

Irish High Court Directs Remote Hearing of Witness Action

COVID-19 and the associated social distancing and other public health measures have had far-reaching practical consequences for court hearings. From the outset of the pandemic, the courts adapted quickly by introducing full remote hearings – initially for appeal hearings that did not require witnesses to give evidence, but also more recently for hearings involving witnesses. In August 2020, the Oireachtas enacted the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (the "Act"), which provided a statutory basis for remote hearings in civil proceedings.

In *IBRC v Browne*¹ [2021] IEHC 83, the High Court (O'Moore J) ordered witness testimony to be given by video link in a plenary hearing of a witness action, despite objection from the defendant. The court set out its reasoning in a written judgment.

Statutory Basis

The Act acknowledges the inherent jurisdiction of the Irish superior courts to hold remote hearings and provides a statutory basis for the holding of remote hearings.

Under section 11 of the Act, a court may direct that a case shall proceed by remote hearing. Any party to the proceedings can apply to have the proceedings held remotely. The court may specify the electronic

communications technology by which the proceedings are to proceed. If the court finds that the remote hearing is (i) unfair to either party or (ii) otherwise contrary to the interests of justice, the court should refuse the application for the remote hearing or revoke a direction it has previously made permitting a remote hearing.

Facts

In *IBRC v Browne*, the special liquidators of the IBRC sought to recover sums allegedly owed by the defendant, a former director of Anglo Irish Bank (the former name for IBRC), arising from two loan facilities.

Mr. Browne claimed that he was entitled to rescind the loan agreements due to fraud by IBRC and brought a counterclaim for damages.

The case had been listed to start in January 2021 in a partially remote hearing, but the Level 5 COVID-19 restrictions that were in place at that time prevented the hearing from commencing.

Objections

The defendant claimed that he had to give his evidence in person because the court could not assess his credibility via video link; he

¹ https://courts.ie/acc/alfresco/1957b16b-47c9-4846-9466-9d096a0a0e89/2021_IEHC_83.pdf/pdf#view=fitH

argued that it would be difficult for his lawyers to liaise with him; that only urgent cases should proceed under the President's [COVID-19 Notice: High Court Civil Sittings until further Notice](#)² (5 January 2021) (the "President's Notice") and that his case was not urgent.

High Court Decision

The High Court did not accept these objections and directed that the trial should proceed by way of a fully remote hearing. O'Moore J directed that the trial should proceed via TrialView (an electronic platform for the conduct of remote hearings).

In his written judgment, O'Moore J identified a number of factors as relevant to his decision, as follows:

- (i) Mr Browne had previously agreed that several important witnesses would give their evidence remotely so that raised the question of why Mr Browne's evidence could not be given in the same manner. Mr. Browne offered no explanation as to how his credibility could not be assessed if his evidence was given remotely.
- (ii) Lawyers can consult fully with their teams in preparation for the examination of witnesses by video link, by phone, WhatsApp or by the provision of a memorandum, and those forms of support are no less effective than a meeting. O'Moore J went further and suggested that the fact that the rest of a legal team are not in the same room as the cross-examiner might in fact be beneficial:

"It may well be that there is an important prompt that needs to be given to counsel, but as I have described this can be done in a remote hearing. Even if the prompt cannot be given, and this is at least as likely to happen when evidence is taken physically, it can often be advantageous for counsel to return to the point after the break in proceedings. In fact, the incidences of helpful notes passed to counsel in the cross examination of a witness can be overwhelmed by the number of barely legible but distracting Post Its placed before the cross examiner at a critical time in the challenging of a witness's evidence. The absence of such contact with the rest of the team may therefore be as much a help as a hindrance."

- (iii) The President's Notice is designed to ensure that the most court business that can be safely done, will be done during the current health restrictions. There is no need for a case to be urgent, in order for it to be heard remotely.
- (iv) The remote hearing creates exactly the same scenario for both parties. Any disadvantage identified by Mr Browne would also apply to IBRC. The fact that IBRC did not suggest any unfairness suggested, in O'Moore J's view, that no disadvantage would arise.
- (v) O'Moore J stated that, based on his own experience, the TrialView

² <https://www.courts.ie/news/covid-19-notice-high-court-civil-sittings-until-further-notice>

platform *"is one which enables me to assess the evidence"*. O'Moore J noted that the platform had recently been approved of by other High Court judges. For instance, in *Leinster Overview & Ors. v. FBD Insurance* [2021] IEHC 78, McDonald J stated that the TrialView system was *"perfectly adequate from a judge's perspective in terms of being able to see the face of the witness clearly as the witness is being examined by counsel"*.

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Key Takeaway

The decision of O'Moore J to direct a fully remote hearing of a plenary action in *IBRC v Browne* (especially when considered in light of the other High Court decisions referred to by O'Moore J in his judgment) is an indication that the concepts of remote hearings, and remote evidence in particular, are now firmly embedded in the Irish legal system, in practice as well as in statute.

Further Information

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