

**ADDENDUM TO COURT OF APPEAL GUIDANCE NOTES ISSUED IN APRIL AND SEPTEMBER
2020 FOR REMOTE HEARINGS OR PARTLY DUE TO COVID-19 IN ACCORDANCE WITH
JUDICIARY COVID-19 LEVEL 3 COMMUNITY TRANSMISSION.
(12 April 2022)**

(Chief Justice after consultation with the Judges of the Supreme Court)

Arrangements for Remote Hearings of Civil and Criminal Appeals During The COVID-19 Pandemic (Level 3 Community Transmission).

A. Introduction

1. This Addendum to Court of Appeal Guidance Notes is intended to be an Information Notice.
2. It is essential that the Courts established by the Constitution, including the Court of Appeal, should continue to function to the maximum extent practicable during the Covid-19 Pandemic in compliance with all applicable public health requirements and the over-riding imperative to protect the health and welfare of Court staff and those involved in proceedings before the Court, (see Judiciary Covid-19 Protocol Level 3 issued on 9 March 2022).
3. The Judges, Registrars and staff of the Court of Appeal have worked with the Courts Service to put in place appropriate arrangements for the conduct of Court business remotely or partly. A number of civil and criminal appeals have been heard partly remotely to date.
4. Appeals Review case-managements /directions lists, call-overs and lists to fix dates will be also conducted remotely or partly.
5. This Information Notice is concerned with setting out suitable arrangements that will enable the continuing effective operation of remote hearings. A remote hearing is where all or some of the participants, the Judge(s) of the Court, the Registrar, Counsel, Parties, Representatives of the Press and (where practicable) Members of the Public participate remotely, from different physical locations by means of video and audio technology.
6. It is envisaged that as the Court of Appeal hearings will be conducted remotely in whole or in part, arrangements could be made for hearings attended by the parties and their representatives in the normal way. Nothing in this Information Notice is intended to exclude that possibility. Any such hearing shall take place only where the Court is satisfied that it can proceed in compliance with all applicable public health requirements and the over-riding imperative to protect the health and welfare of Court staff, those involved in proceedings before the Court and the public in accordance with Judiciary Covid-19 Level 3 Protocol).

7. This Information Notice applies to civil and criminal appeals in the Court of Appeal until further notice. It is very likely that it will prove necessary to update this Notice, given changing circumstances, and having regard to the Court's experience of how the arrangements for remote hearings continue to operate in practice.
8. In addition, the Court may, as appears necessary, publish more detailed guidance, in the form of protocols and/or further information notices, on particular issues arising in respect of the holding of remote hearings by the Court, including technical issues and guidelines for the effective conduct of remote hearings.
9. The Practice Direction for Appeals to Vanuatu Court of Appeal No.01 2020 continues to apply to appeals save to the extent that there is any inconsistency between it and this Information Notice, in which case the provisions of this Notice shall apply.
10. The Court will continue to engage with practitioners and other interested parties in relation to the effective management of civil and criminal appeals during the Covid-19 Pandemic Level 3.
11. In establishing and putting into operation arrangements for the remote hearing of appeals, it is inevitable that difficulties and challenges will arise. The Court will be sympathetic to the technological and other difficulties experienced by others and expects that everyone involved will be constructive and flexible in their approach, working co-operatively toward the common objective of ensuring that the Court can, to the maximum extent practicable, continue to administer justice and operate fairly and efficiently during the Covid-19 Pandemic Level 3.
12. The method by which all hearings, including remote hearings, are conducted is always a matter for the Court, operating in accordance with the Constitution, applicable law, Rules and Practice Directions. Nothing in this Information Notice is intended to derogate from or dilute in any way the Court's duty to determine appeals heard by it judicially and in accordance with fundamental principles of justice and fairness.

B. Remote hearings: Video & Audio Conferencing

13. The Protocol for Participation in Remote Hearings issued on 9 March 2022, will apply to the Court of Appeal using TrueConf. The software application TrueConf is an application approved by the Government of Vanuatu.
14. The possibility of using of other web-based video conferencing/virtual meeting room platforms and solutions can be considered.
15. It may also be practicable to conduct certain hearings, particularly Appeal review directions hearings, by way of conference call via telephone.
16. Appeal Reviews directions/case-management hearings will ordinarily be conducted by a single judge of the Court nominated for that purpose by the Chief Justice in accordance

with Section 46(1)(2) and in consultation with other judges of the Supreme Court in accordance with Section 48(2) of the Judicial Services and Courts Act 2000. References in this Information Notice to "*the Court*" include, where appropriate, the Chief Justice or other judge of the Court exercising functions in accordance with Sections 46; 48 (2) of the Act and Article 50 of the Constitution.

