for conducting these tests in a confidential manner (i.e. whether it will be the Courts Service or a third party). Practice Direction SC21 suggest technical guidance will be issued which may address these points.</li> </ul>
<b>Hearing management</b>	<ul style="list-style-type: none"> <li>▪ Based on the information available at the moment, it seems likely that the Courts Service will control the primary software and so will need to manage the hearing (e.g. providing access to participants at appropriate times).</li> </ul>
<b>Court books/papers</b>	<p>Electronic brief building software can be used to create indexed and paginated trial booklets.</p> <ul style="list-style-type: none"> <li>▪ It may be necessary for the parties to agree a core book of documents to be provided to the judge, for example if a large discovery process has taken place and the parties wish to refer to certain documents.</li> <li>▪ An organised and concise bundle is necessary to ensure that it runs smoothly.</li> <li>▪ This will likely be directed in case management or by the presiding judges or will be the subject of further specific guidance.</li> <li>▪ The Court of Appeal issued an <a href="#">E-Filing Information Notice</a> on 20 April providing specific guidance on the content and delivery of electronic appeal books to facilitate the hearing of appeals remotely. Further guidance is expected from other Courts.</li> </ul>
<b>Visual difficulty</b>	<ul style="list-style-type: none"> <li>▪ It may be difficult for parties to participate in the remote hearing if they are simultaneously referring to court papers.</li> <li>▪ A simple but effective measure is to ensure that participants are set up remotely with two monitors. One monitor for court papers and the other to live stream the remote hearing.</li> </ul>
<b>Document sharing</b>	<ul style="list-style-type: none"> <li>▪ There may be instances where counsel wish to direct the Court to a document that is not contained in the bundle. A simple and timely way to do this is for counsel to use the screen sharing/document pushing facility within their selected video conferencing platform.</li> <li>▪ The video conferencing platform chose by the parties should ensure that this function is available to them and test this function during the all-party test run prior to the remote hearing.</li> </ul>
<b>Background noise and interruptions</b>	<ul style="list-style-type: none"> <li>▪ All parties participating should ensure that they are in a quiet, private space to ensure that the hearing is not interrupted.</li> </ul>
<b>Legally privileged conversations</b>	<ul style="list-style-type: none"> <li>▪ Where possible, counsel should take instructions from their instructing solicitors/clients in advance of hearings. However, depending on the nature of the hearing, this may not be possible and, in such circumstances, it will be necessary for counsel, solicitors and clients to communicate in a private and confidential manner during the course of the hearing. In the absence of a function which provides for this form of communication on most video conferencing platforms, it will be up to the parties find a solution to this issue. One potential option is to use instant messaging technology.</li> <li>▪ For example in <i>National Bank of Kazakhstan v The Bank of New York Mellon</i>, the parties used WhatsApp to facilitate lawyer/client and lawyer/counsel conversations.</li> <li>▪ Whatever form of technology is selected, it is important to ensure that it uses its end-to-end encryption to maximize confidentiality.</li> <li>▪ It may also be possible to agree with the Court that short recesses may be granted to facilitate consultation between members of the legal teams and the client which might ordinarily be undertaken without interruption to a physical hearing.</li> </ul>
<b>Witness Procedures</b>	<ul style="list-style-type: none"> <li>▪ Parties should discuss in advance with a witness whether they wish to take an oath or affirmation. If a witness wishes to take a religious oath, the witness must have the relevant religious text available.</li> <li>▪ Witnesses should also be reminded not to discuss their evidence during the course of the trial.</li> <li>▪ Witnesses should be prepared to confirm what documents they have in front of them and who else is in the room/building with them.</li> </ul>

The introduction of remote hearings is a key development and represents significant effort to ensure that the administration of justice is not delayed unnecessarily by the COVID-19 pandemic.

For further information please contact your usual A&L Goodbody representative or any member of the A&L Goodbody [Litigation & Dispute Resolution](#) team.



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