C. Appeals on the Papers

17. It ought also to be possible to determine certain categories of appeal "*on the papers*" i.e., without any oral hearing. Appeals from interlocutory orders of the Supreme Court such as orders in relation to discovery would seem likely to be suitable for determination in this way. Some appeals against summary judgments may also be suitable for disposal on the papers. Other appeals such as appeals against costs may also be suitable for disposal in this manner.
18. Where the parties to an appeal agree that the appeal can be determined on the papers, that agreement should be communicated in writing to the Court of Appeal Registry. If the appeal concerned has already been listed for hearing, it is particularly important that the Registry be notified as soon as possible.
19. The Court will proceed to determine an appeal on the papers only where it considers that it is an appropriate matter to be determined in that way having regard to the nature and significance of the issues arising in the appeal.
20. In the first instance, the Court will dispose of an appeal on the papers only where all the parties to the appeal consent. However, the Court does not exclude the future possibility of directing that particular appeals or categories of appeal, be determined on the papers.
21. Where the Court directs that an appeal be determined on the papers, it may as it considers appropriate give directions regarding the delivery of written submissions. The appellant shall, in all such appeals, be entitled to deliver a further submission in response to the submissions of the respondent.
22. The Court may at any time decide that an appeal which it has accepted as being appropriate for determination on the papers ought in fact to be determined only after oral hearing and, in that event, may give such directions as it considers appropriate for the hearing of such appeal.

D. Article 5 (2) of the Constitution – Public Hearings

23. Save as is otherwise provided for by law, appeals before the Court, including those conducted remotely, shall continue to be heard in public in accordance with Article 5(2) of the Constitution. Given that remote hearings will take place virtually, specific measures have been put in place to satisfy the requirements of Article 5(2) in the particular and challenging circumstances of the Covid-19 Pandemic Level 3. There will be a physical presence of at least one Justice of Appeal at Dumbear Court 1 whenever an appeal hearing

is taking place remotely. Courts 2 and 3 where necessary will be available for e.g., counsel/parties/media representatives and the viewing public.

24. All remote hearings will be recorded using the Court's recording system.
25. Recording a remote hearing, and/or disseminating the recording of such a hearing, without the express authority of the Court is strictly prohibited and may amount to a contempt of court.
26. The Court has put in place arrangements to enable bona fide members of the media, as representatives of the public, to access remote hearings held by the Court so as to enable those hearings to be reported on in the media in the ordinary way.
27. To the extent that it is practicable to do so, arrangements will also be made to facilitate access to remote hearings by members of the public.
28. In the event that an appeal is decided on the papers, the Court shall ensure that its decision on the appeal is published online without delay and shall, where practicable, at the same time as publishing its decision, publish online the parties' written submissions to the Court (or, as it may appear appropriate to the Court, a summarized version of those submissions) as well as such other material relevant to the appeal as the Court considers it necessary to enable members of the public properly to understand the nature of the appeal and the Court's decision on it. A special section will be created on the court website for "Submissions and appeal materials on Appeals on the Papers" for this purpose.
29. For the avoidance of doubt, none of paragraphs [24] – [26] above apply to *in camera* hearings or hearings held otherwise than in public in accordance with law.

E. Papers for Appeals

30. Considerations of public health, as well as associated restrictions on travel and on the operation of the Court of Appeal Registry, mean that the normal system of filing hard-copy books of appeal papers cannot operate satisfactorily or safely. The adoption of electronic filing for appeal papers is essential if the Court is to be able to operate effectively during the Covid 19 Pandemic Level 3.
31. The following steps shall occur:
 1. Electronic Filings will be accepted, by e-mail to: vanuatu-court-of-appeal@gmail.com. Please note that the size limit is 25 MB.
 2. If the appeal books papers are above this limit, the party shall provide an electronic version on an USB Flash Drive to the Court of Appeal Registry via the Drop Box outside the Supreme Court Building.

3. The party must provide 2 hard-copies of the Books of Appeal Papers in each appeal case into the Court Drop Box to be filed and once filed the Court of Appeal Registry will return one copy to the respective party and keep the other as proof of filing of appeal books of papers in respective appeal cases.

F. Fixing of appeals for remote hearing

Appeals already listed for hearing in a set date in 2022

31. A number of appeals are listed for May 2022 sittings.
32. If current circumstances continue, it is unlikely to be practicable for the Court to hear all of these appeals on their listed dates and some will have to be adjourned. In addition, certain of these appeals may not, for various reasons, be appropriate for remote hearing. Longer appeals are less likely to be suitable for remote hearing, at least in the short term as the Court, its staff and practitioners familiarize themselves with the new procedures.
33. The Court will continue to hold regular call-overs of appeals listed for hearing with a view to ascertaining their status, assessing whether such appeals are suitable for remote hearing, giving directions and listing appeals for hearing where appropriate and nothing in this Information Notice affects the listing of cases in that manner.
34. The Court has conducted a number of appeals partly remotely and is satisfied that it is possible to conduct most appeals by way of remote hearing in whole or in part, while acknowledging that some may not be suitable for remote hearing. The Court therefore proposes to proceed in so far as possible on the basis that appeals will be heard remotely or partly on the date listed or such other date which the Court may assign to the appeal in the event that the court is not in a position to hear the appeal on the date currently assigned.
35. At the call-over of the list, any party who considers that an appeal is not suitable for remote hearing may object to the appeal being listed for hearing remotely. The Court will have due regard to any objection advanced to a remote hearing but may, where it considers it appropriate to do so having regard to the interests of justice, direct that the appeal proceed by way of remote hearing notwithstanding such objection.

Appeal cases of urgency to be listed

36. In relation to appeals other than appeals already listed for the May sittings, an application may be made in cases of urgency for the appeal to be listed for hearing and for a direction that the appeal be heard by remote hearing. Such an application should be made to the Court of Appeal Registry as soon as possible following the filing of the Notice of Appeal and should set out the grounds of urgency and should include an appropriate timetable for the taking of the necessary steps to ensure compliance with the requirements of this

Information Notice and of the provisions of 29 (1)(2)(3) above in advance of any hearing of the appeal.

Directions/Case Management Hearings

37. The Court may, from time to time, hold a remote directions/case management hearing in relation to any appeal pending before it.
38. Strictly without prejudice to the generality of the foregoing, such a hearing may be fixed in advance of the Court giving a direction that an appeal be heard by remote hearing and for the purpose of considering whether or not to grant such a direction.
39. Where a direction that an appeal be heard by remote hearing has been made, a remote directions/case management hearing may be fixed in advance of the hearing date to allow for directions to be made in relation to the conduct of the hearing and/or any other relevant matters and for the purpose of ensuring that the appeal will be ready to proceed on the date fixed for it. More than one such directions/case management hearing may take place in relation to any given appeal.
40. Counsel who will be conducting the appeal should, where possible, participate in any directions/case management hearing relating to that appeal.
41. At the discretion of the Chief Justice, a specific Judge of the Court of Appeal may be nominated as the judge responsible for dealing with all directions/case management issues arising in relation to a specific appeal.

G. Preparing for a Remote Hearing

42. Proper and timely preparation and planning is essential if remote appeal hearings are to proceed successfully. Parties and their legal representatives are expected to engage proactively and co-operatively to ensure the successful conduct of the hearing.
43. Parties are in particular expected to engage constructively in identifying and resolving any technical/technological issues that need to be addressed in order to ensure the successful conduct of remote hearings. If not already provided, requests for access to the True Conference server hosted by VanGov should be made in good time.
44. Parties and their representatives must identify the issues that require to be dealt with, make every effort to agree and narrow the issues whenever possible and identify clearly for the Court in advance of hearing those issues which remain to be determined.
45. In any appeal where the appeal papers are of a significant volume, the parties should, in advance of the hearing, identify in writing the particular document or documents likely to be opened by that party in the course of the hearing. Where appropriate, a separate electronic filing of such documents should be prepared and provided to the Court.

46. Similarly, the parties should, in advance of the hearing, identify in writing the specific authorities likely to be referred to by that party in the course of the hearing.
47. Arrangements should be made to enable real-time private communication between parties and their legal teams (and within the legal team) while the hearing is taking place, such as by setting up a WhatsApp group or other form of instant messaging.
48. The parties, and in particular the appellant and its legal representatives, should liaise closely with the Court of Appeal Office in the period prior to a remote hearing to deal with any technical issues and to identify any further arrangements that may need to be made for the purposes of the hearing.

H. Consent Orders

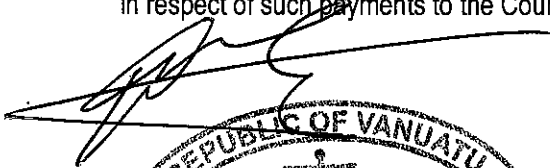
49. Consent orders in respect of pending appeals shall be made on foot of an email setting out the precise terms of the order(s) sought and exhibiting the consent of all of the parties to the appeal to the making of such order(s).

I. Judgments and Consequential Orders

50. The arrangements for the delivery of judgments and the making of consequential orders shall be made by the Court of Appeal at a date provided to the participants.

J. Court Fees

51. Arrangements for the payment of court fees electronically in this way: The Court of Appeal Registry will issue an electronic invoice to parties (Appellant/Respondent) with the government bank accounts and for the issuing by the Finance Department of the receipts in respect of such payments to the Court of Appeal Registry.


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Vincent Lunabel
Chief Justice

Dated this 12 April 2022

